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November 25, 1936

Mr. Eddy

Mr. Turner

(note: See L-40-182)
See Excerpt of Board
minutes of
Dec 29, 1936

Status under the Railroad Retirement Act of 1935 of employees in the dining-car service on the lines of the Atchison, Topeka and Santa Fe Railway Company, which service is operated by Fred Harvey.

Reference is made to the attached letter from Mr. G. H. Nicholson, General Chairman, Kansas and Oklahoma District Board of Adjustment, in which he inquires concerning the status under the Railroad Retirement Act of 1935 of employees in the dining-car service on the lines of the Atchison, Topeka and Santa Fe Railway Company.

Fred Harvey was incorporated in 1901 under the laws of New Jersey. Prior to that time, from 1876, the business had been conducted as a private unincorporated venture solely owned by its founder, Mr. Fred Harvey. Following Mr. Harvey's death in 1901, his executors formed a corporation to carry out existing contracts with the Atchison, Topeka and Santa Fe Railway Company. The stock has been closely held, all stockholders being members of the Harvey family or persons associated with them. The railway company owns none of the stock.

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Fred Harvey has an exclusive contract with the Atchison, Topeka and Santa Fe Railway Company to operate all its dining cars, eating houses and hotels. The dining-car service, the eating-house service and the hotel service have been held by the Interstate Commerce Commission to be "incidental to common carrier operations and reasonably necessary for railroad purposes." Atchison, Topeka and Santa Fe Railway Company et al. 127 I.C.C. 1, 42-53 (1927); Rehearing, 143 I.C.C. 633 (1928); St. Louis-San Francisco Railway Company et al., 41 Valuation Reports (I.C.C.) 139 (1932)

The terms of the arrangement under which Fred Harvey operates the Santa Fe's eating facilities are embodied in a contract under date of July 2, 1906, as modified by three supplementary agreements dated respectively November 1, 1913, January 15, 1926, and March 30, 1933. This contract provides that the Santa Fe shall furnish, repair

and equip all dining cars, haul, switch, heat, light, water and clean them at terminals. It also provides that the Santa Fe shall furnish suitable buildings for hotels, eating houses, and storage space, shall transport free over its own lines all persons and property necessary to the Harvey business, and shall transmit free of charge all telegrams sent in the course of the Harvey business.

On its part, Fred Harvey agrees not to operate similar facilities for other railroads without the consent of the Santa Fe, to operate in a good and first-class manner the dining cars and eating houses whenever and wherever upon the Santa Fe line the railroad shall request it so to do, and to furnish all supplies for the entire business and all equipment for the eating houses.

The contract gives the Santa Fe the right to prescribe Fred Harvey's accounting methods, to inspect its books at any time, to call for the discharge of any employee of Fred Harvey objectionable to the officials of the Santa Fe, and to terminate the contract at any time it is dissatisfied with the service. In the event of such termination, the Santa Fe may buy at an agreed price all the supplies and personal property necessary to the business owned by Fred Harvey at the time the contract is terminated.

Other provisions require the Santa Fe to pay Fred Harvey twenty-five cents for each meal served on its dining cars west of Kansas City, Missouri, and ten cents for each meal served on dining cars east of that point. In addition to these sums, the Santa Fe is to pay Fred Harvey \$150,000 a year. The losses or profits of the business are to be borne or shared as follows: If all proceeds of the Harvey business (including the sums mentioned above) fail to equal or exceed the necessary expenses of the business, the Santa Fe is to bear the loss; if such proceeds (including the payments by the Santa Fe) exceed expenses, but by less than \$150,000, Fred Harvey is to retain two-thirds of such excess and pay the remaining one-third to the Santa Fe; if the proceeds of the business (including the sums paid by the Santa Fe) exceed expenses by more than \$150,000, Fred Harvey is to retain \$100,000 and pay up to \$150,000 of the balance to the Santa Fe, and the remainder if any, is to be divided one-third to Fred Harvey and two-thirds to the Santa Fe.

While the contract between Fred Harvey and the Santa Fe does not expressly confer the right upon the Santa Fe to designate who shall be employed in the service or to fix the compensation of the employees in the service or to direct the manner in which particular employees shall render service, the Santa Fe, through its power to terminate the contract because of dissatisfaction with the service, actually has power to supervise and direct the manner in which the service shall be conducted and the contract expressly gives it the power to call for the discharge of any employee found by it unsatisfactory.

These facts and those detailed below seem to indicate that employees in the dining-car service, while nominally the employees of Fred Harvey, may be, in fact, the employees of the Santa Fe Railroad. But however that may be, I am of the opinion that the employees in the dining-car service may qualify for annuities as employees of Fred Harvey, itself a carrier as defined by the Act.

Fred Harvey is, in my opinion, a carrier as defined by the Act because it is controlled by the Santa Fe and performs a service in connection with the transportation of passengers or property by railroad.

1. Fred Harvey operates the dining cars, eating houses and hotels of the Santa Fe. It may not perform a similar service for other railroads without the consent of the Santa Fe. While it operates the dining cars and two eating houses on the lines of the St. Louis-San Francisco Railway Company, by far the greater portion of its revenues is derived from the service it provides on the Santa Fe's lines. The contract between the Santa Fe and Fred Harvey gives the Santa Fe not only the right to prescribe Fred Harvey's accounting methods and to procure the discharge of any of Fred Harvey's employees but also, through the power which is reserved to it to terminate the contract because of dissatisfaction, the power to direct and supervise the manner in which Fred Harvey conducts its service. The exercise of the power to terminate the contract would be rather disastrous to Fred Harvey, since its revenue is derived mainly from the service which it renders on the lines of the Santa Fe. That the Santa Fe actually has control over Fred Harvey has been recognized by officials of Fred Harvey and the Santa Fe. In 1926, a cease and desist order by the Corporation Commission of Oklahoma directed to Fred Harvey was appealed to the Supreme Court of Oklahoma and proceeded to a decision upon a stipulation by the parties (which included Fred Harvey and the Santa Fe) that Fred Harvey was the "mere servant or agent" of the Santa Fe. Fred Harvey et al. v. Corporation Commission of Oklahoma, 229 Pac. 428 (1924). In 1926, Ford F. Harvey, President, of Fred Harvey, testified before the Interstate Commerce Commission that "We are absolutely and completely subservient to the demands of the company (the Santa Fe) as to where and how these facilities shall be established, the size of them and the character of the service to be rendered ... We are made just as responsive and just as subservient as if we were on a salary. They may terminate this contract at will, whenever our service is not satisfactory to them." Atchison, Topeka and Santa Fe Railway Company et al., Valuation Docket No. 625, Vol. 14, pp. 132, 135, decision reported in 127 I.C.C. 1.

2. That the service performed by Fred Harvey is a service in connection with the transportation of passengers or property by railroad seems to follow from the decisions of the Interstate Commerce Commission holding the dining-car, eating-house and hotel service provided by Fred Harvey on the lines of the Santa Fe to be "incidental to common

carrier operations and reasonably necessary for railroad purposes." Atchison, Topeka and Santa Fe Railway Company et al., 127 I.C.C. 1, 48-53 (1927); Rehearing, 143 I.C.C. 633 (1928); St. Louis-San Francisco Railway Company et al., 41 Valuation Reports (I.C.C.) 139 (1932).

The opinion I have expressed is predicated on the facts now available to us. It is necessarily tentative. Of course, it is possible, though I do not think very likely, that if a hearing were held for the purpose of providing all interested persons an opportunity to be heard, a different conclusion might be reached.

Copies to: Mr. Latimer
Mr. Dailey
Mr. Bronson