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Stipulation.

Stipulation.

New Jersey Supreme Court

10

CHARLES F. X. O'BRIEN,

Prosecutor,

Certiorari.

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS and
PUBLIC SERVICE RAILWAY COMPANY.

Stipulation.

20

CHARLES F. X. O'BRIEN,

Prosecutor,

Certiorari.

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS and
PUBLIC SERVICE RAILWAY COMPANY.

STIPULATION between the prosecutor and the defendants.

30

It is stipulated between the said parties as follows:

1. That the writs allowed in the above entitled causes shall be returned forthwith and the cases brought on for final hearing before Mr. Justice Swayze sitting as the Supreme Court at his Chambers at the Court House in the City of Newark at ten o'clock on Monday, October 14, 1918.

2. That one return shall be made by the Board of Public Utility Commissioners to both of said writs.

3. That the reasons upon which the prosecutor will rely on said hearing are and shall be regarded as follows:

40

(1) The Board of Public Utility Commissioners was without jurisdiction to make the orders mentioned in the writs.

(2) The orders were made without any evidence before the board of the value of the property of the Public Service Railway Company used and useful in serving the public, except as hereinafter stated.

(3) The board did not determine what was or is a fair rate of return upon the fair value of the property of the Public Service Railway Company used for or devoted to the public at the times the said orders were respectively made.

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(4) The board ordered a charge of one cent for initial transfers without determining what was or is a fair rate of return upon the fair

Stipulation.

devoted to the public at the times the said orders were made, respectively.

10 (5) The board ordered a charge of one cent for initial transfers without determining that said amount, or the total to be received by the company because of said charge was, in addition to the fares continued by said board and in force at the time the order of July 10, 1918, was made, was or is a fair rate of return upon the fair value of the property of the Public Service Railway Company used for or devoted to the public.

20 (6) The board ordered a charge of seven cents where five cents is now charged, up to and including March 31, 1919, and fixed as a just and reasonable charge to be imposed, observed and followed by the said Public Service Railway Company on and after April 1, 1919, a charge of six cents where five cents is now charged, such charges to be in addition to the charge of one cent for each initial transfer allowed by the board in the said order of July 10, 1918, without determining that said amounts, or the total to be received by the company because of said charges was or is a fair rate of return upon the fair value of the property of the Public Service Railway Company used for or devoted to the public.

30 (7) The board ordered said charge of seven cents, and said charge of six cents, as specified in the preceding paragraph hereof, without determining what was or is a fair rate of return upon the fair value of the Public Service Railway Company's property used for and devoted to the public.

(8) Said orders are in violation of a number of ordinances enacted by the City of Jersey City and other municipalities which provide that passengers shall be carried on the lines of the Public Service Railway Company for no more than a five-cent fare and that no charge shall be made for transfers. The Public Service Railway Company is operating its railway system by virtue of these ordinances.

40 (9) The orders are illegal in that they are in violation of certain ordinances enacted by the governing authorities of the City of Jersey City, among which are the following: Ordinance enacted June 10, 1893, granting rights in the streets of Jersey City to the Hoboken and Rutherford Railway Company; ordinance enacted August 28, 1893, granting rights in the streets of Jersey City to the Consolidated Traction Company; ordinance enacted March 5, 1894, which gave rights in the streets of Jersey City to the North Hudson County Railway Company; ordinance enacted November 1, 1898, giving rights in the streets of Jersey City to the North Hudson County Railway Company, and permitting said company to use electric power on its street railway system in Jersey City; ordinance enacted October 24, 50 1904, giving right to operate a street railway in Jersey City to the North Jersey Street Railway Company; ordinance enacted November 14, 1904, giving rights with respect to the streets of Jersey City to the North Jersey Street Railway Company; ordinance enacted August

Stipulation.

Public Service Railway Company; ordinance enacted February 23, 1912, giving rights in the streets of Jersey City to the Public Service Railway Company.

(10) That the statute under which the Board of Public Utility Commissioners made the orders mentioned in the writs, and the said orders are in violation of Article IV., Section VII., paragraph 3 of the Constitution of New Jersey. 10

(11) That the orders mentioned in the writs, and the statute under which the board acted, are in violation of the Constitution of the United States, and in particular in violation of Section 1, 14th Amendment thereof.

(12) Said orders are illegal in that a large part of the alleged excess of operating expenses of the Public Service Railway Company over its gross receipts, upon which alleged excess the finding and report and order of said board were based, consisted of fixed charges, such as interest on various kinds of indebtedness, and rentals upon leased property, which fixed charges said board had no power to use as the basis for fixing the rate or fare ordered by said board. 20

(13) The said orders are illegal in that a large part of the alleged excess of operating expenses over gross receipts of the said Public Service Railway Company, upon which alleged excess the said board's findings and report and order were based, was caused by large losses in different parts of the State, sustained by said company operating its lines outside the limits of certain cities, for instance, Newark and Jersey City, respectively, and which losses the said company cannot be permitted to recoup as against the public in said cities, and which losses said board had no power to order should be made up or sustained, by an increased rate or fare to be paid by the prosecutor or the public residing in said cities. 30

(14) There was no evidence that the rate or fare ordered by the board to be paid by the prosecutor and the public in Newark and Jersey City was just and reasonable.

4. That said return shall contain the following:

(a) The findings, report and order of the board dated July 10, 1918. 40

(b) The findings, report and order of the board dated September 25, 1918.

(c) The following portions of the transcript of testimony taken before the Public Utility Commissioners in the proceedings resulting in said findings, reports and orders, namely: pages 487 to 493 both inclusive, pages 1139 to 1141 both inclusive, pages 1157 to 1200 both inclusive, pages 1208 to 1232 both inclusive, and page 1265, in the first case, and pages 14 to 101 both inclusive in the second case. 50

P. 64;

P. 987; p. 995; p. 1048;

P. 65;

Pp. 1772 to 1775.

P. 109;

Stipulation.

5. The following exhibits were offered in evidence in the proceedings before said Board of Public Utility Commissioners; they need not be attached to the return or printed, but are considered as attached to the return and may be produced by either party and used on said hearing or on appeal, as if returned and printed in the record in *extenso*:

P. 2, P. 3, P. 4, P. 7, P. 14, P. 14a, P. 27, P. 31, P. 32, P. 33, P. 34, P. 35, P. 36, P. 38, P. 39, P. 40, P. 41, O. 7, O. 8, O. 9, O. 10, O. 14, O. 15, in the one case, and P. 201, P. 202, P. 203, P. 204, P. 205, P. 206, P. 207, P. 208, P. 209, P. 210, in the other case, with the verification thereof.

O. 26, O. 27, O. 28, O. 29, O. 30, O. 31, O. 32, O. 33;

O. 52a (marked 52), O. 53, O. 48;

O. 56;

with the verification thereof.

All ordinances, agreements, exhibits and letters of agreement and acceptance, in connection with the construction and operation of the Terminal Building in Newark, may be produced by either party and used on said hearing or on appeal, as if returned and printed in the record in *extenso*, but are considered as attached to the return.

6. There was no other evidence before the said board in either of said proceedings on the subject of physical valuation of the property of the Public Service Railway Company, except as above set forth.

7. Copies of any of the ordinances and leases introduced in evidence before the board may be used by either party; such ordinances and leases need not be attached to the return or printed, but may be produced by either party and used on the hearing or on appeal, with the same effect as if returned and printed in the record in *extenso*.

8. That the prosecutor is a resident and citizen of Jersey City, and owner of real estate in Jersey City.

MARSHALL VAN WINKLE,

Attorney for Prosecutor in writ bringing up Order of September 25th, 1898.

GEORGE L. RECORD,

Attorney for Prosecutor in writ bringing up Order of July 10th, 1898, relating to Transfers.

L. EDWARD HERRMANN,

Attorney for the Board of Public Utility Commissioners.

FRANK BERGEN,

Attorney for Public Service Railway Company.

Writ of Certiorari.

Writ of Certiorari.

The State of New Jersey to the Board of Public
(SEAL) Utility Commissioners, and Public Service Railway Com-
pany, GREETING:

We being willing for certain reasons to be certified of a certain 10
order made by the Board of Public Utility Commissioners, dated
July 10th, 1918, effective August 1st, 1918, in the matter of the ap-
plication of the Public Service Railway Company for approval of in-
crease in rates, which order fixes as a just, and reasonable charge to
be imposed, observed and followed on and after the effective date of
said order by the Public Service Railway Company a charge of one
cent on all initial transfers issued by said company to its passengers,
do hereby command you that the said order, with all things touching
and concerning the same, to our Supreme Court, to be holden at 20
Trenton, on the first day of the next stated term thereof, you do cer-
tify and send, together with this writ, that herein may be done what
of right and according to the constitution and laws of the State of
New Jersey ought to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our said Supreme
Court, at Trenton, this eleventh day of August, A. D. nineteen hun-
dred and eighteen.

GEORGE L. RECORD,
Attorney of Prosecutor.

ENOCH L. JOHNSON,
Clerk.

30

Endorsed:

NEW JERSEY SUPREME COURT.

CHARLES F. X. O'BRIEN,

Prosecutor,

vs.

THE BOARD OF PUBLIC UTILITY COMMISSION
AND PUBLIC SERVICE RAILWAY COMPANY.

40

WRIT OF CERTIORARI.
Returnable November Term, 1918.

GEORGE L. RECORD,
Attorney of Prosecutor,
15 Exchange Place,
Jersey City, N. J.

50

I allow this writ; let it be sealed.

F. J. SWAYZE,

J. S. C.

Writ of Certiorari.

Return to Writ.

NEW JERSEY SUPREME COURT.

10	CHARLES F. X. O'BRIEN, vs. THE BOARD OF PUBLIC UTILITY COMMISSIONERS AND PUBLIC SERVICE RAILWAY COMPANY.	} <i>Prosecutor,</i> } } }	<i>On Certiorari.</i> <i>Return of Writ.</i>
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20 *To the Honorable the Justices of the Supreme Court of Judicature of New Jersey.*

The Board of Public Utility Commissioners herewith sends to the Supreme Court of Judicature of the State of New Jersey a certain order made by this board the tenth day of July, A. D. nineteen hundred and eighteen, together with the record and proceedings and the proofs before said board, and findings and conclusions thereon, and all things touching and concerning the same as fully and entirely as before said board they remain, as it is within commanded.

IN WITNESS WHEREOF the seal of said board is hereto affixed, and certified by the subscriber.

30 ALFRED N. BARBER,
*Secretary of the Board of Public
Utility Commissioners of New Jersey.*

(SEAL)

Writ of Certiorari.

40 (SEAL) The State of New Jersey to the Board of Public Utility Commissioners, and Public Service Railway Company, GREETING:

50 We being willing for certain reasons to be certified of a certain order made by the Board of Public Utility Commissioners, dated September 25, 1918, effective October 15, 1918, in the matter of the application of the Public Service Railway Company for approval of increase of rates, which order fixes as a just and reasonable charge to be imposed, observed and followed on and after the effective date of said order by the Public Service Railway Company a charge of seven cents where five cents is now charged up to and including March 31, 1919, and the board fixes as a just and reasonable charge to be imposed, observed and followed by the said Public Service Railway Company on and after April 1, 1919, a charge of six cents where five cents is now charged, to hereby command you that the

Writ of Certiorari.

stated term thereof, you do certify and send, together with this writ, that therein may be done what of right and according to the constitution and laws of the State of New Jersey ought to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, this eleventh day of October, nineteen hundred and eighteen.

ENOCH L. JOHNSON,
Clerk.

10

MARSHALL VAN WINKLE,
Attorney of Prosecutor.

Endorsed:

NEW JERSEY SUPREME COURT.

20

CHARLES F. X. O'BRIEN,

Prosecutor,

vs.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS
AND PUBLIC SERVICE RAILWAY COMPANY.

WRIT OF CERTIORARI.

Returnable November Term, 1918.

30

MARSHALL VAN WINKLE,
Attorney of Prosecutor,
1 Exchange Place,
Jersey City, N. J.

I allow this writ to apply as a stay of the order brought up on condition, however, that the case be brought on for final hearing before me at the Court House in the City of Newark on Monday, October 14, 1918; provided, that said stay shall not become operative in case Public Service Railway Company shall on or before October 14, 1918, file a stipulation with the clerk of this court to give a receipt to each passenger paying a seven-cent fare under said order for the excess thereof over the former fare of five cents.

40

F. J. SWAYZE,
J. S. C.

Oct. 10, 1918.

50

Return to Writ.

Return to Writ.

NEW JERSEY SUPREME COURT.

10 CHARLES F. X. O'BRIEN,

Prosecutor,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS AND
PUBLIC SERVICE RAILWAY COMPANY.

On Certiorari.

Return of Writ.

20 *To the Honorable the Justices of the Supreme Court of Judicature
of New Jersey:*

The Board of Public Utility Commissioners herewith sends to the Supreme Court of Judicature of the State of New Jersey a certain order made by this board the twenty-fifth day of September, A. D. nineteen hundred and eighteen, together with the record and proceedings and the proofs before said board, and findings and conclusions thereon, and all things touching and concerning the same as fully and entirely as before said board they remain, as it is within commanded.

30 IN WITNESS WHEREOF the seal of said board is hereto affixed, and certified by the subscriber.

ALFRED N. BARBER,
*Secretary of the Board of Public Utility
Commissioners of New Jersey.*

(SEAL)

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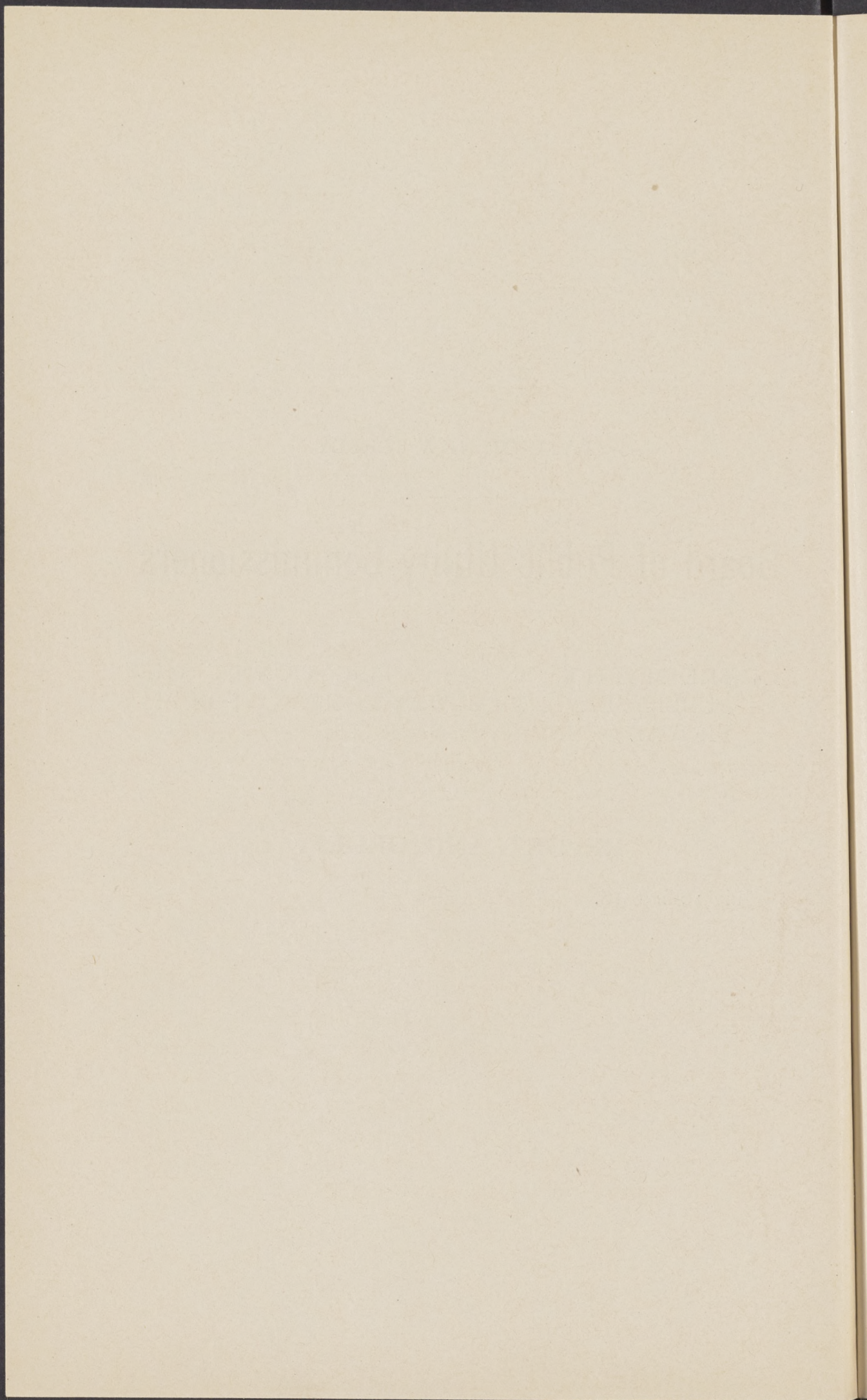
STATE OF NEW JERSEY.

Board of Public Utility Commissioners

IN THE MATTER OF THE APPLICATION OF THE
PUBLIC SERVICE RAILWAY COMPANY FOR AP-
PROVAL OF INCREASE IN RATES.

REPORT AND ORDER.

July 10th, 1918.



IN THE MATTER OF THE APPLICATION OF THE
PUBLIC SERVICE RAILWAY COMPANY FOR AP-
PROVAL OF INCREASE IN RATES.

REPORT.

Marshall Van Winkle and George L. Record, for New Jersey
State League of Municipalities.

Thomas N. McCarter, Frank Bergen, E. W. Wakelee and L.
D. H. Gilmour, for Public Service Railway Company.

L. Edward Herrmann, for the Board.

The Public Service Railway Company is a corporation of
this State, operating a street railway system in 146 municipali-
ties of this State.

On March 5th, 1918, it filed a petition with the Board in
which it alleged that the cost of maintaining and operating its
system during 1918 had abnormally increased above the corre-
sponding expenses in 1917.

That in the year 1917, on account of increased costs of labor
and materials, the cost of maintenance and renewals of way,
structures and equipment, the cost of power and of all other
materials required in the conduct of its business has greatly
increased over 1916; that the conditions giving rise to such
increased costs in 1917 still exist, and that such costs will con-
tinue to increase in the year 1918 over present costs; that it
needs large sums of money to maintain and improve its street
railway system in order to enable it to meet the present demands
for service and to provide for the growing demands for service
required by the government and the public, and that it will be
unable to obtain the new capital necessary for such additional
construction, equipment and extensions; that the present rates
of fare charged are unjust, unreasonable and insufficient to

allow it to furnish reasonable and adequate service and maintain the integrity of the physical property, and that a charge of seven cents as a rate of fare where five cents is now charged, a charge of two cents for the first transfer and an additional charge of one cent for a transfer issued on a transfer would increase its annual revenue \$3,700,000, which approximates the amount it estimated it would require to operate and maintain its property during the present year. The approval of the said rates is asked.

On March 19th, 1918, an amendment to the petition was filed, changing the relief prayed for to "emergency" relief required by existing conditions. With the amended petition the petitioner filed as rates of fare to be charged on its railway system on and after April 1st, 1918, a schedule as follows:

1. A fare of seven cents where five cents is now charged.
2. A charge of two cents for each transfer issued on payment of a cash fare.
3. A charge of one cent for each transfer issued on a transfer.

Pursuant to directions of the Board, copies of the petition were mailed to the mayors of all the municipalities in which the petitioner's road operates. Advertisements containing a copy of the petition filed with the Board and advising of the time and place of hearing were also inserted in newspapers throughout the territory served by the company.

Objections to the authority of the Board to proceed without a hearing were filed by various municipalities and answers were filed by others, all of which alleged the existence of ordinances passed by these municipalities and accepted by the Public Service Railway Company or its predecessors, in which there was incorporated the provision that the rate of fare to be charged by the railway company within the corporate limits of the municipalities should not be more than 5 cents.

It was claimed that these ordinances constituted a bar to the Board proceeding in the matter and that it was without power to increase the maximum rates of fare specified in the respective ordinances.

Numerous hearings extending over several months were held. Many of the remonstrant municipalities were members of an

association known as the "League of New Jersey Municipalities." Instead of appearing individually these municipalities joined in opposition in the proceedings and were represented by associated counsel. Other municipalities appeared by individual counsel.

The question of the jurisdiction of the Board presented by all the municipalities in which ordinances had been passed by the municipality and accepted by the railway company, or its predecessors, limiting the rate of fares to be charged was duly considered by the Board.

That the Board has power to increase rates regardless of the existence of such ordinances has been affirmatively declared by our courts.

The case of the Borough of Bradley Beach *v.* Atlantic Coast Electric Railway Company was pending in the Court of Errors and Appeals during this proceeding. In that case the Board had ordered the issuance of a transfer beyond the corporate limits of Bradley Beach, which in effect was a reduction of the maximum fare specified in the ordinance. The Supreme Court had set this order aside, holding that the ordinance constituted an inviolable contract.

That the Board has power to increase rates despite the existence of a similar ordinance or ordinances was subsequently held by the Supreme Court in the case of the Northampton, Easton and Washington Traction Company *v.* the Board of Public Utility Commissioners. The Court of Errors and Appeals, in June, 1918, set aside the judgment of the Supreme Court in the Bradley Beach case, and comprehensively stated the Board's power to fix rates despite the existence of such ordinances; not only to increase where the same were found to be unjust, unreasonable and insufficient, but to reduce rates specified in the ordinance when the same were found to be excessive. This court decision disposes of the contention of the municipalities that the Board is without jurisdiction.

The original petition as amended restricts and confines the petitioner to "emergency relief required by existing conditions." The "existing conditions," the evidence shows, are the result of

the increased cost of labor and materials employed in the maintenance and operation of the street railway due to the abnormal conditions brought about by the war. No argument is necessary to establish that the prices of most, if not all, commodities and wages of labor have increased. It now becomes pertinent to consider to what extent the increased wage of labor has affected those employed in street railway operation and maintenance, as well as how and to what extent the prices of materials entering into the maintenance and operation of street railways have been affected.

These are the essential elements to be regarded in considering the reasonableness of existing rates in abnormal times, and the only relief which could be predicated upon them would be "emergency relief," temporary and limited in extent, designed to meet and tide over a general condition not affecting the applicant utility alone. Ordinarily, in fixing just and reasonable rates, the accepted standard is a rate which will afford a fair return upon the value of the property used and useful in serving the public. The application of this standard requires ascertaining the value of the utility's property.

To ascertain the value of the property of a utility requires exhaustive investigation and is inconsistent with the granting of emergency relief required by general conditions. All commissions and engineers will agree that as a practical matter it is more difficult, and requires more time and labor, to determine the values of the properties of steam railroads and electric railways than that of other public utilities. These utilities by reason of their peculiar development require most careful expert investigation of the financial history of each company in the process of ascertaining value. When, as in the present case, there are numerous subsidiary companies leased for long terms, at rentals forming a large part of the fixed charges of the petitioner, and these fixed charges and interest are attacked as extravagant, excessive and unwarranted, the investigation required under normal, general conditions becomes still more complicated and time-consuming. The Board must, however, define an emergency and matters it will consider in emergency applications.

An emergency for which a carrier is entitled to relief by a temporary emergency rate exists where, by reason of general conditions not affecting the applicant utility alone, the operating revenues are insufficient to operate and maintain its property and to pay rentals and interest on such of its securities, a default in the payment of which would jeopardize the solvency of the company.

The evidence in the case indicates that no new capital is at present intended to be secured by the petitioners for extensions. That the only extensions contemplated by it are those necessary to serve localities where industries have been erected and engaged in the manufacture of war munitions and governmental work. In these cases, the Federal Government has furnished or will furnish the necessary capital to make the extensions.

The present case, therefore, is not like those heretofore considered by this Board, in which the factors affecting the marketability of new issues of securities to raise capital for extensions need be taken into account.

During the war period and in accordance with National and State war policies, while in underwriting normal returns for public utilities we should allow rates sufficient to keep the utility solvent and in good operating condition, we must also continue our declared policy of disallowing rates in war times for the purpose of increasing dividends. *Stockholders in such corporations must share in the burdens and hardships resulting from financial changes due to the war and cannot expect to wholly escape therefrom.*

The Cooley valuation of the petitioner's property was submitted at the request of the Board's counsel. Its admission was opposed by counsel for the municipalities. Dean Cooley was not produced as a witness for examination or cross-examination on his report. The Board is therefore not warranted in giving it consideration, and has not done so.

Our investigation has therefore been confined to ascertaining from the evidence the financial needs of the petitioner to keep it solvent and in good operating condition to serve the public.

ELEMENTS TO BE CONSIDERED.

From the above it becomes apparent that our consideration must be confined to the following:

1. Operating revenue.
2. Operating expenses and taxes.
3. Income deductions.
4. Appropriation for depreciation reserve.
5. Wage increases.
6. Taxes on additional revenue.

The company's estimate of relief required was set forth in Exhibit P-3. It purported to show the estimate of operating results for the present year on the basis of present costs, the necessary wage increases and the additional gross revenue required to offset the deficit for the year, on the basis of the financial results of 1916. The estimated total operating revenues for 1918 are \$18,883,983.83. This includes revenue from transportation and revenue from operations other than transportation. For operating expenses and taxes there is estimated \$13,752,720.87. This leaves the net operating income before deducting depreciation of \$5,131,262.96. To this is added the sum of \$12,000, operating income from other operations and non-operating income amounting to \$200,000. This non-operating income is made up of interest on investments, bank balances, and the like, making the gross corporate income before deducting depreciation \$5,343,262.96. The income deductions amount to \$5,165,745.15, which is the sum total of the interest on the funded debt and rentals of the underlying properties.

It is estimated, therefore, that the balance available for depreciation, dividends and surplus amounts to \$177,517.81. The estimated appropriation for depreciation reserve is \$1,188,149.61. This sum provides for an amount of replacement and renewal work, for way, structures, and equipment equal to the work carried out in 1916 at the prices now prevailing. This, it is estimated, would leave a deficit of \$1,010,631.80, on the estimated revenue at present rates. For dividends the petitioner proposes an amount on the capital stock outstanding equal to that

paid in 1916 of \$1,491,066.38 and 8 per cent. on the additional stock now authorized of \$1,250,000 or \$100,000, resulting in an estimated deficit for the year of \$2,601,698.18. The company also estimates the annual amount of wage increases necessary and not included in the above stated operating expenses at \$635,714, and the amounts to be paid for franchise taxes and Federal income taxes on the additional revenue sought at \$257,061.51, making the total estimated deficit for the present year of \$3,494,473.69. Since this estimate was prepared the president of the petitioner testified that labor difficulties had arisen resulting in an additional wage increase of \$450,000, making the total annual wage increase \$1,085,714. Based on this estimate, the additional revenue required would be \$3,687,412.18. Accordingly, the franchise taxes and Federal income taxes would be increased on the additional revenue required to approximately \$292,700, making the total estimated deficit \$3,980,112.18.

COMPARISON.

The Board has carefully scrutinized and analyzed the foregoing estimates of operating revenue and expenses for the year 1918 made up by the company, in comparison with the corresponding revenues and expenses in previous years and in comparison with the actual results of operation during the first four months of 1918 as set forth in the statement filed by the company in accordance with conference ruling number fifteen. This is a statement showing, among other things, the income, operating expenses and revenue deductions for the calendar years 1914, 1915, 1916, 1917, and for the first four months of 1918.

We are well aware that the car-mileage operated during the early months of 1918 was less than the car-mileage operated during the corresponding months of 1917 (as shown by objector's Exhibit O-37) and less than the car-mileage which might have been expected during that period of 1918, and that consequently the operating expenses during that period were less than they would have been had the car-mileage been greater. On the other hand, we are also aware that the weather conditions were

unusually severe during the early months of 1918, and the operating expenses were consequently presumably materially higher than they would have been with normal weather conditions.

The Board is of the opinion that it is reasonable to judge the estimates of the revenues and expenses for the year 1918 on the basis of the results of operation during the first four months of the year, especially in view of the fact that any increase in rates which may be granted may be expected to decrease the traffic to some extent and will therefore tend to decrease operating expenses.

From analysis and comparison we have set up estimates differing somewhat from those made by the company which appear more reasonable in the light of the operating results of previous years and of the first four months of 1918.

In these estimates the revenue from transportation, without a change of rates, is estimated at \$18,434,000 on the basis of the revenues during the first four months of the year and the relation to be expected between the revenue during that period and the revenue during the entire year, as determined from the records of previous years. The revenue from operations other than transportation is estimated at \$600,000 on the basis of revenues from the same source during past years, taking into consideration the increase in this revenue from year to year and also taking the relative amount of this revenue received during the first four months of 1918, as compared with that received during the corresponding months of previous years. The operating expenses and taxes are estimated at \$13,010,000 on the basis of the expense and taxes during the first four months of 1918 and the relation to be expected between the expenses for those four months as compared with the expenses for the entire year, as determined from the records of previous years. The operating income from other sources is estimated at \$11,000 in the same manner. The non-operating income is estimated at \$220,000 on the basis of the income from this source during past years. The appropriation to depreciation reserve is taken at \$800,000. The company claims \$1,188,149.61 as a reasonable allowance for this expense on the ground that owing to the increased cost of

labor and materials it would require this amount of money to do in 1918 the same amount of work which was done in 1916 for \$728,001.18. It is undoubtedly true that the cost of labor and materials has advanced greatly and that more money would be required to do a piece of work under the conditions now prevailing than would have been required to do an equal amount of work in 1916.

The Public Service Railway Company leased its power plants to the Public Service Electric Company in 1910. Under the terms of this lease the electric company is required to provide for maintenance, repairs and replacements. To this extent the petitioner is relieved from the necessity of providing for the depreciation of these properties. It, therefore, becomes necessary to ascertain what proper depreciation should be allowed for the remaining property. The amounts appropriated to the depreciation reserve and the amounts actually spent for replacements and renewals, annually, together with the book amount of fixed capital in each of the five years are shown in the following table:

DEBITS AND CREDITS TO RESERVE FOR ACCRUED AMORTIZATION (DEPRECIATION).

Year.	<i>Debits for</i>		<i>Credits through debits</i>		<i>Fixed Capital by Books.</i>
	<i>Replacements made</i>		<i>to expense accounts</i>		
	<i>Amt. In</i>	<i>% Fixed Cap.</i>	<i>Amt. In</i>	<i>% Fixed Cap.</i>	
1913,	\$452,503	0.51%	\$472,496	0.54%	\$88,052,203
1914,	314,293	0.35	469,466	0.53	88,798,181
1915,	522,722	0.58	616,384	0.69	89,603,042
1916,	489,038	0.51	731,228	0.77	95,564,747
1917,	460,756	0.47	179,935	0.18	97,400,383
5 years,	\$2,239,312	0.487%	\$2,469,509	0.538%	\$459,418,556

If we apply the average percentage of 0.538%, this being the resultant percentage obtained from an analysis of the table above, to the book fixed capital for 1916, the amount of \$514,138 is the amount that should have been appropriated to the reserve for 1916. Applying the percentage estimated increased costs of the company 162.4%, this being the percentage used by the petitioner as representing the increased costs of labor and ma-

terials in 1918 as compared with 1916 prices, gives \$834,960 as the average figure for the year 1918. Using in the same way the average percentage of realized depreciation as represented by debits to the reserve applied to the fixed capital gives \$465,400 for 1916; and again applying the same percentage used by the petitioner for the increased costs of labor and materials in 1918 gives the sum of \$755,810 as the greatest realized depreciation (that is, actual replacements to be provided for or expected in 1918), if the same proportional amount of work can be done in this period of difficulty, considering the scarcity of labor and materials. For these reasons we conclude that the sum of \$800,000 will in this emergency constitute sufficient appropriation to the depreciation reserve for 1918.

The testimony is to the effect that the wage changes will result in a total estimated increase of \$1,086,000. From the foregoing estimates of revenues and expenses, operation on this basis would produce an annual deficit of \$797,000. If provision is made for providing this amount of additional revenue, the additional taxes entailed are estimated at \$63,000. On the foregoing basis the total amount which must be added to the company's revenues in order to enable it to meet its operating expenses, pay bond interest and rentals on leased properties, provide a reasonable appropriation to depreciation reserve and increased wages is estimated at \$860,000.

The estimates outlined are placed beside the corresponding estimates set up by the company in the following table. The company's estimates are taken from Exhibit P-3 with modification in reference to wage increase in accordance with subsequent testimony, and a corresponding modification in the taxes on the additional revenue required.

	<i>Company's Estimate Ex. P 3</i>	<i>Board's Re- vised Estimate.</i>
Revenue from Transportation,	\$18,418,783.83	\$18,434,000
Revenue from Operations Other than Transportation,	465,200.00	600,000
Total Operating Revenues,	<u>\$18,883,983.83</u>	<u>\$19,034,000</u>
Operating Expenses and Taxes,	13,752,720.87	13,010,000
Net Operating Income before Deducting Depreciation,	<u>\$5,131,262.96</u>	<u>\$6,024,000</u>
Operating Income—Other Operations,	12,000.00	11,000
Non-Operating Income,	<u>\$5,143,262.96</u>	<u>\$6,035,000</u>
Gross Corporate Income before Deducting Depreciation,	200,000.00	220,000
Income Deductions (Interest on funded debt and rentals),	<u>\$5,343,262.96</u>	<u>\$6,255,000</u>
Balance Available for Depreciation, Dividends and Surplus,	5,165,745.15	5,166,000
Appropriation to Depreciation Reserve,	<u>\$177,517.81</u>	<u>\$1,089,000</u>
Dividends—	<u>\$1,188,149.61</u>	<u>800,000</u>
Capital Stock Outstanding,	(1) \$1,010,631.80	\$289,000
Earnings in 1916,	\$48,750,000	
Additional stock now authorized, \$1,250,000 at 8%,	\$1,491,066.38	
	100,000.00	
	<u>\$1,591,066.38</u>	
Deficit or Surplus for the year at this point,	(1) \$2,601,698.18	\$289,000
Annual Amount of wage increases necessary and not incl. above,	(2) 1,085,714.00	(2) \$1,086,000
Deficit,	<u>(1) \$3,687,412.18</u>	<u>(1) \$797,000</u>
Amounts to be paid for Franchise Taxes and Federal Income Taxes if additional revenue required is allowed,	292,700.00	(3) 63,000
Total Deficit,	<u>(1) \$3,980,112.18</u>	<u>(1) \$860,000</u>

(1) Deficit. (2) Revised estimate due to increased wage scale (\$635,714.00 plus \$450,000.00). (3) Estimated in proportion to company's original estimate.

ADDITIONAL REVENUE REQUIRED.

To enable the petitioner to render safe, adequate and proper service to the public, we conclude that approximately \$860,000 additional revenue will be required.

*Methods of Obtaining Additional Revenue.**Zone Basis.*

This additional revenue might be secured by increasing the flat five-cent fare now charged by introducing a zone system of charges whereby the fare should be commensurate with the distance traveled. The zoning system would tend to make the cost of the service more nearly approximate its value to the passenger and would tend to secure the maximum revenue to the operating company at the minimum equitable cost to the passengers carried. It would also tend to make the cost per unit of service more equitable, but cannot be resorted to furnish emergency relief on account of the long delay that would ensue before such a system could be developed and equitably applied.

Car Mile Basis.

It may be suggested that the company's revenue for this emergency should be based on a study of the average revenue per car mile adjusted to present conditions. The Board does not consider that this method is logical or feasible. The cars in thickly populated traffic centers are usually crowded to capacity at certain hours and the revenue per car mile in that portion of the line is high; as the car proceeds, when the suburban area is reached or passed, the load becomes very light. If the company were allowed a uniform revenue per car mile, the total cost per car mile (which does not vary largely in percentage) would be assessed on the few remaining passengers and would make the cost of the service so largely exceed its value that the method would fail by reason of such high cost to the passengers.

Transfer Basis.

The company estimates in Exhibit P-7 a charge of one cent for each transfer issued on a base fare of five cents will provide approximately \$850,000 of additional revenue per year, which is substantially the amount of additional revenue required. By making a charge for transfers the additional revenue now required can be promptly secured and at the same time the additional burden will, in general, be carried by the long-haul passengers since, as a rule, the average total length of the ride by passengers who use transfers (including the ride on the cash fare and the ride on the transfer) is longer than the average ride of passengers not using transfers. The transfer charge seems to be the best applicable in the present case, and we have accordingly adopted this method.

RECOMMENDATIONS.

Depreciation Reserve.

The continuous maintenance of safe, adequate and proper service is the paramount duty of a public utility.

Such continuous service can only be assured by the maintenance of a proper depreciation reserve.

This fact is recognized in the system of accounts adopted by this Board and by the company in the setting up of a depreciation reserve. This depreciation reserve is built up out of the rates. In the year 1917 the appropriation for depreciation reserve, which should have been credited thereto, was depleted to the extent of over \$500,000 and used to pay dividends.

To divert to the payment of dividends moneys credited to or which should go to the credit of this reserve, and so destroy the assurance of the continuance of safe, adequate and proper service, is wholly unjustified and a violation of the paramount duty of the utility.

If the earnings of a utility will not admit of the maintenance of a proper depreciation reserve and a fair return upon the property used and useful, the remedy is not to be found in the reduc-

tion of the amount carried to or the depletion of the depreciation reserve, but in a prompt application to this Board for relief, before which the inter-related question of the continuous maintenance of safe, adequate and proper service and of just and reasonable rates may be considered, and all parties affected—the utility and the public—heard.

Valuation and Leases.

The president of the petitioner urged that not even in normal times was the return received by the company a fair return on the fair value of the property used in the service of the public, basing his conclusion upon the Cooley valuation and the addition thereto of an allowance of intangibles estimated by him. The municipalities properly denied this and criticized the valuation from an inspection and analysis thereof. The compiler of the appraisal was not produced and as we have said above no consideration was given by us to it.

In the fixed charges, the rentals paid by the petitioner to the underlying companies under the long-term leases in and through which the petitioner operates portions of its lines were subject to much criticism on the part of the municipalities in that the rentals paid were charged to be excessive.

The time is perhaps not far remote when the entire subject of the valuation of the properties and adjustment of rates of this company may be investigated. The criticism of the municipalities as to rentals and leases under which the same are paid, however, seems to require our comment. Fixed leases are in opposition to regulation because under the head thereof a utility could secure a return to which, under proper utility regulation, it might not be entitled, and the abuse of leases of this character is more marked where the lessor and lessees are so co-related as to be practically under the same control. The same abuses may exist under leases of this character as have heretofore been known to exist through the practice of holding companies, which abuses our State has sought to eliminate or curtail through prohibitory legislation. To secure the complete advantage and benefit of regulation all charges should be carried as far as possible by

the operating utility, rather than indirectly by means of long-term leases of a non-operating company, under which the rental paid might be in excess of a fair return on the fair value of the property.

Should, in future proceedings, an investigation be made to ascertain the fair value of the property and the return received by the petitioner, undoubtedly the underlying leases under which the petitioner operates will be and should be carefully analyzed, and the rentals paid thereunder investigated, for in ascertaining the fair return upon this property not only would the return received from the rates of fare as at present charged be pertinent, but it should also be determined whether the fixed charges are excessive.

Readjustment of Fares.

Numerous witnesses produced by the petitioner clearly indicated as their opinion that the flat rate fare system was an inheritance from horse-car days and was in no sense a scientific or proper charge for the service rendered. While the Board's power to increase railway fares despite the existence of a municipal ordinance specifying the maximum fare to be charged has been sustained, an important question would arise as to whether we would countenance a horizontal raise of the uniform five-cent rate without an investigation of the nature and extent of the service rendered for the fare charged and all the elements involved therein. The charge for the service does not bear any fixed relation to the service. Under the present existing five-cent uniform rate, some passengers are permitted to be carried a considerably greater distance for the same rate than other passengers. This may unduly discriminate against the short-haul passenger or short-rider, and any horizontal increase in the flat rate would further exaggerate this discrimination.

The witnesses for the company further testified that in the event of a horizontal increase in fares it was reasonably certain that the traffic would diminish by from fifteen to twenty per cent., and that this loss of traffic would be the short-haul traffic, for the reason that most of the short-riders in cities would walk rather than use the cars at the increased fares.

If the intimations of the president of the company are correctly interpreted, we can expect with the advent of normal times after the war an application by the company for a readjustment of fares on its lines, and the matter as to the method of raising revenue and adjusting rates having been so fully discussed in the present application, we are of the opinion that it would not be remiss for us to suggest that the company make a comprehensive study of the question for future use. It is important to the public as well as to the company that the short-haul traffic business should be retained. Such business may be the determining feature which will make possible a general reduction of fares, inasmuch as the best method of developing is clearly to retain a low minimum fare. Admitting the necessity for modification of the fares charged, some method can certainly be devised by a proper study of the company's system. While the system is extensive, covering nearly a thousand miles of track, it is separated and operated in six divisions and is capable of a practical zoning system.

CONCLUSIONS.

1. The petition will be dismissed.
2. We conclude (a) that, in order to render the public continuous, safe, adequate and proper service, the Public Service Railway Company will be required to raise additional revenue to the amount of \$860,000, and determine the existing rate to be insufficient. Additional revenue to the amount of \$860,000 will admit of the wage increases to the maximum testified to by the president of the company to be necessary. The wage controversy between the employees of the company and the company is now before the Federal War Labor Board for adjustment. The amount we allowed in our calculations was \$1,086,000 and this sum shall be appropriated toward any increase allowed by the Federal War Labor Board. (b) We further, in our calculations, allowed as an appropriation to depreciation reserve the sum of \$800,000, which sum is not to be used for any other purpose. The balance of our allowances is to cover the fixed charges, being the interest on the funded debt, rentals and taxes.

3. We conclude that the sum of \$860,000 can best be raised to meet the emergency by imposing a war surcharge of one cent on all initial transfers. As this is to be an emergency charge, it should become effective subject to the following conditions:

(a) The company shall promptly file with the Board for each calendar month, beginning with the month of June, 1918, so long as this surcharge is added to its schedule of rates, a statement giving the total amount of wages and salaries paid, duly classified by character of service rendered to the company and the rates per hour, day or period for which the wage or salary is payable, likewise classified, and indicating any change in classification of employees and the wage rates resulting therefrom.

(b) The company shall file with the Board for each calendar month, beginning with the month of June, 1918, during which the emergency surcharge is added to its rate schedule, a complete comparative income statement for 1917 and 1918 of its operations showing revenue and revenue deductions, classified in accordance with the uniform system of accounts for street or traction railway utilities (first issue) prescribed by this Board, together with mileage, traffic and miscellaneous statistics as required on page 35 of the form of annual report now required to be filed by this Board.

(c) The Board will retain jurisdiction of the emergency or war surcharge as herein approved for the purpose of modifying or abrogating same as and if the conditions change.

4. The company shall file or submit to the Board before January 1st, 1919, a plan whereby the method of charging at present in force may be revised by an equitable zoning system over its entire territory, proper consideration being given to all of the elements to more properly relate the cost of service with the length of haul and value of service.

Subject to the foregoing conditions and their acceptance by the company, the Board fixes as a just and reasonable charge to be imposed, observed and followed by the Public Service Railway Company on and after the first day of August, 1918, a charge of one cent on all initial transfers, in addition to any and all charges now imposed, observed and followed by said company.

Dated July 10th, 1918.

ORDER.

The Board of Public Utility Commissioners having on the date hereof made and filed a report, stating its findings of fact and conclusions thereon, which report by reference thereto herein is made part hereof, HEREBY ORDERS fixed as a just and reasonable charge to be imposed, observed and followed, on and after the effective date of this order, by the Public Service Railway Company a charge of one cent on all initial transfers issued by said company to its passengers; this charge to be in addition to the charges now imposed and exacted by the said company, and to be collected only in the event that prior to the twenty-fourth day of July, nineteen hundred and eighteen, the Public Service Railway Company shall file with the Board of Public Utility Commissioners its acceptance in writing of the following conditions.

(a) That the said Public Service Railway Company agrees to file with the Board for each calendar month, beginning with the month of June, 1918, and continuing so long as the charge fixed by this order is in effect, a statement giving the total amount of wages and salaries paid, duly classified by character of service rendered to the company and the rates per hour, day or period for which the wage or salary is payable, likewise classified, and indicating any change in classification of employees and the wage rates resulting therefrom.

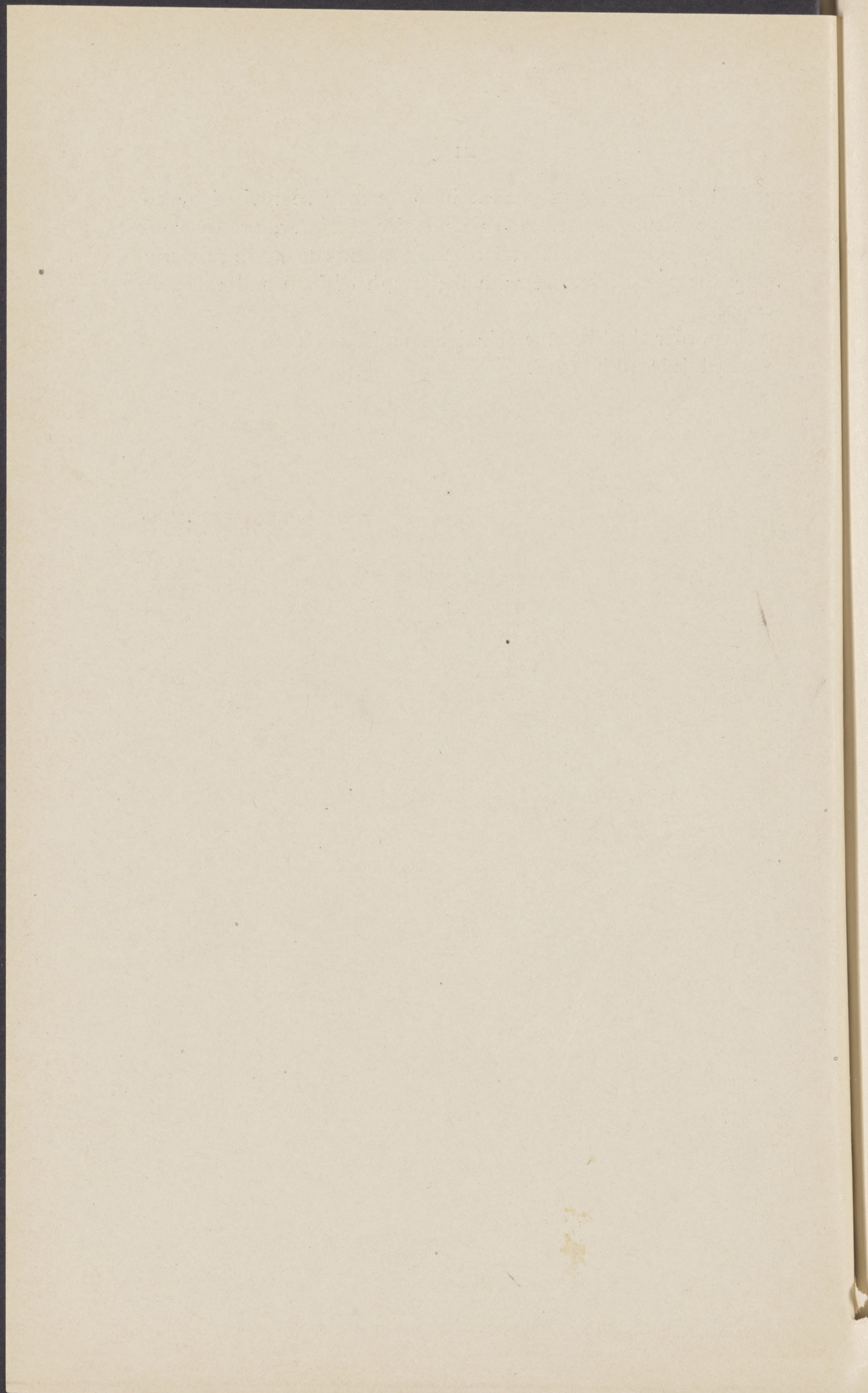
(b) The said Public Service Railway Company agrees also to file with the Board for each calendar month beginning with the month of June, 1918, a complete comparative income statement for 1917 and 1918 of its operations showing revenue and revenue deductions, classified in accordance with the uniform system of accounts for street or traction railway utilities (first issue) prescribed by this Board, together with mileage, traffic and miscellaneous statistics as required on page 35 of the form of annual report now required to be filed by this Board.

(c) Said Public Service Railway Company shall file or submit to the Board before January 1st, 1919, a plan whereby the

method of charging at present in force may be revised by an equitable zoning system over its entire territory, proper consideration being given to all of the elements to more properly relate the cost of service with the length of haul and value of service.

This order shall become effective August 1st, 1918.

Dated July 10th, 1918.



STATE OF NEW JERSEY.

Board of Public Utility Commissioners

IN THE MATTER OF THE APPLICATION OF THE
PUBLIC SERVICE RAILWAY COMPANY FOR A
FURTHER INCREASE IN RATES OF FARE.

REPORT AND ORDER.

Dated September 25th, 1918.

IN THE MATTER OF THE APPLICATION OF THE
PUBLIC SERVICE RAILWAY COMPANY FOR A
FURTHER INCREASE IN RATES OF FARE.

REPORT.

Marshall Van Winkle and George L. Record, for New Jersey State League of Municipalities.

Thomas N. McCarter, Edmund W. Wakelee and L. D. H. Gilmour, for Public Service Railway Company.

L. Edward Herrmann, for the Board.

On August 6th, last, a petition was filed with the Board by the Public Service Railway Company, requesting it to fix as a rate of fare on its lines of street railway seven cents where a fare of five cents is now charged. Such increase of fare to be in addition to the charge of one cent for each initial transfer heretofore allowed by this Board on a former application of the company.

On August 29th, a hearing was held in the city of Newark, and in addition to counsel appearing for the company, the League of Municipalities, and individual municipalities, there appeared representatives of large governmental, industrial manufacturing and financial institutions, as well as Chambers of Commerce and Boards of Trade of various municipalities of this State. Most, if not all, of these representatives presented memorials stressing the necessity of the functioning by the railway company at its maximum efficiency and the allowance of such a rate of fare as would provide sufficient funds. On the other hand, representatives of numerous municipalities appeared, as well as some citizens, to protest against the allowance of any increase in the rate of fare. The only evidence presented, however, was that of the company, there being no testimony offered by any of the agencies of municipalities appearing. The Board welcomes the presentation of facts which will aid it in reaching

a fair and equitable determination of any controversy in any proceeding before it, but the mere approval or protest in a proceeding fixing a rate charged or to be charged by a utility does not aid the Board in arriving at its conclusion. While the memorials were permitted to be filed and the protests to be entered on our record, neither constituted evidence nor testimony and could not be considered by the Supreme Court on review of our finding.

In a former proceeding and upon an application made by the Public Service Railway Company for the approval of the following schedule of fares filed by it to be effective April 1st, last, viz.:

1. A fare of seven cents where five cents is now charged.
2. A charge of two cents for each transfer issued on payment of a cash fare.
3. A charge of one cent for each transfer issued on a transfer.

The Board, by its report and order, dated July 10th, 1918, dismissed the petition, but found the then existing rate to be insufficient.

The conclusions in said report are as follows:

- "1. The petition will be dismissed.
- "2. We conclude (a) that, in order to render the public continuous, safe, adequate and proper service, the Public Service Railway Company will be required to raise additional revenue to the amount of \$860,000, and determine the existing rate to be insufficient. Additional revenue to the amount of \$860,000 will admit of the wage increases to the maximum testified to by the president of the company to be necessary. The wage controversy between the employees of the company and the company is now before the Federal War Labor Board for adjustment. The amount we allowed in our calculations was \$1,086,000, and this sum shall be appropriated toward any increase allowed by the Federal War Labor Board. (b) We further,

in our calculations, allowed as an appropriation to depreciation reserve the sum of \$800,000, which sum is not to be used for any other purpose. The balance of our allowances is to cover the fixed charges, being the interest on the funded debt, rentals and taxes.

"3. We conclude that the sum of \$860,000 can best be raised to meet the emergency by imposing a war surcharge of one cent on all initial transfers. As this is to be an emergency charge, it should become effective subject to the following conditions:

"(a) The company shall promptly file with the Board for each calendar month, beginning with the month of June, 1918, so long as this surcharge is added to its schedule of rates, a statement giving the total amount of wages and salaries paid, duly classified by character of service rendered to the company and the rates per hour, day or period for which the wage or salary is payable, likewise classified, and indicating any change in classification of employees and the wage rates resulting therefrom.

"(b) The company shall file with the Board for each calendar month, beginning with the month of June, 1918, during which the emergency surcharge is added to its rate schedule, a complete comparative income statement for 1917 and 1918 of its operations showing revenue and revenue deductions, classified in accordance with the uniform system of accounts for street or traction railway utilities (first issue) prescribed by this Board, together with mileage traffic and miscellaneous statistics as required on page 35 of the form of annual report now required to be filed by this Board.

"(c) The Board will retain jurisdiction of the emergency or war surcharge as herein approved for the purpose of modifying or abrogating same as and if the conditions change.

"4. The company shall file or submit to the Board

before January 1st, 1919, a plan whereby the method of charging at present in force may be revised by an equitable zoning system over its entire territory, proper consideration being given to all of the elements to more properly relate the cost of service with the length of haul and value of service.

"Subject to the foregoing conditions and their acceptance by the company, the Board fixes as a just and reasonable charge to be imposed, observed and followed by the Public Service Railway Company on and after the first day of August, 1918, a charge of one cent on all initial transfers, in addition to any and all charges now imposed, observed and followed by said company."

The conclusions were reached after an exhaustive investigation. A mass of testimony was furnished both by the company and the municipalities. The allowance of a charge of one cent upon the initial transfer, in addition to the then existing charges, was made upon conditions imposed by the Board and was accepted by the company. The Board retained jurisdiction of the matter for "the purpose of modifying or abrogating" the charge allowed as and if the conditions changed. The petition alleges changed conditions and present proceeding is a continuation of the former. In addition to the new or changed conditions alleged the petition renews its plea for increased revenue upon all of the grounds urged upon the original application, viz., its needs for new capital for construction work, and its inability to market its stock to raise new capital; insufficient revenue to pay dividends on its stock equal to the dividends paid by it in the year 1916, etc. These matters were disposed of by the Board in the former proceeding, and the present proceedings are for the purpose of ascertaining the effect of the conditions which have arisen since the report and order of July 10th, 1918.

The new conditions which have arisen are the further increases in wages ordered to be paid by the petitioner to its motormen and conductors by the National War Labor Board on August 1st last. It will be noted in our former report that in calculat-

ing the amount of additional revenue necessary to be obtained by the petitioner there was allowed the sum of \$1,086,000 for increased wages. This was the full amount of increased wages which the company claimed it would be obliged to pay. At that time the matter of wage adjustment had been submitted to and was under consideration by the National War Labor Board, and with reference to this we said: "The wage controversy between the employees of the company and the company is now before the Federal War Labor Board for adjustment. The amount we allowed in our calculations was \$1,086,000, and this sum shall be appropriated toward any increase allowed by the Federal War Labor Board."

The War Labor Board, on August 1st last, made awards increasing the wages of employees of the petitioner in excess of the amount allowed by this Board, and it is further alleged by the petitioner that in consequence thereof it became necessary and it has been obliged to collaterally increase the wages of its employees in other departments not affected by said Board's order. In making its award the War Board made the following recommendations:

"FINANCIAL RECOMMENDATION.

"This increase in wages will add substantially to the operating cost of the company and will require a reconsideration by the proper regulating authority of the fare which the company is allowed by law to collect from its passengers.

"We make part of this award the words we have used in the award in the Cleveland case:

"We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which the circumstances require it. We believe it to be a war necessity justifying Federal interference. Should this be deemed unwise, however,

we urge upon the local authorities and the people of the locality the pressing need for such an increase adequate to meet the added cost of operation.

“This is not a question turning on the history of the relations between the local street railways and the municipalities in which they operate. The just claim for an increase in fares does not rest upon any right to a dividend upon capital long invested in the enterprise. The increase in fare must be given because of the immediate pressure for money receipts now to keep the street railways running so that they may meet the local and national demand for their service. Overcapitalization, corrupt methods, exorbitant dividends in the past are not relevant to the question of policy in the present exigency. In justice the public should pay an adequate war compensation for a service which cannot be rendered except for war prices. The credit of these companies in floating bonds is gone. Their ability to borrow on short notes is most limited. In the face of added expenses which this and other awards of needed and fair compensation to their employees will involve, such credit will completely disappear. Bankruptcy, receiverships and demoralization, with failure of service, must be the result. Hence our urgent recommendation on this head.’ ”

The petitioner at the hearing rested its claim solely upon the increase in wages which would result from the award of the War Labor Board. Had this award been made before the termination of the former proceeding, we would have included the increased amount allowed, and a greater increase in the rate of fare than was allowed by us would have resulted. No testimony was offered by the remonstrants. They sought to defeat the application, urging the same arguments as were urged in the former proceeding, viz.: that this Board is without jurisdiction; the existence of municipal franchises fixing the rate of fare to be charged and the impropriety of fixing a rate without first ascertaining the value of the property of the petitioner.

These contentions were all fully considered and disposed of in the former proceeding. No reason now advanced appears to us to justify a reconsideration of them.

While the matter as thus presented appears to be simple, complications are present that are not immediately apparent. The award made by the War Labor Board is retroactive, in that the effective date of the award is as of June 7th, 1918. This makes it imperative for the railway company not only to pay the increased scale of wages as they become currently due, but in addition thereto wages in excess of those already paid, accruing since June 7th last, in accordance with the same scale. Having ascertained the amount of these as accurately as possible, consideration must be given to the time within which the necessary revenue must be raised. This vitally affects the amount of the increase allowed. If the additional revenue were required to be raised during the balance of the present year an inequitable and certainly prohibitive increase in fare would result. In order that the patrons of the railway company may not be unduly burdened and at the same time that the petitioner may not be financially embarrassed some plan must be adopted which will be equitable both to the public and the company. Having adopted some such plan a further adjustment then becomes necessary. The company being reimbursed for the deferred wages, the revenues then need only provide for the current increased wages, and the rates of fare should accordingly be reduced.

The petitioner offered estimates showing the amount of increased wages it would be obliged to pay during the then remaining five months of the present fiscal year. The calculations of these estimates were based upon the number of "car hours" and "man hours" actually operated during the present year. No contradicting evidence having been presented, the Board, to satisfy itself as to the accuracy of these estimates, caused the books and records of the company to be examined by its experts. We are satisfied that the estimates presented by the company are reasonably accurate.

According to the statement of the company's counsel, a seven-cent fare with an additional charge of one cent for a transfer,

in effect between September 15th and December 31st, 1918, a period of three and a half months, would yield sufficient revenue to make up the difference of approximately \$860,000 (Exhibit 206) between the actual wage increases paid and to be paid during the last five months of 1918 and the amount of wage increases for which provision was made in fixing the present fare of five cents with a one-cent charge for a transfer. This is equivalent to approximately \$245,000 additional revenue per month and is somewhat larger than the estimated average monthly increased revenue at the higher fare, viz., \$212,500, the difference representing the greater traffic that usually occurs during the last few months of the year than in the other months.

According to Exhibit P-205, the excess of the total annual wage increases effective August, 1918, over the amount of wage increases for which provision was made in fixing the present fare of five cents with an additional charge of one cent for a transfer is \$1,630,000. The excess from August 1st to December 31st, a period of five months, would be $\frac{5}{12}$ ths of this amount, viz., \$680,000. According to Exhibit P-206, the excess up to the close of 1918 will be approximately \$860,000, and subtracting from this figure the \$680,00 leaves \$180,000 as the amount of deficiency in revenue or deficit on August 1st, 1918, which covers that portion of the third and fifth items in Exhibit P-207 applicable to the period prior to August 1st. During each month at the present rate of fare the deficit will be increased by \$136,000, *i. e.*, $\frac{1}{12}$ th of \$1,630,000 above stated, and accordingly on September 15th was approximately \$384,000 and on October 15th will be \$520,000.

According to the statement of the company's counsel the entire amount of the deficit accruing up to September 15th, 1918, would be practically wiped out at the close of the year by raising the fare on the former date from five to seven cents.

At the same average monthly gain in revenue, a loss of \$520,000 accruing up to October 15th, 1918, will be made up in approximately five months. As shown by the evidence, the decreased traffic during the winter months results in a falling off of revenue. March 31st, 1919, is therefore in our judgment a proper time limit to allow for the making up of the said deficit.

It is also established by the evidence that when the company's deficit herein discussed is made up a fare of six cents and a charge of one cent on each initial transfer will yield sufficient revenue to enable the company to meet its operating expenses, pay bond interest and rentals on leased properties, and provide an annual appropriation of \$800,000 for depreciation.

We therefore find and determine that in order to render the public continuous, safe, adequate and proper service, the Public Service Railway Company will be required to raise additional revenue to the amount of \$860,000 by reason of the award of the National War Labor Board on August 1st, 1918, in addition to a like sum provided for in the order of this Board, July 10th, 1918.

The said award was made by William Howard Taft, former President of the United States, and Frank P. Walsh, as arbitrators, and is not a subject of controversy before us. By its terms the award "shall continue for the duration of the war, except that either party may reopen the case before the arbitrators at periods of six-month intervals, beginning February 1st, 1919, for such adjustments as changed conditions may render necessary."

The difficulty in fixing just and reasonable rates in such troublesome times and with the constantly changing conditions must be apparent to everyone.

We find that an emergency exists and determine the existing rates to be insufficient.

We conclude that the sum of \$860,000 should be raised to meet the emergency by imposing a war surcharge of two cents, making a fare of seven cents where five cents is now charged. Said rate of fare to be effective October 15th, 1918, and to continue up to and include March 31st, 1919, and for the reasons previously stated we find and determine that the just and reasonable rate of fare to be charged on and after April 1st, 1919, is a war surcharge of one cent, making a fare of six cents where five cents is now charged.

The charge for transfers to remain the same as in our original order of July 10th, 1918.

As this is an emergency surcharge it should become effective subject to the following conditions :

(a) The company shall promptly file with the Board for each calendar month, beginning with the month of October, 1918, so long as this surcharge is added to its schedule of rates, a statement giving the total amount of wages and salaries paid, duly classified by character of service rendered to the company, and the rates per hour, day or period for which the wage or salary is payable, likewise classified, and indicating any change in classification of employees and the wage rates resulting therefrom.

(b) The company shall file with the Board for each calendar month, beginning with the month of October, 1918, during which the emergency surcharge is added to its rate schedule, a complete comparative income statement for the current and preceding years of its operations showing revenue and revenue deductions, classified in accordance with the uniform system of accounts for street or traction railway utilities (first issue) prescribed by this Board, together with mileage, traffic and miscellaneous statistics as required on page 35 of the form of annual report now required to be filed by this Board.

(c) The Board will retain jurisdiction of the emergency or war surcharge as herein approved for the purpose of modifying or abrogating same as and if the conditions change.

Subject to the foregoing conditions and their acceptance by the company, the Board fixes as a just and reasonable charge to be imposed, observed and followed by the Public Service Railway Company on and after the 15th day of October, 1918, a charge of seven cents where five cents is now charged, up to and including March 31st, 1919, and the Board fixes as a just and reasonable charge to be imposed, observed and followed by the said Public Service Railway Company on and after April 1st, 1919, a charge of six cents where five cents is now charged.

By its report of July 10th this Board ordered the petitioner to file and submit to it on or before January 1st next a plan whereby the method of charging at present in force may be revised by an equitable zoning system over its entire territory, proper consideration being given to all of the elements to more properly

relate the cost of service with the length of haul and value of service.

The company is now and has been for some time past gathering data of traffic on its lines to be used in the preparation of such a plan, and the president of the petitioner assured the Board that such a plan will be filed and submitted to us early in January next. Any plan submitted will necessarily have to be investigated by experts employed by this Board before adoption, to ascertain the fairness of the scheme and the probable results of operation.

We anticipate that it may be possible to adopt some plan before April 1st. The plan with its schedule of rates when adopted will be substituted for the then existing rate.

Dated September 25th, 1918.

ORDER.

The Board of Public Utility Commissioners having on the date hereof made and filed a report, stating its findings of fact and conclusions thereon, which report by reference thereto is made part hereof—

HEREBY ORDERS fixed as a just and reasonable charge to be imposed, observed and followed, on and after the effective date of this order, by the Public Service Railway Company, a charge of seven cents where five cents is now charged up to and including March 31st, 1919, and the Board fixes as a just and reasonable charge to be imposed, observed and followed by the said Public Service Railway Company on and after April 1st, 1919, a charge of six cents where five cents is now charged. These charges to be in addition to the charge of one cent for each initial transfer allowed by this Board in its order of July 10th, 1918, and to be collected only in the event that prior to October 10th, 1918, the Public Service Railway Company shall file with the Board of Public Utility Commissioners its acceptance in writing of the rates herein allowed and for the periods of time named upon the following conditions:

(a) That the Public Service Railway Company agrees to file with the Board, for each calendar month, beginning with the

month of October, 1918, so long as this surcharge is added to its schedule of rates, a statement giving the total amount of wages and salaries paid, duly classified by character of service rendered to the company, and the rates per hour, day or period for which the wage or salary is payable, likewise classified, and indicating any change in classification of employees and the wage rates resulting therefrom.

(b) That the Public Service Railway Company agrees also to file with the Board for each calendar month, beginning with the month of October, 1918, during which the emergency surcharge is added to its rate schedule, a complete comparative income statement for the current and preceding years of its operations showing revenue and revenue deductions, classified in accordance with the uniform system of accounts for street or traction railway utilities (first issue) prescribed by this Board, together with mileage, traffic and miscellaneous statistics as required on page 35 of the form of annual report now required to be filed by this Board.

This ORDER shall become effective October 15th, 1918.

Dated September 25th, 1918.

*Testimony of Thomas N. McCarter—First Rate Case.***Testimony.**

[S. M. 487]

Commissioner Slocum. Any reports filed by the Public Service Railway Company will be considered part of the record.

Mr. Wakelee. That is our case. 10

Mr. Herrmann. Before the case is closed I wish to make a suggestion. In the other case, at the conclusion of the case for the petitioners, I suggested that the appraisals of the respective property of both companies, the first one, the 90-cent rate case, and the second, in so far as it has been approved by the commission, should be put in. While I appreciate that this is not a proceeding for fixing a permanent rate based on valuations, it seems to me that in fixing a rate, this being an emergency application, it might be of some service or some assistance to the commission if they had some guide by which they knew whether or not the rate allowed would be in some proportion to the value of the property. I have been advised by Mr. McCarter that comparatively recently there has been an appraisal made of the visible properties of the Public Service Railway Company, and I therefore suggest that they be offered to the commission for such use as the commission desires to make of them for their consideration in the consideration of the case. 20

Mr. Wakelee. I would suggest that the way to get this before 30

[S. M. 488]

the commission would be to put Mr. McCarter back on the stand, and ask him such questions as will bring out the point suggested by you.

Mr. Herrmann. It is part of your case, but perhaps it would be the better way.

THOMAS N. McCARTER, recalled on behalf of petitioner.

Q (*By Mr. Herrmann.*) Have you ever had an appraisal of the properties of the Public Service Railway Company? A Yes. 40

Q By whom was it made? A Made by Dean Cooley, of the University of Michigan.

Q A recognized authority and expert? A I regard him as having no superior in the country, and I think he has been recognized as being at least a very high authority in matters of this kind.

Q How recently was that appraisal made? A If you will allow me to say by way of introduction, this street railway difficulty—the difficulty of the street railway company—is not of recent origin. We have known for years that if the way were made clear we would have to apply for some change in the rate of fare. Our hands seemed to 50

[S. M. 489]

be tied by the point of view held by the commission that they had no right to investigate or raise fares where the limit of fare was pre-

Testimony of Thomas N. McCarter—First Rate Case.

scribed in the ordinance. We thought that was an erroneous view, and we prepared ourselves by this appraisal, so that when that difficulty was removed, if it should be removed, we would be in a position, at the proper time and in the proper way, to make an application for a raise, based on valuation. That difficulty was removed by the Col-
 10 lingswood and Northampton decisions. This particular proceeding, as I have time after time said, and as you have just said, is not such a proceeding, but is an emergency proceeding, based on the extraordinary developments of the last few months. This appraisal, of which you inquire, was made by Dean Cooley as of December 31st, 1915. I have the summary of his appraisal here in my hand. The supporting data is included within the compass of quite a number of volumes, and are all in our files and ready for production for anyone interested.

20 *Mr. Herrmann.* Have you any objection to offering them in this case?

Witness. Not at all; for the purposes of the case, as you have stated them. I may say that the inventory shows—

[S. M. 490]

Mr. Van Winkle. I object. Have you any further questions?

Mr. Herrmann. I have none.

30 *Mr. Van Winkle.* We object, if the commission please, to the introduction of this so-called appraisal without the so-called appraisal being verified in the way we think it should be. Dean Cooley is probably a great authority, and he has appraised, I have no doubt, this property in his own way. But we have no information here, if the commission please, as to the theory on which the dean has proceeded in making his appraisal. We are entitled to know as to that, as to whether he has appraised on the theory of reproduction cost, or just what he is doing. Those things makes millions of difference.

Witness. It is all told here, sir.

40 *Mr. Van Winkle.* I have no doubt the figures are satisfactory to you, Mr. McCarter.

Witness. Not the figures, but it is all told how he appraised it, the method he adopted.

Mr. Van Winkle. We object to the introduction of it in this case. If this is to be made a valuation case, on the basis of the 1916 valuation, that is one thing. You see here, the position of the company

[S. M. 491]

50 distinctly is this: We want to go back to the 1916 conditions; they have said that several times during the course of this proceeding. They have not said we want you to fix a rate that is just and reasonable, based on a valuation of this company at any particular time; they are not making this a valuation case. I appreciate the position of the counsel for the commission. I think in his place I would act the same way he is acting, and I may say, standing where I stand, I

Testimony of Thomas N. McCarter—First Rate Case.

should act the way I am acting now. Because we do not concede—maybe we are entirely wrong—we do not concede your commission has the legal right to fix a rate, called an emergency rate, on the testimony thus far. We want to be heard later on that head; that is a legal proposition. I take it you will admit this testimony, but over my objection, if you do. I do not assent to its introduction, sir.

10

Commissioner March. We will receive it. Have you it in volume form, Mr. McCarter?

Witness. I have it here; the summary is in volume form, and the others, the large mass of supporting detail, is also in volume form, and is also in our office.

Commissioner March. How much do you desire to use?

Mr. Herrmann. I just desire the summary, with the use of the supporting data, should it be desired.

20

[S. M. 492]

Commissioner March. It will be received and marked P. 27.

(Same is marked Exhibit P. 27.)

Q (By Mr. Van Winkle.) Does it appear, Mr. McCarter, who, if anybody, aided Dean Cooley in this appraisal? A Yes, sir.

Q Did he have engineers with him? A Yes, sir. He had on our property, I think, for upwards of a year nearly fifty men, and the examination of the property cost approximately \$150,000.

Q It was a valuation of the physical property of the company? A It was a valuation of the physical property pure and simple, no elements of intangibles of any character whatever are added in this appraisal; he does not go into development cost or going value; it is the physical value, pure and simple, of the property.

30

Q It is entirely, then, physical valuation from his point of view? A Yes, sir.

Q And he was the appointee of your company? A He was.

Q And your company paid the cost of the appraisal to him?

A Yes, sir.

Mr. Van Winkle. That is all.

40

Q (By Mr. Wakelee.) You stated the date as of which that appraisal was made. The company has spent other sums of money for capital charges since that time, has it not? A It has.

[S. M. 493]

Q It has added to the value of the property? A About eight millions of dollars have been expended in actual cash since this appraisal was made.

Q (By Commissioner March.) That is shown in your annual reports, is it not?

50

Mr. Wakelee. It is, yes.

A It is shown in the evidence in this case, as to 1917, both those years, and then the cost of the terminal is not included in this report, except the land upon which it stands.

Testimony of Thomas N. McCarter—First Rate Case.

Q (By Mr. Van Winkle.) Was there any participation by the commission, by this commission, or supervision by this commission, in connection with the making of this appraisal? A Not so far as I know.

10 Q It was entirely your own appraisal? A It was.

Commissioner March. Anything else, Mr. Herrmann?

Mr. Herrmann. That is all.

Witness. Will this be marked in evidence?

Commissioner March. If you please.

(Appraisal of Dean Cooley received and marked Exhibit P. 27.)

Commissioner March. Anything further, Senator?

20 *Mr. Wakelee.* I think, if the commission pleases, that concludes our case.

* * *

[S. M. 1139]

year period of the ten-year period, that money began to make itself felt. And for the past ten years, for the bulk of the time, the service has been normal, from my point of view, the deficit of which has been carried by the people who own the company through other resources. Had it not been for that the company would have been in the hands of a receiver years ago.

30 Q Senator Wakelee this morning spoke of the Public Service Railroad. Was the property of the Public Service Railroad (I am not speaking now of the Public Service Railway Company at all), was the property of the Public Service Railroad Company included in the Dean Cooley appraisal? A Yes.

Q P. 27, I think it is. A Yes. A statement has been prepared of what that is, and what figure that is, and the amount that should be productive from this.

40 Q Who has that statement? A I saw it. I think Mr. Wakelee has.

Q It isn't before the commission?

Mr. Wakelee. Very glad to do it.

Witness. It will be put in here, if you want. It is about \$2,000,000.

[S. M. 1140]

50 Q I want to ask some questions about that. Are Dean Cooley's figures, detailed figures, in such shape you can give us, from the Summary P. 27 in evidence, the appraisal be made of the Public Service Railroad, separate and apart from the Public Service Railway? A Yes. It shows about \$2,000,000, as I said a moment ago.

Q Let us have the detail figures? A I haven't them here. I suppose they are in Newark.

Testimony of Thomas N. McCarter—First Rate Case.

Mr. Wakelee. I can produce them during the day, or in the morning. I don't know whether they are in Trenton.

Witness. They show about \$2,000,000 for the railroad.

Q I understand, Mr. McCarter, you have made some calculations, I take it, for use by the commission, with respect to the inclusion of the Public Service Railroad's property in the Dean Cooley valuation? A Yes. We have had a statement made up, so there would be no misunderstanding, and we might not have given a false impression to the commission, we had those figures analyzed and prepared, to be taken out of the total gross amount of the Cooley appraisal. 10

Mr. Wakelee. The Cooley report specifically states that includes the railroad.

Mr. Van Winkle. We find it. That is the reason we wanted 20

[S. M. 1141]

to bring it out. Glad to have you add that.

Mr. Wakelee. We will give you that figure.

Q So I can have a question on the record and get an answer. I would like to know, Mr. McCarter, what Dean Cooley's valuation of the Public Service Railroad Company amounts to in the railway company, as it appears in Exhibit P. 27 that is in evidence— A My recollection is— 30

Q Pardon me (continuing). First, giving reproduction cost new, and secondly, giving cost new, less depreciation? A I can't tell you that latter.

Mr. Wakelee. I would ask that the answer to the question be deferred, and later in the day I can give the information to answer it.

Mr. Van Winkle. That is entirely satisfactory.

Q The Public Service Railroad is not a party in this proceeding, is it? A No. 40

Q It seems, Mr. McCarter, in your reports as president of the Public Service Corporation, you apparently combined the Public Service Railway and the Public Service Railroad companies in all your financial and statistical statements with respect to railway property; isn't that so? A I think so.

* * *

[S. M. 1157]

Q Was not the reason, Mr. McCarter, that Dean Cooley was not asked to separate the properties of the two companies, because he could not do so? A I beg pardon. 50

Q Was not the reason that Dean Cooley was not asked to separate the properties of the two companies because the accounts were not kept separate at the time? A No; that was not the reason.

Testimony of Thomas N. McCarter—First Rate Case.

10 Q In Dean Cooley's appraisal at page 127 appears this paragraph:
 "Materials, supplies and working capital. Experience has shown
 that in general these items are likely to be more nearly correct if
 taken directly from the company's books. This is particularly true
 if, as in this case, the books are well kept and frequent inventories
 are made of materials and supplies on hand. The amounts used in
 this appraisal are taken from the following analysis furnished by the
 company." Then, on page 128 of the appraisal is the exhibit on
 analysis of working capital and material and supplies, Public Service
 Railway Company and affiliated companies. Have you got the ap-
 praisal they made use of? A I have not.

[S. M. 1158]

20 Q Won't you kindly have it handed to you? We want to have it
 used in evidence.

Mr. Wakelee. If you want to use it in evidence, it is filed with
 the commission.

A I have one here.

30 Q On page 128 I call your attention to the second column of
 figures "Public Service Railroad Company." You will see the last
 figure, the net total is in red, representing a minus quantity; does not
 that show, Mr. McCarter, that the analysis on which Professor Cooley
 based his allowance of \$924,403 for working capital which you entered
 in the statement gives a minus quantity of \$16,339.91 for the Public
 Service Railroad Company? A It may. I don't know. I am not
 familiar with those figures, never have been.

Q Is this Public Service Railroad Company an operating com-
 pany? A Yes.

Q It is necessary, according to your theory, Mr. McCarter, that
 an operating company should have a working capital? A I think
 they should have.

Q Where does the Public Service Railroad Company get its work-

40 [S. M. 1159]

ing capital from; how much working capital has it? A I cannot tell.

Q Who can tell? A I presume it borrowed its capital, I suppose.

Q What is that? A I suppose when it has not working capital
 of its own, it may borrow it. I agree with you it ought to have it.

50 Q Well, I call your attention to the fact in this connection that
 the analysis furnished by the Public Service Railway to Professor
 Cooley upon which this allowance of \$693,402 for material and sup-
 plies was based, showed the following item: "Public Service Rail-
 road Company, average monthly book balance \$57.27." Now, how
 can a railroad, like the Public Service Railroad, operate on \$57.27
 worth of materials and supplies? A I don't know. I know that it
 ought to have more money to operate properly, and we are coming
 here to ask for it pretty soon.

Testimony of Thomas N. McCarter—First Rate Case.

Q Mr. Boylan knows about that? A He can tell you the facts. He may not be able to draw the psychological conclusion from them, but he can tell you the facts.

Q Now, Mr. McCarter. this morning you talked about wages in ad-
[S. M. 1160]

10

dress the commission. Don't you include in your item of operating expenses all payments that the company makes to labor, both the trainmen and other employees? A I don't understand that. The statements filed in this case include the amounts paid for labor at present prices. There is added to that the sum of six hundred and odd thousand dollars that we think should be granted by way of increase to present schedules of labor, which we have committed ourselves to make if this increase be allowed.

Q As a matter of fact, you do include the wages you pay to labor in your operating accounts, don't you? A Oh, yes.

20

Q There is no element of profit sharing on the part of any man who works for the company, is there; in other words, he gets a certain fixed wage; is not that your way of paying your labor? A Yes; he gets certain other benefits of eleemosynary character that are helpful to him.

Q With respect to the item of \$635,714, which you have stated in your opinion is necessary in order that you might make increases in the wages of your men to attract suitable men to your employment, that estimate, as you view it, is necessary to attract to your com-
[S. M. 1161]

30

pany single men? A I think it is absolutely necessary to preserve the present *status quo* and also to attract other men.

Q Well, now, calling your attention to a paragraph in your testimony, I would like to know what you mean by this statement found on page 125 of the transcript: "Our hands are tied. We honestly believe they should be made," meaning the wage increases. "We will make them if the basis, the substantial basis of this allowance that we are asking for and these figures is given, together with this fund for this special purpose."

40

My question on that is this: Do you mean that you would not make this wage increase totaling approximately \$635,000, in spite of the necessity which you say exists for making it, unless this board grants you substantially everything you have asked for to put you back on the 1916 basis, and in addition gave you an amount as a special fund equal to the amount of increase in wages you suggest?

[S. M. 1162]

50

A I have said that if this board made increases which will enable us to proceed with our business in its orderly course, and in addition thereto gave us \$635,000 specially set aside for this purpose, which we think should be made as increases, we would promptly make them.

Testimony of Thomas N. McCarter—First Rate Case.

Q You are putting the \$635,714 last, this increase in labor, and you are putting it in such a posture that unless this commission gives you enough to put you back in the condition which you specified, and this sum of \$635,714, you won't increase the wages of your men?

10 A You can draw what conclusions you please. I mean to say that if this board only gave us \$635,000 alone, unless they specially ordered it to be given for wages, it would not be applied to that purpose, because there are other things quite as important as that, important as that is.

Q You don't ask this commission to make an order and specifically direct a certain sum to be paid for increase in wages, do you? A I think this commission could indicate that was a proper allowance, which we would gladly respect. We want to do it.

20 Q Mr. McCarter, as a matter of public policy, isn't it bad public policy to trust on this commission the burden of and the responsibility for dealing with wages and wage increases with companies, utilities like your own? A I do not think, under the critical circumstances that now exist, it is at all. I think it is eminently proper for us to say to the commission, we haven't got the funds, we think wages should be increased, and if you will put it in our power to do it, we will increase them \$635,000.

30 Q Don't you think it is better public policy for you to take, yourself, the responsibility for making the increases, and then telling the commission you have done it, and then asking for a sum sufficient to cover anything, all your operating expenses, including that?

A Suppose you did not get it, then what?

Q I am asking you your opinion, Mr. McCarter? A My opinion is, no, not under these circumstances.

Q As a matter of fact, Mr. McCarter, aren't you going to make these increases anyway, no matter what the commission does? A I do not think so, no; I do not see how we can.

40 Q Haven't you put forward this application in this form in order to secure, if possible, the support of your employees and of organized labor generally, to an increase in fares, to enable you to pay dividends on your stock? A We have not. We have put it there

[S. M. 1164]

exactly as it is stated, as what we believe to be; we are without funds to accomplish it without help.

50 Q Dealing with your exact figures, are you not substantially saying to your employees this: Help us to get \$3,650,000 more out of the public and we will give you the last eighteen per cent. of it; you put them last? A No. You can put any construction on it you want, but that is not the fact.

Q Then you want distinctly to have this board assume the burden of dealing with wages and wage increases? A I want the board to grant the application, if it will, in the shape we have asked it.

Testimony of Thomas N. McCarter—First Rate Case.

Q Have you ever before, Mr. McCarter, been willing to allow anybody to tell you what the wages of the men on your system should be? A No, and we are not willing now to have you, or other people, tell us what the wages of the employees should be.

Q I have made no suggestion. A We happen to think they should be increased in this case. 10

Q Are the men on your lines unionized at all? A No; not so far as I know.

Q Is it your idea, Mr. McCarter, that an increase of twenty cents a day to men who are now receiving from \$2.80 to \$3.40, is going

[S. M. 1165]

to have much effect in preventing them from going into other industries, where, as you say, they can get five or six dollars a day, or at the shipyards, given seven and eight dollars a day? A I think it will have some effect, especially in holding our old men. 20

Q What benefit do you give your employees, besides the wages paid, in order to induce them to remain in your service? A Our men are given sick benefits; a man becomes sick or disabled, after the first week of his sickness, or some other period—I don't know that I am right as to detail—he is paid the benefit for ninety days, and that is liberally construed, and in many worthy cases is actually beyond that time. Upon death his family are paid a benefit of \$300. Upon arriving at a certain age, in some cases—upon arriving at the age of sixty-five years, after a certain specified service, he is entitled to retire on a pension, and arriving at the age of seventy years, after a specified service, he must retire on a pension. 30

Q As I understand, your men do not get the maximum rate of pay until they have been about ten years in the service; isn't that it? A Yes.

Q And that is not on the ground that a man is more efficient at the end of the ten years; it is because you are rewarding him for

[S. M. 1166]

remaining so long in your service? A No; on the contrary we think the man is more efficient after he has been with us ten years, than he was in a shorter time. 40

Q How long does it take a man, ordinarily, to qualify for efficient work as a motorman or conductor? A Well, that differs very largely with the men. Some of them get to be expert after a year or two, but on the average, a man who has been in the employ of the company six, seven or eight years, is better than the one who has been there a very much less space of time, not only better in the actual operation of the car, but better in steadiness of his habit, better in sobriety, better in all that goes to make up a useful employee to a corporation of this character. 50

Q The effect of this provision, this ten-year provision, is to keep the men with you? A That is it, keep the old men with us.

Testimony of Thomas N. McCarter—First Rate Case.

Q Have you examined at all the question of utilizing the services of women as conductors, because of the labor scarcity, on account of the war? A Yes.

Q Any study been made of that yet? A We have some women on our cars.

10 Q What lines? A Southern Division.

[S. M. 1167]

Q Can you say about how many? A I think there are some ten or more actually operating, and about as many more to go into service this week, and we propose to gradually extend that as fast as opportunity offers. There are a great many complications about it; it is not easy at all.

Q You are engaging now in all phases of the matter, and looking it up? A We are.

20 Q When did the first woman go on? A I should say two or three weeks ago, a month ago.

Q Have you made a study at all; speaking of economies in this present so-called emergency, any study of one-man car operation, with a view to economizing on labor? A Yes, sir. I beg pardon?

Q With a view to economizing on labor? A We tried one-man car operation several years ago in several cities, notably New Brunswick, and I regret to say it was not successful. The people of the communities where we tried it did not care for the one-man type of car; I think mistakenly. I think the one-man type of car is all right.
30 But that is a very complicated matter, too; it requires a very large expenditure of money, of capital, to remodel your cars for that purpose.

[S. M. 1168]

Q Can you say what the trouble was with the one-man system you installed or started? A I simply think the people thought it was a step backward; they thought it was a reflection on their community that they were asked to get on the cars operated by one man. I think the service was all right; I think it was a mistake on the part
40 of New Brunswick and the other places involved.

Q Don't you think that would not operate now in war times, when we have to employ women in so many industries? Don't you think the one-man car could be used now, as a matter of economy? A Well, I don't know. I wish it could be. But it is a very complicated matter, takes a long time to bring about; you have to remodel your cars, or, better yet, have specially new, modern, one-man cars made for the purpose. I think people would be less displeased with the new one-man type of car that has been invented than they would be
50 with the old cars remodeled to the one-man car basis. I think there are certain places in this state that could be operated very successfully with one-man cars if the people, if the commission and the people of those communities would tolerate it, and if it were practicable within any given time to invest the capital necessary to bring that condition about.

Testimony of Thomas N. McCarter—First Rate Case.

[S. M. 1169]

Q Could you, either now or later, Mr. McCarter, make some estimate of the capital requirement you speak of in the alteration of cars to a one-man basis, recognizing a war crisis and trying to put all the economies into operation we can, and the people are now disposed to accept economies? A Well, it could be figured out how much it would cost to either buy so many new one-man cars or to remodel certain types of cars that we have for one-man operation. But where we will get the money to do it with in these times is another question. 10

Q What lines would you have in mind in such connection? A I think all the lines, practically. In towns like New Brunswick, Plainfield, except the through line that runs through Plainfield, Hoboken, and communities of that size and that character, could very well be operated with one-man cars without any diminution of the service and with ultimate satisfaction to the people. But I think it is not pleasing to the people at first blush. 20

Q While we were discussing possible economies, I asked you a few questions as to the skip-stop plan. I think you said you recently put that plan into operation in a part of your system, was it? A It is in effect in all our system now.

[S. M. 1170]

Q And it dates from April 1st, does it? A April 1st in the Essex Division, and I think May 1st on the rest of the property, or thereabouts. 30

Q Well, can you say on what basis you determined the stops to be eliminated? Has that been studied out properly? A I think it has been. The stops have all been marked.

Q Hasn't this plan so far resulted in an increase in the average speed of the cars? A Yes, slight; very slight, up to date.

Q Doesn't that mean, Mr. McCarter, that every train crew is able to operate a larger number of car miles within a given time? A Not right away, no.

Q Well, calling attention now to the Broad Street, Essex Division, Newark line, and the South Orange line, isn't it a fact that the train crews on those lines are able, because of the installation of the skip-stop plan, to make one extra run a day? A I don't know about that. It undoubtedly will in time result in a car-hour saving. 40

Q Who would know as to that? A Mr. Danforth would know more about it than anybody else. It has to be done very slowly, Mr. Van Winkle. The timetables cannot be speeded up from the old con-

[S. M. 1171]

dition to the new condition overnight; they have to be carefully prepared, and it is in the interest of safety and of good operation to let the people become accustomed to it, and let the men become accustomed to the change, and gradually bring the full change about until within a reasonable time the full speeding up and saving is made as a result of it. It will ultimately result in a considerable saving, I 50

Testimony of Thomas N. McCarter—First Rate Case.

hope, but I think it will take some months to determine just how much.

[S. M. 1172]

10 Q You testified, Mr. McCarter, during the past winter there were from 50 to 75 cars that had been held in the barn because you had no one to operate them. Now, can you tell us what the effect of the increased speed resulting from the skip-stop plan has been, in terms of car operation, in terms of car miles? A Not applicable up to date. It may be due to the fact that the man situation is worse now than then; about 100 runs a day not being operated for lack of men. Not 100 cars but 100 runs a day.

Q Aren't you operating more car miles now, Mr. McCarter, than in January? A I don't know about that; I presume we are, slightly, this season of the year more car miles than January.

20 Q Who would know as to that? Mr. Danforth? A Mr. Danforth. We are not operating more than we did in April a year ago.

Q Has it occurred to you if the application here should be granted, and if the great reduction in traffic which you anticipate would take place, you would have a great many cars to keep in the barns and you wouldn't need so many men on your payroll? A No, I

[S. M. 1173]

don't think it would result that way at all.

Q That would seem so to a layman. A I think it is an error.

30 Q What is the fact? How do you view it? A I view it as affording an opportunity to give those who do ride much better service than we did before.

Q Now passing, Mr. McCarter, to the figure of 6,643,043, which I think you stated represented the estimated cost of complying with the government demands for additional railway facilities. As I have it worked out here, you have referred three times in your testimony to 6,643,043. I would like to know how that figure is made up. I can't get it from the testimony. A That figure was based on the expectation of contracts being entered into for all the work that the government, the various agencies of the government and have under way, or under negotiations with us, for power and other extensions to the railway system; some of which have been incorporated in contracts since; some of which are still being held in abeyance, and I think one or more of which have perhaps been abandoned or changed, I am not sure which. The situation with the government changes from

[S. M. 1174]

50 day to day, and it is impossible to predict with accuracy what they will require and what they won't require. I do know they have already made contracts with us for the Port Newark terminal involving an expenditure of \$800,000 and changes in Camden involving approximately a mile and a half and for cars purchased to serve the district between the rivers in Newark (I have forgotten how much money that does run into), and large other negotiations are still in

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abeyance; the total of which, after all that has been contracted for is done, would be that six million dollars to which you refer.

Q There are no completed contracts? A I think 3 completed contracts. There is the contract for the Port Newark Terminal extension, amounting to in the neighborhood of \$800,000.

Q That is in evidence. A There is a contract that has been executed since for certain track connections in Camden, for the purchase of the cars to operate to the shipping companies in Camden, and for power to enable those cars to operate, which, if my memory is right, runs into nearly a million and a half of dollars. I am not sure of that figure, but there is a contract which has been executed—I think it has been executed for the relocating of our tracks and the
[S. M. 1175]

building of a new car house in Washington Park in Camden to meet certain changes required by the government. Then there are under immediate negotiation—I think the contract has been executed (and this I am not positive of), a contract for a certain number of cars for use, as I say, in the Essex and Hudson division for the territory between the two rivers, called the Lincoln Highway. Then there are the contemplated negotiations of contracts for the construction of a spur in Camden to a new housing ^{development} ~~department~~ being furthered by the government, and for the continuation of the line from the Submarine Boat Corporation property along Avenue R in the Lincoln Highway. That has not yet come to any definite conclusion. And there are many further contracts in North Jersey with them for the necessary power installation that will run the expense up to the figure of which I spoke.

Q The 6,643,043? A Yes. I don't think in that figure the Washington Park change has been included at all. That has come up since. Nor the proposal for the mile of track in Camden for the new housing settlement.

Q That sum includes 6,643,043, Mr. Danforth's estimate of the
[S. M. 1176]

additional capital required for the normal development; that is, the developments irrespective of the government requirements on your system? A No. That is the government requirements, that figure.

Q Mr. Danforth gave his estimate— A It may include 25 additional cars. I don't remember about that.

Q About the additional capital requirements for the normal development of your system, as 2,742,756. A That, as I understand, is not within the six million at all.

Q Does the 6,643,043 include the portion of the electric company's new investment required for railway purposes? A To the extent of the government requirements.

Q Now, with respect to the 821,739 in connection with the Port Newark matter. Does that figure include the cost of a rotary to be installed in the Coe street station of the Public Service Electric? A I presume—I don't know—there was a rotary we are not asking the

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government for any contribution toward. Whether that amount—whether that total cost includes the rotary or whether the amount includes the government contract I am not familiar with. The gov-

[S. M. 1177]

10 ernment contract does not include the contract, I do know.

Q Then the item is not included in the \$800,000 plus? A The company is going to settle that itself.

Q As the testimony appears to be now, the fact now is as to that, that is not included? A That is not included. The government is not going to pay for that rotary, in other words.

Q Isn't the Electric Company, under the terms of the lease of July 1st, 1910, required to furnish the additional machinery required in the power station and sub-stations for railway purposes on the demand of the Railway Company? A Under the lease, yes.

20 Q Wouldn't that clause in the lease cover the present situation? A The Electric Company can't do any better than the Railway Company. They both have to have help, naturally.

Q Isn't this a departing from the terms of the lease, Mr. McCarter? A Not at all.

Q You don't view it as an obligation of the Electric Company under the lease? A I don't view it as obligation of the lease; I

[S. M. 1178]

30 don't view it as an obligation to provide power facilities in abnormal times like this when they can't finance them.

Q Then you say the government is going to pay for the rotary? A No. I said the government was not going to pay for it. It pays for all of the rest of it except the rotary.

Q Does the \$821,739 which the government is going to advance include the cost of the Gotthardt street extension? A Yes.

Q Does it include the cost of additional car house and shop facilities and of 18 new cars? A What?

Q And 18 new cars? A I think it does.

40 Q It doesn't include the right of way along the south side of Doremus avenue on which the line is to be built? A It does not.

Q That is land which you said the company happens to own? A The company happens to own that, and can utilize it for this purpose.

Q Why was the cost of that right of way left out? A We considered that would be unreasonable with the government, to ask

[S. M. 1179]

them to pay for something we already owned.

50 Q Under the terms of this contract do I understand that the title to the tracks, bridges, wires, cars, car house and shop facilities are to remain with the government until you pay for the property at a stipulated price, that is 50 cents on a dollar less depreciation? A The contract speaks for itself. Whatever that is. They certainly have a qualified interest or title in the property, and the franchise runs to us.

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Q The 18 cars would not be used specifically on this line? A They would run over other lines in the city.

Q You would have to pass them over existing lines to the City of Newark? A Yes.

Q I suppose you have other cars beside the 18 going to Port Newark? A Surely.

Q On the estimate, Exhibit P. 6— A I haven't that here by that name.

Q Maybe you will recognize it. It is an item of \$133,075 for two loops, one 1800 feet for the Federal Shipbuilding Company and one [S. M. 1180]

5,405 feet for the Foundation Company. The question is on that: Are these switch tracks and loop tracks to which you referred in your testimony, page 135 of the transcript— A 135?

Q 135; where you stated they are to be put in by the Federal Company and the Foundation Company or the Shipping Board, or someone other than ourselves, using your language? A That is true, they are to be put in by those companies, and the expense is to be borne by them. We have nothing to do but operate over them.

Q If that is so, why are they included in your estimate of new capital required to meet the government demands? A They are not, as I understand.

Q I thought you said they were? A No; I say they are not.

Q What is your intention as to the item of 37,620 for the additional positive feeder and the item of 223,790 for car house and shop facilities, and the item of 525,000 for 40 new cars, all for the service of the Federal and Foundation companies; are these monies to be furnished by you or by somebody other than yourself? A Those monies

[S. M. 1181]

are to be furnished by the government.

Q Who is to furnish the 531,118 for tracks and lines of feeder wire and 21 new cars for the upper Avenue R extension? A If it is constructed it will have to be furnished by somebody; presumably the government, the Shipping Board. They won't furnish it to us or anybody else unless they think they are furnishing it to a solvent concern and will get it back, or some portion of it back, some day. The government don't like to make a bad loan any more than anyone else.

Q Is the government now under contract to furnish that money for these things? A To the extent I have indicated it is. I don't know any more.

Q Has the government raised with you the question of your solvency? A The government inquired as to our status and looked into our whole situation, physical and otherwise.

Q Couldn't the government make the same kind of a contract as with you with the receiver of an insolvent company and be protected? What has your solvency to do with it? A A great deal to do with it. What would they do with the property after the war was over?

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[S. M. 1182]

They would have a nice time then.

10 Q Have you had the question of your company's solvency raised by the government, and if so, by whom, and when and where? A There wasn't, that I know about, a direct financial examination made of our company. But all their negotiations have been predicated on our ability to repay the government the amount we agreed to repay.

Q Have they raised the question of repaying or not? A If they had I don't think they would have given us the money.

Q You are talking about the solvency of your company; it is entirely your own language? A Everything I say is my own language.

Q You aren't quoting anybody on the solvency of your company?

A I didn't intend to be quoting anybody.

20 Q You testified the Electric Railway, Gas and Electric companies have been, up to the beginning of the war, spending between six hundred million and seven hundred million dollars in new construction, and that after the outbreak of the war a drastic policy of retrenchment was adopted? A I never testified to any such circumstance as that. I said we spent about six million dollars on new

[S. M. 1183]

construction.

30 Q All utilities. You were testifying in a big way? A All the companies of the country?

Q That is what you testified, on page 85 of the transcript. A Whatever I said I stand for.

40 Q Not this company alone; and after the outbreak of the war a drastic policy of retrenchment was adopted. You also testified that these companies were faced with the necessity of raising between one hundred million and two hundred million of new capital to furnish additional railway, gas and electric service to shipyards, munition plants, cantonments, navy yards, and industries generally, to meet the war program. Then at page 86 you testified: "The money required for unavoidable extensions during the year 1918 is variously estimated from one hundred million to two hundred million dollars. These estimates are based on the assumptions that no extensions will be made or allowed to be financed unless directly or indirectly essential to the vigorous prosecution of the war." The question is whether these estimates of and for the Public Service Railway Company of the additions required during 1918 are based on the assumptions

[S. M. 1184]

50 which you testified about? A I don't think I quite understand. You mean, will we do anything except what is for the war?

Q No. Is it your idea of the amount of money to be spent for extensions, based on this testimony I called your attention to; for it is based on assumptions? A I don't think I follow you. I have no hesitancy in saying I don't think anything should be done that can be avoided.

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Q You don't think there should be any contest with the government over the raising of funds. Is that what you mean? A No. I mean no money should be spent for any improvement that could possibly be avoided.

Q You wouldn't want to be actively endeavoring in the market to raise money that might be needed for war purposes? A I agree with that. 10

Q So we both agree on what is good public policy and patriotic; do you think the Electric Railway curtailed as much as possible its capital expenditures during the war period? A I do.

[S. M. 1185]

Q The expenditure during the war period should be sufficient to enable the government to perform its functions as strongly as it can. A Yes. 20

Q Isn't the fact, Mr. McCarter, rather contradictory of that, in your estimate of additional capital required by the Public Service Railway for 1918, you have included in addition to the war program, the average capital expenditure of normal times, increasing in proportion to the increase of prices? A In what statement?

Q In your statement. A No; I haven't included any such improvements.

Q Haven't you included in your estimate of additional capital required your capital requirements on the basis of normal times? A No. 30

Q Not at all? A No.

Q May I ask where in these various figures that Mr. Danforth testified to is included the estimate of the cost of the 150 cars not ~~referred~~ ^{included} by the government but referred to as part of your program

[S. M. 1186]

of normal expenses? A Those 150 are cars we had last year. 150 cars on the property, all practically on the property now. They were ordered during 1917, and were not, except in small parts, available for use in 1917. That is that 150 cars. 40

The government at the time of that report ordered 125 cars for those various plants' service, which would make 275, and then were talking about 25 more cars to round out the situation; that is a total of 300 cars, which would enable us to carry the people, we thought, in a proper manner.

Q That would be a normal expansion of the business? A To the extent of that 25 cars; really war business; expansion of the war business, taking these people from Port Newark to the center of Newark, who would have to be distributed around the country, around the suburbs, and it would take some additional cars to do that. 50

Q My recollection is you testified on Monday that the 300 cars required for 1918, as shown by your testimony I think at page 143, included 150 cars bought in 1917? A That is right.

Q If they were bought in 1917, why were they included in the

Testimony of Thomas N. McCarter—First Rate Case.

[S. M. 1187]

figures for new capital as set forth in that application? A They are not; except to the extent, perhaps, they haven't been paid for.

10 Q Or delivered? A Yes. I think they are now. I have had very great difficulty in getting them, but I think they are all delivered now.

Mr. Wakelee. Not all delivered yet.

Witness. Aren't they? I thought they were.

Mr. Van Winkle. Do you know how many are still to be delivered?

Mr. Wakelee. Three yet to come.

Mr. Van Winkle. All but three.

20 Q Well, would 150 new cars a year represent the average annual increase on the Public Service Railway's system in normal times? A No. It was more than normal.

Q That is more than normal? A Yes.

Q Can you give us an idea of the normal increase? A I think our property ought to have about 75 cars a year.

Q Is that the number, approximately added to the system prior

[S. M. 1188]

30 to January 1st, 1917, can you say? A I can't say surely about that. I think 50 to 75 cars on an average. Some years more; some years less.

Q You seem to have purchased some car bodies from the Cincinnati Car Company and you made others yourself? A Yes.

Q Don't it cost more to buy them from the Cincinnati Car Company than to build them yourselves? A They vary, I think it does, as a rule. We can't build any more than the capacity of the shop will permit.

40 Q You are up to capacity? A We are up to the capacity of the labor in our shops. I think Mr. Danforth thinks he can build about 50 cars a year in his own shop. I may be wrong about that; I think that is about the number, without disturbing the equilibrium of our maintenance and repairs.

Q You didn't build the 150 cars you got last year in your shop? A I don't know.

Q Mr. Danforth would know about that? A There might be, 50 cars of closed bodies.

Q Mr. Danforth would know about the cost of these cars?

[S. M. 1189]

50 A Yes. I think we make a better car ourselves than is made for us.

Q Passing to another subject, page 91 of the transcript, you read, you quoted from the letter signed by the Deputy Commissioner of Banking and Insurance of this State to the effect that the total amount of public utilities securities owned and loaned upon by the

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banks of New Jersey, that is exclusive of national banks, was \$33,230,000. Then Commissioner Smith testified, and he promised to write us a letter showing us the exact sum, and I have here his letter which I will read, with the consent of this commission; April 9th, giving an answer to the question he was asked: "I would advise you"—

10

Mr. Wakelee. Under what theory of evidence is he reading in new evidence in this case now?

Mr. Van Winkle. It isn't new evidence. Commissioner Smith was before the commission and he was under examination, and as I remember, he was asked to look up and supply this information.

Commissioner Slocum. He agreed to furnish this information?

Mr. Van Winkle. I understood so. Otherwise he has

20

[S. M. 1190]

to come back.

Mr. Wakelee. I stated at that time he was commissioner of banking of the State of New Jersey and was just as much their commissioner as ours and any information they wanted to get they could. I am not asking the commissioner to come back; at the same time, it is, it seems to me, proper evidence in this case, and not to cross examine Mr. McCarter on some letter that wasn't furnished before our case was closed.

30

Mr. Van Winkle. This is what he said and I wanted to ask him a question.

Mr. Wakelee. I am not questioning the record was sent to you at your request. He sent you a letter.

Mr. Van Winkle. "Commissioner Donges: I think, perhaps, a conference between counsel and the commissioner of banking, would result in an arrangement by which you could secure what you want with the least possible consumption of energy and time on the part of his office." I said: "Yes, sir."

40

Mr. Wakelee. That is what you wanted.

Mr. Van Winkle. Being all of the agreement. The witness said: "If you will ~~ask~~^{give} me that information, I will be very

[S. M. 1191]

glad to get it out for you." I said: "Very good." Mr. Wakelee said: "He is their commissioner as much as he is ours. We simply asked him to give information."

Mr. Wakelee. Yes; that is the way it was agreed then.

50

Mr. Van Winkle. Commissioner Donges said this: "Then we will have it understood."

Mr. Wakelee. No such thing should be interjected here in the evidence, in the middle of the cross examination of Mr. McCarter.

Testimony of Thomas N. McCarter—First Rate Case.

Commissioner Slocum. That is the only point; it isn't proper cross examination on that letter at this time.

Mr. Van Winkle. The only bearing it had was on Mr. McCarter's statements the banks had a certain amount of investment—

10

Commissioner Slocum. You have a perfect right to put the letter in in the proper form. The objection is it isn't proper cross examination of Mr. McCarter on that letter.

Q Do you know, Mr. McCarter, how much of the Public Service [S. M. 1192]

securities the State banks and trust companies have in New Jersey by purchase or on collateral? A No; I do not.

20 Q The figure of 33,230,000 you gave included all utilities of the several classes and character? A As I understood it.

Q You testified in respect to a letter from Mr. Williams, comptroller of the currency concerning the amount of public utility securities owned outright by the national banks of New Jersey; have you ascertained from the comptroller what portion of that total is made up of the stocks and bonds of the Public Service Company and its underlying companies? A No.

30 Q Referring, Mr. McCarter, to Mr. Chambers' testimony about the Public Service fives, you don't claim, do you, that an increase in rates will protect the market price of those bonds? A I think it will substantially help the market price of those bonds.

Q You think an increase in rates will protect the market price of bonds which bear a lower rate of interest than the rate now current?

[S. M. 1193]

A I think it will help them. Anything that tends to make any of the underlying revenues of any of the Public Service tree more certain helps all the securities.

40 Q Now, referring again to the Cooley appraisal, you testified that the company spent, I think, \$150,000 to have a valuation of the company's property made by Dean Cooley? A That sum is approximate. I don't remember the exact amount.

Q Yes. That exhibit, Exhibit P. 27; when was that appraisal made, or that valuation made, when; what time? A I think it was made, it took a long time to make, I think it was made during 1916 and 1917 my recollection is.

Q Pardon me? A My recollection is during 1916 and 1917, but I may be mistaken about that.

50

Mr. Wakelee. The valuation is as of December 31st, 1915.

Witness. I know that.

Mr. Wakelee. And it was made prior to that time, all of which is displayed by the exhibit itself.

Mr. Van Winkle. Is the exhibit dated? That is the reason I ask.

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Witness. I don't think it was all finished by December 31st,
[S. M. 1194]

1915.

Commissioner Slocum. Work had been done on the exhibits
subsequent to that date. 10

Witness. The exhibit is dated, as I say, dated December
31st, 1915, but it was not delivered to me at any such time as
that. Professor Anderson is here and he helped to make it;
he knows when it was delivered. I think about a year ago I
got it, maybe longer.

Q I mean, the appraisal itself isn't dated? A The appraisal is
dated as of December 31st, 1915.

Q That is all. A The value of the property is taken as of De-
cember 31st, 1915. 20

Q When was the work done? A I have just told you my best
recollection is 1916 and early in 1917; maybe part of it was done in
1915, I am not sure. It took a long time to do.

[S. M. 1195]

Q Now, that exhibit is merely a summary, is it not, Mr. McCarter,
of Dean Cooley's work? A I think so.

Q And where is all the supporting data, or what one would need
to have to fully work out this data, or understand it? A The sup-
porting data, as you call it, is in Newark. Whether one would need
to see it I don't know. I have never had the courage to undertake it.
It is very voluminous. Such as it is, it is in Newark 30

Q So as to get it on the record, that summary shows that the re-
production of the property is \$82,035,024? A Whatever it shows.

Q Reproduction cost, less depreciation, \$73,372,126? A Yes. It
also shows that the property is in 100% of operating condition, and
in the judgment of Dean Cooley, that the so-called reproduction less
depreciation is of no value in the premises whatever. The value of
the property is the full amount. 40

Mr. Van Winkle. In this connection, if the commission
please, we wish to have it understood that we are merely ask-
ing questions on the high spots of this exhibit. We claim this
exhibit is merely a summary. It is in the case over our objec-
tion. The supporting mass of data is not here, and any ques-
tions that I may ask are—

[S. M. 1196]

Mr. Wakelee. I ask whether Mr. Van Winkle is making a
motion or an objection? If he is not, I object. 50

Mr. Van Winkle. Perhaps I should have stood up. I am
merely protecting myself in dealing with this exhibit. To re-
peat where I think I left off, we are dealing with what we call
a summary which is supported by data which we have not seen.

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10 This summary is an exhibit in the case over our objection. We conceive our objection gives us certain rights. We conceive that our objection does not cut us off from the right of cross examining on the exhibit. I want to make it clear that I am cross examining under my objection, and I am only touching the high spots. We have not the time to do any more. I have not seen the data. We do not regard the exhibit as presumably correct in the questions that we have asked about it.

Commissioner Slocum. It is in the case for what it is worth, and either side may comment on it, or on any portion of it. Is not that so?

Mr. Van Winkle. Yes, sir. Under my objection I have the right to go back and object at any time I see fit.

20 *Commissioner Slocum.* Your objection is there and the record is there.

Q Mr. McCarter, this appraisal included all of the properties operated by the Public Service Railway Company and the Public [S. M. 1197]

Service Railroad Company and their subsidiaries, including the leased lines, did it not? A I think so.

Q Does it not contain a statement of all of the mains of all the properties? A I think it does.

30 Q You testified, when the appraisal came into evidence, that about eight million dollars had been expended in cash since the date of the appraisal. I suppose that means since December 15th? A Whatever the correct sum is. I thought I said six million dollars, but whatever it is it is susceptible of proof. Mr. Boylan can give you the exact figures. It may be eight million dollars.

Q In dealing with questions of value and valuation, in connection with that appraisal, we would add the eight millions to the other totals? A Whatever the figure is, yes.

40 Q Well, may I ask: Is it your opinion, Mr. McCarter, whether a capitalization of \$155,133,235 issued against this property is indicative of a financial policy sufficiently conservative to warrant this company in demanding what you term an abnormal, unusual, what seems at first blush extraordinary demand for increase in compensa-

[S. M. 1198]

50 tion, in order to preserve the company's credit and put it in a position where the Federal government will feel safe in doing business with it? I have given you the total capitalization and the total valuation shown by the appraisal. A Well, you have not given the total valuation of the property. I am perfectly willing to be entirely frank on this subject of valuation, so far as it has any bearing upon this proceeding. This appraisal was simply introduced into this case to show a *prima facie* physical value alone, sufficient alone to justify any request for an increase of rates that we were making in this case. I do not take it that the outstanding capitalization of the property

Testimony of Thomas N. McCarter—First Rate Case.

has anything to do with this particular application, whether it is larger than the value of the property or whether it is not; but there is no such disparity between the capitalization of the property and the valuation of the property as your question would indicate, and I will proceed to show you where the differences are.

Q In the face of the appraisal, I am asking you. A I am going 10

[S. M. 1199]

to tell you my idea of the value of the property. Including and outside of the value of the appraisal, but determined by the decision in this state. In the first place, this property shows a valuation, as you say, of approximately \$82,000,000, plus approximately \$8,000,000 of moneys spent on it since—a total of \$90,000,000. That does not include intangibles or going value or development cost in any sense, shape or manner. The proof sustained by the commission, by the Supreme Court, and by the Court of Errors in the Passaic case, indicated thirty per cent. as a fair valuation, thirty per cent. of the physical value as a fair valuation for the matters to which I have just alluded. Thirty per cent. of \$90,000,000 is \$27,000,000. That brings your total to \$117,000,000, upon which this company, upon the virtue—upon the faith of the Passaic case, would be entitled to earn eight per cent. In addition to that \$117,000,000, some eight or ten millions, or some other valuation which I have not got, or do not know at the moment, of power houses formerly belonging to the Railway Company, were transferred to the Electric Company, and are not included in this valuation in any way, shape or manner. So if it is eight millions, that brings it up to \$125,000,000, upon which this company, under the doctrine of the Passaic case, would be entitled to earn eight per cent. Now, the 20 30

[S. M. 1200]

\$153,000,000 that you speak of, of valuation, does exist, but in 1916, the year we are talking about, it earned 4.17 per cent.; and you take 4.17 per cent. on \$153,000,000 and compare it with eight per cent. on \$125,000,000, and see where you come out. 40

Q Is that all, Mr. McCarter? A That is all.

Commissioner Slocum. We will recess until two o'clock.

* * *

[S. M. 1208]

Commissioner Slocum. We cannot pass on that now.

Mr. Van Winkle. I just lay that before you. A reasonable time; that is all; no desire to delay. We will hurry through with the cross examination. 50

Mr. Wakelee. What are we doing now but delaying?

Mr. Van Winkle. What is the matter now?

Mr. Wakelee. What are we doing, but delay, at this very minute?

Testimony of Thomas N. McCarter—First Rate Case.

Mr. Van Winkle. I was discussing the matter with the commission, answering the commission's questions. I don't call it delay.

Mr. Wakelee. I do.

Mr. Van Winkle. It does not suit you, of course.

10

THOMAS N. McCARTER resumes the stand.

Cross examination by Mr. Van Winkle (continued).

Q Now, this figure of \$6,643,043 is a definite figure, Mr. McCarter, that you have testified to, and I cannot find in the evidence how it is made up. It is your figure three times testified to. I have no desire to delay the matter, but I want to get a statement from you, or someone in the room if you cannot do it, showing how that figure is made up. A That figure was part of a figure contained in reports made to me by the vice-president and general manager of the Railway Company and the vice-president and general manager of the Electric

[S. M. 1209]

20

Company, as to the amount of capital expenditure under consideration by the government for those two companies.

Q What exhibit have you, Mr. McCarter? A It seems to be called Exhibit P. 5 here. This report totals \$10,822,723.

Q That covers the Electric Company and the Railway Company?

30 A Yes, sir. Divided so as to cover the Railway Company's requirements, plus the Electric Company's requirements, made necessary for the Railway Company's requirements, gives you the figure that you are talking about.

Q I know that is the statement. I would like to have—if you haven't it now, kindly get up a statement of the very figures showing that total. That is what I want. If you cannot now, later. A They are here. Here is a long report marked in this case.

Q I cannot find any other witness giving the same figure. I would like you to make up a statement, or have it made up. A Here it is—here is the statement.

40

Q P. 5, you say? A \$10,822,723.

Q Yes, I have got that. What next? A Wait a minute, now. This report shows that the improvements under consideration with the government, for the Electric Company, in the northern zone,

[S. M. 1210]

were \$3,575,450; for the Electric Company in the southern zone, \$3,742,860; total for the Electric Company of \$7,318,310. Now, for the Railway Company, in the northern zone there was \$2,259,142, and for the Railway Company in the southern zone there was \$917,146, and for twenty-five new cars for the normal distributed growth of the Railway Company there was \$328,125. That makes a total for the Railway Company of \$3,504,413.

50

Testimony of Thomas N. McCarter—First Rate Case.

Q In that connection may I refer you to that page— A A grand total of \$10,822,723, of which, if you will take the railway items, pure and simple, and the items from the electric estimate that are necessary for the railway, pure and simple, you will get the figure of six odd millions you are talking about.

Q On that same page, where you say, doesn't Mr. Osgood refer to the figures you testified to, quoting: "For the furnishing of industrial power and power for railway purposes"? A I did not think Mr. Osgood had testified at all in this case. 10

Q Stated, not testified, but stated; the vice-president and general manager of the Public Service Electric Company? A Yes.

Q You testify now to the normal what, the normal cars, the normal amount of cars?

[S. M. 1211]

Mr. Wakelee. He read from the first page of P. 5 that you have before you, right there. 20

Mr. Van Winkle. If the commission please, I am trying to get the figures on the war.

Witness. I have given them to you several times, and will give them again, if you want them.

Mr. Van Winkle. He has given the normal number of cars, not the war cars.

Commissioner Slocum. You were asking how a certain figure was made up, and Mr. McCarter referred to this exhibit, and was explaining how they were arrived at. 30

Witness. So far as the twenty-five cars are concerned, we think they are necessary for war purposes. While they are not run directly on war lines, so to speak, they will distribute, aid to distribute by transfers to other parts of the system, the war traffic.

Q What part of the \$7,318,310 you testified to is attributable to the Railway Company? A The difference between the total of six million, the six-million figure, whatever that is, and \$3,504,413, or about three millions of dollars. 40

Q Aren't you using now, in your calculation, a figure that is in dispute, that six millions? I am trying to find out how the six million is built up. You are using it in this. A I say it is approximately three million, answering your question as near as I can.

[S. M. 1212]

Q A few hundred thousand might make some difference. We would like to have the figures a little closer than that. A I guess I can work it out for you, if you want. 50

Q We want to see it. A The trouble is you don't know what you want. You are groping around after a lot of things that someone else passes to you, and you don't know what you are after.

Q We have to blunder along. A You are making a poor job of it, I think.

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Q Maybe so.

Commissioner Slocum. Never mind.

Witness. If you will give me the figure you have in mind, the \$6,200,000, I will tell the exact amount.

10 Q I have it three times. Have you got it in the record? I will give it to you; \$6,643,043. A The amount of the \$7,318,310 of electric requirement which is necessary to complete the railway situation, is \$3,138,630.

Q You just did a sum there in subtraction, didn't you? A I gave you the answer to your question truthfully.

Commissioner Slocum. He has answered the question. Your expert, I guess, disagrees with him. Let him go on the stand and tell why he disagrees, and where.

20 [S. M. 1213]

Mr. Van Winkle. We haven't the figures to make up the total.

Commissioner Slocum. I know, but Mr. McCarter has answered the question pointedly, and gone over the question, and tells you it is that. You may not agree with his method of ascertaining the figure, but he has answered the question.

30 Q Now, Mr. McCarter, at recess we were asking questions on the Cooley exhibit. You testified and you said again at length this morning that no elements of an intangible character had entered into the Cooley valuation? A Not other than overhead, which is entirely—the overhead charges of the original construction are in, nothing else, no development costs, no going value.

Q No promoters' compensation? A That is an overhead, that is part of overhead.

40 Q Let us see. How do you define intangibles in that connection? A I define them the way this commission, and the Supreme Court, and the Court of Errors and Appeals did in the Passaic Gas case. In the Passaic Gas case this commission found the pure physical value, the bare bones of the physical property, item by item, as they stood for reproduction purposes; to that they added a certain percentage for overhead charges; those overhead charges are the

[S. M. 1214]

50 items of the character to which you have just alluded, such as interest during construction, taxes during construction, bankers—interest payments to bankers—I don't know whether there was in the Passaic case, but in some cases promotion fees go in, and some they do not. In the Passaic case this commission arrived at a total per centage of overhead charges; this they added to the bare physical bones thus found, and found the physical value to be that particular, the sum of those two particular items. To that sum thus found the commission added, for going value, or going concern value, for cost of

Testimony of Thomas N. McCarter—First Rate Case.

developing the business, as it is better phrased, the sum of thirty per cent. of that total, and the total of all of those was the value of the property found for rate-making purposes.

Q Here you testified that this value is a valuation of the physical property, pure and simple? A So it is. 10

Q Now, besides being a valuation of the physical property, as commonly understood, doesn't it include intangibles of the character you have stated? A Not at all. Those matters are not intangibles; they are actual expenses incurred in the construction of the properties, just as much as the bricks in the physical structure that you see.

[S. M. 1215]

Q This valuation is not a valuation of the physical things now in existence, entirely and alone, is it? A Yes, it is, because those particular things cost this money, beyond all question. 20

Q What do you call these, overhead intangibles, or overhead charges? A I call them overhead charges.

[S. M. 1216]

Q Well, how much do these things amount to in the Cooley valuation? A It is in there but I cannot tell you offhand; I don't know.

Q Are the things you are speaking about? A They are the figures in the Cooley report, whatever they are.

Q Take the item 529A—contingents. A Yes. 30

Q Seven and a half per cent. on items 504 to 529 inclusive, cost of reproduction new, \$2,559,416, cost of reproduction less depreciation \$2,141,449—"Contingents"—how do you call that a physical thing? A Why, I mean that there were contingent items of expenses that undoubtedly took place in and about the construction of these properties that does not appear in the mere valuation of the brick building as you see it standing there.

Q You say "Undoubtedly took place." A Beyond all question takes place, as much as the construction itself.

Q Any record of these things anywhere? A I don't know about the record. 40

[S. M. 1217]

Q Is not that figure entirely suppositional? A Not at all. It is based on the experience of a life time with every man who knows anything about those things or in any other business.

Q It is an estimate made by one man? A It is Dean Cooley's estimate and it is this commission's estimate in the Passaic Gas case and every man's estimate that knows anything about the estimating of the cost of property. 50

Q 529 B, engineering and superintendence of way and structures, 5 per cent. on items 509 to 529, being the same items again figured, cost of reproduction new, \$1,834,248; cost of reproduction less depreciation \$1,834,248; what is that? A Cost of engineering I assume.

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Q Is not that a suppositional figure? A No. You never heard of building work of this character without engineers, and somebody had to pay for them.

Q It is an estimate? A If you mean an estimate as distinguished from the receipted bills of the engineers, I suppose it is.

10 Q The next item, 538A—contingents— A Now, Mr. Van Winkle; I am not saying that I am an expert on overhead charges. If you want to take issue with the commission on overhead charges in the Passaic Gas case, or if you want to take issue with a man like Dean Cooley, you are at perfect liberty to do so, but I do not hold myself competent to do so; I do hold myself competent to say that overhead charges are absolutely matters of expense in a case like this, as any physical property is.

20 Q I think you misunderstand me. I am not contesting these things. I am trying to find out what you mean by physical valuation. A Physical valuation, as I use the term, is an estimate of the actual cost of the physical property, as you see it, plus overhead additions that undoubtedly were incurred in connection with the construction on which the valuation is based.

Q And these things, overhead charges in addition to what I have mentioned or itemized would be: Engineering and superintendence of equipment, law expenditures and administration, interest during construction, taxes, organization, development of the project, interest on money, promoters remuneration; are they not? A They may be and there may be some others. I do not pretend to recall them all. I do

30 [S. M. 1219]

not remember just as to what should be included and what should not.

40 Q In the Cooley valuation the total of cost of reproduction new of these things which you call overhead charges that I have itemized seem to give you the amount \$23,445,548, and the total of cost of reproduction, the same item, is \$22,954,187; are those the overhead charges you recall in the appraisal, or are there others you call attention to? A I do not call attention to any others. I am not familiar enough to know whether your figures are correct. I know there are overhead charges in this statement and I assume you have enumerated them all.

Q Well, now, in this summary Dean Cooley makes allowance of \$3,573,875 for promoters remuneration. The question on that large item is: Do you know of any person who has made that amount of money on the promotion of the Public Service Railway properties? A I don't know.

50 Q Is not that a large item; is not that an enormous figure in connection with promotion of those properties? A I do not think upon property that has the value, if it has the value that I said it had this morning, \$125,000,000 or more, with securities outstanding of \$150,-

Testimony of Thomas N. McCarter—First Rate Case.

[S. M. 1220]

000,000—don't think it is too large at all; I think the laborer is worth of his hire.

Q You think that that is a proper item? A I think it is very moderate. 10

Q I am obliged to ask you the same question—one or two—on the other items to get it in the record right. A You must realize, Mr. Van Winkle, that these properties were not built over one night. It is over a long course of years—a vast property built up all over the state, requiring vast sums of capital, and the men who have engineered it and developed the state by it, I think are entitled to make some money.

Q I have not said they were not. From your point of view do you think that \$5,422,800 cash shown by the appraisal, or the equivalent, as expense of engineering, superintendence of construction, law expenditures and administration during construction, and organization, developing the project under construction—a large figure, or do you stand by that as being reasonable? A I have not the slightest doubt it is reasonable, and I am in thorough sympathy with the findings of Dean Cooley in this estimate, as far as I have studied it. 20

[S. M. 1221]

Q In looking at the appraisal, I see that Dean Cooley makes an allowance of \$3,573,875 for cost of money. I suppose that refers to the discounts, bond discounts and banking discounts? A Things of that character. 30

Q You think that is correct? A I think it is probably far too little.

Q Now, Mr. McCarter, in your testimony you referred to 8 per cent—and you intimated if you did not state that you thought that that is about a proper rate of return to be allowed on money invested in a public utility. Is it your view that this rate of profit, 8 per cent, should apply to the total value of public utility property including all the items embraced in the Cooley appraisal? That means physical property, plus overhead charges. You have testified about certain additional items which you describe as intangibles and things of that kind. A That is precisely my view, but I don't know as my view is of much consequence. That is the view of the Court of Errors and Appeals in this state distinctly expressed. I think franchise value should be added to it and so did the Supreme Court of the United 40

[S. M. 1222]

States in the New York and Consolidated case, where they allowed \$7,781,000 for franchises, and so did our courts use to regard franchises as a matter of property value, and they have not said yet that they are not a proper subject for capitalization. All they did say was, and they said that on the second round, that they were not available for capitalization for rate making purposes. 50

Testimony of Thomas N. McCarter—First Rate Case.

Q You have just put a very high value, Mr. McCarter, on the franchises under which you are operating. Are not these the same franchises, or ordinance contracts that you are seeking to abrogate in this very proceeding, as of no value, being in your way? A The franchise is the right to operate.

10 Q Yes; the right to operate at a 5-cent rate of fare. A It won't profit us to discuss franchise value as to rate making; in that case the Court has decided against me and holds they are not a proper subject for rate making purposes.

Q There is another item of eight million dollars that needs explanation. I think you testified about that in your direct examination—page 104, I think it is, of the transcript. You testified that [S. M. 1223]

20 since the time when the Public Service Corporation purchased the stock of the constituent company afterwards merged into the Public Service Railway Company—I now quote your particular words—“Without regard to the purchase price in any particular, the Railway Company has had advanced to it cash to the amount of \$20,557,789.40.” You stated that the bonds of the underlying companies have been issued to the extent of \$11,949,021.28, par value, as against these advancements, leaving the balance of money received amounting to \$8,806,768.12. This, you say, is in addition to \$10,750,000, which the company has received in cash for its stock sold at par. Now, on this 30 I ask you where the \$8,608,768.12 came from? A It came, a part [S. M. 1224]

of that figure, as I explained in my direct examination—this figure is made up (allow me to correct that answer) by taking the same assumptions of an eight per cent. earning, less what we have received by way of dividends on the property. On that basis it showed that result, to the extent that the actual cash has not been forthcoming from the company, it has been supplied by the Public Service Corporation.

40 Q Is that amount, \$8,860,768.12, is that represented now in the company's capital, its outstanding stock and bonds, or carried on the books as unfunded debt? A There is little or no unfunded debt of the railway company at the present time. There was a large amount of indebtedness of the railway company to the corporation; approximately this sum; although I wouldn't say exactly this sum (I think it was a little less), that was waived by the corporation to the railway company some six or seven years ago, rather than to further increase the capital of the railway company.

50 Q Yes; there seems to be the item of eight million dollars shown on the books of the railway company that was forgiven and written off? A Yes.

Q What is the explanation of that? A Simply that the railway company owed that to the corporation, and there was no other way of

Testimony of Thomas N. McCarter—First Rate Case.

[S. M. 1225]

paying it, except by the issuance of further stock. We thought rather than further increase the capital stock of the railway company by that amount, and have it passed to the corporation, we would waive it. The corporation was the owner of practically all of the stock of the railway company. We simply waived it; we took it away from one hand, away from the other; that is about the size of it.

10

Q Do you know what year? A 1909 or 1910; somewhere along there.

Q In this Cooley valuation, does the item, track and roadway labor, is that an item of physical property? A Track and roadway labor on new construction?

Q Well, track and roadway labor; that amounts to the cost of reproduction new of \$3,882, item 510? A I can't attempt to elucidate Professor Cooley's estimate, except to say he is one of the most eminent authorities in the business, and I have the utmost confidence in him and his organization, and if I find enumerated in his schedule something I don't understand, I assume it is right, because I have confidence in him. I don't know what that means myself. If it means track and roadway labor on new construction, of course, it is a proper item.

20

Q Wouldn't you think that item should be depreciated as other [S. M. 1226]

items are depreciated? We have here track and roadway labor, cost to reproduce, \$3,882,689; cost to reproduce, less depreciation, the same thing as with no depreciation. A I don't think one dollar of this estimate of Dean Cooley's should be depreciated for rate-making purposes.

30

Q He has made depreciation— A Not for rate-making purposes. Quite the contrary.

Q What was he making depreciation for? A Simply to show the situation properly, to prove it should not be deducted for rate-making purposes, by showing there was only such depreciation on the property as must necessarily exist in the case of anything that isn't brand new; but the property was 100% going concern, and if maintained at a higher ratio than is shown by this report it would be a waste of maintenance, whereas if maintained at a lower ratio, then the subject of depreciation might come in.

40

Q Was the appraisal gotten up at all for any prospective use in any rate-making case of any kind? A Gotten up to give us the information we could proceed on the making of any use of it we saw fit at the time.

Q Making use of the information, and not using the appraisal itself? A Yes, using the appraisal itself. We have shown that by,

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[S. M. 1227]

at the very first opportunity we had, offering it.

Testimony of Thomas N. McCarter—First Rate Case.

Q Did what? A We have shown what use we were making of it, by offering it.

Q Mr. Herrmann called for it. A Mr. Herrmann asked us if we had it, and I told him we had, and would be very glad to present it. If you buy, Mr. Van Winkle, if you buy a new hat today, or a new golf club, or a new cane, tomorrow—or a new automobile—tomorrow it isn't brand new, but it may be 100% as good for the purpose you bought it, and it will continue to be 100% for as long a time as it is properly cared for.

Q That is so of an automobile. I can get more for my car than what I paid for it. A I am glad you can. I have never been able to get anything of that kind.

Q Are there any figures, Mr. McCarter, in the records of your company to show that in the actual construction of the Public Service Railway Company there was anything like \$6,807,384 paid for interest on money advanced for construction purposes? A I don't know, Mr. Van Winkle; I can't say.

Q That is just an estimate, isn't it? A I assume it is, in part, if not in whole, an estimate, but there is a certainty of actual expenditure. [S. M. 1228]

ture, that you needn't disturb yourself about.

Q Professor Cooley made an allowance of \$929,403 for working capital; he states that was based upon an analysis furnished by the companies themselves, and then he gives the analysis of that total, \$929,403.57. Does that represent, Mr. McCarter, the excess of the monthly receipts over the monthly expenditures, which you considered ought to be regarded as working capital? A It represents working capital exactly as Dean Cooley shows. I can't elucidate any further.

Q You can't give the details? A I am not the accountant of the company. I can't keep all this vast mass of minutia in my mind.

Q Have you got any copies of the analysis that was given Professor Cooley at the time he made his analysis? A I haven't. There are copies of whatever papers were given to him. He probably has them, or his office force has. I suppose they have the data on which they made their report.

Q Of course, your system, like most other systems, you collect the fare before the man takes his seat, before he gets in the car? A On a very considerable portion of the property; not all of it.

[S. M. 1229]

Q You get your pay from the rider before he gets his ride, of course? A On a considerable portion of the property.

Q On the largest part? A Yes; the larger part.

Q The company pays its employees at the end of the week? A I think once in two weeks.

Q That is, after they have done their work, not in advance? A No.

Q Isn't it a fact, Mr. McCarter, in a situation like that, where the patrons of your road pay in advance, so to speak, and you pay your

Testimony of Thomas N. McCarter—First Rate Case.

labor after the work has been done, that the public supplies the working capital for you? A I can't answer that. I don't know about the refinements.

Q You don't borrow at your bank to pay your men, do you? A We may have at times. It depends on the times, and the cash on hand. 10

Q Don't the nickels you get from your riders constitute the fund with which you pay your men? A The nickels we get from the riders is the fund from which we pay all expenses. We have no other income. I wish we did.

Q I was trying to find out why you needed working capital under those circumstances? A I never knew a company of any size, [S. M. 1230]

wherever they were, that didn't need working capital. You can't carry on a large business without working capital. We haven't enough; I wish we had more. 20

Q You want more all the time. Professor Cooley has made an allowance of \$693,402 for materials and supplies, and he has stated this item was based on an analysis furnished by the companies. Isn't it a fact, in the street railway business, the only element of working capital upon which the public can be required to pay a return, is the sum of money which, on the average, the company necessary has tied up in materials and supplies used for operation, maintenance and repairs? A No.

Q Professor Cooley stated in the exhibit that in many of the municipalities served by your company the existing track structure is not the first, there have been one to two and six to eight complete railway structures in the same locations. Can you indicate any place where the road structure has been built, or rebuilt six or eight times? A Yes. 30

Q Whereabouts? A Broad street, Newark; Market street, Newark; Exchange place, Jersey City; I have no doubt, Montgomery street, Jersey City; innumerable other places.

[S. M. 1231] 40

Q In those instances, how many times has the cost of construction been put in the capital account as it is now carried by the company? A In the last fifteen years only the increased value of every rail, or whatever it may be, the increased value of the new construction over the old has been carried to capital account, nothing else. Prior to that I have no knowledge. There may be one or two exceptions of that, in the first year of the Public Service, there was some tremendous amount of absolutely worn-out track that had to be repaired that first year or so, and that may have been charged at that time to rehabilitation. If it was it was wiped out in that seven or eight million dollars in 1909 or 1910, but there was no case of doubling up of the capital. 50

Q When was the Public Service Newark Terminal Railway Company incorporated? A I can't give you the date. It was in 1912 or

Testimony of Thomas N. McCarter—First Rate Case.

1913, but I can't give you the exact date. I can furnish it to you if you want it.

10 Q Did not the Public Service Newark Terminal Railway Company apply to this board, under date of February 15th, 1913, for the approval of the issue of \$5,000,000 bonds to be sold at ninety cents on the dollar, and an issue of \$8,300,000 of stock, to be sold at par?

[S. M. 1232]

A They made an application with reference to the capitalization of that project, to this board; I don't know the date, nor am I entirely clear as to the amount, but I think your statement of them is about right.

Q Do you remember the outcome of the application? A I think there was \$5,000,000 and \$1,250,000 stock, something of that kind; issued.

20 Q \$1,250,000 stock? A Something of that kind.

Q They authorized the sale of the stock— A At par.

Q At par. There was no consent by the board to the issuance of \$7,050,000 additional of capital stock, the proceeds of which the Terminal Company desired to issue for purposes other than the Terminal, was there? A Yes, sir.

Q How much of it? A All of that; not a dollar of the Terminal Company or the Railway Company stock has been issued since the existence of the company, that didn't have approval.

30 Q Did you issue \$7,050,000 additional stock? A Yes. They ~~re-~~quired or liquidated, in a lawful manner, the then-existing debt, the corporation to the railway.

Q How much stock did the Terminal Company issue? A I can't tell you. I do know they acquired, through

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Testimony of Thomas N. McCarter—First Rate Case.

[S. M. 1265]

BOARD OF PUBLIC UTILITY COMMISSIONERS.

Newark, N. J., Thursday, May 16th, 1918.

PUBLIC SERVICE RAILWAY COMPANY,
In re Increase in Rates.

10

BEFORE THE FOLLOWING COMMISSIONERS:

J. W. SLOCUM, ESQ.

G. F. WRIGHT, ESQ.

L. E. HERRMANN, ESQ., Counsel.

For New Jersey State League of Municipalities appear Marshall
Van Winkle, Esq.

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For Public Service Railway Company appear T. N. McCarter, Esq.,
Frank Bergen, Esq., E. M. Wakelee, Esq., and L. D. H. Gilmour, Esq.

T. N. McCARTER resumes the stand.

Cross examination by Mr. Van Winkle (continued).

Witness. Mr. Van Winkle, if I may give you a figure you
asked for yesterday, which I was unable to give you accurately
at the moment, I can give you now. The valuation of the railroad
company, as included in Dean Cooley's report; cost new is
\$2,716,984, and the cost new, less depreciation, figured in the same
report for the same property, is \$2,600,512. Then if I may cor-
rect an inaccuracy in my testimony of yesterday; I have made
some inquiry into the proceedings with reference to the capitaliza-
tion of the Public Service Terminal Railway Company and I find
that in one re

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Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 14]

Mr. Gilmour. On the copy of the petition mailed there is a notice that this hearing will be held today.

Commissioner March. When was that sent, when were the notices given?

Mr. Gilmour. The notices to Mr. Van Winkle and Mr. Record were sent on August 13th and the other notices were mailed on Monday, August 12th. I want to ask the board for permission to offer and have considered in this connection all the reports which have been filed with this board, including the annual reports of the street railway and also the supplemental reports that have been filed since on request of the board.

Commissioner Slocum. Weren't they all in the original case, excepting supplemental reports?

Mr. Gilmour. Our idea of this case is that it began where the original case left off, and we propose to present to this board conditions that have arisen since that time.

Commissioner Slocum. I understand all that, but didn't you put in evidence in the previous case—

Mr. Gilmour. We did put it in evidence in the other case.

[S. M. 15]

Commissioner Slocum. So they are exhibits in this pending proceeding?

Mr. Gilmour. We ask to have them in this pending proceeding, which we presume is a new proceeding.

Commissioner Slocum. No, sir; everything that has been offered—

Mr. Gilmour. There have been some reports filed since.

Commissioner Slocum. Everything that has been offered in this proceeding whether by the company or the municipalities is now available and will be made use of by this commission. We will of course permit those supplemental reports to be made because they were requested by this board as part of our order.

Mr. Gilmour. I will call Mr. McCarter.

[S. M. 16]

THOMAS S. McCARTER, sworn on behalf of petitioner.

Direct examination by Mr. Gilmour.

50 Q Mr. McCarter, you are president of Public Service Railway Company? A Yes.

Q And are familiar with its condition, financial and otherwise. A Yes.

Q Will you please tell the board the conditions that have arisen since the last hearing in the other application? A My evidence will

Testimony of Thomas N. McCarter—Second Rate Case.

have to do solely with matters that have arisen since the order of July 10th made by the board after the former hearing on the first petition of the company. I first would like to offer in evidence a seven months' statement of actual operations for the seven months ending July 31st, 1918. Mr. Gilmour, you have copies, haven't you, one to offer in evidence, because I want to keep this to refer to? 10

Commissioner Slocum. Furnish a copy for Mr. Record, won't you please?

Mr. Gilmour. Yes.

Mr. Record. If the board please, I would like to make an objection to that being offered in evidence. That is not since the close of the hearing; just going into it all over again fresh.

[S. M. 17]

We had all these statements from January 1st down to the close of the hearing or close to it before. If it is going to be tried on the theory of a continuation so that the other case stands, plus new evidence, well and good, but if we have to go back and decipher all these figures again, compare them with their former statements and take evidence all over again, then we have got to have bookkeepers— 20

Commissioner Slocum. As I recall it, Mr. Record, in the proceedings we obtained results from operation for four months, because that was all that was available at that time. Now, bringing it down to July 31st adds three months more or a seven months period. 30

Mr. Record. Why don't they present a statement for two months, three months?

Commissioner Slocum. What is that?

Mr. Record. Why don't they present a statement for two months or three months?

Commissioner Slocum. I don't know. But I do not see any objection to the exhibit. It may be marked and received. 40

(Statement entitled "Results from operation seven months ending July 31st, 1918, received and marked Exhibit P. 201, August 29th.)

[S. M. 18]

Witness. This statement to which I refer down to the item toward the bottom of the page marked "Net increase in surplus" shows the way the matter has been set up upon the books of the corporation, the books of the railway company as they stood when the books were closed. It shows an apparent profit of \$383,197.42 for the seven months. That, however, is subject to adjustments which are explained below. These adjustments will have to be taken up upon the books of the company during the remaining months of the calendar 50

Testimony of Thomas N. McCarter—Second Rate Case.

10 year. The first adjustment is that we have over expended the set-up for injuries and damages for the seven months period by \$73,961.70. The next correction is that up to date our expenses have been so heavy that it has absorbed the entire set-up made at the beginning of the year for maintenance and depreciation and to keep pace with the award, with the decision of the board of July 10th, so that at the end of the year we should have available \$800,000 for depreciation would require the setting up of seven-twelfths of that or \$466,666.66. Then, if you will look up toward the top of the page you will see a red figure of \$109,255.63. I said a few moments ago that we

[S. M. 19]

20 had spent all of our set-up for maintenance and depreciation. We have over spent it by \$109,255. So, not only have we set up no depreciation up to date, but we have over expended our set-up by \$109,255, which of course must be taken up and recouped before the year is out. That makes a total of \$575,922, plus the \$73,961 above referred to, makes a total of \$649,000.

So that the fact is that instead of showing a profit and loss surplus of \$383,197 as the books show for that seven months' period, not yet corrected, the actual results show a loss for the period of \$266,686.57.

30 Q (By Mr. Record.) The \$109,000, Mr. McCarter, is really on both sides of the account, the way you have got it here; you add it and then deduct it. A It is deducted up above there.

Q It is deducted, not added? A No, deducted up above there.

Q And deducted again down below? A Then added below.

Q I am not good on figures— A Yes, finally deducted; added to the other set-up for depreciation, so that the effect would be that during the remaining—

[S. M. 20]

40 Q The \$109,000 is not a figure that makes that \$7,372,000? A If it were not for that \$109,000 that figure would be that much bigger.

Q If the \$109,000 was added? A If it was not deducted it would be that much bigger, that \$7,372,000.

Q It is deducted up there? A Yes, deducted up there; yes, sir.

50 Q (By Commissioner Wright.) That does not necessarily say though that you are going to spend over \$800,000 in the way of depreciation this year? A It goes to say that we are trying to put ourselves upon the basis of your report of July 10th in which you said there should be set up for amortization and depreciation the sum of \$800,000 and to accomplish that it will be necessary to apply these figures to seven-twelfths of the year which have expired.

Q (By Commissioner March.) Does this include any of the wages, new wages, the proportional amount from June 7th, the War Labor

Testimony of Thomas N. McCarter—Second Rate Case.

Board? A None. It includes the wages, the increase that we made prior to this time and paid, but does not include any of the wages which I am coming to. I have thought it was proper to have prepared [S. M. 21]

and introduced, which I now do, a statement of the result so far as we have gone, of the receipts arising from the penny transfer charge which was put into effect on the first day of August. We have it here for the first twenty-six days of the month, which was up to two days ago. We have it day by day and it totals for the period of the twenty-six days \$63,297.47 which is an average for the twenty-six days of \$2,434.52. Then there is a computation below that, the estimated annual receipts at this rate, if the average maintained for the twenty-six days should be maintained for 365 days, shows it would produce on that basis a total in a year of \$888,600. The fact is, however, as the commission well knows, this is the big time of the year in our receipts, and that the winter receipts are very much less. This estimate approximates the amount allowed by the commission of \$860,000, and that was based upon the testimony in the former case and this estimate seems to bear it out. As a matter of fact we think it will be a little less rather than more because the winter receipts will pull it down, we fear, below the \$860,000. Those are the facts to date.

Commissioner Slocum. Let that be marked as Exhibit 202.

(Statement entitled Receipts from Sale of Transfers, August 1 to August 26th inclusive, received and marked Exhibit P. 202, August 29th.)

[S. M. 22]

Witness. The commission will recall that on the closing day of the last hearing I brought to the attention of the board that there was labor trouble upon the property which the former wage raise we had made have failed to compose and that the matter had been taken to the National War Labor Board. The commission will recall there was a strike lasting a day and about two-thirds of a day by the men for wages and that a representative of the United States Government came to Newark and interceded in behalf of the industries involved in war work and the authorities of the City of Newark bestirred themselves to compose the situation which resulted in an agreement on the part of the striking employees and the company to submit the matter in difference to the National War Labor Board.

The following Sunday ex-President Taft, who is one of the joint chairmen of that board, and Mr. Worden, of this city, who was here this morning and who is a member of the National War Labor Board, met with the representatives of the men and representatives of the company in the Robert Treat Hotel and the matter was then and there submitted to the board

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[S. M. 23]

10 for hearing. The hearing came on sometime thereafter in Washington and was participated therein by myself and Mr. Wakelee, representing the company, a full brief was filed presenting our case as fully as we knew how to and the men were represented by Mr. Carless, of Newark, and by Mr. Vehey, who was a well-known lawyer often representing labor interests. This case was held along with a large number of other cases and curiously enough, on the first day of August, the very day that the former decision of the board became operative as to the additional fare of one cent for a transfer, the War Board made its decision.

20 I may say this National War Labor Board was constituted by the President to adjust all labor disputes affecting war industries during war times, and it was a cardinal principle of their jurisdiction that the industry involved is helpful and essential to the carrying on of the war. Mr. Taft so stated when here in Newark. The President's proclamation is contained in the papers I have here which will be offered in evidence later. So the jurisdiction of the board seems to be very clear and there was no escape from it.

[S. M. 24]

30 I have here, which I would be glad to offer in evidence and have marked, a copy of the statement of the grievances of the men, which was the complaint in the case before the War Labor Board, which was the complaint upon which the case was heard and decided.

Commissioner Slocum. Any objection to it, Mr. Record?

Mr. Record. I see no reason why we should go into that quarrel. We are here with the results of it.

Witness. Only as leading up to the results. I am just about to state the results.

40 *Mr. Record.* The results, it seems to me, is what we have to deal with.

Commissioner Slocum. Do you object to the offer?

Mr. Record. Yes.

Commissioner Slocum. I do not think it is material if he objects to it.

The Witness. Very good. I have no special reason to insist upon it.

50 I now offer in evidence a certified copy of the War Board's award.

[S. M. 25]

Commissioner Slocum. That may be received and marked as an exhibit.

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(Certified copy of award of National War Labor Board received and marked Exhibit P. 203, August 29th.)

Witness. I call the attention of the board to the final recommendation of the National War Labor Board as contained on page three of the award which is as follows: "This increase in wages will add substantially to the operating cost of the company and will require a reconsideration by the proper regulating authority of the fare which the company is allowed by law to collect from its passengers. We make part of this award the words we have used in the Cleveland case: "We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which the circumstances require it. We believe it to be a war necessity justifying federal interference. Should this be deemed unwise, however, we urge upon the local authorities and the people of the locality the

[S. M. 26]

pressing need for such as increase adequate to meet the added cost of operation." And so on.

At the same time that the War Board decided our case they decided a very considerable number of other cases and in some of the cases decided, notably in Chicago there were broader issues involved than were technically involved in our particular case. Our particular case was confined, so far as the War Board jurisdiction was literally concerned, to the wages of trainmen, which was the only matter appealed to them. But in some of the other cases, like Chicago, there were other applications there for raises upon the part of various other men, shop men and all the different departments that go to make up the operating force of a street railway company, and in the Chicago case, the board decided in that case—

Mr. Record. I wish to enter an objection about Chicago. We have no facts about Chicago here. It will just open up an endless case.

Commissioner Slocum. Yes. I think that might be used in your argument, but I don't know it would be very helpful as establishing any fact in this case.

[S. M. 27]

Witness. The point of the testimony is this, if the commission please that the actual raise wages contemplated by the award in our particular case were so much money; that in addition to that specific award of so much money, it involved, for several reasons, raises in other departments.

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Commissioner Slocum. You are going to show, I assume, as part of your case that that increase has been made or is about to be made.

Witness. Yes, have been made, all have been made.

10 *Commissioner Slocum.* Then it is certainly material, independent of what has been done in Chicago.

Witness. The raise has been made and I was going to justify the reasons why it had been made. I was not going to leave it that by caprice we had raised wages in excess of the wages actually allotted the trainmen by the board. But because of the general principle taken in the Chicago case and because of the necessity of raising other departments when you raise one department we have felt compelled to make certain raises, which have been made.

20 [S. M. 28]

Commissioner Wright. In other words giving the reasons why it has been done?

Witness. Yes, sir.

Mr. Record. Chicago hasn't anything to do with that.

Mr. Wakelee. The board laid down a general principle in the Chicago case that we think is applicable to our case.

30 *Commissioner Slocum.* Whether it laid it down or not—I assume it has—but if this company has in good faith increased the wages to its employees since the date of our report we will receive testimony to that effect. We want to ascertain what the amount is.

Witness. Very good. Then the board prefers I should not proceed with the reasons for the increases?

Commissioner Slocum. No. We accept them as made in good faith and in accordance with the statement.

40 *Mr. Wakelee.* Would you be kind enough to call attention to the award as offered by you; that contains some other documents in connection with it, namely, the proclamation of the President.

[S. M. 29]

Witness. I referred to that a few moments ago. The proclamation of the President is contained in the award, which shows the jurisdiction of the War Board and the necessity for its existence in this war time.

Commissioner Slocum. I don't think anybody will question that.

50 *Witness.* Yes, sir. I have here in my hand—of course it is a public record—the opinion, the report and order of the board made on July 10th and I refer to it for the purpose of refreshing the board's recollection that there is alleged in that report for increased wages the sum of \$1,086,000. The details of that

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are shown very concisely and nicely on page thirteen of the report and order of the board dated July 10th.

Now, coming down to what Mr. Slocum has had in his mind—

Commissioner Slocum. Mr. Slocum. What have I had in my mind?

Witness. About the total amount of wages, the increases actually made? 10

Commissioner Slocum. Yes, I am very much concerned with that.

Witness. I have a statement here which shows in summary [S. M. 30]

form the total increases made by the company to its trainmen and other departmental heads during the year 1918, that is, including the increases sworn to in the other case and including the War Board—the increases made since the award of the War Board, on an annual basis. 20

Mr. Wakelee. You said to departmental heads; you did not mean that? You mean other departments?

Witness. I did not mean to use the word “to” if I did use it. I meant all other departments. The total amount of these wage raises on an annual basis, from August 1st last, effective August 1st, last, amount to \$2,716,538. This statement after tabulating that total deducts from it the \$1,086,000 allowed by the board in its report, which leaves a balance of wage raises effective August 1st, on an annual basis of \$1,630,538 and that sum does not include so much of the War Board’s award as is operative prior to August 1st. The War Board award was made effective June 7th, and we are compelled to pay the back wages at the rate of the award, back to June 7th, but this is framed up on an annual basis of operation from August 1st without reference to that particular complication. 30

Mr. Gilmour. I offer that.

[S. M. 31.]..

Commissioner Slocum. It may be marked. 40

(Statement entitled Annual Total Wage Increases received and marked Exhibit P. 204, August 29th.)

Witness. I should be very glad to give any details—give the detail of that summary to any extent that the board or counsel desire.

Commissioner Slocum. Mr. McCarter, couldn’t you have some one furnish in comparative form the amount of wage that you were paying, the company was paying prior to the voluntary increase by your company, then the result of your voluntary increase, and then last the result of the War Board increase, so you would have a set up of three figures? 50

Witness. There were two voluntary raises to the trainmen, first the two cents an hour raise and then to endeavor to com-

Testimony of Thomas N. McCarter—Second Rate Case.

Commissioner Slocum. Then there would be four set-ups; first your wage before there was any voluntary, then the first voluntary increase, the second voluntary increase and fourth award.

10 *Witness.* You mean in rates per hour or in detailed sums total.

Commissioner Slocum. So we could see what the different rates would result in for a period of one year, comparatively, for comparative purposes.

[S. M. 32]

20 *Witness.* I think perhaps this statement that I have here explaining the detail of this, does that very thing; I think perhaps it does it in the form you want it. If it does not, to the best of our ability we will supply anything you want. I have here the matter summarized. For instance, the first item is trainmen—

Mr. Record. Suppose you give us that before you start reading from it.

Mr. Gilmour. May we have this marked in evidence?

Commissioner Slocum. Yes, 205.

(Statement entitled Annual Total Wage Increases (Detail) received and marked Exhibit P. 205, August 29th.)

30 *Witness.* If this does not give you what you want, Mr. Slocum, we will endeavor to supply it. This has trainmen, increase of June 1st, two cents per man per hour, amounts to so much money, \$229,346. Then came the increase of June 6th, 3.12 cents per hour, per man, so many car hours equals so much money.

40 Q (*By Mr. Record.*) Is that estimated, those car hours; estimated or taken from the books as a past fact? A Well, of course for the coming year they are estimated, have to be estimated on the basis—the number of car hours the company thinks it will operate.

[S. M. 33]

Q It is based on what you have done before? A Based on practically what we have done before; so that goes all the way down by departments.

Commissioner Slocum. That is the same information I wanted only in a little different form. The result is the same.

50 *Witness.* Very good. That gives the detail of it. It is on a year's business from the first of August, and as I before remarked, does not include the sum approximating one hundred and sixty odd thousand dollars of back pay which we have got to make to the men by the War Labor Board raise, and are now actually paying for the period between June 7th and August 1st.

Testimony of Thomas N. McCarter—Second Rate Case.

Commissioner March. That is about \$150,000?

Witness. \$164,494. It is on another exhibit which I will produce in a moment, sir.

This commission has asked us to present a zoning system to the best of our ability as near the first of January as is possible, before if possible, and as I think the commission knows, we are proceeding in good faith to do our best in that matter and we shall have something to say about that a little later on.

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[S. M. 34]

Upon the assumption that we are going to be able to work something out of that we have framed this case up purely and simply to meet the intervening emergency that now rests upon us. To that end I have here another statement which I would like to offer in evidence.

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(Statement entitled "Actual wage increases paid and to be paid during last five months of 1918 on basis of Federal War Labor Board's award received and marked Exhibit P. 206, August 29th.)

Witness. This shows in summary form the moneys, over and above that allowed by the board in its report, and order of July 10th and not provided for in that report, that the company will have to have to pay its bills in the calendar year of 1918. The statement starts with five months operation from August 1st to December 31st of the increased wages, again referring to all the wage raises that have been made during the year, and for the five months that figure is \$737,162. The next item in this summary is the back pay under the War Labor Board's award, between July 6th and August 1st which was not included in the previous figure of \$737,162. Then follows the wage raises to other departments, other than the trainmen for the five months period, amounting to \$411,013.

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[S. M. 35]

That makes a grand total of \$1,312,669, against which we deduct five months, five-twelfths of the \$1,086,000 allowed by the commission in its report for wage raises in the calendar year, for the year beginning August 1st, which is \$452,500. That shows a direct net imposition of additional outlay for wages not covered by nor contemplated in the report and order of the board of July 10th, which must be met in cash during this year of \$860,169. And it is that sum and that sum alone which by this proceeding we seek to obtain additional revenue to cover from this board.

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Q (*By Commissioner Slocum.*) In the item of "Other Departments," \$412,012— A \$411,013, isn't it?

Q It is blurred here. A It is \$411,013.

Testimony of Thomas N. McCarter—Second Rate Case.

Q Does that include any increases to officers of the company? A No, sir, not one. It may include one; I think there was one increase, one increase has been made during this year of an officer of the company, of the general superintendent, if you call him an officer, Mr. Bolen. The general superintendent's salary has been raised once and only once and he is the only one who has been raised this year.

[S. M. 36]

Q And he would be the only one that is affected then by this item? A If you call him an officer. He is the general superintendent operating the property, but he is not an executive officer. He is the only officer so far as I know. None of the officers in the ordinary acceptation of the word, meaning myself or the vice-president or the law department or anybody else connected with it down to the general superintendent have had any raise in wage whatever.

Q (*By Mr. Record.*) Mr. McCarter, how does that \$860,000 on the last exhibit—how is it reconciled with the \$1,600,000 on the other exhibit? A It does reconcile; Mr. Boylan, the auditor is sitting right next to you and will explain it. I have the same detail of that in another statement that I had of the statement prepared on the annual basis which gave you substantially the information you desired, and if Mr. Gilmour will produce that that can be marked in evidence. It tells it all by departments.

Commissioner Slocum. This may be marked Exhibit P. 207.

(Statement entitled Actual Wage Increases paid and to be paid during last five months of 1918 on basis of Federal War Labor Board's award (detail) received and marked Exhibit P. 207, August 29th.)

Q (*By Mr. Record.*) Mr. McCarter, let me understand then if I get this right. You now say to the commission that by 205, that is an esti-

[S. M. 37]

mate of actual expenses, increases for the year over and above your revenues, and all you are now asking for is at that rate up to the first of January; is that your point? A I am saying, sir, that we are asking now for an increased rate effective as soon as the commission can put it into effect of such an amount as will produce during the remaining months of the calendar year of 1918 the \$860,000 or thereabouts of additional cash outlay which we have to pay out by reason of these wage raises which were not contemplated by the board in its order of July 10th, 1918.

Q In other words, you have limited your demand in this case to such action as will net you \$860,000 up to January 1st? A Precisely.

Q Is that right? A Precisely.

Q (*By Commissioner Slocum.*) But you want the amount in the company's hands within the five months? A Within the calendar year.

Testimony of Thomas N. McCarter—Second Rate Case.

Q Within the present calendar year? A Within the present calendar year, 1918, so we may have the money to pay out during this year.

Q (*By Commissioner Wright.*) It is only for wages? A Yes, sir, absolutely. This proceeding has taken a very considerable amount of time and a very considerable portion of the year has

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[S. M. 38]

passed away while these proceedings have been going on, and hence it pyramids the amount necessary toward the end of the year. In other words it simply super-imposes upon the report and order of the board of July 10th this additional wage amount and nothing else.

Q (*By Mr. Record.*) Let me ask, if I may interrupt you without disturbing your report, what I am trying to get at: If you ask for a permanent order, we will say, until further notice, on the ground of your annual showing, that would be exactly what you are now asking for. The only difference now is you virtually say, instead of asking for a permanent order of an increase order netting you \$1,600,000 or \$1,800,000 a year, you ask for the same thing in so many months? A That doesn't necessarily follow; that doesn't necessarily follow. On an annual basis such a fare as would produce that amount of money within these few months would produce more than that amount of money for the twelve months' period.

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Commissioner Slocum. This is five-twelfths of the amount required for the year.

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Witness. Not altogether, because the wages have not been in effect all year.

Commissioner Slocum. If they had been in effect—

Witness. If they had been in effect all year we would have

[S. M. 39]

to make up the money in five-twelfths of the year.

Commissioner March. No allowance made by reason of the winter months, that the revenue would not be as much in the consideration of the \$860,000 figure?

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Witness. We have taken the \$860,000 as being produced by the penny for a transfer; we have accepted that. We have accepted everything in the report of the board. By way of information I stated a few minutes ago, I stated I thought it was probably less than \$860,000 rather than more, but have not made any deduction.

Commissioner March. Figuring the excess amount you need for wages for the coming five months, do you have consideration for the five months' revenue not being as much as you claim, the receipts not being as large.

50

Witness. No; no, sir.

Commissioner March. You merely average it.

Testimony of Thomas N. McCarter—Second Rate Case.

Witness. We haven't based it on that. We based it on your report of what the receipts will be, and have shown this additional amount of cash I have here, which goes to show that it is more. Our present estimate of what the year's results will

10 [S. M. 40]

show differs a little from the board, but I produce it to show it is at least worse, rather than better than the board thought it was going to be. I base our case precisely on the facts and figures I have heretofore enumerated. Perhaps I don't get you. Perhaps I don't understand you. If I don't I will try to make it clear.

Commissioner March. You understand it.

20 *Witness.* We have prepared, by way of interest, not as an exhibit upon which we rely in this case, except by way of interest, to show the results arising this year are not going to be any better than the board indicated in its report, therefore there is no salvage out of this \$860,000 which we can make up from other sources.

Q (*By Mr. Herrmann.*) Might I ask a question for information, Mr. McCarter? A Yes.

30 Q Is it your thought that this board, if it should be found to be necessary to raise additional capital to pay increased wages, should regulate a fare or set a price for fare that would impose the wages for the months of June and July in the five months? A I think so, yes, sir. I think we should be made whole on the outgo of this year

[S. M. 41]

which is none of our seeking or making.

40 Q In other words, you think the seven months should be squeezed in the five months of increased fare. A I think, to be specific, that the \$164,000 to which the seven months' figures I have read have got to be altered; that money hasn't been paid; that won't go into the seven months' figures; that will show in the August figures, but that goes for back pay.

50 Q Wouldn't that create an excess of return after the first of the year when you don't have those extra two months to pay? A I don't think so. If so, only to that extent. But that whole matter is in the hands of the board; the board will keep control of the matter, I assume. There is \$164,000 involved in the particular question you asked, which is back pay for nearly two months' period under the War Board's order. I have a statement which Mr. Gilmour will distribute and which I would like to have marked, which shows the best estimate of our operations for the year that we can make at this time.

(Statement entitled Estimate of Results of Operation for year 1918, seven months actual, five months estimated, received and marked Exhibit P. 208, August 29th.)

Testimony of Thomas N. McCarter—Second Rate Case.

Witness. This is the P. 3 of the other case. This sets up the depreciation as the board would like to have it set up if the money is available, and it of course takes account of the

[S. M. 42]

wages that will have to be paid. It shows without any increased revenue, if the full amortization is set up, the likely result is a shortage at the end of the year without additional revenue of \$1,179,596.85. That is not, however, the sum we are asking for in this case. We plant ourselves upon the rock of the commission's report.

10

Q (*By Commissioner Slocum.*) Does this figure include what you would receive from the one-cent transfer? A Yes, sir, it does. It does not include any further increases now suggested. It does include the anticipated revenue for the period from the one-cent transfer at the rate I have indicated to you, at the average rate I have sworn to, and that shows a deficit, without further help, at the end of the year on this basis of \$1,179,596.85. Now, by way of information, I have another statement that shows in part the explanation of the difference between where the commission's figures would land us at the end of the year, which would be even if they gave us the eight hundred and sixty thousand and eleven hundred and ten odd thousand, which we show now as a prospective loss at the end of the year, without further help. In the commission's order and report they took the company's figure of anticipated increase in gross revenue for the

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[S. M. 43]

year without the effect of any increases in revenue allowed by the commission. That was based on a two and a half per cent. increase for the year. At the time the testimony was given in March, January and February had shown such red figures, we then figured it would take three per cent. for the balance of the year for ten months to produce two and a half per cent. increase for the year, and the figures on P. 3 were made up on that basis, and they were adopted by the commission substantially; there were practically no differences. Seven months and twenty-six days, or nearly eight months, all but five days of eight months have elapsed, and I have the actual figures here for that period of time, which I will read, as there are no copies of this apparently to distribute. The passenger and special car revenue for 1918 up to and including August 26th amounted to \$11,836,827. Now, for purposes of comparison with the figures as we swore to them before, and of the commission's report, we deduct the transfer revenue of the twenty-six days, which has been \$63,297. This leaves \$11,773,530 as the revenue without the transfer revenue for the period of seven months and twenty-six days. This is comparable with the revenue for the same period of 1917, which was as follows: \$11,665,617, an increase in percentage for this period of time of nine hundred and twenty-five one-thousandths of one per cent., so that the increase

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Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 44]

for the year, instead of being two and a half per cent., as was predicated by both the company and by the commission for the period thus far elapsed, is less than one per cent., nine hundred and twenty-five one-thousandths of one per cent. In this statement which I introduced, which shows our estimate for the year, we have accounted for the balance of the year upon an increase irrespective of the allowed increase, a normal increase of three per cent., but we have not gotten it thus far. We have allowed it for the balance of the year. To bring the receipts up to the base figure shown by both ourselves and by the commission for the whole year would require an increase for the balance of the year of from six to eight per cent., which is entirely out of the question that we will get irrespective of increases that are allowed. That in part accounts for the difference between the commission's figures as shown in their report and our present statement of results for the year 1918 over and above the difference caused by the increase of wages. As I say, we are not relying on that, not making any claim for that at all, planting ourselves right upon the \$860,000, which I have proven has got to be distributed within the calendar year of 1918 for increased wages now in effect.

Q (By Commissioner Wright.) To what do you attribute that loss between two and a half per cent. and one per cent. practically?
A I attribute it to varying causes, principally the rigorous conditions

[S. M. 45]

of last winter; secondly the lack of operatives to operate the cars, existing in very acute form in the spring and still existing to a very considerable degree. Ordinarily this property over a long period of years ought to increase ^{four or} ~~ten~~ five per cent. a year.

Q But with this increase of wages it should increase more now, shouldn't it? A That is the reason we have taken three per cent. We have allowed for that somewhat, but we by no means yet have our full complement of men. I think we are 600 men short of our full complement of men. We are getting them as fast as we can; the new wage is attracting them far better than the old wage did. The labor situation is very acute, and we cannot compete even with these wages with what shipyards can pay and other establishments can pay, but we are doing the best we can. Then I think, too, people are saving money somewhat; there isn't the pleasure of riding that exists in normal times, and I don't think there is the family riding that exists in normal times, and our statistics show that. They show the all-day business when the women ride is perhaps not up to normal.

Q (By Mr. Record.) Why should that be? Have you any theory to account for that? A No, except economy.

Q (By Mr. Herrmann.) Have you prepared any estimates showing the number of car miles operated in 1917 and the number of car

[S. M. 46]

miles operated in 1918? A I haven't it here, but we have that record which we can give you.

Testimony of Thomas N. McCarter—Second Rate Case.

Q I would like to have that. A The number of car miles operated in 1918 to date is slightly less than the number of car miles operated in 1917.

Commissioner Wright. It is shown by 207.

Witness. It may show it; I don't know but it does, and to the extent the car miles are less it is due to lack of men to operate them. 10

Mr. Record. Car hours, that is another proposition?

Witness. Yes. That is a different proposition, but a better proposition than car miles. Then, car hours are somewhat affected, too, by the skip-stop operation; there is some saving, some little saving in that. It was sworn to in the other case, and I reiterate it here, that a seven-cent fare applied to this property for a period of one year will, in the best judgment we are able to produce in the matter, yield an additional revenue for the year of \$2,800,000. The board doubtless recalls the testimony that was given at length, both by myself and Mr. Danforth, in the other case in that respect. I may say that 20

[S. M. 47]

subsequent developments and further study of what is going on in other properties have only confirmed the reasonable accuracy of that prophecy and of that estimate. I may say, as evidence of its accuracy, that I may adduce the testimony in the transfer case, where we as you see have estimated it almost accurately. A penny for a transfer we said would produce eight hundred and fifty or eight hundred and sixty thousand dollars. We think it will be a little shy of that, though for the twenty-six days of midsummer it is a little in excess of it, but very little. Dealing with such big figures, it may be called approximately exact. It is true that the increases derived from increase in revenue through the country generally have been disappointing. They have not shown our increases to be—our estimate of increases to be ultra conservative; they have rather shown the contrary. For instance, you will recall Mr. Storrs, the president of the Connecticut company, who testified that the six-cent fare was bringing his property in its early months of trial, and he thought it would bring about ten per cent. increase. I am informed by Mr. Storrs he was too optimistic, 30 40

[S. M. 48]

that the increase approximates, averages, eight per cent. and not ten. So it is with—

Q (*By Commissioner Slocum.*) That is the seven-cent fare? A That was the six-cent fare. Our testimony was the six-cent fare would produce a ten per cent. increase, and the seven-cent fare would produce this amount in a year, which was fifteen per cent. increase. I may say I attended last week a large convocation of electric railway men in New York, where I heard them tell all their various experi- 50

Testimony of Thomas N. McCarter—Second Rate Case.

ences with raises. They are irreconcilable. It depends on the locality and the urban quality of the locality, how built up it is and how contiguous it is, upon a thousand and one different reasons. Their various stories are irreconcilable, some rather higher, some very much less. With all the additional information I have had in the meantime, and it is very considerable, I see no reason to change my testimony in the previous case, neither does Mr. Danforth, that the best estimate that we can make, and rather fortified by our estimate in the transfer case, is that a seven-cent fare over a period of a year's time will produce an additional revenue of \$2,800,000. We have predicated this increase upon the assumption that it is to be effective September 15th. We had to take some date and we took that date. It probably will take that time to consummate whatever inquiry the board will want

[S. M. 49]

to make in this matter. Then we took the percentage of our gross receipts of 1916 and 1917 flowing to the company between the period of September 15th and January 1st, as compared with the total receipts of the year, and we found by the experience of those two years that thirty per cent. of the gross flowed to the company between the fifteenth day of September and the thirty-first day of December, inclusive. So upon the assumption that the board could and would make an order making this rate of fare effective on September 15th we took thirty per cent. of two million eight hundred thousand dollars as the increased revenue that would flow by reason of the operation of that fare between September 15th and December 31st. That thirty per cent. of \$2,800,000 is \$840,000, from which we deduct five per cent. on the franchise tax.

Mr. Record. Have you that table?

Witness. I think Mr. Gilmour has one to distribute.

Commissioner Slocum. Won't you just offer it and be marked?

Witness. Surely.

Commissioner Slocum. Let that be marked 209.

[S. M. 50]

(Estimate of receipts from additional increase from September 15th to December 31st received and marked Exhibit P. 209, August 29th.)

Witness. From that we deduct the five per cent. franchise tax on that sum of money, which is \$42,000, leaving us as net additional revenue coming from such a raise for the five months' period \$798,000, approximately \$800,000, which is sixty thousand dollars less than the wage imposition increase that we have asked for.

Q (*By Mr. Record.*) Five per cent. franchise tax; that is just a year's tax, the proportion of the time on eight hundred and forty?

A Yes, sir, it is five per cent. of eight hundred and forty, bringing

Testimony of Thomas N. McCarter—Second Rate Case.

us approximately even, not even, much less than even with our estimate as we view it, giving us less rather than more of the absolute wage increase which has been imposed, entailed upon us.

Q (*By Mr. Wakelee.*) Has the company any other means of revenue? A None whatever, I am sorry to say. Now, gentlemen, except to call your attention to what you doubtless know, since our last hearing the National Association of Public Utility Commissioners, resident in Washington, at a meeting in Washington, has come out with a strong endorsement in the wish that the state commissions would be allowed to retain their jurisdiction of these matters and that they

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[S. M. 51]

would arise and meet the emergency as they found it, and also to call your attention to a telegram of the President in the New Orleans case, in which he took the ~~provision~~ ^{position} he couldn't interfere locally, but said it was imperatively necessary that local and state authorities could take the action necessary for immediate relief, the two pamphlets showing which I would like to offer and have marked.

20

Mr. Record. I didn't catch that.

Witness. The first pamphlet to which I refer is a citation of a letter written by the War Board of the Public Utility Commissioners. They have a War Board in Washington, they have a committee of themselves which meet in Washington, and in the agitation which has taken place to have the President assume the direct authority for raising the fares of these properties they issued a pronunciamento to him or wrote a letter to him I think, in which they said they thought the jurisdiction of the local commissions should be preserved; they were competent to handle these matters, and went on record ~~in~~ unequivocally as saying the local commissions should meet such conditions as which arose, of the character of which I have been trying to describe.

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[S. M. 52]

Mr. Record. I don't see the relevancy of that.

40

Witness. Perhaps it has not very great relevancy. I cite it for what it is worth. Then I also brought to the attention of the commission for what it may be worth that the wording of the President's telegram in the New Orleans case where he said he could not take hold of the property itself, but said it was imperatively necessary that the local and state authorities should take the action necessary for the immediate relief of these properties. I just bring that to the attention of the commission for what it is worth.

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That is our case and all of it.

Mr. Record. I object to those two.

Commissioner Slocum. Of course they haven't any evidential value and are not offered for that purpose.

Testimony of Thomas N. McCarter—Second Rate Case.

Mr. Record. Then they ought not to be in the case if they have no evidential value.

Commissioner Slocum. In the other case we allowed to be filed the letter or proclamation of Secretary McAdoo, I suppose these are almost in the same class.

Witness. I have here also, which I do not propose to burden the commission with, a selection from a very considerable

[S. M. 53]

number of communications, including several mayors and others, in which they express their approval of this application and ~~not~~ their disapproval, and it is refreshing to say I have some newspaper clippings that also express their high approval of the proposition.

Mr. Record. Have you any extracts from my speeches you want to read?

Witness. I have those down in my scrap book at my home, which you talk so much about.

Mr. Record. I would like to object to all of these things.

Commissioner Slocum. Of course the newspaper clippings will not be received by the board. Any communications addressed by bondholders or stockholders or whatever they might be, or municipalities to the association or to the Public Service Corporation will not be received.

Mr. Gilmour. Mr. McCarter, did you want to make any further statement with regard to what is being done with the zoning system?

Witness. Yes. I did omit to say that. The zoning system is under very careful study. What has been accomplished in that to date is this: immediately after the filing by the board

[S. M. 54]

of the report and order in which they directed us to do that. I appointed a committee, a zoning committee for the study of this problem, of which I myself am chairman and the other members of the committee are Mr. Danforth, vice-president and general manager of the company; Mr. Boylan, general auditor; Mr. Donecker, assistant general manager; Mr. Gilmour, who is so familiar with our ordinance requirements and other requirements of the system, and Dr. Conway, whom you all know testified as an expert in the other case and who is so well versed in matters of this kind. That committee met and is meeting. The full committee meets every other week. In the meantime there has been a sub-committee appointed consisting of Dr. Conway, Mr. Donecker and Mr. Boylan, and that sub-committee is actively in charge of the matter and is reporting to the full committee as I say, every other week.

Testimony of Thomas N. McCarter—Second Rate Case.

Under the sub-committee's direction there is being taken, as I think the commission knows, a study or a count of the traffic. We are trying to locate where all the traffic originates and where it goes to. We are doing it line by line and we have about fifty young men, largely college students who are avail-

[S. M. 55]

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able at this season of the year (that is one of the reasons we hurried so) ride the cars, and blanks are being handed to passengers; where the passenger gets on is checked by one of these young gentlemen, the card is handed to the passenger and he is requested to fill out to what point he is going, whether he is going on the car he is on or on a transferred car. We are following very closely the system adopted in Philadelphia seven years ago when they made a very full study of traffic conditions on which they based the necessity for their subway system.

20

Then, too, this committee proposes, the sub-committee and possibly some members of the other committee—I am going myself if I can get time—to visit all the places in the country where any kind of zone system is in effect. We have appropriated \$25,000 to the cost of this system. It is going to cost at least that, perhaps more. I may say everything is being done with dispatch and vigor and will continue to be done to produce as full a report on the whole subject as can be pro-

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[S. M. 56]

duced, and by the time the commission have asked for, which I think will be possible.

Cross examination.

Q (*By Mr. Hanrahan.*) I would like to ask one question. Is this \$2,800,000 entirely exclusive of the one cent extra, Mr. McCarter, for transfer business? A Yes.

Q That would not, the whole amount, with the former raise of one cent and the proposed raise you ask for now, almost four million dollars; do I understand that right? The one cent transfer will net your company \$860,000, it is estimated at, is it not? That takes up several months back from the time it went into effect. You are asking then virtually with the former raise and the present proposed raise of two cents, that would net your concern almost four million dollars per year. A If the two rates remained in force for a full calendar year, our best estimate is they would produce from \$3,500,000 to \$3,600,000 a year.

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Commissioner Slocum. Mr. Record, any questions?

Mr. Record. I would just like to reserve the right to cross examine. I think there was one point—I think what I have in mind has been included in the subsequent statements.

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Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 57]

By Mr. Herrmann.

Q Will you kindly refer to Exhibit P. 204? A I didn't mark them, Mr. Herrmann.

10 Q The one entitled Public Service Railway Company annual total wage increases. These are actual figures, are they, or estimated?

A They are actual figures on the basis of a year's operation.

Q Do they include the raise made by the company voluntarily or are they in excess of that? A The \$2,716,000, that includes those made by the company voluntarily as well as those made by the War Board.

Q So it is an increase over what? A It is an increase over—a present increase of wages now operative over and above such wages as were in effect at the time of the start of this original proceeding.

20 Q That would be in March? A Yes, sir. And as I said before that does not include the \$164,000 of back wages to be paid between June 7th and the first of August by reason of the War Board award.

Q (*By Mr. Record.*) Mr. McCarter, might I ask this question on the first one you presented? You have, less deficiency—you have seven-twelfths of \$800,000 annual depreciation \$466,000. I did not get clearly in my mind what that really means. Do I understand the board fixed \$800,000 as the proper amount for a year—do I understand that you have actually expended that \$800,000? A No, sir.

30 [S. M. 58]

These are the facts: heretofore it has been our practice to set up so much per car mile of operation for maintenance and depreciation, two and a half cents or three cents, as the case may be. That sum was deemed by us and heretofore has been taken by the commission as a sufficient sum to cover both these propositions, and such amount of that sum as was not actually spent for maintenance has been available for depreciation, against which items properly chargeable to depreciation were charged. Now, this year the company has expended that entire sum thus set up at the start of the year plus \$109,000 on its maintenance, and therefore—

40 Q That is up to date in this year? A For the first seven months. And therefore has nothing for depreciation. Now, the commission said in its report of July 10th that they thought there should be a sum of \$800,000 set apart for depreciation on this property. We thought it ought to be figured; we thought it ought to be \$1,100,000; they reduced it to \$800,000. Now, then, those figures have not been taken up on our books, as I said, for seven months; they will have to be taken up if the money is available to take them up during the calendar year and to apply that to the seven months produces the changes made there below.

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[S. M. 59]

Q That still does not make it plain to me. I want to get in my mind the actual expenditures. Let us assume you have expended

Testimony of Thomas N. McCarter—Second Rate Case.

\$109,000 more than the estimated requirements during the first seven months; does it follow that you have not thereby put the property in such a state of repair, that perhaps by the end of the year you will not have expended more than \$800,000? A We may not have expended, but the commission, if we had the money available, would require us to segregate that fund. 10

Q That is exactly what I mean. Are you asking now that this commission give you money to put off in a savings bank, to segregate? A Not at all, sir. I am asking—I am not asking, the commission has ordered us to set up \$800,000 for depreciation and I am asking that money be made available to us and when available it is charged against constantly as a matter of bookkeeping but the items go against the depreciation item, some items more in one month than another, and some items very much more in one month than another. The theory is, at the end of the year \$800,000 of cash provided for that purpose will take care of the items chargeable during the year against that item. 20

Q I understand that. That is what I am trying to get at.

Commissioner Wright. And will have to be spent.

[S. M. 60]

Witness. Or if not spent cannot be used for any other purpose; will be held for the purpose until they are spent.

Q I have no quarrel with that proposition, provided this case has been tried on the regular basis, but it has not. You are in here now with all the rules of the game abandoned asking for special emergency action by this board. This \$800,000 proposition is based on your regular bookkeeping arrangement about depreciation. What I am trying to get at is, are you shy any cash that you have got to have made up on that account? A Yes, we are, of course we are. We ought to do every bit of that work called for by that this year, every bit of it. 30

Q You mean by that that you have delayed making repairs that you ought to make? A Surely; yes, sir. 40

Q And you will use up more than the \$800,000? A Use up the \$800,000, if practical to do it. So much of the year gone. Whether it will be actually gone by the first of January I cannot say. It will be gone as soon as it can be spent properly.

Q I want to find out by the first of January—will it be gone by the first of January? A I cannot say what will be gone.

[S. M. 61]

Q Can anybody say? A I don't think so, no. I can say the items are there, ought to be done, and involve more expenses than that and if not done by the first of January it will have to be done as soon thereafter as it can be done and we cannot use the 1919 money for it because that will have to be done too. You cannot keep these properties going without keeping them up and this money is to keep 50

Testimony of Thomas N. McCarter—Second Rate Case.

up these properties, it is to keep up the permanent depreciation of these properties.

10 Q I understand that theory. We are talking about these coming five months. I am trying to get at whether you mean to demand that money whether you can expend it or not? A I mean to say that the repairs are waiting to be done, that it is a small amount for a property of this size to have for that particular item of accounting and that the \$800,000 should be spent in these five months and if it is not spent the property will suffer from it and it will have to be spent as soon thereafter as it can be.

20 Q My point simply is, if you saw in the actual operation of this plant, by reason of delay and material and what-not that you were not going to spend that money, you ought not to ask for it in this emergency thing because you are simply saying to this commission fill up our purse. I am asking you have you got to have that filled? A I mean to say the items entering into the depreciation account are [S. M. 62]

just as much bills as wages or anything else and if you don't spend them the property goes to pieces.

30 Q Not if you don't spend it. A We are going to spend it as much as we can. Of course we are confronted with the labor situation and with the fact that a good portion of the year has passed. But on the other hand it is simply deferred maintenance; it has got to be done.

Q I am not disputing that; I am asking for your best judgment as to how much of that you will spend this year in cash? A I cannot say, I don't believe anybody else can. We cannot spend it until we get it, that is sure.

By Mr. Herrmann.

40 Q I still have not straight in my mind when the increase is based from. I think you testified it was from March. Are you not in error on that, from Exhibit P. 204? Your testimony in the former case as I recall it was this: that in March your salaries as estimated were \$365,714. A Our increases, not salaries.

Q Increases, and that in June at the final hearing you said that there was a further increase of \$450,000? A Yes, sir; that is all part of this.

50 Q Then you deduct the allowance made by the board of \$1,086,000? A Yes, sir. The board took me at my word in the other case; the 635 and the 450 just about made up the 1086 and they said we will [S. M. 63]

allow that. For the purpose of showing it in simple form we have put in those increases plus the additional increases since and made one total and then credited that with 1086 which the board allowed for increases in the other matter.

Testimony of Thomas N. McCarter—Second Rate Case.

Q With what figure is the item of \$1,630,538 comparable? A That is the total increased wages that this company, the total net increased wages that this company would have to pay over and above that allowed by the board in their report for the calendar year beginning August 1st, 1918.

Q (*By Mr. Gilmour.*) Not counting the two months, June and July? A Not counting the two months' back wages of \$164,000. It is that 1600 figure plus the 164 aggregating \$1,800,000 that has been the basis of what I have been saying and others have been saying that this entailed upon us an increase of \$1,800,000. 10

Q So the aggregate of wages paid to August 1st, 1917, would be comparable with this figure here? A I don't follow that.

Q The aggregate of all wages paid in 1916 with this increase added to it will be what you estimate you will have to spend for the calendar year of 1918? A Not the calendar year 1918. That \$1,630,000 is what will have to be spent, not in the calendar year of 1918, but in a year beginning August 1st. 20

[S. M. 64]

Q Will you refer to P. 205 and let me know in figures what has been the increase in the wages of trainmen in the aggregate? You have it itemized two cents per hour, extended to the car hours. A Trainmen, it is shown on 204 I guess. \$737,162.

Q What is it in dollars and cents per hour on 205? A First the trainmen, two cents per hour, then there was 3.12 cents per hour, that makes 5.12, then there was 8.50 per hour, which makes a total of 13.62. 30

Q Is that applied to all classified labor or to each classification of labor? A That applies to trainmen, trainmen pure and simple.

Q (*By Commissioner Wright.*) All trainmen get that much? A Yes, sir.

Q (*By Mr. Herrmann.*) Regardless of length of service? A That is the average, that is the average. It was not a uniform raise, we had one scale in effect and the War Board put another in effect; this is the average result of it. 40

Q Could you furnish us with the number of employees that would be affected from which you took or abduced your average? A Yes, Mr. Boylan can give you that in detail. Every man is affected and affected upward, very substantially upward, some more than others. The rate of wage originally ran from twenty-eight to thirty-four cents, then from thirty to thirty-six cents, then we came along with our substituted change with three classes, thirty, thirty-five and forty 40

[S. M. 65]

cents; now the War Board comes along and makes it forty-one, forty-three and forty-five cents, and for different lengths of time. 50

Q What method did you use in arriving at an average, by which you based your computation? A I cannot tell you that. Mr. Boylan will have to tell you that. These are actual figures as I understand it.

Testimony of Thomas N. McCarter—Second Rate Case.

Commissioner Wright. You will notice you use the same number of car miles there in every case.

Mr. Boylan. Based on the year.

Witness. Based on the year's operation.

Commissioner Wright. Necessarily meaning every man?

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Mr. Boylan. Yes, sir.

Mr. Herrmann. You say we can be furnished the information showing the classification of trainmen?

Witness. I presume Mr. Boylan you can give him just what he wants?

Mr. Boylan. You mean less than three months, over six months and over a year?

Mr. Herrmann. I don't know how they are classified.

20

Mr. Boylan. That is the way they are paid, less than three

[S. M. 66]

months, forty-one cents; the next six months forty-three cents and over a year forty-five cents.

Mr. Herrmann. My understanding of the War Board's order is that it does not affect the trainmen as a class, but affects—

Mr. Boylan. Oh, yes.

Mr. Herrmann. Affects them in different grades.

30

Witness. How do you mean, Mr. Herrmann? Men in service over ten years are not affected the same as men in service over six months.

Mr. Boylan. Some got five cents an hour, some eleven, some thirteen and so on, all depending on seniority.

Commissioner Wright. What do you mean by "so on?"

Mr. Wakelee. The record is in evidence.

Commissioner Wright. You went up to thirteen and then said "so on."

40

Mr. Boylan. Five, eleven, eight, thirteen, ten cents; I haven't just got those figures here, but I can show the different steps, comparing the War Board award and the old rates that were in effect June 7th.

[S. M. 67]

Witness. You see, they are now discussing total rates; the first two-cent raise and the three and a half-cent raise and the eight and a half-cent raise.

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Q (By Mr. Herrmann.) In other words, what I am trying to find out is this: wouldn't there be a class of trainmen that would be more materially affected than another class? A Some got a higher raise by reason of this War Board action than others, if that is what you mean, yes.

Testimony of Thomas N. McCarter—Second Rate Case.

Q If they were more numerous than the other class it would require more money, and if the class that got the lesser raise were more numerous it would require less money? A I assume that would be true.

Q I want the data to support the theory by which you arrived at the average? A I cannot give you that, Mr. Boylan will furnish that.

10

Commissioner Wright. I think I recall Mr. Danforth's statements saying a great many of the old men were leaving, you had to depend on new men and the changes were something enormous in the course of a month.

Witness. It is true not only of the old men, but the new men, and the tendency has been, of these higher wages, to bring back a very considerable number of our old men, and these

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[S. M. 68]

figures are all compiled on the state of affairs as we find it on a given date and that average will not vary substantially in the last year. They come and go, but the average of men stays pretty constant. A large number of our old men have come back.

Commissioner Wright. How was the number of car hours arrived at in Exhibit 205?

Witness. You mean on this basis?

30

Commissioner Wright. Yes.

Mr. Boylan. That was a seven months' actual car hours basis and an estimate of five months.

Commissioner Wright. Seven months of this year; which seven months were they?

Mr. Boylan. Seven months past.

Commissioner Wright. It did not include January and February.

Mr. Boylan. It did.

40

By Mr. Hanrahan.

Q May I ask that question again; how many men approximately—I would like to ask, approximately how many men that increase included, approximately? I know you cannot tell exactly. A About 3,600 men.

Q And does that increase only include what is known as platform men? A The figures sworn to with regard to trainmen only include

[S. M. 69]

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trainmen. The other figures to which I swore include other departments of the company's operating force.

Q By trainmen you mean motormen and conductors? A Yes.

Testimony of Thomas N. McCarter—Second Rate Case.

Q And about thirty-six hundred of them are included, men and women? A 3,600 operating trainmen, including the operating force at the present time, about.

Q (By Mr. Oliver.) What is the average percentage of increase in the wages now, based on what they were before any raises were made? A The average is 13.62 per hour.

Q What does that show in the aggregate? In other words, you were paying say \$100,000 in wages before the increase; how much will you pay now?

Mr. Wakeley. It is shown on P. 204.

Mr. Oliver. It shows the percentage of increase, does it?

Mr. Wakeley. No, it shows the actual dollars of increase.

Commissioner Slocum. Just read the figure if you have it there, from the exhibit.

Mr. Wakeley. \$2,716,528, from which is deducted the \$1,086,000 allowed by the board in the previous case, leaving a bal-

[S. M. 70]

ance, a deficiency of \$1,630,000, with no revenue to meet it.

Q (By Mr. Hanrahan.) I would like to know if there was any increase in the other departments of the railroad company that are in any way included in this, or whether the men in other departments, in other capacities working for the railroad company, are they included in any way in this, or are their wages just the same as they were before? A No, they have very largely been increased as I have sworn to here.

Q There is no increase for them asked in any way in this proposed \$4,000,000 or three and a half million dollars? A Yes there is. The increase asked for includes all the wage raises we have made both to trainmen and to other men and to other departments of the company's operating force, including them all, except the officers.

Commissioner Slocum. We will recess now until two o'clock.

Mr. Gilmour. Mr. President, if you please, we are through. No more witnesses.

Commissioner Slocum. No more witnesses?

Mr. Gilmour. No, sir. We will file any information that Mr. Herrmann desires, but we are through.

[S. M. 71]

Mr. Record. I asked for what the board may consider a reasonable time in which we can get our representatives of the League of Municipalities together. Mr. Van Winkle is chief counsel, he will be back here Monday, I understand, and we will move as fast as we can. I would suggest that we be given two weeks to put in our side of the case.

Discussion.

Commissioner Slocum. What is there to be put in except the examination of these records and exhibits and to ascertain the verity of the testimony.

Mr. Record. Can we do that over night?

Commissioner Slocum. No, but do you need to consult the municipalities? 10

Mr. Record. Yes, we need to raise the money and need to find out whether the municipalities want to raise the money to hire the experts and go ahead. We were presented here in the other case, a mass of figures; we produced experts and your Honors took our figures and did not take theirs.

Commissioner Slocum. That is all over now.

Mr. Record. I am only passing on this point. The figures they gave you before, after you considered all the case you did not allow, therefore their figures before were not substantiated upon cross examination and by the facts as they developed, according to the judgment of the board, and it is 20

[S. M. 72]

therefore reasonable to assume at least that we ought to have a chance to verify these figures. For instance, your counsel asks for the number of men—they have computed a lot of averages here—

Commissioner Slocum. Certainly, and he is going to be furnished that information and this board is going to dissect it. 30

Mr. Record. Have we no right to see that?

Commissioner Slocum. Yes, you can see it as soon as we get it.

Mr. Record. We want a reasonable time in which to come here and say we have nothing to say in derogation of these figures or we will have.

Commissioner Slocum. We will announce at two o'clock what date it will be adjourned to. 40

Mr. Gilmour. I would like to have something to say in regard to that.

Recess from 1 to 2 o'clock.

AFTER RECESS.

Commissioner Slocum. Now, gentlemen, Mr. Record in response to my inquiry as to how much time we should give suggested two weeks, and Mr. Gilmour said he would like to be heard. Mr. Gilmour, what have you to say? 50

[S. M. 73]

Mr. Gilmour. I only wanted to suggest in that regard that Mr. Record has known for three weeks just what he had to

Discussion.

10 meet in this case and just what he would need to meet it. We have produced nothing here that is surprising or that is new, except these War Labor Board figures which we had all set out in the petition. Mr. Van Winkle knew before he went on his vacation both the proposition which would be presented to the board today and when it would be presented, and it does not seem to us that we ought to be deferred to the caprice of the vacation of counsel or those sort of things when the emergency which meets us is imperative and the condition is so necessary to service of this railway, the relief is so necessary to the service of this railway. Mr. Record says that the figures which we presented before were modified on cross examination. The board knows that is not true. Those figures were not modified; other figures were used by the board on their own examination, which they got from the books and from reports which they asked for. These figures are presented here today, the information on which they are based and

[S. M. 74]

all the books of the company are open to the board's inspectors, and the board has inspectors who are perfectly able to check them up and verify them, and it seems to us if Mr. Record desires to present any evidence at all in answer to this application he ought to be ready to do it now.

30 *Commissioner Slocum.* Anything further? (No response.)

Commissioner Slocum. The board feels that the question has come down to one of allowing an increase for the labor costs, and it has called for additional information from the company; the company has responded by saying it will furnish it forthwith; that will be in the possession of the board, I assume, today or tomorrow.

Mr. Gilmour. Today.

40 *Commissioner Slocum.* And that information, of course, will be available to Mr. Record and any other attorney interested in the case, and to give them an opportunity to inspect those records and make such investigation as they desire, we will continue the case for one week here.

[S. M. 75]

Mr. Gilmour. One week from today?

Commissioner Slocum. One week from today here.

Mr. Gilmour. 10:45?

Commissioner Slocum. Eleven o'clock.

50 *Mr. Hanrahan.* I am not a lawyer and it is very difficult for me to come here; I have to deprive myself. I represent a large number of people of our City Federation and I will ask your indulgence for a few minutes on that brief or resolution to you.

Discussion.

Commissioner Slocum. We could not hear you, Doctor, for the simple reason we have not heard the other gentlemen.

Mr. Hanrahan. Mr. McCarter stated his case.

Commissioner Slocum. Mr. McCarter is president of the company and appeared as a witness, and of course we would hear him. We will hear any witness you have, but it is not fair to ~~commit~~ ^{Permit} you to make a speech or some remark and exclude fifteen or twenty others who are in the same capacity; that would hardly be fair treatment. 10

Mr. Hanrahan. In most cases they are lawyers and it is their duty to be here; I have no retainers in this case whatever.

[S. M. 76]

Commissioner Slocum. We will not hear you now, Doctor; we have to treat all alike. 20

Mr. Hanrahan. Can I submit, without reading, one further paragraph without reading it to you?

Commissioner Slocum. Yes, sir; you may file it with the stenographer, it will receive the same treatment.

Mr. Slayback. If I understand it, I come down from Verona and cannot make a statement here from the borough council of Verona expressing the sentiments of the people.

Commissioner Slocum. We told you, Mayor, this morning we would be glad to receive any data or information you had and we heard nothing further from you and I assumed Mr. Record speaking for the municipalities represented you. If he does not, we will give you all the time you want. 30

Mr. Slayback. Mr. President, the Borough of Verona was a party to the other suit, the Borough of Verona will not be a party to any further suits, and we have no other representative here except myself.

[S. M. 77]

Commissioner Slocum. The borough is very ably represented. We will be very glad to hear from you. I did not intend you should be shut off in any way. 40

Mr. Slayback. All right, sir, I thank you. I want to state here that the people of the western part of this county feel that the Public Service Corporation have discriminated against them ever since this road was put in operation. About four or five years ago—

Commissioner Slocum. No; I didn't understand you. I thought you wanted to submit some facts. 50

Mr. Slayback. I do; that is a fact.

Commissioner Slocum. If you want to submit an argument—

Mr. Slayback. No, no argument. This is in relation to the fare.

Discussion.

Commissioner Slocum. The rate of fare?

10 *Mr. Slayback.* The rate of fare. When the increase was made we paid two fares from the terminal to our town. We want to call to your attention the fact that if you place two cents on each five-cent fare charge, you charge us fourteen cents and the distance you are carrying us from this terminal to the

[S. M. 78]

westerly boundary of Verona is less than the distance which the Public Service carries its passengers to the end of the Valley Road line today for five cents.

Commissioner Slocum. How does that happen? Have you a diagram?

20 *Mr. Slayback.* Yes, I have a map and the distances correctly taken. This is what I want to submit to you for your attention in your arranging a new fare schedule; I want to state this, that the people of my town are absolutely fair and square, willing to pay the Public Service Corporation whatever they are entitled to if placed on a per mile basis or on some basis where our people are not paying a bigger or greater amount of the charges.

Commissioner Slocum. At this time we are not zoning or not giving a per mile charge.

30 *Mr. Slayback.* We object to being asked for any fare, any higher rate of fare under the present conditions, paying ten cents from the City of Newark to our town, which is in excess of the fare that is paid to the end of the Valley Road line in Montclair, seven-eighths of a mile more, and for which they previously gave a transfer without any charge.

[S. M. 79]

Commissioner Slocum. You say if this application is granted you would be compelled to pay fourteen cents instead of ten cents?

40 *Mr. Slayback.* Yes, sir.

Commissioner Slocum. And you protest against that increase?

50 *Mr. Slayback.* Yes, sir; that is the idea exactly, sir. I want to present to you a letter from my town, and also a map, a diagram, very carefully marked showing the distances and showing the reason why we feel it would be an imposition if any further increase was made upon us. But on the basis of some other fair equitable adjustment of fares by which the people of my section pay the same as the people of any other section, the same distance from the terminal or starting point, we are perfectly willing to stand an increase if the Public Service are entitled to it.

Discussion.

Commissioner Slocum. That will be received and filed with the papers in the cause.

Mr. Oliver. Mr. Chairman, I represent the Town of Westfield. I heard your Honor remark, you assumed that Mr. Record represented all the municipalities of the state.

[S. M. 80]

Commissioner Slocum. Excepting those who appeared by special counsel this morning and were so recorded.

Mr. Oliver. I did not state on which side of the question Westfield stood. Westfield is in favor of the increase on general principles, because we believe it is indispensable that the road should have the increase and there is a special reason in our case why the increase should be granted, because of a very large grade crossing improvement that is under way there. The trolley company are under an agreement to conform with our plans by changing the location of their tracks.

Commissioner Slocum. You are attorney for Westfield?

Mr. Oliver. I am attorney for Westfield.

Commissioner Slocum. Now, next Thursday when we meet here, after Mr. Record produces his witnesses, then counsel will have an opportunity to give their views and every citizen who wants to express his views, and Dr. Hanrahan representing the association, will be given a chance. It is not the intention of the board to shut off anyone from expressing their views, but we want them expressed at the proper time which

[S. M. 81]

would be next Thursday.

Mr. Oliver. I understand. But my point is I would like to introduce exhibits into evidence in favor—I suppose it would be in favor of the Public Service.

Commissioner Slocum. We could not let you introduce those except with their consent. If they haven't any objection to have these exhibits marked as part of their case, we haven't any objection.

Mr. Oliver. We are helping them fight their battles for our own benefit and I don't suppose they would object.

Commissioner Slocum. If there is no objection it will be received and marked.

~~*Mr. Oliver.* If there is no objections it will be received and marked.~~

Mr. Oliver. I just asked Mr. Record if he requires formal proof?

Mr. Record. No, no technical things of any kind. The only point is this ought to be put in in some formal way, by somebody.

Testimony of Paul Q. Oliver.

Mr. Oliver. It is put in by the Town of Westfield. I offer it.

Mr. Record. But these photographs ought to be explained by somebody on the record so we would have a definite state-

[S. M. 82]

10 ment of what they show.

Mr. Oliver. That is what I wanted to know. I will call Mr. Ross.

Mr. Record. The photographs mean nothing unless they are explained.

Commissioner Slocum. If you want to put that in as part of the plaintiff's case we will hear it now, if you have a witness or you can be a witness yourself if you are familiar with the conditions shown there.

20 *Mr. Oliver.* I am quite familiar with it. I offer the photograph.

Commissioner Slocum. Just be sworn.

PAUL Q. OLIVER, sworn on behalf of Westfield.

This is a photograph—

Mr. Record. I want to object. We certainly have to have an issue here. There is no valuation, no issue here that I know anything about. Your Honor says you think it has now

30 come down to a question of paying some wages.

Commissioner Slocum. Yes.

Mr. Record. If so, it is utterly immaterial if they are digging a hole in the ground or lifting it up on stilts.

[S. M. 83]

Commissioner Slocum. Only to this extent, as I see it; here is an attorney representing a community and he says that community wants to go on record as favoring the increase asked for and they want to tell why they favor it, and one of

40 the reasons is some grade crossing conditions.

Mr. Record. Yes. But your Honor just ruled this is now down and I have got to take up with my people a narrow issue, these wage increases.

Commissioner Slocum. That is the only thing there is to answer.

Mr. Record. Then this hasn't any relation to that.

Commissioner Slocum. No, but why should we prohibit a community from explaining why they want to go on record in

50 favor of the increase?

Mr. Record. Then you have got to give me time to look at the thing, find out all about it and answer it.

Commissioner Slocum. No, this is simply explaining why the representatives of that community favor the increase.

Testimony of Paul Q. Oliver.

Mr. Record. Here are a dozen men appeared, wanted to appear here wanted to say—

[S. M. 84]

Commissioner Slocum. They did not represent any community. 10

Mr. Record. Yes, they did, several.

Commissioner Slocum. No, they did not, I beg your pardon. They represented manufacturing interests, shipbuilding interests and things of that character; they did not represent municipalities.

Witness. They wanted to talk, Mr. Chairman. I wish to submit evidence.

Commissioner Slocum. Anything that pertains to the plaintiff's case must be submitted today. 20

Mr. Record. I object to this line of the testimony.

Commissioner Slocum. We will permit the representative of Westfield to explain why his borough wants the increase.

Witness. This is a photograph taken from the south showing the present status of the grade crossing to the west of the new bridge shown. Will you mark that please. *its purpose is to abolish a grade crossing*

Q (*By Commissioner Slocum.*) What street? A That is the new location, Westfield avenue. The purpose of it is to eliminate the Broad street grade crossing and it is done by vacating the Broad street grade crossing about one hundred feet to the left and closing 30

[S. M. 85]

Westfield avenue bridge which is at present fifty feet wide and shifting it 150 feet to the west, thus making that take the place of the Broad street grade crossing and the old Westfield avenue bridge. The plan of course contemplates the moving of the railway tracks which are present in Westfield avenue around and through the new bridge which the picture represents. The other photograph, exhibit 2 represents the present status of the same improvement from the north. 40

Commissioner Slocum. Let those be marked as exhibits one and two for the Borough or Town of Westfield.

(First photograph received and marked Exhibit 1, Town of Westfield.)

(Second photograph received and marked Exhibit 2, Town of Westfield.)

Witness. I have here blue prints showing the ground location of the improvement. Of course I am not competent to testify to that. If there is any objection on that score— 50

Mr. Record. I make no technical objection; I don't want to create any trouble for you.

Testimony of Paul Q. Oliver.

Witness. I offer them in evidence.

Mr. Record. I just wish to offer the same objection to their relevancy.

[S. M. 86]

10 *Commissioner Slocum.* Let it be marked as Exhibit No. 3.

(Blue print received and marked Exhibit 3, Town of Westfield.)

20 *Witness.* I simply want to say, I said generally that the improvement was being held up on account of the unwillingness or impossibility on the part of the railway to make the change; that is their reason. They are under obligations to do the work. A law was passed through the Legislature, I think in 1917, providing that in a case of this sort, where the location was changed in any particular of the right of way, they should have the same franchise rights as regards that as over the original, as if they had remained on the original route, and in pursuance of that Legislature an ordinance was passed giving them the new location through Westfield as it is to be, and it was formally accepted by the company. As we gather from the railroad, the Central Railroad authorities, the old Westfield avenue bridge, which it sought to eliminate, represents the one weak spot in the whole line between New York and Philadelphia, and so the government is very urgent to have this

30 [S. M. 87]

work finished, naturally the town of Westfield wants it finished, and we have served notice upon the Public Service Railway Company that in five or six weeks, four or five weeks now, the work will have progressed to that point where it will be necessary to change the locations of those track and conform with the plan, and they have notified us that because of their inability to raise money the work cannot be done and will not be done. The result will be that Westfield avenue, where the railway tracks are now, will be filled up; that will positively be done, that is the plan of the railroad company, nothing to stop us, and no other way to get the work done. That is why the Town of Westfield, aside from feeling on general principles under the conditions that they should, they must have the increase, selfishly wish that the rate should be increased so that they will be permitted, taking their statement as true, that they haven't the money and cannot go ahead. For this reason, in order to have the work go ahead as it must go ahead, we ask they have this temporary increase in rates.

50 [S. M. 88]

Cross examination by Mr. Record.

Q Where is the resolution stating the wishes of the Town of Westfield? Does the Town of Westfield express itself by the opinions of

Testimony of Paul Q. Oliver.

an attorney or does it express itself by ordinance? A I am speaking now—I attend every meeting of the Council.

Q I ask you does the Town of Westfield express itself by an attorney or does it express itself by resolution or ordinance? A Well, as to matters of policy, matters of this sort, I don't know how they could express their wish by ordinance. 10

Q Can they by resolution? A Possibly they might.

Q Have they passed any resolution on this subject? A No, not instructing us to appear, but at the last meeting the Mayor who was here stated it was his intention to appear here, and it met with the unanimous passive approval of the Council.

Q Has the Council taken any official action on this subject? A I was going to say the Council refused to join with the League of Municipalities in paying the legal expenses for this second proceeding.

Q Did the Council by any resolution instruct you or the Mayor to ask this commission to grant this application? A They did not, sir, but I was present at the meeting— 20

Mr. Record. Wait a minute. I think I am entitled to a responsive answer.

[S. M. 89]

Commissioner Slocum. Just answer the question.

Q They did not. A They did not.

Q Was it the understanding of the individual members of the Council that if this company got the increase they now ask for that these improvements would be carried out? A Why, yes. 30

Q And that is the reason why they tacitly consented to your coming here, is that right? A There was nothing said about my coming here. The Mayor was to come.

Q That was the reason there was in their minds, according to your opinion? A That was the urgent reason; yes, sir.

Q Now, have you heard the testimony here that the company now asks for merely money enough to pay these motormen and is asking no more, and that if this commission grants the present application they will not be in any better shape to make your improvement? A I did hear that statement; yes, sir. 40

Q That situation was not put before the members of your Council, was it? A No.

Q They thought this company was just going to have some more

[S. M. 90]

money to do general things with, is that so? A No, they were informed that unless this increase was granted the work could not be done and would not be done. 50

Q When was that? A That was prior to the last meeting.

Q After the decision of the board in this case? A We got that word prior to the meeting of the 19th of August.

Q In writing? A Yes, a letter from Mr. Gilmour.

Testimony of Paul Q. Oliver.

Q Stating that unless this increase was granted they would not complete this proposition? A No, he did not say that.

Q Did he say that if it was granted they would? A No, sir.

10 Q Did he give you that impression? A I don't know he gave me that—not from the letter, understand; the letter simply said they did not have money and could not do the work.

Q Then, so far as the record goes, there is no resolution by your board and there is a letter from the Public Service stating that they did not have the money and therefore could not do the work. A There is such a letter; yes, sir.

Mr. Record. I should say that ought to throw all this evi-
[S. M. 91]

20 dence out. It seems to me that has no standing here whatsoever; a lawyer comes in here and tells what he thinks the members of the board think and what Westfield thinks. It is elementary that the board of a town can only speak by resolution or ordinance.

Commissioner Slocum. It may not be very illuminating on the main question at issue.

Mr. Record. But my challenge is his right to represent the town at all; he has got no authority for representing it.

Commissioner Slocum. He appears in company with the
30 Mayor of the town and as his spokesman.

Mr. Record. But on cross examination he says he has no authority to say this.

Witness. I am the general attorney, I represent the town generally.

Mr. Record. The general attorney has no right to testify the way you have testified without a resolution.

40 *Commissioner Slocum.* His testimony may stand for whatever it is worth. Is there any other municipality or any other person who desires to join with the petitioners in its request for an increased fare. If so, we want to hear from them now.

[S. M. 92]

50 *Mr. Wakelee.* If the commission pleases, there were a large number here this morning representing the United States Government in its various capacities, representing large shipbuilding interests, aeroplane interests in this state working for the government, as well as other representatives of Chambers of Commerce, Boards of Trade and business men generally, but they understood they would not be given any opportunity today and they are not here this afternoon. While that may be part of our case it is not the kind of testimony we ourselves are formally offering. The gentlemen come here of their own accord without any request on our part, and desire an opportunity to be heard, and my suggestion was, if the case was to

Testimony of Paul Q. Oliver.

be adjourned until next Thursday, perhaps that would be an opportunity to let these gentlemen—

Commissioner Slocum. Our idea was to give today to all those parties who wanted to advocate the increased fare, whether the company or any other dependent citizen or municipality. Then give another day for those who are opposed to it. If you want longer time, we will give everybody a chance

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[S. M. 93]

to be heard, but it certainly hasn't much probative force on the question at issue. The question at issue is whether these fares or tariffs should be raised, and, if so, what amount, and whether these figures for labor are as you gentlemen have testified, if they are aggregating those sums, and then it is the duty of the board to see what relief we can give. Simply because some Board of Trade thought we ought to do it and another Board of Trade thought we ought not to do it will not be controlling. In our judgment we must, as we are obliged to do under the law, give the best relief we can to the facts that are submitted to us.

20

Mr. Wakelee. I am not asking for any further time.

Commissioner Slocum. The only thing is the board does not want anyone to feel they haven't an opportunity to give their views. This morning we did not want to listen to their views previous to receiving the case; we want the case in and then they can talk all alike.

30

Mr. Wakelee. I don't think the gentlemen understood it so; but I have no brief for them; I have no right to ask for time

[S. M. 94]

for them. I know in their expressions to me they were very much disappointed; they thought they were not given an opportunity to express their views, especially the representative of the United States Shipping Board, Mr. Appel, the general attorney who was here from Philadelphia, and desired very much to state their position.

40

Mr. Record. It is quite obvious there isn't a single one who can testify to a fact; they can simply say, we want facilities.

Commissioner Slocum. If they do insist on another day we will have to provide it for them, but the next day will be for the defence, for the municipalities to produce anything they have to offer, and then we will hear both sides in the argument, if there is any argument produced at that time.

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Testimony of Thomas N. McCarter—Second Rate Case.

THOMAS N. McCARTER, recalled on behalf of petitioners.

Now, if the commission please, I would like to make a correction in regard to an error this morning. It won't take but

[S. M. 95]

10

a minute. I find on inquiry during the noon hour that the increase, that the raise in salary of Mr. Bolen to which I referred as the only person who might be regarded as an officer whose salary had been raised since any of these proceedings began, that his salary is not included in these figures. These relate only to the men and not to Mr. Bolen.

20

Q (*By Commissioner Slocum.*) So the figures you have given do not even relate to Mr. Bolen? A No, sir, they do not. Then I produce here, and if agreeable to Mr. Herrmann, offer in evidence the information that he asked for before luncheon, the figures he asked for. This has been submitted to him and I understand is what he desires.

Mr. Herrmann. I have seen it; it is just what I did require.

Commissioner Slocum. Will you please furnish a copy to Mr. Record at the same time. This will be marked Exhibit P. 210.

(Statement received and marked Exhibit P. 210, August 29th.)

30

Witness. Now I want to say, before I leave the stand, in regard to the Westfield matter. It is true that we wrote the authorities of Westfield that we could not go forward with this

[S. M. 96]

40

enterprise because we did not have the money. It is also true that the establishment of this fare during these few months will not give us that capital money with which to make this improvement. But I do feel, and have all along felt, that if the seven-cent fare is established at this time it will restore our credit, which has been very seriously interfered with, and place us upon a basis where the company can function to the extent that it should function in these critical times.

Q (*By Mr. Herrmann.*) Just one question on Exhibit 210. A That is the new one?

Q That is the new one. Does that include the women conductors?

A Oh, yes.

50

Q They get the same rate of wages as the men? A Yes, sir. That is one of the cardinal principles of the National War Labor Board, that they must get the same compensation for the same work that men get.

Q (*By Mr. Wakelee.*) Did you desire to say any more on the depreciation reserve? A I don't know what more I can say about it, except I am informed by the auditors; in fact, I know myself that

Testimony of Thomas N. McCarter—Second Rate Case.

there are large numbers of items waiting now to be charged off against this year's depreciation, notably the burning up of a lot of [S. M. 97]

cars, their value over and above the insurance money received for them. It is just as vital we should have that sum of money to take care of the necessities of this year as it is we should have it to pay wages with. It is just another method of operation. The board expressed it very clearly in their report. I cannot improve on the way they expressed it, and there is no doubt we will have the items to charge up against it. 10

Q (By Commissioner Slocum.) The only difference between the board and the company at that time was you thought you ought to have \$1,100,000 and we gave you \$800,000, but the principle was agreed to both by the company and the commission? A Yes, sir; absolutely. 20

Q (By Commissioner Wright.) Do you pay the employees of your company, other than your platform men, the same rate of wages? A No. The War Labor Board, as I was about to say—I am getting back to Chicago—the War Labor Board have several times announced that every male employee above the age of twenty-one years working for a war essential should receive at least forty-two cents an hour, and they made that binding in the Chicago case. They also yesterday decided the same principle with regard to a large number of workers in Bridgeport. That is a general proposition, and in the language [S. M. 98] 30

used in the Chicago award it was made general. We have not put that all in effect, all the employees. If the employees took that matter to Washington, there is no doubt our company, or any other company, they would obtain it. We have done the best we could with them; we have gone along with the men and made raises toward that figure, but have not in every case raised up to that amount. We thought it was an extraordinary raise and did not want to do any more than we thought was absolutely essential. Partly because of that pronouncement and attitude of the War Labor Board, as well as because of the interrelation between the departments ^{newark's make} it was raises. We did make them, but have not made them all to the same extent. 40

Q Do you remember whether the War Board allowed the platform men in Cleveland as much as in Newark? A They allowed more. Our scale, 41, 43 and 45; Cleveland scale, 43, 45 and 47.

Q (By Mr. Wakelee.) Won't you state how soon that high point is reached? A Yes. Under the War Board's award the new men for the first three months get forty-one cents; for the next nine months, rounding out the first year of employment, they get forty-three cents, and after the first year they get forty-five cents, whereas under our old scales it used to take ten years to get up to the maximum, and under the modified scale we put in effect in June it took 50

Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 99]

five years. Now they all get to it in one year. And it is a fact that women going to work on this property now—we are hiring them as rapidly as we can—for a ten-hour day's work will get \$4.10; after one year will get \$4.30. It is a very extraordinary wage, but it is there.

Q (By Mr. Wakelee.) After a year \$4.50? A After a year \$4.50.

Q That is the order of the War Board? A That is the order of the War Board.

Q That women should receive the same wage. A It never was my order by any stretch of imagination.

Q (By Mr. Herrmann.) Has there been any general scheme followed in raising salaries of others than platform men? A Yes, it has been done very carefully and very thoughtfully by Mr. Danforth, the vice-president and general manager, in close co-operation with the head of the particular department, and then in submission to the executive committee of which I am chairman.

Q What would you say would be the percentage of increase granted to other than those affected by the War Board's order? A In general much less than the trainmen.

Q Could you tell us the approximate percentage? A I cannot, in percentage. I have no doubt Mr. Danforth can; he is here, I think.

[S. M. 100]

Q There hasn't been any scheme adopted of a percentage? A No. We did what we thought we had to do and no more, and we did not raise up to the minimum limit suggested by the National War Labor Board in the Chicago case or any other case.

Q What was the reason for advancing salaries in other departments not required by the War Board? A This wage situation is very critical, the labor situation. I am having it in the gas and electric companies every day. Wages today are not the wages of tomorrow, and of course when such a large wage was made to the trainmen, it is most natural, in fact it would have been unavoidable that the other departments should not right away have followed.

Q (By Commissioner Slocum.) You are following the ruling of the War Board? A We are following the ruling of the War Board in the Chicago case. I know perfectly well all they have to do is to make their wants and wishes known (as the hymn says) and that is all there is to it.

Mr. Wakelee. Will you permit me to testify? It slipped Mr. McCarter's memory. The decision of the War Board in all these other cases and the general principles laid down by them was that all of these collateral employees should be raised on the same percentage as the motormen and conductors, but

Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 101]

where that percentage of increase did not bring them up to forty-two cents, then it must be made in every case forty-two cents.

Witness. Mr. Wakelee is right in that respect. I adopt that as my testimony. We have not yet done it in all the ramifications of our departments. We have not yet done it. We may have to do it. These figures represent what we have done. 10

Q (*By Commissioner Slocum.*) Do you know why Cleveland was allowed more money than Newark? A No, I do not.

Q Is that all? A That is all.

Commissioner Slocum. Any cross examination, Mr. Record?
Mr. Record. No. 20

Commissioner Slocum. If there is nothing further, gentlemen, we will recess now until next Thursday. 20

Mr. Herrmann. Before we recess I should like to have this opportunity to ask for leave to examine the books of the company for verification of those figures.

Mr. Gilmour. Certainly.

* * * *

[S. M. 64]

Mr. McCarter. They are. 30

Mr. Congleton. On behalf of the City of Newark, I desire at this time to enter an objection to the board's proceeding with this application, on the ground that the board is without jurisdiction, for the following reasons: First, that the several ordinances under which the Public Service Railway Company is now operating in the City of Newark created a contractual relation between the City of Newark and the several companies, to which they were granted, to which rights and privileges the Public Service Railway Company has succeeded, and which rights and privileges it is now exercising and enjoying, and it is therefore bound by said contracts. 40

2. That this contractual relation involves an obligation on the part of the Public Service Railway Company, as the successor in title of the companies with which said contractual relation was created, to observe that provision of the several ordinances that requires it to give a continuous ride within the city limits for a fare of five cents.

3. That this contractual relation also requires the Public Service Railway Company, as the successor in title of the companies with which said contractual relation was created, to observe the further provision of the several ordinances that requires the establishment and maintenance of a system of transfers on all of the lines and extensions of said companies, whenever and wherever built, and to issue said transfers to 50

Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 65]

such passengers as may request the same for a continuous ride within the city limits, for a fare of five cents.

10 4. That with respect to the provisions of the several ordinances fixing fares and requiring the establishment and maintenance of a system of transfers, the contracts are inviolable, and the state has not relieved the companies through which the several ordinances were granted and with which contractual relations were established, from the obligation of observing them, nor has the state conferred jurisdiction so to do upon the Board of Public Utility Commissioners.

20 *Commissioner Donges.* That raises two kinds of questions, one a question perhaps of fact, and also a matter of law. The matters of law, I take it, have been recently passed upon by the Supreme Court in several cases—

Mr. Congleton. Yes, sir.

Commissioner Donges. —which have been before the board. I assume it is agreed that we are bound by the Supreme Court?

Mr. Congleton. I think so. But that case may go to the Court of Errors and Appeals, and I am stating these objections for the purpose of saving any rights I may have.

* * * *

[S. M. 109]

30 technical names you have in accounting, but it is available for distribution.

Mr. Record. What was the return for income or dividends?

Witness. That year, three per cent.

Commissioner Donges. In 1916?

Witness. In 1916. As I think I have before stated, in 1917—

Commissioner Donges. Two and a quarter?

40 *Witness.* Two and a quarter per cent. in 1917. Now, the increased costs shown in the petition as the basis for this application will be shown by others better able to give them than I, and I will not take up the time of the commission with them.

Now, I have here a similar statement for 1918, based, except as I will differentiate as I go on, upon present actualities, the details of which, so far as not proven by me, will be shown you by others.

50 This statement is again drawn along the same general form that I have been using. The basis of this application is the request to this commission, is to put us back on the 1916 basis. We are not asking for the impracticable and for the eight per cent. dividend on this stock which the commission thought proper to assure to us, or to endeavor to assure to us, in the other two cases. We realize the difficulty in the situation with

Testimony of Thomas N. McCarter—Second Rate Case.

[S. M. 110]

which we are confronted. This company never has earned eight per cent., and to impose that burden at this time would be, despite the exigencies of the occasion, that we can hardly expect to ask for, even under the distressing conditions that prevail. What we have asked for, and what this application is, as I said before, is to put us back on the 1916 basis, where we had our head above water at least. This statement shows—

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Mr. Bergen. The 1918 statement?

Witness. The estimated statement for 1918. As I say, the details of this statement I do not swear to, but it will be proven by others. I am trying to give the commission the benefit of our views upon the whole situation, and also the gentlemen interested on the other side.

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This statement shows an anticipated gross revenue for the year, the total operating revenues which I guess is the technical expression, of \$18,883,983.87.

Commissioner Donges. Won't you give us that, as you may have it prepared, for 1916, 1917 and 1918?

Witness. I will have that done. I do not know that I have it here now.

Commissioner Donges. I thought you had it on another statement.

Witness. Surely.

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Commissioner Donges. You have them in parallel columns?

* * * *

[S. M. 986]

Witness. The Jersey City district has not been specifically examined as to the business in that particular city in distinction from the rest of the territory. The statement that I make with regard to all territory is applicable to the Jersey City situation as well.

40

Q Why should the ordinance contracts of the City of Newark be abrogated in this proceeding, for instance? A For the same reason.

Q You give the same answers? A Yes. In regard to Jersey City I don't remember whether there is a 5-cent obligation there, I am not sure. In Newark there is.

Q Yes, there is an obligation there. Do you say too in that same connection that you have not made a special study of the Newark situation so you can tell this commission whether Newark taken by itself is losing money to the company on a 5-cent, free transfer, basis? A There has been no special consideration of the problems we are now facing addressed to traffic arising, carried within the City of Newark. The statement I made with regard to the whole territory is applicable in my judgment to Newark as well.

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Testimony of Thomas N. McCarter—Second Rate Case.

Q That brings up the question that I am going to get your opinion so I may deal with it myself by later questions or argument.

[S. M. 987]

10 You don't view, do you, the situation as one of possible discrimination if the commission should order, we will say, a 5-cent fare re-
 20 tained in one place and impose a 7-cent fare in another part of your system; that would not be discrimination would it? A. I am entirely willing, as I have said before, to have a study made of the zoning system, and would be glad to see it put into practice if it is a practical thing to do. I have been president of this street railway system for 15 years, I have given very close attention to it, and I am frank to say I do not know how to do it. If I did know how to do it by a practical method I would be only too glad to do it, but I do not know how to do it. I think there are very serious if not insuperable difficulties in connection with it. In addition to those there are sociological questions connected with it. I think if we had not a flat zone fare in the last 20 years these cities would all have developed very differently. I think they would have developed with districts like the East side of New York, they would have been tenement districts in large measure in the center of the cities and the suburbs of the city would not be built up. They have built up in the way they

* * * *

[S. M. 995]

30 will be taken out of the company's revenues and there will be that amount less for the stockholders, isn't that it? A There would be less that amount remaining in the surplus of the company.

Q Aren't such taxes and all taxes properly a part of operating expense? A They are.

Q Don't you think it just and fair in a case bounded on pressing necessity to leave out at once this one hundred and one thousand dollars? A I do not, no. I think the question is, what is the pressing necessity. The pressing necessity is, in my judgment, that the company should be put at least in its financial condition of 1916. 40 Whatever is necessary to put it in that condition is a public and pressing necessity that is my judgment.

Q Wouldn't the result of putting in this calculation, including these figures, that one hundred and one thousand dollars plus, wouldn't the result be that the patrons of your company would pay both their own income taxes and the company's income taxes? A That is true of all taxes, they are paid by the consumer.

* * * *

50 [S. M. 1048]

Mr. Van Winkle a copy of it.

Mr. Van Winkle. We had a stipulation in prospect covering these ordinances.

Mr. Wakelee. I think it is the same as Commissioner Donges dictated.

Discussion.

Mr. Van Winkle. Commissioner Donges was aiding us to get the stipulation straightened out. Perhaps Mr. Wakelee will agree to that stipulation now?

Mr. Wakelee. I agree to your statement.

Mr. Van Winkle. It is stipulated that all franchises, ordinances and consents by companies and acceptances and agreements by companies in connection with the operation of the street railway now operated by the Public Service Railway Company and the fixing of fares and rates are offered in evidence and considered as received in evidence; any of these may be used in evidence as if specially offered, and received in evidence in this proceeding, and also on any appeal or review of this proceeding in any Court. 10

Commissioner Slocum. That stipulation is actually agreed to? 20

Mr. Wakelee. The offer comes from Mr. Van Winkle and we consent to it.

* * * *

[S. M. 1772]

Mr. Van Winkle. While Mr. Record is waiting I might introduce the ordinances that we spoke about yesterday. Senator Wakelee has had them looked over. Speaking of the ordinances, I was saying, Senator Wakelee had them looked over and this one about Jersey City is correct, with some minor corrections, it goes in subject to corrections should it be wrong in particular. 30

Mr. Wakelee. We consent that portion of the ordinances now introduced by Mr. Van Winkle shall go into the record provided it is understood that does not lessen the previous understanding that all ordinances are in. We don't want to confine ourselves to these portions that are introduced.

Mr. Van Winkle. That is the understanding. This is illustrative and special and specific. 40

Commissioner Slocum. That is understood. It may be received and marked as an exhibit.

Mr. Van Winkle. In view of the requests of municipalities specially, I am offering these others. I left out one I could not check up.

Commissioner Slocum. You offer all three that have been corrected and checked.

[S. M. 1773]

Mr. Van Winkle. These are corrected ones. Paterson, Passaic, Roselle and the ones about Orange that have been corrected, East Orange. 50

Commissioner Slocum. Five altogether?

Mr. Van Winkle. Five outside of Jersey City.

Discussion.

Commissioner Slocum. Let them be received and marked.

Mr. Wakelee. With the same understanding I suppose?

Mr. Van Winkle. The same understanding.

10 (Ordinance of Jersey City received and marked Exhibit O. 26.)

(Ordinance of East Orange, Suburban Traction Company received and marked Exhibit O. 27.)

(Ordinance of East Orange, Central Avenue Electric Road received and marked Exhibit O. 28.)

(Ordinance of Roselle received and marked Exhibit O. 29.)

(Ordinance of Passaic received and marked Exhibit O. 30.)

20 (Ordinance of Paterson received and marked Exhibit O. 31.)

Mr. Wakelee. Mr. Van Winkle and some attorneys seem to think if this case is appealed and this record used these ordinances must be found in the record. I am not going on that assumption. I am assuming any of our ordinances as approved, our ordinances can be used here, on appeal, or any other place that the record is used.

[S. M. 1774]

Mr. Van Winkle. No question—

30 *Commissioner Slocum.* I understand that is agreeable to all parties.

Mr. Wakelee. I wanted that clear on the record.

Mr. Van Winkle. Should we appeal, on that question, we would have the record in shape to take it up, should we have an appeal.

MARK WOLFF, resumes the stand.

40 *Mr. Van Blarcom.* Pardon me a moment. May I introduce the ordinances and agreement for the Village of South Orange?

Commissioner Slocum. In this case?

Mr. Van Blarcom. Yes; for Riker & Riker.

Commissioner Slocum. Is there any objection?

Mr. Wakelee. No objection if we have the right to put in the ordinances if we wish.

50 *Mr. Van Blarcom.* The first is a certified copy of the ordinances and agreements of the South Orange and Maplewood Street Railway Company and its successors; and a certified copy of the ordinances and agreements of the Newark and South Orange Railway Company and its successors.

Exhibit O. 26—Ordinances of Jersey City.

[S. M. 1775]

Commissioner Slocum. Let each be marked a separate number.

(Certified copy of ordinances and agreements, South Orange and Maplewood Street Railway Company and its successors marked Exhibit O. 32.) 10

(Certified copy of ordinances and agreements, Newark and South Orange Railway Co. and its successors marked Exhibit O. 33.)

Commissioner Slocum. Now, Mr. Wolff, you may resume.

By Mr. Record.

Q This morning we had a halt about a letter of Mr. E. F. C. Young directed to somebody, and we didn't have to whom it was directed. He has got it here and I suggest it be read into the record. 20

Commissioner Slocum. Yes.

Witness. The letter from Mr. E. F. C. Young was addressed to the 7 companies which formed—was addressed to the following companies: Paterson, Central Electric Railway Company; Saddle River Traction Company; Palisade Railroad Company; White Line Traction Company; Paterson, Passaic & Rutherford Electric Railway Company; Paterson, Hoboken and Rutherford Railway Company; Paterson Horse Railroad Company, and the Jersey City, Hoboken and Paterson Street Railway Company when incorporated. The 30

* * * *

EXHIBIT O. 26 (being a reference to some of the Jersey City ordinances).

ORDINANCES OF JERSEY CITY, APPROVED ON FOLLOWING DATES: 40

- Dec. 20, 1859—To Jersey City and Bergen Railroad Co.,
 “ operate a street car railway in Jersey City.
 Section 8: The said Company may ask, demand and receive as fare not exceeding 5c for any distance within said city * * *
- Jan. 18, 1860—Jersey City and Hoboken Horse Railroad Company,
 Section 8: (Same as the foregoing)
- Apr. 24, 1863—Jersey City and Bergen Railroad Company,
 To operate branches. 50
 Section 6: (Same as the foregoing)
- Aug. 10, 1863—Jersey City and Bergen Railroad Company,
 Covering extension to line.
 (Subject to the same restrictions and conditions contained in the foregoing Ordinances)

Exhibit O. 26—Ordinances of Jersey City.

- Mar. 12, 1867—Jersey City and Bergen Railroad Company,
Extension.
(Same as preceding Ordinance)
- Dec. 19, 1872—Jersey City and Bergen Railroad Company,
To operate turn-out.
10 (Subject as above.)
- Nov. 13, 1874—Jersey City and Bergen Railroad Company.
Extension.
(Same as foregoing.)
- Oct. 12, 1883—Jersey City and Bergen Railroad Company.
Extension.
("Subject to restrictions and conditions of existing ordinance.")
- May 31, 1884—Jersey City and Bergen Railroad Company.
20 Extension.
(Shall be subject to the restrictions and conditions of existing ordinances)
- Nov. 24, 1884—Jersey City and Bergen Railroad Company
Extension.
(Shall be subject to the restrictions and conditions of existing ordinances.)
- Oct. 11, 1887—Jersey City and Bergen Railroad Company.
Extension.
(Shall be subject to the restrictions and conditions of existing ordinances.)
- Apr. 21, 1890—Jersey City and Bergen Railroad Company.
30 Extension.
(Shall be subject to the restrictions and conditions of existing ordinances.)
- Dec. 30, 1891—Jersey City and Bergen Railroad Company.
Extension.
(Shall be subject to the restrictions and conditions of existing ordinances.)
- Sep. 20, 1892—Jersey City and Bergen Railroad Company
40 Extension.
(Shall be subject to the restrictions and conditions of existing ordinances.)
- June 10, 1893—Jersey City, Hoboken and Rutherford Railway Co.
Paragraph 7, Section 2: If said company shall consolidate with, or lease, or be leased to any other railway or traction company, within the limits of Jersey City, then transfer tickets shall be issued for a continuous ride, interchangeable between said lines, for one rate of fare of five cents to, or from, any point within Jersey City, upon the lines so consolidated or leased.

Exhibit O. 26—Ordinances of Jersey City.

- Paragraph 14: Said company shall, within thirty days
 Section 2: after the adoption of this Ordinance,
 file with the said board, or clerk there-
 of, a written acceptance of the pro-
 visions, terms and conditions of this
 Ordinance, executed in due form under
 the corporate seal and signed by presi-
 dent and secretary, and a failure to
 file such written acceptance within the
 time aforesaid, shall be deemed and
 taken as a refusal so to do on the part
 of the said company, and all rights and
 privileges to them hereby granted,
 shall forever cease and be at an end. 10
- June 19, 1893—Agreement of acceptance by Company filed. 20
 That the said Jersey City and Hoboken and Ruther-
 ford Electric Railway Co., and the directors thereof,
 do hereby accept the location of the tracks of said
 railway and the grants and rights to said company
 contained in the said ordinance.
- June 22, 1893—Filed in the office of the Secretary of State.
- Aug. 28, 1893—Consolidated Traction Co.
 Right to lay rails, and operate street railway.
 Paragraph 7, Section 2: (The same as Section 7 in
 foregoing Ordinance). 30
 “ 13: Same as Section 14 in the
 foregoing Ordinance.
- Sep. 28, 1893—Acceptances by Co. and endorsements filed.
- Mar. 5, 1894—North Hudson County Railway Co.
 To operate a street railway in Jersey City.
 Paragraph 7, Section 4: Same as Section 7 in fore-
 going Ordinance on fares.
 “ 13, “ “: Same on acceptance as
 Section 14 preceding Ordi-
 nance. 40
- Mar. 6, 1894—Acceptance filed.
 The Co. does hereby accept the provisions, terms and
 conditions of the foregoing ordinance * * * as
 fully and completely as if provisions, terms and con-
 ditions of said ordinance were herein at large set
 forth.
- Nov. 1, 1898—North Hudson County Railway Co.
 To use electric power on its lines.
 Section 7: That said Company shall grant trans-
 fers for immediate use on a single fare
 of five cents from and to its Grove
 Street line at Henderson Street or
 Willow Avenue, Hoboken, to and from
 its lines on its elevated road on Ferry 50

Exhibit O. 26—Ordinances of Jersey City.

Street, and to and from any point on such lines in Jersey City.

Nov. 3, 1898—Acceptance of this Ordinance by Company.

Oct. 24, 1904—North Jersey Street Railway Co.

Ordinance to operate street car line.

Section 3: The permission and consent above granted is upon the following terms and conditions * * *

Paragraph 5: Every person entering any car operated over any part of the line of street railway hereby located, and paying a fare of five cents, shall be entitled to a transfer to any intersecting line controlled by Public Service Corporation of New Jersey, which transfer shall entitle the holder thereof to a continuous ride within the limits of Jersey City on such intersecting line.

Section 3: Every person entering the cars of the North Jersey Street Railway Co., or the cars of any other company, owned or controlled by Public Service Corporation of New Jersey, at any point on any of the lines operated by such companies in that part of Jersey City which was formerly Hudson City, and at any point on any of the lines of such companies in that part of Jersey City which was formerly Greenville, shall be entitled to ride in either direction between such parts of Jersey City reached by any of said lines upon the payment of a single fare of 5c

Paragraph 6: Every person entering the cars of the North Jersey Street Railway Co., or the cars of any other company, owned or controlled by Public Service Corporation of New Jersey, at any point on any of the lines operated by such companies in that part of Jersey City which was formerly Hudson City, and at any point on any of the lines of such companies in that part of Jersey City which was formerly Greenville, shall be entitled to ride in either direction between such parts of Jersey City reached by any of said lines upon the payment of a single fare of 5c

Oct. 25, 1904—Acceptance by the Co. and directors.

Other ordinances of the same date to Jersey City, Hoboken and Paterson Railroad Co. to the same effect and acceptance thereof.

Nov. 14, 1904—North Jersey Street Railway Co.

Same sections as above.

Acceptances.

Aug. 31, 1911—Public Service Railway Co.

Authorization to make connections and operate.

Section 6: The tracks, permission for the construction of which is hereby granted, shall be operated and maintained subject to the same conditions, provisions and limitations as the tracks to which the same are connected are subject.

Sep. 6, 1911—Acceptances by Public Service Street Railway Co.

Exhibit O. 26—Ordinances of Jersey City.

Jan. 12, 1912—Public Service Railway Co.

Paragraph 3, Section 7: In laying, maintaining and using said tracks, the said Company shall be subject to the restrictions of existing ordinances.

Paragraph 4, Section 7: Said Railway Company shall file an acceptance of the terms of this ordinance as required by law and in case of failure to do so, all rights and privileges hereby granted shall cease and be at an end.

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Feb. 10, 1912—Acceptances by Company.

“ 23, 1912—Public Service Railway Co.

To operate and maintain street railway.

Paragraph 5, Section 5: The permission and consent above granted are upon the following terms and conditions * * *

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Every person entering any car operated over any part of the line of the street railway hereby located and paying a fare of five cents, shall be entitled to a transfer to any intersecting line controlled BY Public Service Railway Co. which transfers shall entitle the holder thereof to a continuous ride within the limits of Jersey City on such intersecting line.

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Opinion of Justice Swayze.

Opinion of Justice Swayze.

Filed October 18, 1918.

New Jersey Supreme Court

CHARLES F. X. O'BRIEN,

Prosecutor,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS and
PUBLIC SERVICE RAILWAY COMPANY,

Defendants.

(Two Cases.)

Certiorari.

Argued October 14, 1918.

Decided October , 1918.

George L. Record, Esq., and Marshall Van Winkle, Esq., for the prosecutor.

L. Edward Herrmann, Esq., for Board of Utility Commissioners.

R. V. Lindabury, Esq., for Public Service Railway Company.

SWAYZE, *J.*

By an order of July 10, 1918, the Board of Public Utility Commissioners fixed as just and reasonable a charge of one cent on all initial transfers issued by the Public Service Railway Company to its passengers, in addition to the charges theretofore exacted. Before this charge was to be collected the railway company was required to file with the commissioners its acceptance of the terms of the order. This was done.

By an order of September 25 the board fixed as just and reasonable a charge of seven cents where five was then charged, up to and including March 31, 1919, and six cents on and after April 1, 1919, in addition to the charge of one cent for each initial transfer. These charges were to be collected only in the event that prior to October 10 the railway company filed its acceptance in writing of the terms of the order. This was done.

The prosecutor is a resident, citizen and owner of real estate in Jersey City, in which some of the lines of the railway run.

I held at the argument that the prosecutor has a standing to prosecute the writs. No objection was made when the writs were allowed or when argument was had as to the granting of a stay. Under those circumstances it is too late to make the objection at final hearing after the return to the writ has been made. Even if the objection had been timely, it must have been overruled. The matter probably concerns every resident of the city, and an increase of street railway rates affects his pecuniary interest directly as a probable passenger and indirectly as interested in cheap urban transportation. If the question had been raised at the proper time I have no doubt Mr.

Opinion of Justice Swayze.

O'Brien's interest could have been easily proved. It was not questioned, but was taken for granted. I therefore overrule the objection.

The chief point made by the prosecutor is that the Board of Public Utility Commissioners was without jurisdiction to make the orders, since they were made without evidence of the value of the property of the railway company. The prosecutor assumes that the only power of the board in respect to rates is to fix just and reasonable individual rates, after hearing upon notice, as provided in paragraph (c) of section 16 of the Public Utility Act. This section may properly be described as the section of the act which authorizes the board to take proceedings adverse to the "public utility" and to require it to do what it may not want to do. It is because the proceedings under that section are *in invitum* that care is taken to provide for notice and a hearing, without which the proceedings would be without due process of law. If section 16 were the only section of the act applicable there would be some force in the prosecutor's contention. There are other sections which prevent this narrow construction of the act. The scope of the act, as we have recently said, is very broad; it was meant to give full control of all public utilities to the board so far as could be done by legislation. *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Comrs.*, 104 Atl. 218. The act provides not merely for proceedings *in invitum*, but by paragraph (h) of section 17 for agreement between the board and the "public utility." That paragraph provides for an increase of rates by the "public utility" itself, authorizes the board to hear and determine whether the increase is just and reasonable, and makes it the duty of the board to approve the increase upon being satisfied that the same is just and reasonable. The difference in the two methods is fundamental. One is the method of litigation, long, expensive, unsatisfactory, necessarily too slow to afford prompt relief, and sure to do injustice by delay to one side or the other. The other we may call the method of agreement, or bargaining, if we choose; prompt and comparatively satisfactory, and resulting, if not always in abstract justice, yet in a determination which, in the hands of fair-minded men, is likely to be acquiesced in. When we consider the well-known object of this legislation, apparent in many sections of the act, we cannot believe that the legislature meant to limit the power of the board to a power to make war on much of the most important business of the state. The difficulty meant to be remedied was the control by private corporations or individuals, necessarily monopolistic in character, of business affected with a public interest. The aim of the legislature was to subject such corporations (or individuals if there were any in the same situation of monopolistic vantage) to public control so that a public board, charged with the interests of the public, might have a measure of control over the service to be rendered and the price to be paid therefor. Justice to all, as the policy of the state, is evinced in the act. The difficulty of securing justice through political or judicial methods is not necessarily inconsistent with the legislative policy. The readiest means to approximate that end is the method of agreement provided by paragraph (h) of section 17. The contrast between

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Opinion of Justice Swayze.

the method of section 16 and the method of section 17 could not be better shown than it is by making the board the actor in section 16 (c), and making the "public utility" the actor in section 17 (h). It is of no consequence that in the present case the Public Service Railway Company began the proceedings by a petition asking the consent of the board instead of itself increasing the rate and waiting for the board to act upon some one's written complaint or on its own initiative. The essential thing meant to be secured by section 17 (h) was agreement between the "public utility" and the board. No right could be lost by the petition, a method more polite or more politic, as we choose to call it. In fact, the exact method provided by section 17 (h) has been pursued in this case. The railway had increased its rates. It has merely secured in advance the assurance that the board will take no adverse action. If it should be considered important, the board may now, being satisfied, as it has already said, that the increase is just and reasonable, approve of the increase, and there would not be even an appearance of any but the statutory method. But neither its prior approval of the petition nor a subsequent order, if the board make one, is necessary to secure the same end. Paragraph (h) distinctly recognizes that the "public utility" retains its power to increase rates; it gives the board power to determine whether the increase is just and reasonable, but it does not compel the board to act on its own initiative; if it does not, the increase is in effect unless some one makes a written complaint.

The evidence shows that the increase is only enough to enable the railway to meet the increased expense forced upon it by the order of the War Labor Board of the Federal Government to increase wages. The increase permitted the railway allowed nothing for return on large investments of capital. The railway, if its petition had been denied, would have had ground to complain that the rate allowed was not just and reasonable. Since its petition was granted, it cannot complain. The prosecutor is in no position to complain. He did not venture to introduce evidence or to contradict the evidence offered on the part of the railway. He contents himself with urging that there was no evidence of the value of the property of the railway, and assumes that the justice and reasonableness of a rate can only be determined by first ascertaining the value of the property devoted to the public service. I am unable to follow his reasoning. The question of the reasonableness of a rate has always been regarded as complex and as largely a business question.

Even in the narrower question of determining the value of the property, it has long been settled that the original cost of construction, the amount expended in permanent improvements, the amount and market value of bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given

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such weight as may be just and right in each case. The reasonable worth of the service rendered is a maximum of the permissible rate and a fair return on the value of the property is a minimum. *Smyth v. Ames*, 169 U. S., 466. Such a standard is certainly a flexible one and sustains the view taken by this court in *Public Service Co. v. Public Utility Board* (the gas rate case), 84 N. J. L., 463. We there said that a just and reasonable rate is rather a question of business judgment than one of legal formula, and must often be tentative since the exact result cannot be foretold; and that the real test of the justice and reasonableness of an individual rate is that it should be as low as possible and yet sufficient to induce the investment of capital in the business and its continuance therein. The opinion in that case was adopted by the Court of Errors and Appeals, 87 N. J. Law, 597, and is the law of the state. Under the tests as stated by the courts, the value of the property is relevant to the question of a reasonable rate, but not conclusive. The reasonableness of the rate is the result, to borrow a scientific expression, of a composition of forces, some of which were set forth in the cases cited. There are others. There can be no better evidence of the reasonableness of a rate than its general adoption by the municipalities of this and other states in ordinances granting consent to the location of street railways over a long succession of years, with acquiescence by the public without question, and, as far as we know, without complaint either by the public or the Boards of Utility Commissioners, while in the earlier days, before public regulation came in vogue, the universal five cent fare had been most attractive to investors. It is true that changing times seem to have made the long accustomed rate of five cents unreasonably low, in view of the notorious fact that increasing burdens of expense have been imposed by public regulation and that the prices of everything and the wages of labor have increased. Five cents was certainly not on its face unreasonably high, since it was a standard rate, and there was an entire absence of proof on the part of the prosecutor. It follows with the certainty of a geometrical axiom that the addition of just enough to meet the increased wages forced on the railway company by the War Labor Board could not make unreasonably high what was not so before. The failure to allow any return on capital invested would, if this had been a case of the board fixing a rate instead of a case of its approving a rate fixed by the railway, have been a violation of the principle of the Gas Rate case that a just and reasonable rate must be sufficient to induce the investment of capital in the business and its continuance therein. It is argued by the prosecutor that the board could not proceed without evidence or a hearing even under section 17 (h). In view of the fact that the same result would follow mere inaction on the part of the board, I am unable to yield assent to the argument. It is at any rate beside the mark in the present case. Here there was evidence of the president of the railway company and no evidence of the prosecutor. I am unable to see how the board could draw any other conclusion than

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it in fact drew. The question of the justice and reasonableness of a rate is a question of inference from facts proven rather than in itself a matter of proven fact. The question is common in the law. Three examples are enough. A landowner on a running stream may make a reasonable use of the running water. It is for a court or jury, using its best judgment, to decide what is a reasonable use. Our conduct must be that of a reasonably prudent man. What is reasonably prudent conduct is for the jury using its best judgment to decide. At common law and under the act of Congress known as the Sherman Act, a contract in restraint of trade is valid if the restraint is reasonable, invalid if it is unreasonable. It is for the court or jury, as the case may be, to decide what is reasonable or unreasonable in the light of the evidence and the decided cases. So in the question of a reasonable rate where there is evidence for and no evidence against the rate and no decided case holding the particular rate to be unreasonable, the tribunal, whatever it may be, is compelled to the inference of reasonableness, as the board was in this case. If any doubt were left, it would be removed by the suggestions made by counsel for the prosecutor as to the method by which the railway might meet this increased expense for wages. One counsel suggested that the difficulty might be met by decreasing the service rendered. I do not doubt that the service might be reduced to such an extent that a five cent fare would suffice. But that was not the problem presented to the board. Their problem was whether to approve the railway's plan to keep the service up to the present standard and allow it the means to pay the increased wages with which the War Board had not provided it. The board had the power to reduce the efficiency of the service, but apparently preferred to keep up the service even at the cost of increasing the rate. This is a question of business policy. No one, except counsel for the prosecutor, now suggests that a reduction of efficiency would be tolerable or tolerated. This solution of the difficulty seems out of the question. We can hardly imagine the municipalities whose interests are represented by the prosecutor adopting their counsel's suggestion that the efficiency in revenue might be met by a reduction in the efficiency of the service. The other counsel suggested, with seeming seriousness and indifference to results, that relief could be found in the appointment of a receiver, and that if, upon a valuation of the property a fare of five cents would result in adequate return on that value, it could make no difference what effect it might have, and that the railway would only be in the position of one who had in the past made improvident bargains. This argument, however, overlooks the nature of the case and the issue presented. No one asked that the board determine what was a fair rate. The only issue was whether the increased expenses due to the action of the War Labor Board might properly be made up out of the proposed increased fare. The petitioner was the Public Service Railway Company, and that company alone. If the proceedings were to be turned into one where the petitioner was to run the risk of business suicide, the

Opinion of Justice Swayze.

interests of underlying companies would be affected; their contracts might be terminated, and it might even be impossible for them to earn a fair return on their investment. They would be entitled to notice and a hearing under section 16 (c). Evidently the present proceeding contemplates no such remedy as a receivership as suggested by counsel. Probably no such remedy was contemplated by the legislature. The failure to provide a procedure by which so drastic a remedy could be legally accomplished, indicated that when the legislature by section 17 gave the board power by order in writing to require every public utility to furnish safe, adequate and proper services and to keep and maintain its property and equipment in such condition^{as} to enable it to do so, and by section 16 gave the board power after hearing, upon notice, to fix just and reasonable rates which should be imposed, observed and followed thereafter by any public utility, it was contemplating orders to the operating public utility only. I do not say that if a reasonable rate drove the operating company into insolvency that rate could not be established against the underlying companies. I only say that the present proceeding is not adapted for that purpose. The act contemplates a regulation of still existing public utilities for the benefit of the public, not their destruction. It was decided more than thirty years ago that the constitutional power was a power to regulate, not a power to destroy. *Railroad Commission Cases*, 116 U. S., 307, 331. I am unable to agree with counsel for the prosecutor either that the remedy for the needs of the railway company to meet the higher wages of its employees is to be found in a lessened efficiency of service or in a receivership. There is no suggestion that government aid is possible. There is no other source of revenue except fares. I think the granting of the railway company's petition was required by the evidence.

The contention of the prosecutor that the rates fixed by ordinances cannot be changed by the consent of both the board and the railway company is disposed of, so far as this court is concerned, by the decision in *Collingswood Sewerage Co. v. Collingswood*, 102 Atl., 90i; and in *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Comrs.*, 104 Atl. 218. The suggestion that the matter is one for the legislature alone and not for the Public Utilities Commission is settled adversely to the prosecutor by the United States Supreme Court (*Railroad Commission Cases*, cited above) and by constant practice in this and other states.

The orders brought up by these two writs must be affirmed with costs.

Rule affirming orders entered October 19, 1918.

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*Rule Affirming Order.***Rule Affirming Order.**

Entered October 19, 1918.

New Jersey Supreme Court

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CHARLES F. X. O'BRIEN,

*Prosecutor,**vs.*BOARD OF PUBLIC UTILITY COMMISSIONERS AND
PUBLIC SERVICE RAILWAY COMPANY,*Respondents.**Upon
Certiorari.**Rule Affirming.*

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This cause coming on to be heard before the Court upon the return of the writ of certiorari in this cause, which brings up for review an order of the Board of Public Utility Commissioners bearing date the 25th day of September, 1918, in the matter of the application of Public Service Railway Company for an increase of fare, and the reasons filed by the prosecutor for the reversal of said order having been read, and the return to said writ, including said order and the report and proceedings of said board having been inspected, and the arguments of Marshall Van Winkle and George L. Record of counsel for the prosecutor; and L. Edward Herrmann, counsel with the Board of Public Utility Commissioners, and R. V. Lindabury and Frank Bergen, of counsel with the Public Service Railway Company, having been heard; and the Court having considered said reasons, return, order, report, proceedings and arguments, and being of the opinion that said order brought up for review should be affirmed;

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IT IS ORDERED that the said order so brought up for review by the writ of certiorari heretofore allowed in this cause be and the same is hereby in all things affirmed with costs; and that the order and proceedings brought up for review by said writ be and they are hereby remitted to the Board of Public Utility Commissioners.

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Rule entered this 19th day of October, A. D. 1918.

Rule (in form as above) entered Oct. 19, 1918, affirming order of board bearing date July 10, 1918.

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Notice of Appeal.

Notice of Appeal.

Filed November 13, 1918.

10 **New Jersey Supreme Court**

CHARLES F. X. O'BRIEN,

Prosecutor,

vs.

20 THE BOARD OF PUBLIC UTILITY COMMISSIONERS
and THE PUBLIC SERVICE RAILWAY COMPANY,

Defendants.

On Certiorari.

Notice of Appeal.

(2 Cases)

To L. E. Herrmann, attorney of Board of Public Utility Commissioners,

Frank Bergen, attorney of the Public Service Railway Company.

PLEASE TAKE NOTICE that the prosecutor appeals from the entire judgment and record in the above entitled causes to the New Jersey Court of Errors and Appeals.

30 MARSHALL VAN WINKLE,
Attorney of Prosecutor.

Dated Oct. 31, 1918.

Service of above notice duly acknowledged.

Filed Nov. 13, 1914.

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Reasons for Reversal.**New Jersey Court of Errors and Appeals**

 CHARLES F. X. O'BRIEN,
*Prosecutor,**vs.*
 BOARD OF PUBLIC UTILITY COMMISSIONERS AND
 PUBLIC SERVICE RAILWAY COMPANY.

*Certiorari.**Reasons for
Reversal.*

 CHARLES F. X. O'BRIEN,
*Prosecutor,**vs.*
 BOARD OF PUBLIC UTILITY COMMISSIONERS AND
 PUBLIC SERVICE RAILWAY COMPANY.

Certiorari.

The prosecutor writes down the following reasons upon which he relies for a reversal of the judgment of the Court below:

1. The Board of Public Utility Commissioners was without jurisdiction to make the orders mentioned in the writs.

2. The orders were made without any evidence before the board of the value of the property of the Public Service Railway Company used and useful in serving the public, except as hereinafter stated.

3. The board did not determine what was or is a fair rate of return upon the fair value of the property of the Public Service Railway Company used for or devoted to the public at the time the said orders were respectively made.

4. The board ordered a charge of one cent for initial transfers without determining what was or is a fair rate of return upon the fair value of the Public Service Railway Company's property used for or devoted to the public at the times the said orders were made, respectively.

5. The board ordered a charge of one cent for initial transfers without determining that said amount, or the total to be received by the company because of said charge was, in addition to the fares continued by said board and in force at the time the order of July 10, 1918, was made, was or is a fair rate of return upon the fair value of the property of the Public Service Railway Company used for or devoted to the public.

6. The board ordered a charge of seven cents where five cents is now charged, up to and including March 31, 1919, and fixed as a

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New Jersey Court of Errors and Appeals

CHARLES F. X. O'BRIEN,

Prosecutor,

vs.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS
OF NEW JERSEY and THE PUBLIC SERVICE
RAILWAY COMPANY.

Certiorari.

(2 Cases)

Points for Prosecutor.

1. The Board has jurisdiction to enforce, but no jurisdiction to abrogate, the ordinance contracts. The Legislature clearly intended to give the Board a jurisdiction to enforce ordinance-contracts, and used express words in an attempt to accomplish this purpose. (See Section 17 of the Public Utility Act of 1911.)

A jurisdiction in the Board to abrogate ordinances is not specifically granted by the act of 1911; and such jurisdiction is not necessarily implied. Such jurisdiction cannot be implied at all—indeed such jurisdiction is forbidden—because of Sections 17 and 37 of the Act, the first of which grants, or attempts to grant, to the Board, a jurisdiction to compel compliance with ordinance-contracts; and the second of which exempts ordinance-contracts from abrogation through the exercise of any jurisdiction by the Board.

In the absence of clear and definite language, conferring without ambiguity jurisdiction in the Board to increase rates of fare agreed upon by the Railway and the local authorities, it should not be held that the Legislature has intended to delegate any of its powers in the matter, whatever its powers may be.

Our argument in support of this point has already been submitted to this Court in a brief filed by us, under leave of this Court, in the case of *Collingswood Sewerage Co. v. Borough of Collingswood*, argued last term. We refer to that brief, and rely upon and press the points and arguments therein contained. To save unnecessary printing, we file a copy of that brief with this brief, the same to be regarded as part of this brief.

2. The Board has exercised a discretionary power to fix rates which is in fact legislative. Its action is arbitrary and baseless.

The Board has no power to make an order compelling the public to pay on the ground that such order is viewed by the Board as desirable, and a failure to make such order is viewed by the Board as impolitic.

The Act of 1911 does not lay down a sufficiently definite rule which the Board is merely to apply to specific cases as they arise,

to warrant the determination that the Board has not been endowed with a discretionary power of fixing rates which is, in fact, legislative.

The Board has no power to make an order merely because the Board determines that such an order is advisable. The Board cannot exercise a judgment and discretion of equal latitude with the power of the Legislature itself. The Board has no power to make an order based on grounds of public policy or economics.

3. The function exercised by the Board in fixing a rate to be paid is a judicial function, to be exercised only on evidence.

The Board has no power to fix a rate to be paid by the public merely on evidence that the Railway presently needs to receive such a rate; it can only fix a rate to be paid by the public on evidence showing reasonably, not only that the Railway needs to receive such a rate, but that it deserves to receive such a rate, that is, that it earns such rate on the value of its property used for or useful to the public. It is the value of the Railway's property and the service given which are at the root of any order directing the public to pay a rate for the use of the Railway's property.

Because of the nature of Points 2 and 3, it seems best to discuss them together.

Has the Board a jurisdiction to fix a rate of fare to be paid by the public, under the compulsion of the order of the Board, without the Board finding on evidence that such rate is a fair rate of return on the value of the property of the Railway used for or useful to the public?

We contend that the orders were made arbitrarily, without the Board knowing the value of such property, without the Board finding such value, without the Board determining what was a fair rate of return on that value.

The Act places the burden of proof on the Railway. "Burden of proof" is a substantial thing; it is not an empty phrase.

To our contention the Board and the Railway answer, as we understand, that the Board, in making the orders under review, did not fix a rate of return; that the Railway did not ask the Board to fix such rate; that the Board provided only for a revenue sufficient to meet an increase in wages of employees, which increased wages it needed to pay, or should pay, because of the suggestions of the War Labor Board.

If the suggestions of the War Labor Board are a sufficient foundation for the orders under review, then our contention cannot prosper; but, as we understand, in discussing the legality of the orders we are not concerned only with a mere necessity of the Railway.

Moreover, it is to be considered that when the first order, the one of July 10th, was made, the War Labor Board had made no suggestion or recommendation of any kind—that came along afterwards.

We do not understand that an order compelling the public to pay

a rate may be made only because such order "would be best" for the Railway.

Nor do we understand that the test of whether an order should be made is the ability of the Railway to comply with it, or to get along without it.

To say that an order should be made because not to make it would result in disaster to the Railway, is to say that matters are to be bounded by the needs of the Railway alone, irrespectively of the value of the service rendered by the Railway; which is a proposition we deny. Such a proposition ignores the right of the public to receive value for the price they pay—a value commensurate with the amount paid. There must be a relation of value between that which is paid and that which is received for the payment.

The needs of the Railway alone cannot decide matters. We may suppose a case where the needs of a railway for increased revenue had clearly resulted from gross mismanagement and positive fraud; and, surely, in such a case, mere proof that the railway needed more revenue would not alone furnish a proper foundation for an order compelling the public to pay the amount the railway needed.

No matter what the Railway needs, the public should pay only for what the public gets.

The question is not one-sided; it is not only whether the Railway needs more revenue; it is broader than that; it includes an inquiry whether the public should be compelled to pay the amount needed because the Railway earns that amount from the public by virtue of the service which the public receives from the use of the Railway's property. And the public should not pay except for corresponding value received by the public. How else can justice be achieved?

The question is not simply whether the Railway can, or cannot, get along without an order. If an order should properly be made against the Railway, to better service, for instance, to better, we will say, intolerable conditions of service, in a case where the public is paying a high rate on an unkept promise of good service, there would not be an inquiry, involved in, or preliminarily to the making of such order, to ascertain whether the Railway could comply with the order. If a judgment should, in the law, pass against a party to an action, because the merits are that way, there is no preliminary inquiry by the Court to ascertain if the party has the ability to pay the judgment. And so here; matters cannot be decided only on a consideration of the needs of the Railway. An order should not be made, cannot legally be made, without a determination of the question whether the public should pay the amount needed by the Railway because of the value of the service received by the public. And this question must be determined, for it is vital, and it must be determined independently of the needs of the Railway, for it is a separate question. There is no such determination back of the orders under review. We say that a determination of the question whether the public should pay the amount needed by the Railway, necessarily involves a consideration of the value of the Railway's property used for or useful to the public; that this consideration is necessary; that

it is basic; that without this no valid order compelling the public to pay can be made.

The Board and the Railway meet our contention by stating that the orders under review "were not made in a rate proceeding"; that they were made in "an emergency proceeding"; that in "an emergency proceeding" the Board may dispense with proof; that it may dispense with any inquiry as to the value of the Railway's property; that without fixing a rate which is a fair return on the Company's property, the Board may arbitrarily order the public to pay a rate fixed by the Board.

We are here to attack this proposition. We view this theory of the jurisdiction of the Board as untenable.

We are unable to distinguish between "a fair rate of return" on the value of the Railway's property used for and useful to the public, and a fare or rate paid by the public, and received by the Railway, for using that property; and if the meanings are equivalent, then our contention seems to be justified.

The Railway frankly stated to the Board, "This is not a rate case"; and it stated further, in substance, "Neither you nor the public are now concerned with the value of our property. We need the money. We will prove our need; and, having proved our need, it is your duty, as it is your power, to give us by your order, compulsory against the public, the power to compel the public to pay the amount we need."

The word "emergency" was used as a word magic to produce the orders under review.

A summary of valuations of items of the Railway's property, called "The Cooley Valuation," was introduced in evidence over our objection. But, afterwards, the Board threw this paper out of the case, on the ground urged by us, namely, that it was entirely unverified and unproved, and inadmissible for use by the Board.

The Board distinctly placed its right to make the orders on the ground that it was dealing with "an emergency proceeding"; so that the facts sharply present the issue raised by our contentions.

The Act of 1911 does not recognize or provide for "an emergency proceeding." No requirement of proof can be dispensed with merely because a proceeding is called "an emergency proceeding." There is no express authorization in the Act for "an emergency proceeding." If such a thing as "an emergency proceeding" is to be recognized, and such proceeding is one which is merely of a summary nature, one in which no proof need be offered, a proceeding where only a partial presentation of matters is to be made, the ordinance contracts should not be abrogated in such a proceeding.

The Acts of other states have provisions relating to "emergency proceedings."

The Wisconsin Act (Act of 1911, Chap. 87) contains special provisions relating to an "emergency"; and a decision of the Wisconsin Railroad Commission, which we refer to, distinguishes "an emergency proceeding" from "an ordinary proceeding."

The Wisconsin Act (unlike the New Jersey Act) contains provisions (which we may describe as additional provisions) as follows:

Section 1797-m—99. 1. "The Commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the people or any public utility of this state, in case of any emergency to be judged of by the Commission, to temporarily alter, amend * * * any existing rates, schedules and order relating to or affecting any public utility or part of any public utility in this state.

2. "Such rates so made by the Commission shall apply to one or more of the public utilities in this state or to any portion thereof as may be directed by the Commission, and shall take effect at such time and remain in force for such length or time as may be prescribed by the Commission." (Wisconsin Stat., 1911, chap. 87.)

These provisions of the Wisconsin Act have been construed by the Wisconsin Commission in the case of *Milwaukee Electric R. & Light Co.*, P. U. R. 19184A, p. 806 (Oct., 1917), where the Commission said:

"The possible emergencies contemplated by the statute unquestionably relate both to the public and the utility, or either. As said by this Commission in the emergency application in relation to street car fares and zone limits, decided January 16, 1917, 18 Wis. R. C., 681: 'The provisions of §1797-28 (the Railroad Act) were intended to apply to situations unusual, unforeseen, and out of the ordinary, such as could not be adequately or efficiently handled in ordinary proceedings; that such necessity must be a pressing one—an exigency, and the conditions or occurrences responsible for such emergency, must threaten serious loss or inconvenience to the public directly.' "

The Wisconsin Railroad Commission held, also in *Re Milwaukee Ry. & L. Co.*, P. U. R., 1917-C, p. 97 (Jan. 16, 1917), that no emergency within the meaning of the Wisconsin statute quoted from above is shown to exist pending the revaluation of the company's property to determine the reasonableness of its rates, by mere evidence that the cost of operation has increased by reason of the general increase in the cost of labor and materials so as to make the revenues non-compensatory.

The Indiana statute has the same provisions as the Wisconsin statute (Section 122).

The Indiana Commission has held that it will not, under any circumstances, permit utilities to capitalize the war, or use any claim for a temporary emergency rate as a means of securing an unjust return or thereby permanently establish higher rates. (*Re Indianapolis & Cincinnati Traction Co.*, P. U. R., 1918, C. 761.)

In this Indiana case, the company expressly predicated its right to relief upon the emergency section of the Indiana statute; and waived any desire to secure increased rates for the payment of dividends, and asked for only sufficient increases in rates to provide

enough additional revenue to take care of operating expenses and fixed charges.

The Ohio statute has the same provisions as the Wisconsin statute (Laws 1911, No. 325, Sec. 34).

The Alabama statute has provisions covering emergency rates for railroads (Code 1907, Sec. 5721).

The Nebraska statute has provisions covering "emergency" cases, to be judged by the commission, relating to "any railway company or common carrier" (Cobbey's Anno. Stats. 1909 as amended, Sec. 10,654).

The Oregon statute has a provision covering "emergency" cases, to be judged by the commission, relating to railroad companies.

The Rhode Island statute provides that the commission may, when deemed by it necessary to prevent injury to the business or interest of the people or a public utility, in case of any emergency to be judged by the commission, permit any public utility to temporarily alter, amend or suspend, any existing rates, schedules and orders relating to or affecting any public utility or a part of any public utility (Acts 1912, Ch. 795, Sec. 44).

The South Dakota statute provides for the making of emergency rates for common carriers (Sess. Laws 1911, Ch. 207, Sec. 54).

The Texas statute provides that the commission may fix railroad rates in emergency cases (Sayles Civ. Stats. 1897, Art. 4581-a).

Whether we view the function of the Board in fixing and compelling the public to pay a rate as judicial or legislative, it seems to us matters are equally favorable for us under our contentions; for, if the function is judicial, it can be exercised only on evidence, and evidence is lacking in this matter; and if the function is legislative, the principles on which it is to be exercised are not sufficiently laid down in the Act delegating the legislative power, and the Act is objectionable.

Professor Wyman in speaking of the majority opinion in 219 U. S. 433, uses this language:

"It is all very well to say, as the majority did, that commissions must have a broad outlook; but the question is by what rules they are to act, if we are to have a government of laws, not of men."

Dealing first with the proposition that the function exercised by the Board may be viewed as legislative, we point out that there is no express adjudication, as far as we know, holding that the mere statement in the Act (or in similar Acts) that the Board shall fix a rate that is just and reasonable is a sufficient statement of the principle which is to guide and control the Board. "The question which still awaits final judicial settlement by the Supreme Court is whether the provision of the law may fairly be said to lay down a sufficiently definite rule which the commission is merely to apply to specific cases as they arise, to warrant the determination that that body has not been endowed with a discretionary power of fixing rates

which is, in fact, legislative." (*Willoughby on the Constitution*, p. 1323, Ed. 1910.)

If the orders under review rest on the proposition that no matter how it came about that the Railway needs increased revenue, it is, all things considered, "best on economic grounds," "best on grounds of public policy or expediency," that the orders should be made, we say then that the making of the orders involves the exercise of a discretionary legislative function incapable of delegation by the legislature.

In discussing the delegation of legislative power, the true distinction to be made is between the delegation of power to make the law, and the conferring an authority or discretion to be exercised under and in pursuance of the law.

Professor Wyman (in *Harvard Law Review*, Vol. 27, p. 569, 1914) in speaking of certain decisions of the courts respecting the jurisdiction of the Interstate Commerce Commission, uses this language:

"These decisions mean that we as a people will not be content to have our rights determined by administrative fiat; we demand reasoned judgments based upon ascertained principles generally understood. If the Commission is to be held to its functions of administering the law, we must have some basis for determining the meaning of the word reasonable used in the Act. The Commission, as has been seen, can only set aside a rate if it is unreasonable; in its place it can only fix a rate if it is reasonable. But how is it to be determined what rates are unreasonable, and what charge would make them reasonable, unless we have definite principles universally recognized? The Interstate Commerce Commission has made noteworthy progress in the past few years in establishing by its decisions the bases upon which the reasonableness of rates depend as a matter of law. The Supreme Court has also of late been giving the stamp of its approval to rules for the determination of the reasonableness of rates which seem at last to be practicable. Vague though a phrase in a statute may apparently be, yet it may well have a definite meaning in the law; and by the prevailing rule, when a given phrase has an accepted significance at common law, it should be taken in that sense. We must have some objective standard to go upon or we have no security from subjective difficulties. What is reasonable according to principles of law governing the matter is what we must insist upon in order to confine our considerations to administration. If we have nothing to rely upon except what seems upon the whole to the body in power desirable or impolitic, we can hope for nothing better than benevolent despotism subject to all the corresponding risks of arbitrary power."

"The Act is objectionable, because it would be a sheer interpolation to imply that the determination of the Board is to be regulated by any fixed standard."

See *State v. Hudson County Avenue Commissioners*, 37 N. J. Law, 17.

“But, from what I have said, I think it must be, upon careful consideration, conceded that a power unchecked, except by the obligations of fairness and a reasonable discretion, is vested in this body of persons to distribute this tax according to its judgment of what is just and right, among the various townships in this county. Holding this opinion, it seems to me necessarily to result that this act cannot be enforced. The reason of this conclusion is, that the legislature has transferred to these commissioners a part of the law making power.” *Ch. J. Beasley in State v. Hudson County Avenue Commissioners*, 37 N. J. Law, 19.

The mental attitude which leads one to allow or disapprove a thing may be the result of one's sentiments; one's political beliefs; one's economic theories; one's religious and social relations, and the like; one's judgment as to expediency. All these are matters to appeal to legislative judgment. No one would contend that these matters should appeal to a body of men exercising judicial functions. The Legislature itself is the body to declare what is expedient from the standpoint of policy, economics and the like.

The Board made the orders (See p. 7 of orders of July 10, 1918) to prevent “a default in the payment of rentals and interest on securities.” It viewed such a default as bad public policy, and wrong from the standpoint of economics. It made the orders to protect “the solvency of the Company.”

Even if we admit that the Board acted wisely from the standpoint of public policy and economics, are we not clearly entitled to say that only the Legislature itself could make an order on such a footing?

The basing of rates upon what is economically desirable has never been the test of the Federal Courts in reviewing the orders of the Interstate Commerce Commission in relation to rates.

Phil. and R. Ry. v. Int. C. C., 174 Fed. 687.

The Board has no power to make an order merely because the Board determines that such an order is advisable. The Board cannot exercise a judgment and discretion of equal latitude with the power of the Legislature itself.

Unless an Act contains definite principles to govern the Board, the Board is exercising legislative power, and is enacting a special law each time it makes an order of the character of the orders under review.

If our view is taken, then the Board in each case makes an order which follows necessarily, by force of the Act itself, upon the establishment of certain facts. If our view is taken, the Board, having ascertained the value of the Railway's property, makes an order fixing a rate of return which shall be reasonable. This rate might be a percentage established by the Board. In proceeding in this way, there would be a valid exercise of the power given by the Act to fix a rate which is just and reasonable. But it seems clear to us that to hold that the Board may arbitrarily, or on grounds of policy or expediency, fix a rate for the public to pay, is to say that the

Board may act with as full power as the Legislature itself; and certainly the exercise of such power is forbidden.

If the Board is exercising a legislative power, how can our courts correct such exercise? The courts cannot inquire into the policy or expediency of an enactment of the Legislature. And if the Board has exercised a legislative power in the making of the orders under review, and if it founded its action on policy or expediency, what power have our courts over such exercise of power? It seems clear to us that the provision of the Act permitting the Supreme Court to set aside an order "if there is no evidence reasonably to support it," shows that the Board, in fixing a rate, is exercising a judicial power, and one which must be founded on evidence,—a power which cannot be founded only on public policy or economics.

We view the function of the Board in fixing what the public shall pay for the use of the property of the Railway as a judicial function. And our view is supported, as we have just said, by the provision in the Act that an order of the Board may be set aside by the Supreme Court unless it have evidence to reasonably support it.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and this, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States."

Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418.

Reasonableness of a return is a judicial question.

Wyman on Rate Regulation, Sec. 307, 2d Ed. 1915.

As we conceive, certain classes of orders which are contemplated by the Act may be quasi-judicial, or legislative; but an order fixing a rate to be paid by the public is made under the exercise of a judicial function.

Chief Justice White, in 225 U. S. 282, *Proctor & Gamble Co. v. U. S.*, in speaking of the Interstate Commission, said it was "An administrative body endowed with what may be in some respects qualified as quasi-judicial attributes."

The Supreme Court, in 233 U. S. 479, said that the Commission had "a quasi-judicial capacity," and, also, "a quasi-legislative capacity."

"The somewhat mixed functions of the Commission, and its peculiar status are indicated by the various descriptive terms which have been applied to it, both by the Commission and the Courts * *. It has frequently been held to have quasi-judicial power."

Wyman on Rate Regulation, 2nd Ed., 1915, Sec. 1133.

It seems clear to us that no matter how the proceeding before the Board may be described, the Board needed to determine what was a fair rate of return upon the value of the Railway's property used for or useful to the public before it could properly determine what was a just and reasonable fare for the public to pay.

And we must bear in mind that no presumption exists as to any fact or question of fact. The burden of proof was on the Railway, and they needed to produce proof of every fact which needed to appear.

"Evidence is as necessary to the discharge of the Commission's quasi-judicial functions as is a hearing, and a finding, without evidence to support it, is arbitrary and void. Hence, when it is contended that an order, the enforcement of which is resisted, was rendered without any evidence to support it, the consideration of such a question involves, not an issue of fact, but one of law, which it is the duty of the courts to examine and decide."

Wyman on R. R. Regulation, Ed. 1915, Sec. 1145.

Section 26 of the Act provides that "All hearings and investigations, before the Board, or any member thereof, shall be governed by rules adopted by the Board, and in the conduct thereof neither the Board nor such member shall be bound by the technical rules of legal evidence."

We do not read this section as meaning that the Board has the right to determine an application on hearsay. The Board, before changing a rate, must first "determine" that the existing rate is unjust, unreasonable or insufficient (Sec. 16, Sub. c.)

We do not understand that the Board sits as a commission of experts.

The Oregon Commission in a recent case made this statement with respect to the character of its jurisdiction:

"In fixing rates for a utility, the Oregon Commission performs three distinct functions. The first, administrative, in seeing that the public gets the service it pays for; the second, judicial, in seeing that the public pays for what it gets; and the third, financial, in permitting a return sufficient to justify the investment of capital in public service." (*In re Portland Railway, Light & Power Co.*, P. U. R., 1918, B-2.)

The proceeding before the Board called for the exercise of the "judicial function" as classified by the Oregon Commission; for, in this proceeding, the Board was asked to come to a determination for the purpose of seeing that the public pays for what it gets. In the proceeding questions of service by the Company were not up for determination. The Board was dealing with questions of quality of service only incidentally, if at all.

"The question of the reasonableness of the rate charged for transportation by a railroad company is peculiarly a question for judicial investigation and decision." (*Tift v. Southern R. Co.*, 123 Fed., 795; 134 U. S., 418; *Chicago R. Co. v. Minne-*

sota; U. S. v. Missouri Pacific R. Co., 65 Fed., 903; *Interstate C. C. v. Western R. Co.*, 88 Fed., 186.)

The New York Commission has held that the final decision of a New York Commission in a rate proceeding must be made upon the evidence as submitted, since in fixing rates it acts quasi judicially. (*Re Long Island Ry. Co.*, P. U. R., 1918, A-3, p. 651.)

Quasi judicial is a term applied to the action and discretion of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature. (*See Bair v. Struck*, 29 Mont., 45, 74 Pac., 69, 63 L. R. A., 481; *Mitchell v. Clay County*, 69 Neb., 779, 96 N. W., 678; *De Weese v. Smith* (C. C.), 97 Fed., 317.)

Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial. (Mechem Pub. Off., §637; Bishop, Non-Contract Law, §§785, 786.) Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally "quasi judicial." The officer may not, in strictness, be a judge; still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial. (Throop, Pub. Off., §§533, 534; *Bair v. Struck*, 63 L. R. A., at page 483.)

Mr. William D. Guthrie, the eminent constitutional lawyer, in a lecture delivered before the Association of the Bar of the City of New York in 1916, stated that the power exercised by the Interstate Commerce Commission and by other public service commissions is a judicial power. His language is:

"It cannot well be denied that the Interstate Commerce Commission and other public service commissions are constantly exercising judicial powers, and that there is seldom any effective judicial review of their rulings. The essential nature of their acts of power is not, of course, to be changed by calling them quasi-judicial, or by any other nomenclature. The power to hear evidence and decide a controverted question of fact is a judicial function just as much as the power to decide a question of statutory construction, or other question of law." (Some Legal Phases of Corporate Financing; Lectures by Stetson, Guthrie and Others, Macmillan, 1917.)

The theory upon which this exercise of judicial power is being allowed under the Federal Constitution, which separates the judicial from the legislative and executive powers, is that performance of judicial duties may be vested in executive or administrative officers

where such power is merely incidental to the exercise of functions properly administrative.

In speaking of the provision that the Public Utility Boards "shall not be bound by the technical rules of legal evidence," Mr. Guthrie said:

"The statutory provision generally inserted that these tribunals shall not be bound by the technical rules of evidence, I venture to say has only complicated the performance of their duties and has been of little practical help, for legal evidence must be adduced in order to support any finding."

Mr. Guthrie quotes Professor Wyman as follows:

"Professor Wyman has said that 'the more liberal the practice in admitting testimony, the more imperative the obligation to preserve those essentials of action in accordance with evidence adduced by which rights have been immemorially asserted or defended'."

Mr. Guthrie shows that, as Public Utility Commissions are exercising judicial power, they have not the same liberty and facility of action as if they were acting as experts charged with the sole duty of acquiring special and accurate knowledge as to public utilities, and of formulating rules with respect to them, which are made *prima facie* correct and binding, subject to review in the courts, if challenged. Having judicial power, they may have the most accurate expert and special knowledge of the situation presented by the case or complaint before them; they may have a few weeks before concluded a thorough investigation of the subject in all its aspects and at great expense and delay; they may know all the material facts with reasonable certainty; prompt action may be advisable and they may be prepared to act; but they must nevertheless in each case proceed anew to hear and consider and rule upon every particle of evidence, relevant or irrelevant, which counsel may offer to adduce. Hence the great mass of information which the Commissions are laboriously accumulating year after year is not available to them as evidence upon which to base an order in any contested case in hand.

In the Bay State Rate Case (at p. 28 of the Report of the Public Service Commission of Massachusetts) appears this significant language:

"No evidence was introduced by the company to substantiate its claim of 'intangible property'. The reasons given are that 'with the full history of the company before the Commission this question became an economic and legal question for the Commission to decide' and that 'the Commission is an expert body appointed for the purpose of doing justice to the parties in just such situations, and no opinion evidence would aid the Commission in this respect'. In view of the burden of proof imposed by the statute these reasons can hardly be deemed adequate. If such 'intangible property' exists, both the remonstrants and the Commission were entitled to due notice, and evidence should have been produced."

We contend that every fact essential to a determination by the Board that the existing rate was insufficient must properly appear before the Board, and that every such fact must appear in the proceeding, before any order of increase could be made.

The Massachusetts Public Service Commission has held that no presumption as to any fact or question of fact exists in a proceeding to ascertain the reasonableness of a proposed increase in rates (*Bay State Rate Case*, P. U. R. 1916, F. 221).

“The provisions of the statute clearly indicate the legislative intention to be that where a Commission fixes a rate after a hearing the rate so established must be based upon the evidence presented to the Commission, and indeed on no other theory can the provision making an appeal to the Circuit Court the exclusive remedy for determining the reasonableness and lawfulness of the order be sustained as a valid enactment.”

(*Public Utility Commission v. Atchison T. & S. F. R. Co.* at p. 1005 P. U. R. 1917 E.)

“While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be reexamined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the Courts to examine and decide (*Int. Com. Comm. v. Louis & Nash. R. R.*, 227 U. S. 88, 91, 92 and cases cited.)”

In discussing the question of burden of proof, the Interstate Commerce Commission (in *Re: Advances in Rates by Carriers in Western Trunk Lines*, 20 Interstate Commerce Reports 315) said:

“The assumption of the law is that the railroad which increases its rates takes such action knowing that the law casts upon it—if challenge is made, either by this Commission or otherwise—the burden of justifying its action. There is, in the language of Dean Wigmore, ‘The risk of non-persuasion.’ (Wigmore on Evidence §2485.) The railroad must assume to prove to this Commission that their increased rates are within the words of the description and limitation used in this act; that is that they are just and reasonable. And to say that they must prove that, is to say that they must satisfy our minds of this fact.”

The United States Supreme Court has held that

“The section provides for a full hearing, and that confers on the carrier the privilege of introducing testimony, and thus imposes on the Commission the duty of deciding in accordance with the facts proved; a finding without evidence is beyond the power of the Commission.” (*Interstate Commerce Commission v. Louisville, etc. R. Co.*, 1913, 227 U. S. 88, 33 S. Ct. 185, 57 U. S. (L. Ed.) 431.)

We now quote from an opinion of the United States Supreme Court, which is informing and decisive on the matters we are discussing.

“On the appeal here, the Government insisted that while the act of 1887 to regulate the commerce (24 Stat. 379, c. 104, §§14, 15, 16) made the orders of the Commission only *prima facie* correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. 584, c. 3591, §15) that rates should be set aside if after hearing the ‘Commission shall be of the opinion that the charge was unreasonable.’ In such case it insisted that the order based on such opinion is conclusive, and (though *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

“1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed *the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless.* (Italics ours.)

“And if the Government’s contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make the findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution’s condemnation of all arbitrary exercise of power.

“In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi-judicial in character*, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the ‘indisputable character of the evidence.’ *Tang Tun v. Edsell*, 223 U. S. 673, 681; *Chin Yoh v. United States*, 208 U. S. 8, 13; *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *Zakonoite v. Wolf*, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made. *United States v. B. & O. S. W. R. R.*, 226 U. S. 14. Cf. *Atlantic C. L. v. North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301; *Oregon Railroad v. Fairchild*, 224 U. S. 510; *I. C. C. v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co. v. Interstate Com. Comm.*, 219 U. S. 433; *Muser v. Magone*, 155 U. S. 240, 247.

“2. The Government’s claim is not only opposed to the ruling in *I. C. C. v. Union Pacific*, 222 U. S. 541, 547, and the cases there cited, but is contrary to the terms of the Act to Regulate Commerce, which, in its present form, provides (25 Stat. 861, §17) for methods of procedure before the Commission that ‘conduce to justice.’ The statute, instead of making

clares that 'they may be suspended or set aside by a court of competent jurisdiction.' 36 Stat. 539 (15). Of course, that can only be done in cases presenting a justifiable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

"3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Int. Com. Comm. v. Northern Pacific Ry.*, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusion of fact (*Int. Com. Comm. v. Delaware &c. Ry.*, 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551.

"4. The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of §12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevails in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25.

"*But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.* (Italics ours.) In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross examine witnesses, to inspect documents and to offer evidence

in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for, otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.*, 226, U. S. 14."

In *Int. C. C. v. Union Pac. Ry.*, 222 U. S. 541, is found a statement of the grounds upon which the courts will set aside orders of the Interstate Commerce Commission, as follows: Where the order is: 1. Beyond the power which it could constitutionally exercise. 2. Beyond its statutory power. 3. Based upon a mistake of law. But questions of fact may be involved in the determination of questions of law—so, an order may be set aside. 4. If rate so low as to be confiscatory. 5. If Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support the order.

"The Commission as a quasi-judicial body is vested with many of the powers of a court. It may summon parties before it, it may compel the production of papers and the giving of testimony, and may make orders which have the force of law. It is likewise subject to many of the obligations and restraints which rest upon a court. If it may summon parties before it and issue orders which may deprive them of property and in certain respects control their conduct, the parties so affected must have an opportunity to be heard. There are few cases in which this question has directly arisen, but in all of them it is distinctly recognized that administrative orders, quasi-judicial in character, are void, if a hearing was denied, or if that which was granted, was inadequate or unfair. In the comparatively few cases in which such questions have arisen, it has been pointed out that it has invariably been recognized that administrative orders quasi-judicial in character are void."

1. If a hearing was denied.
2. If, although granted, it was inadequate or manifestly unfair.
3. If the finding was contrary to the indisputable character of the evidence.
4. Or if the facts found do not, as a matter of law, support the order.

Wyman on Rate Regulation, Ed. 1915, Sec. 1143.

It is the spirit which gives life to any rule, to any statute. The Public Utility Act was designed to give public utilities and the public substantial justice. If the Act means what the Railway says it means, it is not a valid statute. It means that we are governed by men, and not by law. To hold that it means what we say it means is, we respectfully maintain, to hold that it ministers to substantial justice.

MARSHALL VAN WINKLE,
GEORGE L. RECORD,

NOV. 1. 1918

New Jersey Court of Errors and Appeals

CHARLES F. X. O'BRIEN,

Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS and
PUBLIC SERVICE RAILWAY COMPANY,

Defendants-Respondents.

On Certiorari.

(Two Cases.)

Brief for Board of Public Utility Commissioners.

The facts upon which the Board made its respective orders of July 10 and September 26 last, under review, are fully set forth in its reports accompanying said orders.

These orders were reviewed by the Supreme Court under Sec. 38 of the Act creating the Board, Chap. 195, Ph. Laws 1911, as amended by Chap. 30, Ph. Laws 1918.

“The Supreme Court is hereby given jurisdiction to review said order of the Board and to set aside such order in whole or in part, when it clearly appears that there was no evidence before the Board to support reasonably the same, or that the same was without the jurisdiction of the Board.”

It is not contended by the prosecutor that there was no evidence before the Board to support reasonably the order; his contention is that the same was without the jurisdiction of the Board, first, because of the existence of municipal ordinances limiting the rates of fare to be charged by the Public Service Railway Company, and, secondly, that the Board is without power to fix just and reasonable rates without first determining the fair value of the property used.

The jurisdiction of the Board to regulate rates despite the existence of rate-fixing ordinances has been heretofore determined by this Court.

Borough of Bradley Beach v. Atlantic Coast Electric Railway Co., 104 At. Rep. 218.

Collingswood Sewerage Company v. Borough of Collingswood, opinion filed Nov. 18, 1918.

As to the second point urged by the prosecutor, the pertinent sections of the Act creating the Board and defining its powers are as follows:

Chap. 195, Ph. Laws 1911.

16. The Board shall have power * * *

(b) From time to time to appraise and value the property of any public utility as herein defined, *whenever in the judgment of said Board it shall be necessary so to do*, for the purpose of carrying out any of the provisions of this act, * * *

(c) After hearing, upon notice, by order in writing to fix just and reasonable rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility, as herein defined, whenever the Board shall determine any existing individual rate, joint rate, toll, charge or schedule thereof, or commutation, mileage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential.

* * * * *

17. (h) When any public utility, as herein defined, shall increase any existing individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates, or change or alter any existing classification, the Board shall have power, either upon written complaint or upon its own initiative, to hear and determine whether the said increase, change or alteration is just and reasonable. The burden of proof to show that the said increase, change or alteration is just and reasonable shall be upon the public utility making the same. The Board shall have power, pending such hearing and determination, to order the suspension of the said increase, change or alteration until the said Board shall have approved said increase, change or alteration, not exceeding three months. It shall be the duty of the said Board to approve any such increase, change or alteration upon being satisfied that the same is just and reasonable.

The other paragraphs enumerating the powers of the Board apply to standards of service.

Broadly interpreted, the powers of the Board may be said to be:

(1) To require utilities to furnish to the public safe, adequate and proper service.

(2) To fix a just and reasonable rate to be charged for such service; in making of rates the Board may investigate upon its own initiative the justness and reasonableness of the existing rates charged by a utility, or when any public utility shall increase any existing rate charged by it, determine whether said increased rates are just and reasonable. The Board's power to appraise and value the property of any public utility may be resorted to in either proceeding. It is not mandatory, however, that the Board shall resort to an appraisal and valuation of the utilities' property in the fixing of just and reasonable rates.

The Act creating the Board of Public Utility Commissioners of this State is patterned after, and almost identical with, the Federal act under which the Interstate Commerce Commission exercises its powers. In exercising its powers in fixing rates, it has fixed just and reasonable rates without valuation of the property, and its findings in so doing has been sustained by the Federal courts.

Minnesota Rate Cases, 230 U. S. 352.

The power to fix just and reasonable rates to be charged by utilities is legislative. This power the legislature has conferred upon the Board of Public Utility Commissioners. The theory of rate regulation and the doctrine under which this power of the legislature was conferred was concisely stated by Mr. Justice Brewer as early as 1888:

“The reasonableness of a rate changes with the changed conditions or circumstances. That which would be fair and reasonable today, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods, in this State once in two years. Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals. Such power can change rates at any time and thus meet the changing conditions of circumstances. While, of course, the argument from inconvenience cannot be pushed too far, yet it is a certainty a matter of inquiry whether in the increasing complexity of our civilization and our social and business relations the power of the legislature to give increased extent to administrative functions must not be recognized.”

Chicago & N. W. Ry. Co. v. Day, 35 Fed. 866-875.

Our own courts have repeatedly drawn attention to the broad powers conferred upon the Board by the legislature.

Public Service Gas Company v. Board of Public Utility Commissioners, et al., 84 N. J. Law 463.

Atlantic Coast Electric Railway Company v. Borough of Bradley Beach, 104 Atl. Rep., p. 218.

Collingswood Sewerage Company v. Borough of Collingswood, 102 Atl. Rep. 901.

Both orders of the Board were made after hearings. Much evidence was presented to it in the case. A full statement of the facts upon which it found the increased rates to be just and reasonable are set forth in the Board's orders and accompanying reports. It found that for the utility to render to the public safe, adequate and proper service, it would require additional revenue over and above what it was then receiving, or could be reasonably expected to receive from such service in the amounts set forth in its respective reports. It assumed that the rates existing were just and reasonable. The existing rates were in effect unchallenged for many years:

“In determining the justice and reasonableness of rates, perhaps no better test can be ordinarily found than the rates customarily charged in localities similarly situated, although we do not say that even that test is infallible.”

Public Service Gas Company v. Public Utility Board, 84 N. J. Law, page 474.

It is not contended by the prosecutor that the Board in its calculations, upon which it based its orders, overestimated the amount of revenue found to be necessary to meet the operating expenses and fixed charges of the Railway Company; nor that such additional amount was necessary to insure to the public safe, adequate and

proper service. No legislative formula was followed by the Board in making its reports and orders. It treated the applications made to it as fair-minded business men. That the rates fixed by it are excessive can therefore not be successfully maintained.

The Board found an emergency to exist, and defined an emergency as follows:

“An emergency for which a carrier is entitled to relief by a temporary emergency rate exists where, by reason of general conditions not affecting the applicant utility alone, the operating revenues are insufficient to operate and maintain its property, and to pay rentals and interest on such of its securities, a default in the payment of which would jeopardize the solvency of the company.”

No dividends upon the stock issued and outstanding by the Railway Company were allowed by the Board. The prosecutor therefore is not injured, because the Board did not make an appraisal and valuation of the property of the Railway Company. A valuation and appraisal might be important to the utility were it to charge that the rates permitted to become effective by the Board were insufficient and inadequate to afford a fair return on the fair and reasonable value of its property used and useful in furnishing safe, adequate and proper service to the public. The utility, however, having accepted the rates fixed by the Board as emergency rates to be just and reasonable, this question does not arise.

The prosecutor failing to show that the Board acted arbitrarily or contrarily to the weight of evidence, the findings of the Court below should be affirmed.

L. EDWARD HERRMANN,
Counsel for Board of Public Utility Commissioners.

New Jersey Court of Errors and Appeals

CHARLES F. X. O'BRIEN,
Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS and PUBLIC SER-
VICE RAILWAY COMPANY,
Defendants-Respondents.

On Certiorari.

(Two Cases.)

Brief for Public Service Railway Company.

Public Service Railway Company operates street railways in one hundred and forty-one municipalities of this state. It is the successor, by various consolidation agreements and leases, of street railway and traction companies that previously operated in the same territory.

The ordinances granting consent to the location of tracks of the street railways in some of the municipalities contain provisions limiting the rate of fare to five cents to be charged in a particular municipality or fare zone. In others no such provision exists. The initial charge made by the company, however, in every case was five cents. The large increase in operating expenses, cost of material and maintenance in recent years, caused by the war, created an emergency, and made it necessary last March for Public Service Railway Company to apply to the board of public utility commissioners for leave to increase its rates to seven cents where five cents had previously been charged, and also for leave to charge two cents for the first transfer, and one cent for each additional transfer.

It was estimated by the company that these increases would place it in the financial position that it occupied in 1916. The board, by a decision rendered on the 10th of July last, denied the company's application, but granted relief to the extent of permitting a charge of one cent to be made for the initial transfer, effective August 1st. This charge, it was estimated by the commission, would produce an amount which, added to the company's revenue, would enable it to meet its operating expenses, pay bond interest and rentals on leased properties, make a reasonable provision for depreciation reserve, and pay the increase of wages to its motormen and conductors made and contemplated about the 1st of June last. The conclusion of the utility board necessitated the application of all corporate income to the payment of fixed charges and operating expenses, and expressly denied to the company any revenue to pay return on the money invested by Public Service Railway Company in the business, amounting to fifty million dollars. (Commission's report of July 10, pages 7 and 18.)

The motormen and conductors of the company were dissatisfied with the increase in wages made in June, in consequence of which a strike occurred, and the matter was submitted to the national war labor board for its decision. That board on the 1st of August awarded an additional increase in wages to the amount of \$1,630,538 a year, effective as of the 7th of June preceding (case, page 51). The increases in wages made by the company in June and by the war board in August amounted to \$2,716,538 per annum. Thereupon an application was made to the utility board to reopen the hearing commenced in March, and the same was granted.

Upon proof of the action of the war labor board, there being no contradiction of the evidence, the commission made an order declaring that a charge of seven cents where five cents had previously been made would be a reasonable rate until the 31st of March next, after which six cents might be charged instead of seven cents (page 13 of report of September 25th). No change was made in the order authorizing a charge of one cent for initial transfers.

The writs of certiorari brought up for review both orders of the board. Many reasons were filed by the appellant, but only two were argued in the supreme court, and we are informed by counsel for the appellant that only the reasons argued in that court will be presented for consideration in this court. Those reasons are:

(1) That the ordinances accepted by the street railway companies constituted contracts fixing rates of fare; that these contracts are protected by the contract clause of the constitution of this state and of the United States, and cannot be changed except by consent of the municipalities which passed the ordinances.

(2) That the orders of the board were not based on an appraisal and valuation of the property of Public Service Railway Company, and that it is beyond the power of the board to prescribe a rate without making an appraisal and valuation of the property employed by the utility company in serving the public.

I.

We regard the first objection as no longer open for discussion in this state. By the following cases it is entirely settled that rates to be charged by corporations engaged in serving

the public, prescribed in ordinances or agreements between such corporations and municipalities, may be changed by the state or by the utility board under authority of the utility act, with the consent of the utility, whether the municipality that passed the ordinance or entered into the contract consents or not. *Cortelyou v. Anderson*, 73 N. J. L., 427; *Public Service Ry. Co. v. Board of Public Utility Commrs.*, 85 N. J. L., 123, affirmed in 86 N. J. L., 696; *Borough of North Wildwood v. Board of Public Utility Commrs.*, 88 N. J. L., 81; *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commrs.*, 104 Atl. 218; *Collingswood Sewerage Co. v. Collingswood*, 102 Atl., 901, recently affirmed by this court; *Northampton; Easton & Washington Traction Co. v. Board of Public Utility Commrs.*, 102 Atl., 930.

II.

(a) It is true the application to the board made by the company in March and renewed in August was not a proceeding to fix a rate on a valuation of its property, but rather to obtain revenue to meet an emergency. Nevertheless, during the years 1915, 1916 and 1917, a valuation of the property of the street railway company as of December 31, 1915, had been made by Dean Cooley of Ann Arbor, Michigan, who probably stands at the head of gentlemen qualified to make an appraisal and valuation of the property of utility corporations. The valuation made by Dean Cooley occupied two years in time and the constant services of about 50 assistants. The fact that such a valuation had been made was known to the counsel for the utility board, and during the hearing he called for a summary of the appraisal and offered

it in evidence while Mr. McCarter was on the witness stand (case, p. 9). That summary shows that the value of the physical property of the company on December 31, 1915, was about \$82,000,000, not including intangibles, such as going value, development cost, franchises, etc. Mr. McCarter, who is very familiar with the value of the property of the company, thereupon testified as to its value, including the amount expended on the property, about \$8,000,000, since the Dean Cooley valuation was made. Mr. McCarter verified the summary of Dean Cooley's valuation and added his estimate of the value of the intangibles, excluding franchises. By his testimony it appeared that, excluding the franchises, the value of the property at the time he testified was at least \$117,000,000, plus the value of the company's interest in the power houses, which he estimated at \$8,000,000 (case, pages 29-31). There was no contradiction of this testimony (case, end of page 99). It therefore appears that the value of the property of the Public Service Railway Company, excluding franchises, is \$125,000,000, and the only return allowed on that sum by the utility board's estimate is \$5,166,000. (Page 13 of report of July 10th.)

It is perfectly clear that the company at the time of the hearing was not earning a reasonable income on the fair value of its property, nor do the increases allowed by the utility commissioners, being for increased expenses only, permit the company to do so. The undisputed fact is that Public Service Railway Company was not, and is not now, earning any income at all on the money it invested in the property (case, page 98). The amount so invested is about \$50,000,000.

(b) There is nothing in the utility act that requires the board to make an appraisement and valuation of property of a utility corporation as a preliminary to a change of rates. The board may do so if it chooses, as it may value the property of a utility for many other purposes, that is, on applications to approve a merger or consolidation agreement, an increase of capital stock, or a mortgage or lease. In fact it is not often that utility boards do make valuations of property when changing rates. The interstate commerce commission has never done so, and yet it has changed rates many times. In the recent *Western Rate Advance Case*, Int. Com. Rep., vol. 35, p. 497, increases in railroad rates were authorized throughout a very large part of the country without valuation of the property of the carriers, and rates are often changed by legislation and by action of state utility boards without valuation of the property. In the *Minnesota Rate Cases*, 230 U. S. 352, rates were decreased without valuation of the property of the carriers, and the same course was pursued in the case of *Willcox v. Consolidated Gas Company of New York*, 212 U. S. 19. The utility board of this state has repeatedly done the same thing. It may change rates of its own motion, or it may permit utilities to change rates by filing a new schedule and omitting to suspend it. P. L. 1911, 377 (c), 380 (h). Valuations are generally made by companies which claim that a rate fixed either by legislation or by a commission is confiscatory, and so litigation concerning valuation in rate cases ensues. In that way the question of valuation came into the case of *Smyth v. Ames*, 169 U. S. 546, the *Minnesota Rate Cases*, and in *Willcox v. Consolidated Gas Company of New York*, and in many others.

It is not a necessary prerequisite to the fixing of a rate.

Besides, it is impracticable in many cases to make a valuation of the property of a utility corporation within the time in which it is necessary to change a rate. It would take at least two years, and cost a very large sum of money, to make an appraisal and valuation of the property of the Public Service Railway Company, and if it were necessary to do so in order to change the rate of fare it could not be done in time to prevent insolvency.

As stated above, the Interstate Commerce Commission fixes rates constantly, without a valuation of the property. It has nowhere been suggested that such valuation is a prerequisite to the action of the commission. The following are a few of the later cases that have been decided by the United States supreme court where rates were fixed without a valuation either by the interstate commerce commission or state commissions and no question was made of the right to do so on that ground.

In *Pennsylvania R. R. v. Towers* 245 U. S, 6, the public service commission of Maryland had fixed certain commutation rates without valuation, and its action was sustained by the state courts, and on writ of error by the United States supreme court.

St. Louis S. W. Ry. Co. v. United States, 245 U. S., 136, is a case where the interstate commerce commission had fixed rates, and the court below and the United States supreme court sustained the commission. In that case there was no valuation.

In *Darnell v. Edwards*, 244 U. S., 565, the Mississippi Railroad Commission had fixed a rate. There had been no appraisal of the property, but on the appeal to restrain such rate the cost of the property was proven, the appeal having been taken on the ground of confiscation. An injunction was denied.

III.

A reasonable rate for service rendered by a utility corporation to an individual should not be in excess of the value of the service. If it is, he does not get an equivalent for the amount of his payment. If, on the other hand, the rate does not yield a reasonable return on the value of the property employed in serving the public, its effect is to take private property for public use without just compensation. A reasonable rate must be somewhere between these two limitations. It may be that a utility corporation has unwisely planned or located its works to render public service so as to make it impossible to earn a fair income on the reasonable value of the property. In that event the individual could not be charged more than the service is worth in order that an income may be earned on the property so situated and employed; but that is an exceptional case, and that condition does not exist in the present case.

The law defining a reasonable rate was stated very clearly by the supreme court in the case of *Public Service Gas Company v. Public Utility Board*, 84 N. J. L., 463 (Passaic Gas rate case), which opinion was subsequently adopted by this court and is now the law of this state. In that opinion it was said (pp. 471 and 472):

“On the one hand a just and reasonable rate can never exceed, perhaps can rarely

equal, the value of the service to the consumer. On the other hand it can never be made by compulsion of public authority so low as to amount to confiscation. A just and reasonable rate must ordinarily fall somewhere between these two extremes, so as to allow both sides to profit by the conduct of the business and the improvements of methods and increase of efficiency.

“Justice to the consumer ordinarily would require a rate somewhat less than the full value of the service to him; and justice to the company would ordinarily require a rate above the point at which it would become confiscatory. To induce the investment and continuance of capital there must be some hope of gain commensurate with that realizable in other business; the mere assurance that the investment will not be confiscated would not suffice. Many of the cases in the federal courts and in the courts of our sister states have involved a determination of the confiscatory character of the rate under the fourteenth amendment or similar constitutional provisions. We are not called upon to deal with this constitutional question; we have to do only with the question submitted to our judgment by the legislature, and expressed in the language of the statute authorizing the commissioners to fix just and reasonable individual rates. The word ‘individual’ is important. It connotes more than a mere distinction between the rates of one corporation and the joint rates mentioned immediately thereafter. If the legislation related to railroad rates alone, where joint rates are common, the word ‘individual’ might have a narrow sense pointing to a distinction between the rate fixed by a single corporation and the rate fixed by two or more acting together. The statute relates to all public utility corporations, and the expression ‘individual rates’ must be equally applicable to all. As applied to gas companies, the words can hardly be meant to

point a distinction from joint rates; for a joint rate by gas companies must be a rare occurrence; in the actual situation in this state in 1911 almost inconceivable. We think the legislature must have had in mind the rate to the individual consumer. In cases involving the constitutional question, the whole property used in the particular public service and the net return upon the whole must be considered, and if the whole net return is a fair return for the whole property, there is no confiscation, although some individual rates may be unremunerative. *Minneapolis and St. Louis Railroad Co. v. Minnesota*, 186 U. S., 257. But where, as in this case, the individual rates must be just and reasonable, the net return upon the whole investment may be less than the ordinary return upon investments involving equal risks (*Covington, &c. Turnpike Co. v. Sandford*, 164 *id.*, 578), or may be very much more. *Cotting v. Kansas City Stock Yards Co.*, 183 *id.*, 79. With this statutory declaration before us, we may well adopt the language of Lord Selborne in *Canada Southern Railway Co. v. International Bridge Co.*, L. R., 8 App. Cas., 723: 'The principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with.' Lord Selborne expressly reserves the case where the results to the company are so enormously disproportionate to the money laid out as to be some evidence that the charge is unreasonable with reference to the person against whom it is charged. That, however, is a case not now before us."

There is nothing in this case to show that the individual rates fixed by the board were unjust to the individual, and therefore the plaintiff in error has no reason to complain.

The reasoning of the foregoing expression adopted by this court as its own is altogether inconsistent with the theory that a valuation is a necessary prerequisite to consideration and alteration of rates by the utility board.

Counsel for the appellant seem to be under the impression that a rate cannot be fixed in an emergency unless there is some provision in the statute authorizing a utility board to fix a rate for that purpose. It is the duty, and within the power, of utility boards to maintain reasonable rates at all times as nearly as practicable, and the utility board of this state has many times fixed rates to deal with emergencies, and utility boards of other states having statutes similar to ours have done the same thing. *Re Utah Light & Traction Co.*, Public Ut. Reports Annotated, 1918 B, p. 497; *Re Queens Borough Gas & Electric Co.*, Public Ut. Reports Annotated, 1918 D, p. 842; *Re Third Avenue Railroad Co.*, Public Utility Reports Annotated, 1918 E, p. 100.

There seems to be considerable confusion in the briefs on the part of the appellant growing out of the failure of counsel to keep constantly in mind the distinction between legislative and judicial functions. To prescribe a rate is a legislative function exclusively. To determine whether an existing rate is lawful or not is a judicial function exclusively. In point two the appellant admits that the action was legislative; and in point three it is said the function exercised by the board in fixing a rate to be paid is a judicial function to be exercised only on evidence. The distinction between legislative and judicial functions in respect to rates was very clearly expressed in *Prentis v. Atlantic Coast Line*, 211 U. S., 210, in which the court said at page 226:

“But we think it equally plain that the proceedings drawn in question here are

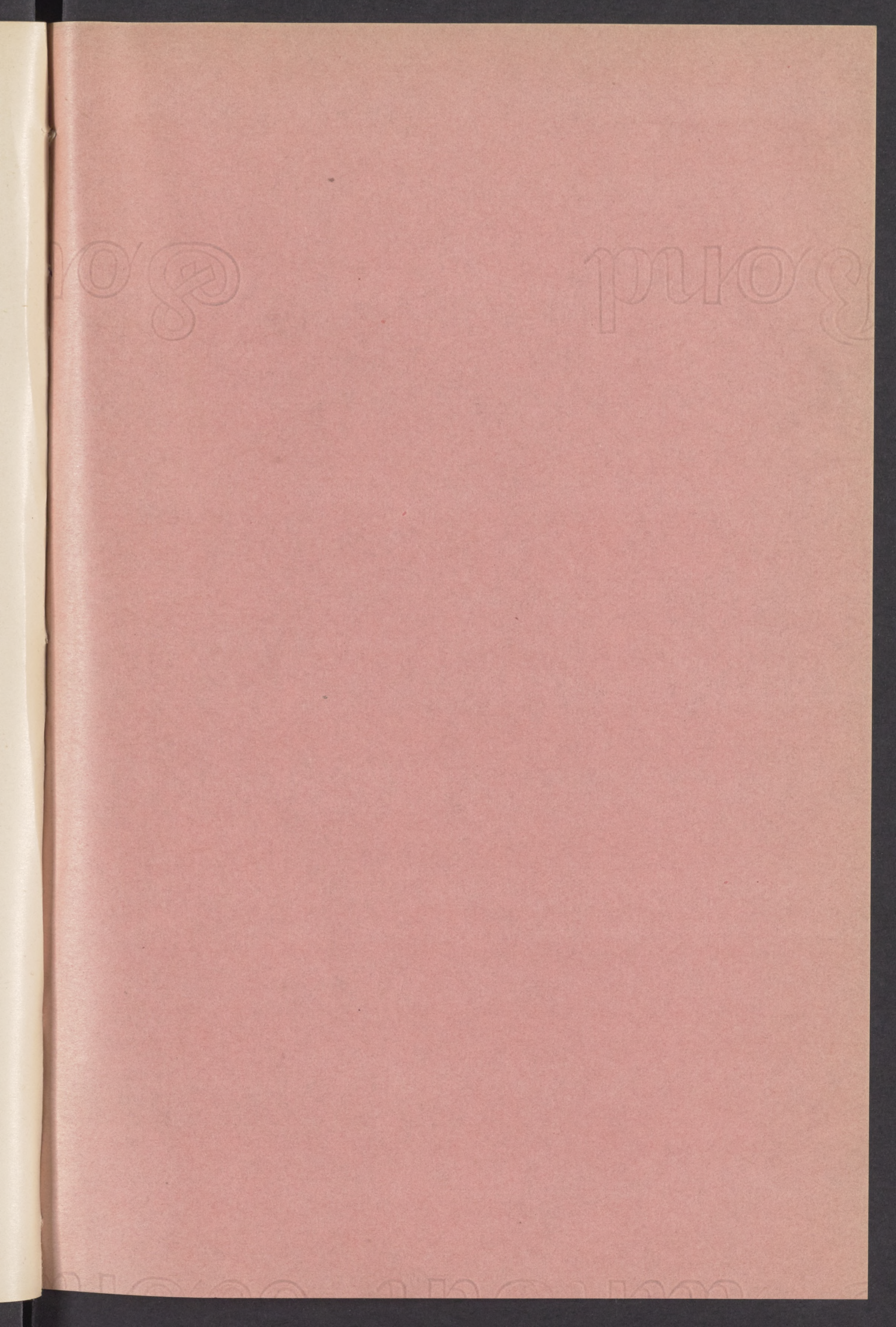
legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future and therefore is an act legislative not judicial in kind."

See also *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362 (397); *Interstate Com. Commission v. Ry. Co.* (Maximum Rate cases), 167 U. S., 479 (505); Judson on Interstate Commerce, 3rd ed. § 53, p. 99.

Since it is clear that to prescribe a rate is a legislative act, courts cannot set aside an order fixing a rate except for one of three reasons: (1) Because it is discriminatory. There is no such contention in these cases. (2) Because the rate is higher than the service is worth. There is no evidence here that the service is not worth the rates fixed in the orders under review; and (3) Because a rate is so low that it does not yield a reasonable return on the fair value of the property properly employed in serving the public. There is no point of that kind presented in these cases.

We therefore respectfully submit that the judgments of the supreme court in these cases should be affirmed.

FRANK BERGEN,
R. V. LINDABURY,
Counsel for Public Service Railway Company.



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