

Mr. Smith

Package Agency
Employer of Elec. package agency employees
Service to Elec. pack. agency had service to carriers

MEMORANDUM

L-38-1081
38-7-26

WASHINGTON, D. C.
November 17, 1938

L-38-1081

TO The Board
FROM The General Counsel
SUBJECT Creditability of service to The Electric Package Agency

Approved by Board
Nov. 22, 1938

On August 17, 1938, I submitted an opinion to the Board in which I concluded that The Electric Package Agency (hereinafter referred to as the "Agency") was an express company subject to Part I of the Interstate Commerce Act, and was, therefore, an "employer" within the meaning of the Railroad Retirement Act since May, 1902. Since I submitted that opinion, however, certain information has been given us by the Lake Shore Electric Railway Company, one of the participants in the Agency, which has led me to change my opinion as to the status of the Agency.

This additional data, which was furnished us by Mr. F. W. Coen, Receiver of the Lake Shore Electric Railway Company, establishes that The Electric Package Agency was merely an operating department of the various railways involved, and that the persons engaged in the performance of the operations of that Agency were either employees of particular railways involved or joint employees of all those railways.

The following description of the Agency is based upon the data supplied us by Mr. Coen.

The Agency was established some time in 1898 by the officers of the Lorain and Cleveland Railway Company, which was a predecessor to the Lake Shore Electric Railway Company, to handle less-than-carload freight and express matter. Subsequently, other carriers became participants in the operation of the Agency.

The Agency was finally abandoned as of July 16, 1934, when all its tariffs on file with the Interstate Commerce Commission were cancelled.

The participating carriers during the agency's existence, and the period of their affiliation with the agency, may be listed as follows:

1. The Lake Shore Electric Railway Company, or its predecessor company, The Lorain and Cleveland Railway Company, from 1898 until the discontinuance of the Agency. The Lake Shore Electric Railway Company

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has been held to be an "employer" under the Railroad Retirement Act from September 25, 1901, until it ceased operations about a year ago; and service to The Lorain and Cleveland Railway Company has been held creditable as service to a predecessor carrier by railroad.

2. The Cleveland Railway Company or its predecessor company, from 1898 until approximately 1925. No ruling has yet been made on the status of these companies.

3. The Cleveland, Southwestern Railway and Light Company or its predecessor companies, from 1898 or 1899 until approximately 1930. The Cleveland, Southwestern Railway and Light Company has been held to be an "employer" under the Railroad Retirement Act from May 3, 1924, to February 28, 1931; and the Cleveland, Southwestern and Columbus Railway has been held to be an "employer" under the Act from January 1, 1918, to May 3, 1924.

4. The Northern Ohio Traction and Light Company or its predecessor companies, from 1898 or 1899 to about 1925. No ruling has yet been made as to the status of this company under the Railroad Retirement Act.

5. The Cleveland, Painesville and Eastern Railway Company, from about 1898 or 1899 until about 1925. No ruling has yet been made as to the status of this company under the Act.

Mr. Coen states that there were some other small participants in this Agency, but they were added on to the main participating carriers listed above, and did not continue this operation for a great while. Mr. Coen states further that for many years, the Agency service was operated between Cleveland, Ohio, and Detroit, Michigan, by the Lake Shore Electric Railway and the Detroit, Monroe and Toledo Short Line Railroad Company. The latter company, however, was not a participating carrier in the Agency but handled the cars and merchandise by special arrangement with the Lake Shore Electric Railway Company.

The Agency's management was as follows: A committee consisting of the General Manager of each participating carrier, or his representative, directed the Agency's activities, and employed a manager to handle the detail. All salaries and changes in salaries were fixed by the

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representatives of the members. All employees whose activities were common to several companies were approved by the various carrier representatives, and employees working wholly on an individual carrier were approved by the manager of the particular carrier, and were subject to discipline and dismissal by the manager of such carrier.

The persons engaged in the performance of the Agency's functions at Cleveland were considered joint employees of the carriers participating in the Agency, while those working on the Lake Shore route were considered employees of the Lake Shore. In both cases, these persons were accorded the same rights and privileges as any other carrier employee. Furthermore, they were subject to the supervision and direction of the participating carriers as to the manner in which their services were performed; and were paid sometimes by the Agency with the funds of a carrier and sometimes directly by a carrier.

In a letter dated October 27, 1938, Mr. Coen makes the statement that:

"I was closely associated with the Electric Package activities from its inception in 1898 until its discontinuance, and in consequence knew how the business of the Agency was handled, knew a great many of the employees, and knew of their relationship with the carriers, and from such knowledge covering the entire period of approximately 35 years, I feel that these employees were the employees of the carrier and were paid out of the carrier funds just as surely as if all of these activities had been carried on in the name of the Railway Company - the use of the name Electric Package Agency being merely as a matter of convenience in the carrying on of the business which it conducted in behalf of the carrier."

Mr. Coen states that the finances of the Agency were handled somewhat as follows: The Agency, not being a corporation but only a name assumed for convenience, had no capital, and used its collections for business done to pay its expenses. All equipment which was used, such as vehicles, office and station equipment, etc., was owned by the carriers. In Cleveland, where it was a joint agency representing the various carriers, the expense for the necessary equipment was borne by the various carriers. The expenses of the Agency, generally speaking, were borne by the Agency. This expense, however, did not include any payment to any carrier for services performed by it, such as transportation of merchandise, etc. The income on each carrier line was allotted

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to that line and the expenses on each carrier line was allotted to that line. If the income exceeded the expenses as above described, such excess was paid directly to the carrier.

In the case of the Lake Shore Electric Railway, the income and expenses accruing to it were entered on the Lake Shore's books as gross income, and expenses of the Agency were carried to the appropriate accounts as shown by the records of the Lake Shore. Mr. Coen states that "so far as the Lake Shore Electric Railway Company is concerned, the operations of the Electric Package Agency and the employees connected therewith, were in fact a part and parcel of the railway operation, and Electric Package Agency was only the name used for that vehicle."

It should also be noted that the Agency was not required to make any state or county tax returns, or reports to the Ohio Public Utilities Commission or to the Interstate Commerce Commission, all these reports and returns being made by the participating railroads.

Mr. Coen submitted data on the gross income, gross expense, and net earnings of the Agency for certain years, including a statement of the percentages of each of these items attributable to each participating carrier. From this material it appears that, excluding the last few years of the Agency's life, when the Lake Shore was the only participant, the Lake Shore's percentage of gross income and gross expense during the existence of the Agency varied from about twenty to forty-five per cent, and its percentage of net earnings varied from about twenty to fifty-three per cent.

The Agency possesses the characteristics of a railroad association within the meaning of section 1 (a) of the Railroad Retirement Act, with the exception that on the evidence we now have, it does not appear that it was "controlled and maintained wholly or principally by two or more employers" under the Act, as required by the Act, during its entire existence. As may be noted from the above list of participating carriers, only one of the participating carriers has been ruled by the Board to be an "employer" as far back as 1901. Consequently, the railroad association approach is unsatisfactory for present purposes.

The foregoing information establishes, however, that the Agency was merely an operating department of the various participating carriers, and that the persons engaged in the operations of the Agency were either employees of particular carriers, or were joint employees of all the participating carriers. In view of the fact that either the Lake Shore Electric Railway Company and its predecessor, the Lorain and Cleveland Railway, participated in the operations of the Agency from its origin in 1898 to its final discontinuance as of July 16, 1934, I

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conclude that the persons engaged in the performance of the Agency's operations were, as to (1) the work done by them on the route of the Lake Shore or on that of its predecessor, the Lorain and Cleveland Railway, or (2) work done jointly for the Lake Shore, or its predecessor, and the other participating carriers, in the service of an "employer" (The Lake Shore Electric Railway) or of a predecessor carrier by railroad (The Lorain and Cleveland Railway Company).

Those persons were either directly or indirectly compensated by the Lake Shore, or by its predecessor, for the work done by them for those two companies. This conclusion is the reasonable inference to be drawn from the fact that throughout the existence of the Agency, the Lake Shore, or its predecessor, played a most important part in the activities of the Agency, with the result that during this entire period, the Lake Shore or its predecessor, was having work done for it by the Agency and was making payments, either directly or indirectly, for the labor involved in such work on its behalf.

Consequently, it is my opinion that the work performed by persons engaged in the operations of the Electric Package Agency (1) on the route of the Lake Shore, or on that of its predecessor, the Lorain and Cleveland Railway, or (2) performed jointly for the Lake Shore, or its predecessor, and the other participating carriers, constitutes service which is creditable under the Railroad Retirement Act. I recommend that such service be held creditable from 1898, the year in which the Agency was established, until July 16, 1934, when the Agency was finally abandoned.

Lester P. Schoene
General Counsel

CC to Mr. Latimer
Mr. Eddy
Mr. Reed
Mr. Hodge
Mr. Lynch