JUDGE JAMES H. WILKERSON

Memorandum concerning the conduct of Judge Wilkerson in the successive insolvencies of the St. Paul Railway

The Chicago, Milwaukee & St. Paul Railway Company went into receivership in March 1925 and was reorganized in January 1928. In 1935 this railroad line was once more put into the hands of the federal court, this time under the Bankruptcy Act.

Both in 1925 and in 1935 the judge who took charge of the railroad was Judge Wilkerson.

This memorandum relates to his conduct as presiding judge in the two insolvency proceedings. The memorandum is based upon testimony taken by the subcommittee of the Senate Committee on Interstate Commerce in its railroad investigation. The subcommittee held hearings with reference to the St. Paul Railway from December 6 to December 14, 1937, both dates inclusive. In the course of those hearings considerable testimony was elicited bearing upon Judge Wilkerson's conduct in those insolvency proceedings.

I. Institution of the 1925 Receivership

Kuhn, Loeb & Co. and National City Company, both of New York, bankers for the St. Paul Railway, decided in the early part of 1925 that the Railway should be put into receivership. The bankers'

lawyers, Cravath, Henderson & deGersdorff of New York (the present firm name is Cravath, deGersdorff, Swaine & Wood) drafted the court papers for putting the Company into receivership. They drafted a bill of complaint to be signed by a friendly creditor which the Company's officers were to select. The bankers' attorneys also prepared a draft of the answer of the Company consenting to receivership. The bankers' attorneys also prepared a draft of the order to be signed by the judge, putting the Company into receivership and appointing receivers.

When it was decided to put the Company into receivership, the bankers' New York attorneys got in touch with their Chicago representative, Ralph M. Shaw, of the law firm of Winston, Strawn & Shaw. Mr. Shaw conferred in the office of Cravath, Henderson & deGersdorff in New York on a Sunday in March 1925, with the bankers' attorneys and other attorneys whom they had called to their office. Meantime the bankers had decided that they would want as receivers for the Road, Harry E. Byram, president of the Company, and Mark W. Potter, a New York lawyer and former member of the Interstate Commerce Commission. Mr. Shaw, the Chicago attorney selected by the bankers' New York attorneys, visited Judge Wilkerson confidentially, told him that a receivership was being arranged, and asked him to take charge of the receivership and to appoint the receivers whom the bankers had selected. Judge Wilkerson did so. He also appointed, as his special representative, a third receiver, Edward J. Brundage, former attorney general of the State of Illinois. Mr. Brundage had previously been associated with Judge Wilkerson in the practice of the law.

Mr. Shaw made his first formal appearance in the receivership

proceeding as attorney for a creditor of the Railway Company requesting that the Company be put into receivership. Shortly thereafter Judge Wilkerson appointed Mr. Shaw's law firm special counsel for the receivers. That law firm thereafter continued as the most important lawyers formally participating in the receivership proceeding and, in fact, had a considerable part in dominating the activities of the receivership estate.

The receivership was thus placed by Judge Wilkerson, in the hands of men who, as he knew, had been selected by the bankers or their lawyers, and not in the hands of impartial persons who would seek to do justice evenly as between contending groups of security holders.

II. The Service of the Receivers and Their Chief Counsel to the Bankers

Kuhn, Loeb & Co. and National City Company issued a plan for the reorganization of the St. Paul Railway. Promptly thereafter, the two receivers whom they had selected, publicly announced their approval of that plan. There is reasonably clear evidence that they did so at the instance of the bankers. No court hearing, however, had yet been held on the plan. Other security holders attacked the bankers' plan vigorously, but the two receivers committed themselves in advance of any hearing, giving the bankers' opponents no opportunity to present their side of the case prior to the receivers' reaching and publishing their conclusion. The receivers were also active privately in soliciting support for the bankers' plan.

Mr. Shaw's firm, while acting as counsel for the receivers, supported the bankers in all possible ways, and chiefly in secret. Even in the course of open court proceedings, Mr. Shaw's firm committed the receivers to positions friendly to the purposes of Kuhn, Loeb & Co. and National City Company, and antagonistic to the opponents of the bankers.

Despite continued evidences of such an attitude on the part of the receivers and the special counsel for the receivers, Judge Wilker-

son continued them in their respective offices in the receivership administration and paid them handsome emoluments, as will be brought out in detail later in this memorandum.

III. Secret Hearing for One Side and Refusal to Hear Other Side.

Kuhn, Loeb & Co. and National City Company issued their plan for the reorganization of the St. Paul Railway at the beginning of June, 1925. They issued this plan in their capacity as Reorganization Managers for the Railroad. They had become Reorganization Managers by assuming that office on their own motion, having, indeed, assumed control of the entire affair from the very outset.

In October 1925 a group of independent security holders opposed to the Kuhn Loeb-National City Co. reorganization plan for the Chicago, Milwaukee & St. Paul Railway Co. petitioned Judge Wilkerson for leave to intervene in the receivership proceedings. At the instance of the Reorganization Managers, Kuhn, Loeb & Co. and National City Company, the petition of their opponents was fought by various parties to the suit, including the receivers and the mortgage trustees. Oral argument on the petition was heard by the Court on October 29, 30 and 31, 1925.

In the course of the argument before Judge Wilkerson, one of the principal issues raised was whether the Court could properly consider, at that time, the fairness or unfairness of the bankers' reorganization plan, which they had already declared operative. The

independents vigorously urged that the Court give immediate consideration to the merits of the plan, protesting, among other things, that the bankers were employing coercive measures to obtain the support of the security holders. These measures, it was claimed, consisted of the threat of the imposition of penalties on security holders who failed to deposit their holdings under the plan within a specified period of time.

During the argument before Judge Wilkerson the independent security holders were continually confronted with the argument that the bankers' plan was not yet before the Court; that since it had not been filed as of record, its fairness or unfairness could not be propeely considered at that time. The purpose of this argument was to delay consideration of the merits or demerits of the plan until the bankers had succeeded in lining up enough security holders to render ineffective the independents' opposition.

While these proceedings were going on before Judge Wilkerson, there was considerable controversy in the press concerning the merits or demerits of the bankers' plan and of a plan sponsored by the independent interests. On October 29, 1925, the first day on which the hearings were held before Judge Wilkerson on the intervention petition, Paul D. Cravath, senior partner in Cravath, Henderson & deGersdorff, counsel to the bankers, wrote to Ralph M. Shaw, partner in Winston, Strawn & Shaw, attorneys for the receivers of the Carrier. In this letter, the attorney for the bankers elaborately explained, from the point of view of the bankers as Reorganization Managers, the merits of the Kuhn Loeb-National City Company plan, and the

demerits of the plan sponsored by the opposition, and suggested that Mr. Shaw explain the matter fully to Judge Wilkerson. Mr. Cravath stated in part:

> "I am very anxious that the Court should get no wrong notions of the comparative merits of our plan [the Reorganization Managers' plan] and the so-called Roosevelt plan [the independents' plan]. I very much hope, therefore, that you will some time take an opportunity of explaining the subject to the Court."

Then, after explaining the situation in detail, from his own point of view, he concluded as follows:

> "I think that these brief observations, and after perusing the circulars [referring to various propagandizing documents enclosed with the letter, copies of which had been used to induce security holders to support the bankers' plan] you will have the situation clearly in mind, and will be in a position to explain it to the Court and to Receiver Brundage, which I hope you will do at an early opportunity." (Underlining supplied.)

A full copy of Mr. Cravath's letter of October 29th is annexed hereto as Exhibit A.

Mr. Cravath and other members of his firm were well aware of the fact that at the very time this letter was written hearings were going on in open Court on the intervention petition of the independents; that the latter were vigorously asking of Judge Wilker-

son the prompt consideration of the bankers' reorganization plan; and that they were being thwarted at every turn with the argument, presented by persons friendly to the bankers, that the plan was not yet before the Court, and could not therefore be properly considered at that time.

As stated above, hearings continued on the intervention petition through October 31, 1925. Mr. Shaw replied to Mr. Cravath's letter by telegram of October 30, 1925, as follows:

"The matter mentioned in your letter of October 29th has been attended to Stop Will probably be in New York Tuesday or Wednesday and drop in to see you

Ralph M. Shaw"

A careful perusal of the record before Judge Wilkerson on October 29, 30 and 31, fails to disclose any reference whatsoever to any of the material or arguments contained in Mr. Cravath's letter. Yet Mr. Shaw's telegram of the 30th states "The matter .... has been attended to". When Mr. Shaw was questioned before the Senate subcommittee as to the manner in which he carried out Mr. Cravath's wishes, his only response was "I have no independent recollection of what took place eleven years ago. If it was attended to it was attended to." The attorney for the mortgage trustees, Mr. Sunderland of Davis, Polk, Wardwell, Gardiner & Reed, who was present at the hearings before Judge Wilkerson on October 29, 30 and 31, 1925, testified before the Senate subcommittee that he had never heard of Mr. Cravath's letter prior to the date of the subcommittee's hearings.

There can be no other explanation of Mr. Shaw's telegram than that Mr. Shaw succeeded in imparting the arguments contained in Mr. Cravath's letter to Judge Wilkerson secretly, arguments in favor of the bankers' plan and against the plan sponsored by the independents. Judge Wilkerson, although purporting to fulfill the role of impartial arbiter in the dispute between contending security holders on an issue of vital importance, gave private ear to the arguments of one side of the controversy without affording to the opposition an opportunity to defend its interest. The deliberate partisanship thus exhibited is the more flagrant in the situation here discussed inasmuch as the opposition was at that very time vigorously attempting to persuade the Court at public hearings that the bankers' plan (which the Court was considering in private at the behest of the bankers' attorney) should be dragged out into the open for prompt consideration of its merits and demerits.

In the light of these facts it is not at all surprising to learn that the Court agreed with counsel for the receivers and counsel for the mortgage trustees that it could not at that time properly consider the bankers' plan, since it was not yet a matter of record, and that the Court denied the petition for intervention. Nor is it surprising to learn that the Court ruled the same way with respect to subsequent petitions for intervention filed by a different group of independents, in 1926, in which the identical issue, namely prompt consideration of the bankers' plan, was raised.

The first group of independents subsequently made its private bargain with the bankers. The second group continued the battle and, following the denial of its petition to intervene, sought relief from the Appellate Courts. The latter, however, were without any knowledge of Judge Wilkerson's private information concerning the "merits" of the bankers' plan. This is shown by the following testimony, at the hearings of the Senate subcommittee in 1937, given by E. S. S. Sunderland, attorney for Guaranty Trust Co. of New York, which had cooperated with the bankers in the St. Paul affair:

> Q. Mr. Sunderland, you said a few minutes ago that on various points, such as the request of the of the bondholders' defense committee for permission to intervene, the circuit court of appeals had ruled in the same way that Judge Wilkerson ruled. Do I recollect your testimony correctly?
>
> A. That is my recollection.
>
> Q. And that whenever the Jameson committee, or the bondholders' defense committee, tried to bring the issue before the circuit court of appeals, or even the Supreme Cour of the United States, it was unsuccessful, ... in its contention.
>
> A. Unsuccessful in its contention.
>
> Q. Do you know whether the record on appeal before the circuit court of appeals and before the United States Supreme Court in any of those proceedings in which the

appellate courts ruled against thebondholders' defense committee, showed in any way whatsoever that Judge Wilkerson had secretly received the arguments of the attorneys for the bankers in support of their plan and in opposition to the opponents of their plan, as early as October 1925?

A. I am pretty clear in my recollection of the records, and I am quite certain that they did not, because I think I would have known of it, and I did not know of this attempt until you told me about it this morning.

Q. And if there had been anything in the records on appeal, or in the briefs - either excerpts from these communications between Mr. Shaw and Mr. Cravath, or any other communications, or any reference to them, you would have known of it?

A. I am quite clear that I would have, but I do not think it could have been in that record,.....

The appellate judges sustained the decision of Judge Wilkerson, denying the petition of the bankers' opponents for intervention and thus, in effect, sustained the action refusing to grant to the bankers' opponents a hearing on the bankers' plan at the very time when, unknown to the appellate judges, Judge Wilkerson had already granted to the bankers' representatives a private and secret hearing on the subject.

IV. Judge Wilkerson's Approval of the Bankers' Reorganization Plan

The bankers' plan for reorganization of the St.Paul Railway set up a financial structure which was unsound. Though it went into effect in January 1928, insiders were already discussing in 1930, the possibility of another receivership and, in the intervening years between 1930 and 1935, such discussions increased in volume until finally and belatedly the Company was put into the federal court's hands once more.

This was a reorganization involving some two-thirds of a billion dollars of securities and affected great numbers of bondholders and stockholders. It was carried through at enormous expense. It was such an inadequate reorganization of the financial structure of the Railroad Company that it did not last as long as the bicycle of a small child would ordinarily last.

The plan was attacked by its opponents in the proceeding before Judge Wilkerson. He gave the plan his approval.

By his conduct in postponing consideration of the plan in the court proceedings, Judge Wilkerson also assisted the bankers in getting the plan past the Interstate Commerce Commission. The procedure devised by the bankers' attorneys and permitted by the Judge was calculated to delay consideration of the plan until the bankers had obtained the support of a large majority of security holders. The plan was promulgated in June 1925, yet Judge Wilkerson refused to consider its merits or

demerits in open court (his private consideration of the plan has already been discussed) until December 1926, after the foreclosure proceedings had been terminated and the property sold at auction. By that time the bankers had succeeded in lining up a large majority of security holders, largely through the threat of imposing penalties for failure to deposit under the plan.

A further substantial lapse of time ~~necessarily~~ intervened before the new company, which had purchased the property at auction under the bankers' plan, went to the Interstate Commerce Commission for approval of the issuance of securities. A minority of the Commission voted against approval of the securities issued under the plan. A majority voted to approve the issuance of the securities. One of the major circumstances influencing the majority of the Commission was that the Company had already been in receivership for a substantial period of time and if the securities issued under the plan were not approved by the Commission an additional protracted period of time would elapse before a reorganization could be effected. Also of considerable importance in influencing the majority of the Commission was the sheer weight of numbers of those supporting the bankers' plan. Because of these circumstances the Commission reluctantly approved the plan. The Commission, however, complained of the delay in bringing the plan before it for consideration and directed that in the future plans of reorganization should be produced for its consideration at a much earlier stage in the proceedings. Had Judge Wilkerson heeded the requests of the independents, the plan might have been before the Commission two years before it actually was considered by

that body, in which event it would hardly have been approved as submitted.

Fortunately Judge Wilkerson's action in repeatedly ruling that the bankers' plan could not be considered until the termination of the foreclosure proceedings has not served as a precedent in subsequent equity receiverships of railroads. Illustrative of the opposite procedure is the pending equity receivership of the Wabash Railway. Concededly because of the evils disclosed in the conduct of the St. Paul receivership, the procedure devised in the Wabash receivership is designed to assure a prompt and early consideration of the reorganization plan by both the court and Interstate Commerce Commission, prior to any solicitation of deposits from security holders.

V. Judge Wilkerson's Approval of the Receivership Expense

The St. Paul receivership of 1925 - 1928 is a glittering example of the opportunities for getting-rich-quick in equity receiverships of large railroads. The aggregate cost of the receivership, including both receivership and reorganization fees and expenses, amounted to the enormous sum of $6,954,859.18, all of which was raised by assessments on stockholders. The division of this vast fund contributed by the security holders was appropriately described by Mr. Swaine, counsel for the reorganization managers, as " a slicing of the melon".

As presiding judge in the receivership proceeding, Judge Wilkerson was directly responsible for the compensation allowed the various parties to the litigation. Unmindful of the fact that this was a bankrupt railroad, he carried out this responsibility by allowing the following, among other huge fees:

a. To the receivers and their counsel - approximately $1,200,000.

Two of the receivers, Mr. Brundage and Mr. Potter, had received monthly compensation of $4,000 each during the entire period of the receivership. The third receiver, Mr. Byram, had received monthly compensation of $6,250. The annual compensation thus paid to the three receivers aggregated $171,000. Apparently not deeming this a sufficient burden on the security holders, Judge Wilkerson granted each of the three receivers a special bonus of $100,000 at the termination of the receivership. Accordingly, the total compensation allowed the receivers for less than three years' service amounted to over three-quarters of a million dollars. Mr.

Frederick H. Ecker, who had been chairman of the principal bondholders committee during the receivership period, and who is now Chairman of the Board of Directors of Metropolitan Life Insurance Co., testified before the Senate sub-Committee reluctantly, feeling that he "was passing judgment on the Court", that the allowances granted to the receivers now seemed to be "an unnecessarily large amount of money".

In addition to the more than three-quarters of a million dollars allowed the three receivers, Judge Wilkerson allowed various counsel to the receivers over $350,000. The major portion of this sum, almost one-quarter of a million dollars, was allowed to chief counsel, Winston, Strawn & Shaw. It was one of the partners of this firm, Mr. Shaw, who had privately conveyed information to Judge Wilkerson on a controversial issue raised in the Court proceedings, as above noted.

b. To the mortgage trustees and their counsel - approximately $900,000.

Of the fees here included, the lion's share, approximately half a million dollars, went to the Guaranty Trust Co., of New York, trustee under the principal bond issue, and its counsel. The remainder was divided up between the other mortgage trustees and their counsel.

Guaranty Trust Co. received the substantial fee of $125,000 for its services in foreclosing the mortgage. In addition, Judge Wilkerson approved an allowance of $25,000 to a vice president of Guaranty Trust Co. who happened also to be the individual trustee

under the same mortgage. Individual trustees are frequently appointed to meet technical requirements of State laws, and perform no real duties. This particular individual trustee was employed by Guaranty Trust Co. and had received his regular salary for doing corporate trust work. He was, in fact, the officer of the Trust Co. in charge of this particular proceeding. Obviously services that he performed in the St. Paul receivership could not properly be divorced from the services of the Trust Co. Yet the judge allowed him, as an individual trustee, a separate fee. There seems no justification for this duplicate payment for the single service.

The fees granted by the Judge to the Guaranty Trust Co. and the individual trustee, although very substantial, were relatively small when compared with the fees granted counsel, who received almost $350,000. Of this sum Davis, Polk, Wardwell, Gardiner & Reed, New York counsel for Guaranty Trust Co., received $250,000.

The above are only a few of the larger fees granted by Judge Wilkerson in the receivership proceeding. A complete list of fees and expenses in the court litigation is contained in the annexed Exhibit B.

In addition to the receivership fees and expenses, there were substantial reorganization charges. These included the fees and expenses of the reorganization managers, the various protective committees, their counsel, and the numerous depositaries of securities under the plan.

For the magnitude of the reorganization charges Judge Wilkerson is also directly responsible. The compensation of the reorganization managers was fixed by the reorganization plan at over a million dollars.

The plan itself was approved by Judge Wilkerson, who necessarily, therefore, approved the amount of compensation fixed therein. As testified to by Mr. Swaine, of counsel for the reorganization managers, at the hearings before the Senate sub-Committee:

> "I think that the Court did pass upon the fee of the reorganization managers in approving the plan because the plan itself set forth the fee of the reorganization managers, and I think the Court could have said that that was something which would prevent his approving the plan if he had thought it was an unreasonable fee."

The plan did not fix the amount of other reorganization charges, but gave the reorganization managers unlimited discretion to fix such charges. Accordingly, by confirming the plan with these provisions, Judge Wilkerson in effect delegated to the reorganization managers the power to fix other reorganization fees. This conclusion is confirmed by the testimony of Mr. Swaine, attorney for the bankers:

> Question. When Judge Wilkerson approved this plan, he also approved the provision of the plan giving unrestricted discretion to the reorganization managers to fix the compensation of committees, depositaries, etc.?
>
> Answer. Yes.

Later in his testimony Mr. Swaine agreed that the Court could have refused to confirm a plan lodging such broad powers in the reorganization managers:

Q. As I understand your answer to a previous question, Judge Wilkerson could have refused to confirm the plan containing a provision delegating such powers to the reorganization managers?

A. I suppose he could have.

A complete list of the reorganization fees and expenses fixed by the reorganization managers under the power thus delegated to them is contained in the annexed Exhibit B. Among the larger fees so fixed were the following:

(a)	Counsel to the reorganization managers -	$500,000.
(b)	Bondholders Protective Committee -	$162,500.
(c)	Counsel to Bondholders Protective Committee -	$175,000.
(d)	Depositaries of Bondholders Committee	
	Guaranty Trust Co. -	$139,000.
	Bankers Trust Co. -	$105,000.
	Chemical Bank & Trust Co. -	$102,000.
(e)	Preferred stockholders committee -	$ 75,000.
(f)	Counsel for preferred stockholders -	$180,000.
(g)	Depositary of preferred stockholders committee (New York Trust Co.) -	$ 67,000.
(h)	Common stockholders committee -	$ 70,000.
(i)	Counsel to common stockholders committee -	$ 50,000.
(j)	Depositary of common stockholders committee -	$ 53,000.

As stated above, these are only a few of the larger fees fixed by the reorganization managers. The size of these fees, and of the

other fees listed in the annexed Exhibit B covering both the receivership and reorganization proceedings, indicates clearly a lack of adequate supervision by the Court over the distribution of the security holders' funds.

VI. Use of the Railway's Facilities for Personal and Family Purposes

Mr. Brundage, the receiver appointed by Judge Wilkerson as his personal representative, engaged in a veritable orgy of use of private cars of the Railway Company for personal travel for himself, his children and his family all over the country. He even used private cars for junkets for friends and, on at least one occasion, indicated that he expected Judge Wilkerson himself to be one of the party. He used the staff of the St. Paul Railway to secure passes on other railroads and even on steamship lines for himself and his family. His use of private cars for such personal travel extended as far as California and Florida, and the private passes that he obtained through the efforts of the Railway staff which was serving under him while he was receiver, carried him free on the lines of Canadian and Alaskan railroads and on steamships as far as Alaska. Any reasonable attention to the business of this estate would have enabled Judge Wilkerson to know that Mr. Brundage was absenting himself unduly for a man charged with the grave responsibilities of conducting the receivership of so big a railroad, and being paid compensation at a rate which called for full time service. The merest inquiry would have enabled Judge Wilkerson to know of this gross abuse of the facilities of the railroad for private and personal uses by a receiver appointed by himself.

The gross abuse of the railroad by one of Judge Wilker-

son's appointees was known to at least another one of the receivers and must have been known to many of the leading officials and other employees of the St. Paul Railway. It is a reasonable conclusion that, with so many persons knowing the facts of this scandal, it would have been the easiest thing in the world for Judge Wilkerson also to have known; and the evidence that he himself was expected to be one of the guests on at least one of the private car trips, would tend to indicate that he had known of the abuse of private car privileges, if not of other abuses of similar nature.

To some, although to a much lesser extent, one or both of the other receivers availed themselves of the private car facilities of the railroad while it was in receivership under the control of Judge Wilkerson.

The record before the Senate subcommittee does not indicate whether any other facilities than private cars and free passes were sought and secured by one or more of the receivers at the expense of the treasury and standing of the St. Paul Railway. What the record does disclose as to private cars and free passes indicates the need for careful investigation by the present bankruptcy trustees of the St. Paul Railway into the records of the Company, and interrogation of those members of the Railway Company's staff who might have knowledge on the subject. However, the Railway, in its present bankruptcy proceeding, is again in the hands of Judge Wilkerson and any reflection that such an investigation might throw on Judge Wilkerson's appointees as receivers, might reflect on him as well.

VII. Whitewashing of Past Wrongs

Railroad receiverships and bankruptcies of the past have been replete with charges of fraud, mismanagement or other misconduct on the part of those whose stewardship of the property failed to avert financial disaster. Because of the public scandal resulting from the failure of receivership and bankruptcy judges to cause thorough investigations to be made of such charges, with the resultant vigorous prosecution where justified, Congress in August of 1935 amended Section 77 of the Bankruptcy Act, requiring the judge in charge of railroad bankruptcy proceedings to order the trustees under Section 77 to report on any such fraud, mismanagement or misconduct.

The second bankruptcy of the St. Paul within a decade occurred shortly prior to this amendment of the Bankruptcy Act. Once again Judge Wilkerson took charge of this large railroad property, although his administration of the previous receivership had been severely criticized, notably with respect to the enormous expense of the proceeding.

Judge Wilkerson appointed trustees in mid-October of 1935, two months after the enactment of the amendment to Section 77. No action was taken, however, toward observing the express mandate of Congress until June 8, 1936, almost eight months after the appointment of trustees. The report of the trustees was not submitted to

the Court for an additional five months, and that report professes to be only an interim report. A further period of eighteen months has now elapsed since the interim report was filed without any sign of either a final report or a second interim report. Nor has there been any action by Judge Wilkerson to compel his representatives, the trustees, to comply with the legislative requirements.

Obviously the purpose of Congress as expressed in the statute may be completely thwarted if the required report is not promptly made. Difficult questions concerning the running of the Statute of Limitations often interfere with actions against directors, officers and others, arising out of fraud, mismanagement and misconduct. The possibility that such problems may later confront the trustees if litigation is deemed desirable, necessitates a prompt investigation and report. The report already filed by the trustees shows that they themselves recognized this problem.

Moreover, delay will play directly into the hands of those most likely to be the perpetrators of the wrongs, namely, directors, officers, etc. The experience of the Senate subcommittee has been that these very individuals are normally in control of the railroad when it reaches the Bankruptcy Court. Such persons have a very vital interest in the reorganization proceeding, namely, the perpetuation of their control, and will naturally benefit by delay, which in the fullness of time may ripen into complete forgetfulness. Security holders are anxious to reorganize. That is their prime desire. They

will not be likely to favor the institution of litigation after several years of bankruptcy if the time has become ripe for the consummation of a reorganization plan. Since a delay in the investigation and report of malpractices necessarily means a delay in the institution of possible damage suits, the practice may well result ultimately in a complete whitewashing of possible misdeeds of the management.

The interim report filed by the bankruptcy trustees whom Judge Wilkerson had appointed was, in effect, a whitewash of those who had had to do with the railroad in the past, on a small number of subjects discussed in that report. A continued delay in doing a thorough job will have the same results as a whitewash, even if there be no further reports by the trustees.

The principal trustee active in this branch of the work, heretofore appeared before a subcommittee of the Senate Judiciary Committee in support of the nomination, subsequently unsuccessful, of Judge Wilkerson for elevation to the United States Circuit Court of Appeals. In the proceeding before the subcommittee of the Senate Judiciary Committee, Judge Wilkerson's record as district judge was under attack. One of the subjects of attack was his conduct in the receivership of the St. Paul Railway from 1925 to 1928. Several attorneys appeared in defense of Judge Wilkerson. One of those attorneys was subsequently appointed by the Judge as a trustee in bankruptcy of the St. Paul Railway when it again entered the federal

courts. For that appointment Judge Wilkerson alone was responsible, since no security holder had suggested this attorney for the trusteeship; nor had any security holder supported him for the position. As in the case of the appointment of Mr. Brundage in the earlier St. Paul receivership, this attorney was the personal appointee of Judge Wilkerson, the one trustee in whom the judge reposed special confidence. Yet it was this same attorney, who, as a trustee, was charged with the responsibility and

power of investigating the past conduct of the officers of this Company. Such an investigation necessarily included the past conduct of Judge Wilkerson himself in connection with the previous receivership of the Company. Thus the carrying out of the mandate of Congress for a thorough investigation of past irregularities, wrongdoing and fraud was, in this case, in control of a judge whose own past conduct might have to be criticized as the result of such an investigation, and in the hands of an appointee of the judge who had theretofore sought to protect this very judge against criticism with respect to his conduct of the St. Paul receivership when that conduct was under inquiry by a subcommittee of the Senate Judiciary Committee.

VIII.

This memorandum does not relate to other matters for which Judge Wilkerson was criticized before the subcommittee of the Senate Judiciary Committee when he was nominated to the Federal Appellate Court. This memorandum relates to matters which were discussed at the hearings of the subcommittee of the Senate Committee on Interstate Commerce in 1937. Based upon that record alone, it is apparent that Judge Wilkerson has a most unfortunate thirteen-year record in the affairs of the St. Paul Railway; that he failed in the performance of the duties resting upon him in the successive insolvencies of that road; that he engaged in practices which were reprehensible; and that, from the first conference which he privately granted to the bankers'

lawyer in 1925 up to the present time, his acts and his omissions to act have been of such a nature as to call for his withdrawal from the administration of the St. Paul Railroad bankruptcy and for censure and possible removal from office.

Dictated
May 7, 1938