
MEMORANDUM

Chicago, Illinois
April 7, 1943

TO Director, Bureau of Retirement Claims

FROM The General Counsel

SUBJECT Status of the Berkshire Street Railway Company

In response to your request, I submit herewith my opinion on the following:

QUESTION

Is service to the Berkshire Street Railway Company creditable under the Railroad Retirement Act?

OPINION

The Berkshire Street Railway Company has never been an employer within the meaning of the Railroad Retirement Act and service to it is not creditable.

DISCUSSION

The Berkshire Street Railway Company was incorporated in Massachusetts on June 11, 1901 and commenced operations August 11, 1902 as an electric railway. As of 1908, it operated 72 miles of line, the main line extending between the Massachusetts-Vermont state line and Great Barrington, Massachusetts. By 1913 its mileage had increased to 145, including lines of the Vermont Company and the Hosack Falls Railroad Company operated under lease, and its operated line had extended into Vermont and New York. In 1923, as a result of cancellation of its lease with the Vermont Company line, its operated mileage was reduced to 97, all of which lay in Massachusetts. In 1929 when it ceased all interstate operations it used only 95 miles of track. By November 12, 1932 it had discontinued all rail operations in favor of bus operations in which it has since been exclusively engaged.

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Although clearly a carrier by railroad subject to Part I of the Interstate Commerce Act during at least the period for which it filed annual electric railway operating reports with the Interstate Commerce Commission (July 1, 1907 through September 26, 1929), the Berkshire was never more than a street, suburban or interurban electric railway. Thus, as shown by the table in the appendix, the Berkshire handled no freight at all during 7 years of its rail operations and in 9 other years its freight revenues were under \$500. In the year of its greatest freight business, the proportion from that source of its total transportation revenues did not exceed 3.1 per cent; in most of the other years in which it handled freight the percentage was considerably less. Moreover, according to available information, even this small freight traffic was purely local in nature. The Berkshire was, in fact, not equipped to handle the ordinary line of freight traffic to any appreciable extent as at no time did it own more than 6 freight cars and these cars were not interchangeable with steam railroads. As for its passenger traffic, despite the filing of concurrences with the Interstate Commerce Commission in the passenger tariffs of 2 steam railroads, the New Haven, and the Boston and Albany, which concurrences were in effect only during the years 1908 to 1914, this traffic (according to the New Haven, which since 1905 had directly or indirectly owned the Berkshire) was local only and was not interchanged with other carriers. Also of some significance are the facts that the New Haven listed the Berkshire, in a general statement of New Haven affairs for the year 1914, as one of its "trolley companies." and in its report for 1916, the New Haven, listing its affiliated companies, placed the Berkshire under the heading "street railways held directly" although another electric line subsidiary, the New York, Westchester and Boston, was listed as a "railroad." Finally it is important to note that the Interstate Commerce Commission itself has held the Berkshire to be nothing more than a street, suburban or interurban electric railway and not subject to the Locomotive Inspection Act which Act, the Commission holds, includes every carrier by railroad subject to the Interstate Commerce Act which is not "strictly a street, suburban or interurban railway" (and even the latter is included if "operated as a part of a general railroad system of transportation"). Rules for Testing Other Than Steam Power Locomotives, 122 I.C.C. 414 (1927).

It is also clear that the Berkshire was never "operating as a part of a general steam-railroad system of transportation" within the meaning of the electric line proviso of the Railroad Retirement Act. The proviso is a limitation not only on the coverage of railroads subject to the Interstate Commerce Act but also on the coverage of companies owned or controlled by "carrier-employers" so that obviously the quoted provision is not satisfied by showing only that the

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Berkshire is owned and controlled by the New Haven. Cf. New York, Westchester & Boston Railway Company, 218 I.C.C. 253 (1936). And since the provision has to do with railways, the business of which is transportation, the operating relation required would seem to be that of transportation. See Hudson & Manhattan Railroad Company v. Hardy (CCA 2), 103 F (2d) 327 (1939) cert. den. 307 U. S. 641; Texas Electric Railway Company v. Eastus, 25 Fed. Supp. 825 (1939) (affirmed 308 U. S. 512; Interurban Railway Co., 227 I.C.C. 589 (1938).

There is some evidence that the New Haven intended to use the trolley lines it acquired in New England, one of which was the Berkshire, as feeder or supplementary to its general transportation system (evidence in Financial Transactions of the New York, New Haven and Hartford Railroad Company, 31 I.C.C. 32 (1914) but it must be borne in mind that the statements to that effect were made in an investigation of the propriety of the New Haven's action in acquiring control of local transportation companies in New England and were probably calculated to justify the New Haven's monopolistic action. A contention that the Berkshire would be operated as part of the New Haven transportation system appears to have been advanced originally for the purpose of influencing the Massachusetts Legislature to pass a special act permitting the New Haven to hold the stock of certain street railways since the Massachusetts law prohibits a railroad corporation from holding stock in a street railway company. This special Act was sought by the New Haven after a decree of the Supreme Judicial Court of Massachusetts had found that it was acting ultra vires in acquiring control of the Berkshire. In any event, however, it appears that during the entire period of New Haven's control, the Berkshire filed only 2 concurrences in New Haven's freight tariffs, one of which was effective from April 4, 1919 to July 15, 1926 and the other from February 10, 1913. Moreover, even apart from the fact that the freight business was practically negligible, the evidence we have is that the traffic was "purely local." Accordingly, the Berkshire can to no extent be regarded as a part of the New Haven's freight carrying system. With respect to the possibility that the Berkshire operated as a part of the New Haven passenger carrying system, it appears that the Berkshire filed concurrences in the passenger tariffs of the New Haven, the Boston and Maine, the Boston and Albany and the Bennington and North Adams Street Railway. However, the earliest of these concurrences, that with the Bennington and North Adams Street Railway, was filed January 8, 1908, and the last, which was in the tariffs of the Boston and Albany Railroad, was cancelled on May 31, 1914, so that it was for no more than a 6-year period in which the Berkshire had any participation in the passenger tariffs of steam railroads. And as a matter of fact, according to the New Haven, the Berkshire at no time interchanged passengers with

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any steam railroad. Moreover, according to the Electric Railway Journal, Volume 42, December 6, 1913, pages 1170 and 1177, the Berkshire operations were managed by a branch of the New Haven financial system referred to as the electric railway branch, an entirely distinct unit. Other indications that the Berkshire was not operated as a part of the general steam railway system of New Haven, in addition to the New Haven's claim to that effect, are the facts that at no time was the Berkshire freight and express traffic handled under the rules of the American Railroad Association or any similar steam railroad association, nor was the Berkshire ever a member of such an association; its employees have not belonged to any of the standard railroad labor organizations and neither the National Mediation Board nor its predecessor has assumed jurisdiction in any labor disputes involving them. Finally, it is to be considered that the Interstate Commerce Commission, the agency which has been given final authority to determine questions of electric railway status under the Retirement Act (Section 1(a); see also Shields v. Utah, Idaho Central, 305 U. S. 177 (1938)), concluded, as previously indicated, that the Berkshire was not "operated as a part of a general railroad system of transportation."

The facts outlined above showing that the Berkshire was a small local line with little or no interchange of traffic with other railroads show also that the Berkshire, during the period of its operation as an electric railway, was not a "part of the general steam-railroad system of transportation." Portland Traction Co., 237 I.C.C. 647 (1940); Cf. Indiana Railroad, 229 I.C.C. 48 (1938); Cincinnati & Lake Erie Railroad, 232 I.C.C. 267 (1939); 243 I.C.C. 439 (1941).

And it is clear that the Berkshire, throughout the period since 1932, during which it has been exclusively engaged in bus operations, has not been an employer as a "carrier affiliate." These bus operations appear to have been instituted solely in substitution for its rail service which, as has been pointed out, had not been conducted as part of the New Haven railroad system. They have been purely local bus operations within and between the towns served by the Berkshire in a small area in the northwestern part of Massachusetts. It is indicative in this connection that, according to Moody's financial manual, the average fare for the passengers carried by the Berkshire during the years 1940 and 1941 has been about 7.13¢. There is no indication that these bus operations have any direct connection with the New Haven's railroad transportation business. See General Counsel's opinions on: Boston, Worcester and New York Street Railway Company, L-40-93; Union Transportation Company, L-41-179; Cf. General Counsel's opinion on New England Transportation Company, L-40-466. ✓

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In summary it is my opinion, on the basis of the available evidence, that the Berkshire throughout the period when it operated an electric railway, fell within the terms of the electric railway exemption proviso in Section 1(a) as a street, suburban or interurban electric railway not operated as part of a or the general steam railroad system of transportation and, that it has not been, in its subsequent bus operations, performing services or operating equipment in connection with railroad transportation. Accordingly, although the Berkshire has been controlled through almost its entire existence by a "carrier employer," the New Haven, it is my opinion that it has never been an employer and service to it is not creditable under the Railroad Retirement Act.

Joseph H. Freehill
General Counsel

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APPENDIX

TABLE OF BERKSHIRE'S RAILWAY OPERATING REVENUES*

<u>Year</u>	<u>Passenger Revenues</u>	<u>Carriage of Express and Parcels Revenues</u>	<u>Freight Revenues</u>	<u>Switching</u>
1902	\$ 27,362.21	\$	\$	\$
1903	181,099.23	194.55		
1904	192,539.85			
1905	182,696.37	704.37		
1906	257,889.70	1,124.06		
1907	398,915.74	2,287.01		
1908	400,771.62	3,176.54		
1909	181,056.60	5,817.28	58.60	
1910	470,980.02	8,722.01	96.06	
1911	728,767.68	11,734.73	135.14	
1912	792,580.41	13,510.48	769.60	
1913	892,889.87	11,849.25	7,382.18	
1914	914,813.87	5,858.21	21,154.70	
1915	860,802.83	4,988.37	21,025.26	
1916	919,124.61	5,555.34	28,229.26	
1917	1,009,399.48	6,081.91	32,279.50	
1918	800,111.35	4,883.12	30,618.84	114.00
1919	850,396.08	4,163.21	21,416.04	#6.00
1920	1,026,933.52	4,322.37	7,476.19	513.46
1921	1,078,006.21	5,353.95	2.67	4,136.96
1922	1,026,208.88	2,944.08	#50.00	5,694.37
1923	946,336.07	3,143.33	91.67	732.62
1924	890,949.74	4,339.67		181.05
1925	820,938.94	4,332.68		172.49
1926	810,387.93	4,763.05		113.30
1927	765,442.43	4,158.57		165.26
1928	720,590.48	3,894.73		137.36
1929**	522,583.68	2,907.49		320.00

* Figures for period 1902 to 1907 taken from Massachusetts Railroad Commissioners Reports. Figures for subsequent years taken from Interstate Commerce Commission Reports.

**Nine months only.

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