

April 14, 1941

Mr. [REDACTED], President
International Railway Company
Walbridge Building
Buffalo, New York

Dear Sir:

We have completed our investigation of the status of the International Railway Company under the Railroad Retirement and Railroad Unemployment Insurance Acts. Based upon the information furnished by you and the Erie Railroad Company and that obtained from the files of the Interstate Commerce Commission, the standard financial manuals and other sources cited herein, it is my opinion that the International Railway Company has been an "employer" under the Acts since April 17, 1938 with respect to its North-Tonawanda-Lockport-Olcott Freight Division operations and an "employer" prior thereto with respect to its Buffalo-Lockport-Olcott Division operations.

The International Railway Company was organized on January 27, 1902 under the laws of the State of New York by consolidation of the capital stocks, franchises and properties of the Buffalo Railway Company, the Buffalo & Niagara Falls Electric Railway, the Buffalo, Tonawanda & Niagara Falls Electric Railway Company, the Niagara Falls & Suspension Bridge Railway Company, the Buffalo & Lockport Railway, the Lockport & Olcott Railway and the Niagara Falls Suspension Bridge Company. At the time of the consolidation, the Niagara Falls Suspension Bridge Company owned a toll bridge across the Niagara River between Niagara Falls, New York and Niagara Falls, Ontario, but did not operate any railway service; the Buffalo & Lockport Railway was an electric surface street railway operating a passenger service locally within the City of Lockport, New York and between the Cities of Buffalo and Lockport, and a freight service between North Tonawanda and Lockport, a distance of approximately 13 miles; the Lockport & Olcott Railway was an electric street surface railway operating passenger and freight service between Lockport and Olcott, a distance of 14 miles; the other companies were electric street surface railways engaged exclusively in the transportation of passengers, the Buffalo Railway Company operating 108 miles of track on the city streets of Buffalo, New York, the Buffalo & Niagara Falls Electric Railway operating 24 miles of track between Buffalo and Niagara Falls, the Buffalo, Tonawanda & Niagara Falls Electric Railway Company operating four miles of track in North Tonawanda, and the Niagara Falls and Suspension Bridge Railway Company operating 19 miles of track in Niagara Falls, New York.

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It appears that passenger rail service in the City of North Tonawanda was discontinued prior to 1935. Some time in 1937 passenger rail service was discontinued and bus service substituted between Buffalo and Lockport, between Lockport and Olcott, and between Buffalo and Niagara Falls. Such substituted bus service, except that between Buffalo and Niagara Falls, was discontinued on June 30, 1939. In August 1937 passenger rail service in the City of Niagara Falls was supplanted by bus service which apparently is still in operation. On April 17, 1938 passenger rail service was discontinued in the City of Lockport and bus service substituted; the bus service was discontinued on June 30, 1939. Thus, the only passenger rail service operated by the International Railway Company since April 17, 1938 has been in the City of Buffalo. Since June 30, 1939, International Railway Company has operated bus service only in and between the Cities of Buffalo and Niagara Falls.

It appears further that from January 27, 1902, the date of its organization, to April 1921* the International Railway Company conducted passenger and freight operations from Buffalo to North Tonawanda to Lockport to Olcott and in the Cities of North Tonawanda and Lockport for the Erie Railroad Company pursuant to a "Lease-Agreement" dated June 1, 1898, and a supplemental "Lease" and "Contemporaneous Agreement" both dated September 1, 1899, between the Erie Railroad Company and the Buffalo & Lockport Railway, a predecessor of the International Railway Company. Thereafter its operations under such agreements have been confined mainly, if not entirely, to the switching of freight in the Cities of North Tonawanda and Lockport and the transportation of freight over the line of the Erie Railroad Company between North Tonawanda and Lockport and over International Railway Company's railroad from Lockport to Olcott, which latter operation (Lockport to Olcott) was discontinued on or about August 31, 1939. Since sometime in 1937 International Railway Company has had no rail connections between Buffalo and North Tonawanda.

Under the "Lease Agreement" of June 1, 1898 the Erie Railroad Company leased to the Buffalo and Lockport Railway for 99 years a part of its railroad between North Tonawanda and Lockport, designated the "leased road", together with all the buildings, property and appurtenances belonging thereto and granted it the right of trackage over certain of Erie's tracks in the City of Tonawanda connecting with the "leased road" and designated as the "trackage section."

* The Railway Official Guide shows that the Erie Railroad Company had a passenger station at North Tonawanda prior to April 1921 but none thereafter. This indicates that Erie conducted no passenger operations beyond Buffalo after April 1921.

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The Buffalo and Lockport Railway undertook "to haul for the Erie Company all the freight, mail and express matter of, from or for the Erie Company between North Tonawanda and Lockport, and load or unload the same where necessary, and in all respects * * * fulfill all the obligations now or hereafter imposed by law or by any lawful authority upon the Erie Company with respect to the receiving, transportation and delivery of freight, mail or express between said points or over any portion of the leased road or trackage section." It also agreed to "furnish and provide passenger service suitable and sufficient to properly perform the passenger business of the Erie Company over the leased road and the trackage section * * * and run passenger trains or cars in connection with all passenger trains arriving at or departing from North Tonawanda as shown from time to time upon the time cards of the Erie Company. It will sell passenger tickets of and for the Erie Company from Lockport and all points upon the leased road and trackage section over the same to all points upon the lines of the Erie Company, or elsewhere, as may be required by the Erie Company, in all respects as the same now are issued and sold by the Erie Company, or as may be prescribed by the Erie Company from time to time. The Erie Company will issue and sell tickets from all points on its lines to Lockport and any intermediate stations that may be established on the leased road, and the coupons or tickets covering the transportation over any part of the leased road or trackage section shall be accepted by the Lockport Company. * * * It will not issue or sell tickets for passage over any railroad, other than street-surface railroads, except the railroad of the Erie Company, without the consent of the Erie Company, unless the point to which such ticket is issued or sold is a point not upon the lines of the Erie Company or its connections."

The Buffalo and Lockport Railway agreed further that it would "thoroughly equip the leased road in all respects as a first-class railroad for the transportation of passengers, freight and other property by electric power, so that the same shall be in all respects sufficient and suitable for the performance by the Lockport Company of the duties and obligations of the Erie Company as a common carrier of passengers, freight, mail and express thereover." It was to maintain at its own expense at Lockport and at other points upon the leased road, offices, passenger stations and freight houses sufficient and suitable for the proper transaction of its business and that of the Erie Company at such points, and to employ and maintain thereat a sufficient number of competent employees, satisfactory to Erie, "to properly perform all necessary work in connection with such business." The rules and regulations promulgated by the Erie for the government of its employees were to apply to all employees engaged upon or in connection with the leased line.

The Erie Company retained the exclusive right to establish all freight, passenger and express rates between any points on the

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leased road or trackage section and any points on the lines of the Erie Company or its connections. All freight consigned over the leased road or trackage section, or to or from any point thereon, except local freight transported between points on the leased line and trackage section, was to be consigned, hauled and receipted for in the name of and in the manner required by the Erie Company, the same as other business of the Erie Company. The Buffalo and Lockport Railway was not to handle any, except local, freight or express for a road other than the Erie nor for an express company not designated by Erie. The interchange of cars between the two companies was to be made in accordance with the Master Car Builder's Rules, and the Buffalo and Lockport Railway was to pay the customary charge for car mileage on the cars of the Erie Company, or of other companies, hauled by it and conform to the car service rules adopted by the Western New York Car Service Association.

Generally, all earnings accruing from transportation of passengers and freight partly over the leased road and trackage section and partly over the railroads operated by the Erie Company were to be divided between the two companies by prorating them upon a straight mileage basis. Revenues derived from local transportation of passengers, mail, express and freight between Lockport and the North Tonawanda station of the Erie Company, or intermediate points were to be retained by the Buffalo and Lockport Railway. Switching services performed by it for the Erie between industries in the City of Lockport and the leased road were to be compensated at specified rates.

Under the "Lease" and "Contemporaneous Agreement" of September 1, 1899 the term of the "Lease Agreement" of June 1, 1898 was extended to 999 years and the Erie Railroad Company leased to the Buffalo and Lockport Railway a part of its railroad and right of way between Main Street, Buffalo and Ellicott Creek, Tonawanda, designated as the "leased section" and granted to it the right of trackage over certain tracks between Ellicott Creek and the trackage section designated as the "trackage section extension" for the purpose of enabling the Buffalo and Lockport Railway Company to operate a railway line over the same between Buffalo and Lockport. The leased section and trackage section extensions were not to be used for freight business (except fruit, vegetables and milk from the districts between Lockport and Olcott), but only for passenger business. The Erie Company was to construct at Lockport's expense a track on the leased section and also the track designated as the "trackage section extension."

The Buffalo and Lockport Railway agreed to "perform and satisfy all of the duties and obligations now or hereafter imposed by law or lawful authority upon the Erie Company with respect to said leased section, and particularly with respect to the operation and

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maintenance thereof." It also agreed to construct and extend its railroad tracks so as to reach all the factories and industries in the City of Lockport and to construct an extension of its railroad and tracks, or a connecting railroad, from Lockport to Olcott on Lake Ontario. All freight and express handled by it over the tracks so constructed, except local freight and express, was restricted to that received from or delivered to the Erie Company. Finally, it undertook to switch freight cars for the Erie Company to and from all industries located upon or reached by the tracks of the Lockport Company at the current rates prevailing from time to time for switching by steam-railroad companies at such points.

Total passenger revenues for the years 1935, 1936, 1937 and 1938 amounted to \$5,594,467, \$6,218,785, \$6,281,759, \$5,450,635, respectively, as against freight revenues of \$120,757, \$138,379, \$122,901, and \$80,256 for the respective years. The freight revenues during those years have been 2.0 per cent, 2.1 per cent, 1.9 per cent and 1.4 per cent of total revenues. Inasmuch as the local freight operations from North Tonawanda to Lockport to Olcott have been negligible, it is apparent that the above freight revenues have been derived almost exclusively from freight handled for the Erie Railroad Company, which has exceeded 180,000 tons annually.

It is clear that International has always been engaged in interstate transportation as a common carrier by railroad and therefore has always been subject to Part I of the Interstate Commerce Act. It was requested by the Interstate Commerce Commission to file Annual Reports and complied therewith until 1925 when the Commission, without disclaiming jurisdiction over International, excused it from so doing because of the small proportion of interstate to total revenues. It has filed tariffs, powers of attorney and concurrences with the Commission and has complied with the Locomotive Inspection Act and the Hours of Service Act. Although the amount of traffic carried by International in interstate commerce does not appear, it may be assumed from the fact that almost its entire freight revenues have been derived from freight transported or switched for Erie that a substantial part of the freight carried by it has been moved in interstate commerce.

Since International has been engaged in activities which make it a carrier by railroad subject to Part I of the Interstate Commerce Act, it is an "employer" within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts, unless it falls within the electric railway exemption proviso in section 1(a) of those Acts. To be within the exemption proviso the company must be merely a street, suburban, or interurban electric railway, not operating as a part of a or the general steam-railroad system of transportation. Compare Texas Electric Ry., 208 I.C.C. 193, 202 (1935), review by injunction proceedings dismissed - Texas Electric Ry. Co. v. Eastus,

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25 F. Supp. 825 (N.D.Tex. 1938), affirmed by Supreme Court without opinion, 308 U.S. 512 (1939); Oklahoma Ry. Co., 218 I.C.C. 123 (1936); Indiana Railroad, 229 I.C.C. 48 (1938); Cincinnati & Lake Erie Rd.Co., 229 I.C.C. 187 (1938); Division 215 v. Chicago, Aurora & Elgin Rd.Co., 234 I.C.C. 301. By virtue of its operations from North Tonawanda to Lockport to Olcott since April 17, 1938, International has been more than a mere street, suburban or interurban electric railway and has operated as a part of a and the general steam-railroad transportation system.

Apart from its operation by electric motive power, International in its rail operation over the North Tonawanda-Lockport-Olcott route and in the Cities of North Tonawanda and Lockport since April 17, 1938 has possessed none of the distinguishing characteristics of a street, suburban, or interurban electric railway. Its operations have been confined exclusively to the transportation and switching of freight. No rail passengers have been carried and no rail passenger equipment used. Inasmuch as street, suburban, or interurban electric railways are essentially and characteristically (local) passenger carriers (see Piedmont & N. Ry.Co. v. Interstate Commerce Commission, 286 U.S. 299; United States v. Chicago, North Shore & M. R.R. Co., 288 U.S. 1), the following language in Chicago Tunnel Company et al, 214 I.C.C. 81, is equally applicable to International's rail operations since April 17, 1938:

" * * * we are not referred to any authority for holding that an electric railway which transports only freight can be considered a street railway, and we do not think such a railway is within the commonly understood meaning of the term * * *. A street railway is one which is primarily if not altogether a carrier of local passengers. See Rules for Testing Other Than Steam Power Locomotives, 122 I.C.C. 414, 424; and Piedmont & N. Ry. Co. v. Interstate Commerce Commission, 286 U.S. 299, 307."

See also Status of San Francisco and Napa Valley Railroad, 237 I.C.C. 675; Cook Transit Corporation Operation, 202 I.C.C. 389, 465; Sea-view Ave. Industrial Ry. Abandonment, 175 I.C.C. 281.

Moreover, practically the entire transportation service performed by International between North Tonawanda and Lockport since April 17, 1938 has been carried on under Erie's tariffs as Erie's agent. So far as Erie's obligation to the public is concerned it has been Erie's work. International's switching of cars in the Cities of North Tonawanda and Lockport and its transportation of freight to and from Olcott, while not Erie operations, have nevertheless been performed primarily if not exclusively for Erie. It may be

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noted in this connection that such switching and transportation operations were originally instituted at Erie's instance and presumably for Erie's benefit. International's freight operations over the North Tonawanda-Lockport-Olcott route and in the Cities of North Tonawanda and Lockport on behalf of and for Erie in effect have constituted International a part of the Erie system with respect to such operations. See Hudson & N.R.Co. v. Hardy, 103 F. 2d. 327; Texas Electric Ry. Co. v. Eastus, 25 F. Supp. 825, 830-1.

Furthermore, International's freight and switching operations for Erie since April 17, 1938 have been conducted as a part of the national railroad system of transportation. As Erie's agent under Erie's tariffs and through its physical connection with Erie, International has transported a considerable amount of freight originating at or destined to points throughout the country and it has therefore participated to a substantial extent in the carriage of the national commerce. Cf. Indiana Railroad, 229 I.C.C. 48; Cincinnati & Lake Erie R.R. Co., 232 I.C.C. 267; Chicago, South Shore & South Bend R.R., 234 I.C.C. 34; and Chicago, North Shore & Milwaukee R.R. Co., 234 I.C.C. 301.

It is thus clear that by virtue of its electric line operations over its North Tonawanda-Lockport-Olcott route, International has been, at least from April 17, 1938, more than a street, suburban or interurban electric railway and has operated as a part of a and the general steam-railroad system of transportation. However, in view of my conclusion that the North Tonawanda-Lockport-Olcott route should be segregated from the other operations of International, it is unnecessary to decide at this time that International, in its entirety, is not within the electric railway exemption proviso of Section 1(a) of the Acts, and there will be no determination, under the present circumstances, that it is an employer as to its operations other than those on the North Tonawanda-Lockport-Olcott route.

If the North Tonawanda-Lockport-Olcott Freight Division should be considered as an entity, it would be a carrier by railroad subject to Part I of the Interstate Commerce Act, and not within the electric railway exemption proviso of Section 1(a) of the Acts, for the reasons set forth in the consideration of International's operation of the Freight Division. Considered apart from the street railway operations of International, its Freight Division since April 17, 1938 has been beyond question more than a street, suburban, or interurban electric railway and has been operated as a part of a and the general steam-railroad system of transportation. And since all the revenues of the Division have amounted to 2 per cent or less of International's total revenues, and the other operations of International apparently have not been in interstate commerce and, standing alone, would be within the exemption proviso, it is advisable to determine,

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in accordance with Section 202.03 of the Board's Regulations, 4 Federal Register 1478 (April 7, 1939), whether the Freight Division, as an identifiable and separable enterprise, should be considered the company which has been an employer under Section 1(a) of the Acts; and it is my conclusion that it should be so considered.

A like procedure under Sections 202.03 and 202.09 of the Board's Regulations, supra, was followed in General Counsel's Opinions No. 1939 R.R. 98, approved B.O. 39-567 re Kirby Lumber Corporation, No. 1938 R.R. 28 re Ohio-Midland Light & Power Company and No. 1940 R.R. 4 re Rochester Transit Corporation, and Board Decision of October 3, 1940, re Utah Copper Company, et al.

Section 202.03 of the Regulations, supra, provides:

"With respect to any company or person principally engaged in business other than carrier business, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer."

Obviously the great bulk of International's business has been the local intrastate carriage of passengers on its electric street railway and bus systems, the total operations of the Freight Division amounting to only 2 per cent or less of its entire business in terms of revenue. It is apparent then that International has been engaged principally in a business which is not in itself sufficient to make the company a carrier by railroad subject to Part I of the Interstate Commerce Act and which in addition is such that, standing alone, it would be within the electric railway exemption proviso in Section 1(a) of the Acts. Compare Kansas City Southern Railway v. United States, 282 U.S. 760, 764 (1931).

Since only the business over the North Tonawanda-Lockport-Olcott Freight Division would make International a carrier by railroad subject to Part I of the Interstate Commerce Act and not within the electric railway exemption proviso of Section 1(a) of the Acts, and this business has constituted a very small part of International's entire operations, only the Freight Division should be considered an employer under the Acts, for it has been an identifiable and separable enterprise. There has been no physical connection between the electric street railway lines and the lines of the Freight Division at least since April 17, 1938. No passenger service has been operated

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over this Division; its service has been restricted entirely to freight operations, principally under Erie's tariffs. The individuals employed on the Freight Division between North Tonawanda and Lockport have been subject to the rules and regulations governing the conduct of Erie employees. The revenues received from the Freight Division are necessarily distinct from those earned by the electric street railway and bus lines, since they are derived in the main from the Erie Railroad in connection with services performed for it and are therefore easily segregable from the street railway and bus revenues. In reality, the Freight Division has been an Erie operation distinct and separate from International's electric street railway and bus operations.

Accordingly, the North Tonawanda-Lockport-Olcott Freight Division enterprise of International should be considered the "employer" under the Acts at least since April 17, 1938.

Prior to that date the operations of the North Tonawanda-Lockport-Olcott Freight Division were the same as described above, except that this Division was then operating as a part of International's Buffalo-Lockport-Olcott Division which also operated a rail passenger service between Buffalo and Olcott and in the Cities of North Tonawanda and Lockport. Prior to 1922 part of this passenger service was operated for Erie under Erie's tariffs. International's passenger service for Erie probably ceased in 1921 since it appears that Erie discontinued its passenger station at North Tonawanda in that year. Accordingly, International's rail passenger service over its Buffalo-Lockport-Olcott Division from 1922 to 1938 presumably was of a local nature. However, the character and extent of the freight operations over this Division were such as to constitute it more than a street, suburban or interurban electric railway which operated as a part of a and the general steam-railroad system of transportation. And since the rail operations of International between Buffalo and Olcott were always conducted as a separate division of International distinct from its electric street railway and bus operations in the City of Buffalo and elsewhere, the Buffalo-Lockport-Olcott Division of International was an identifiable and separable enterprise of International and should be considered the "employer" under the Acts from January 27, 1902, the date of International's incorporation, to April 17, 1938 when only the North Tonawanda-Lockport-Olcott Freight Division of International continued to be the "employer." This separate treatment of International's operations between Buffalo and Olcott is similar to the separate consideration given by the Interstate Commerce Commission in Rules for Testing Other Than Steam Power Locomotives, 122 I.C.C. 414, to the inter-urban operations of the Portland Electric Power Co. which also operated electric street railway lines in the City of Portland, Oregon. Service to the Buffalo-Lockport-Olcott Division of International is

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creditable toward annuities under the Railroad Retirement Act from January 27, 1902 to April 17, 1938 and service to the North Tonawanda-Lockport-Olcott Freight Division is creditable thereafter.

Under Section 202.13 of the Board's Regulations (4 Federal Register, p. 1479), if the International Railway Company will concur therein the conclusion expressed above will be made final by the Board. If the company does not concur in the conclusion reached, the question will be submitted to the Interstate Commerce Commission for determination as provided in Section 1(a) of the Acts.

We thank you for your cooperation in this matter, and trust that we may have a decision as soon as possible as to the company's concurrence in this opinion.

Very truly yours,

[REDACTED]
General Counsel