

almost two months before he made the order to draw the grand jurors—he did not direct those names to be restored to the box—and his attention had been called to the removal of these names before making the order to draw the petit jurors from the box—it fairly may be inferred that he had either directed that the names be removed or approved the removal before making the orders for drawing the jurors.

And even if it can be regarded as essential, under § 277 of the Judicial Code, that the judge should have given written direction to draw the jurors from part of the district only, still, as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. See *Steers v. United States* (C. C. A.), 192 Fed. 1, 4. It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown. *Nofire v. United States*, 164 U. S. 657, 660; *United States v. Royer*, 268 U. S. 394, 398; and cases cited.

We find that the District Court had jurisdiction of the case; that the constitution of the grand and petit juries was not illegal; and that there was no invasion of the petitioners' rights under the Sixth Amendment. The judgment is

*Affirmed.*

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UNITED STATES *v.* NEW YORK CENTRAL RAIL-  
ROAD COMPANY, LESSEE.

UNITED STATES *v.* NEVADA COUNTY NARROW  
GAUGE RAILROAD COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

Nos. 238 and 304. Argued February 21, 25, 1929.—Decided March 11, 1929.

Under the Act of July 28, 1916, the Interstate Commerce Commission, in fixing the compensation to be paid by the United States

to railroads for services in carrying the mails, has authority to make its order increasing rates operative from the time of the filing of the carrier's petition for increase. P. 77.  
65 Ct. Cls. 115, affirmed.

CERTIORARI, 278 U. S. 588, to judgments recovered by the railroad companies for services in carrying the mails.

*Solicitor General Mitchell*, with whom *Messrs. Joseph Stewart, George C. Butte* and *Robert P. Reeder*, Special Assistants to the Attorney General, were on the brief, for the United States.

The question is as to the intention of Congress and is one of statutory construction. The Commission's authority is limited by the Act. The terms of the statute show that the orders were to operate prospectively. It is provided that an order shall continue in force until changed by the Commission; that the rates fixed are those "to be received," and that they shall be paid "during the continuance of the order." The Act further provides that the Commission shall proceed as if determining rates for private shippers and, under the Commerce Act, the Commission has no authority to make or allow retrospective increases.

The Act expressly authorized a retrospective readjustment at the time of the first rate order made by the Commission, of rates fixed by law at the time of the passage of the Act. The expression of such power to readjust excludes the power to make retrospective orders subsequently.

The intention of Congress is further disclosed by the legislative practice for many years of providing for periodic readjustments of railway mail pay, always prospective and not retrospective in their operation. The Congressional Record supports the contention that Congress understood these orders were to operate prospectively.

So construed, the statute is not invalid as to all cases, nor is it shown that confiscation occurred here. Prior to the Act of July 28, 1916, Congress had not asserted the power to compel railroads to carry mail or to fix the pay.

It is not important here, whether the power to compel the service results from the fact that the railroads are common carriers, or is incident to the power to establish post roads, or is an exercise of the power of eminent domain. The railroads may be required to carry the mails provided just compensation is paid.

The fair and reasonable rates authorized by this Act, as in the case of rates applicable to private shippers, may be more than those necessary to avoid confiscation. It does not follow from the findings of the Commission that the respondent was subjected to confiscatory action by the rates in effect pending the hearing. The Commission's findings relate to groups of carriers, and on them no one carrier may show confiscation.

A statute that requires a public utility to obtain consent of a public commission to increase rates is not necessarily invalid because some time may elapse between the application for, and the granting of, relief. The Commerce Act allows suspension of increases for a reasonable time, with no provision for retrospective increase. Many state statutes have similar provisions. No system of rate regulation or adjustment keeps up with the necessity for increases or decreases. Adjustments lag behind the need for them. If there be undue delay in granting relief, the courts will grant it where the utility is operating under confiscatory rates. These carriers could have refused to transport the mails at confiscatory rates, and, on proper showing, resisted the enforcement of the rates, and the Postmaster General could have kept the mails moving by exercising his statutory authority to contract for higher rates than those established in the Commission's orders.

The acceptance by the carriers of the mail offered and the acceptance of the compensation paid, without "saving the question of price" other than by filing a petition for relief, amounted to an agreement to carry the mails at the existing rates subject only to such readjustment as under the terms of the statute, properly construed, the Commission could make.

*Messrs. Frederick H. Wood and George H. Fernald, Jr., with whom Messrs. Clarence M. Oddie and Ben B. Cain were on the brief, for respondents.*

The power conferred upon and exercised by the Commission was not the power to regulate the charges of interstate railroads for the performance of common carrier services, but was the power to determine just compensation for the taking of private property for public use.

The interpretation placed upon the statute by the court below, should be sustained to avoid giving rise to a serious constitutional question.

As a matter of statutory interpretation, the construction placed upon the Act by the court below was right. The arguments advanced by the Government to avoid the constitutional difficulty are so destructive of the purpose of the Act and of its orderly administration, either by the Postmaster General or by the Commission, as to call for the adoption of the interpretation placed upon it by the court below, if at all permissible.

The interpretation placed upon the statute by the court below is not only a permissible one, but is the only one by which its general intent may be effected and by which injustice either to the United States or to the carriers may be avoided.

The words relied on by the Government do not in express terms limit the power of the Commission, as claimed, and should not be so construed as to limit the general intent of the Act or to be productive of unjust and incongruous results.



Respondents did not acquiesce in the payment to them of less than fair and reasonable compensation.

The statute, read as a whole, should be construed as conferring the authority exercised.

MR. JUSTICE HOLMES delivered the opinion of the Court.

On February 25, 1921, and June 30, 1921, the respondent railroads respectively filed applications with the Interstate Commerce Commission for a readjustment of the compensation for services in carrying the mails rendered by them, from dates before the applications and for the future. The Commission at first expressed an opinion that it had "authority to establish rates only for the future" but made orders establishing rates as fair and reasonable after the date of the orders. On further hearings, however, it made new orders establishing the same rates as fair and reasonable for the times between the filing of the applications and the orders previously made. 85 I. C. C. 157. 95 I. C. C. 493. See 144 I. C. C. 675. The railroads applied to the Postmaster General for payment as ordered by the Commission, but their applications were refused. Thereupon they sued in the Court of Claims and got judgments for compensation computed according to the last orders of the Commission. 65 Ct. Cls. 115. The United States asked and obtained a writ of certiorari from this Court.

The ground taken by the United States is that the Interstate Commerce Commission had been given no authority to change the rates of payment to be received by the railroads for any time before its orders went into effect. The question is one of construction which requires consideration not of a few words only but of the whole Act of Congress concerned. This is the Act of July 28, 1916, c. 261, § 5; 39 St. 412, 425-431 (C., Tit. 39, ch. 15, where the long § 5 is broken up into smaller

sections) which made a great change in the relations between the railroads and the Government. Before that time the carriage of the mails by the railroads had been regarded as voluntary, *New York, New Haven & Hartford R. R. Co. v. United States*, 251 U. S. 123, 127, now the service is required (C., Tit. 39, § 541); refusal is punished by a fine of \$1,000 a day (C., Tit. 39, § 563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation. The words are "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." The Government admits, as it must, that reasonable compensation for such required services is a constitutional right. So far as the Government has waived its immunity from suit this right may be enforced, in the absence of other remedies, not only by injunction against further interference with it but by an action to recover compensation already due. Accordingly the statute provides for application from time to time to the Interstate Commerce Commission to establish by order a fair, reasonable rate or compensation to be paid at stated times. C., §§ 542, 551, 554.

We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. *American Smelting & Refining Co. v. United States*, 259 U. S. 75, 78. But the filing of an application expresses a present dissatisfaction and a demand for more. A further protest would be a super-

fluous formality. If the claim of the railroads is just they should be paid from the moment when the application is filed. In the often quoted words of Chief Justice Shaw, "If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks v. Boston*, 15 Pick. 198, 208. In fact the necessary investigation takes a long time, in these cases years; but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future. *Oklahoma Natural Gas. Co. v. Russell*, 261 U. S. 290, 293. This being so, and the Interstate Commerce Commission being the tribunal to which the railroads are referred, it is a natural incident of the jurisdiction that it should be free to treat its decision as made at once. Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act. No reason can have existed for leaving the additional annoyance and expense of a suit for compensation during the time of the proceedings before the Commission, when the Commission has had that very question before it and has answered it, at least from the date of its orders. We are quite aware that minutiae of expression may be found that show Congress to have been thinking of the future. We put our decision not on any specific phrase, but on the reasonable implication of an authority to change the rates of pay which existed from the day when the application was filed, the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission, and the fact that, unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air.

*Judgments affirmed.*