

August 19, 1944

Mr. Alanson W. Willcox
Assistant General Counsel
Federal Security Agency
Washington, D. C.

Dear Sir:

I have your letter of July 13, 1944 comprising your proposed opinion on the status of the Texarkansas Stockyards Company. You state that the question is now before the Appeals Council of the Social Security Board and that from the evidence there presented, it is clear that the Company is a public stockyard and is engaged in loading and unloading rail-borne livestock. The evidence is, further, that about ten per cent of the incoming livestock and fifty per cent of the outgoing livestock, and about forty per cent of the total handled, is rail-borne. The Company has nine employees who, with the exception of two scale men, are general laborers. Of these, three men spend twenty-five to thirty minutes a day, on an average, in livestock loading and unloading and the Company's general manager spends fifteen minutes a day, on an average, in connection with such carrier operations. You conclude that the Company's carrier operations are "so casual and insubstantial as to be negligible and that, therefore, services performed for the company are not creditable under the Railroad Retirement Act but are services covered by the Social Security Act."

It is clear, on the basis of the facts stated, that if the Stockyards Company is an "employer" under the Railroad Retirement Act at all, it is as a carrier by railroad subject to part I of the Interstate Commerce Act. While the Company's carrier operations appear to be small, I can find no basis for agreeing with you that for this reason the Company, otherwise a carrier subject to the Interstate Commerce Act, is not such a carrier. In Beaver Sand Co. v. Director General, 66 I.C.C. 285, the Interstate Commerce Commission held that the "short length", the "scarcity" of a railroad's equipment, "and the limited extent of its operations" did not prevent it from being a common carrier by railroad subject to the Interstate Commerce Act. The conclusion that the railroad was such a common carrier was, according to the Commission, "unescapable" simply because "there is a bona fide holding out . . . to perform a transportation service for the public at rates published and filed in the manner prescribed by law" and "its services and facilities are available to and actually employed by the public." Cf. United States v. Colorado & N. W. R.R. Co., 157 Fed. 342; Jurisdiction Over Urban

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Electric Lines, 33 I.C.C. 536, 538. I may point out, too, while the Retirement Act provides for exemption from coverage of carrier affiliates whose railroad-connected services are only "casual", no such exemption is provided for "carriers" which include carriers by railroad subject to part I of the Interstate Commerce Act.

Accordingly, I am unable to agree with your proposed opinion that the railroad services of the Stockyards Company are not covered by the Railroad Retirement Act. It may be, of course, that our investigation, which I am directing to be made, will develop information sufficient to warrant a segregation between the Company's railroad and non-railroad business. I shall be glad to inform you further in that regard.

Very truly yours,

P.M.J.

Joseph H. Freehill
General Counsel