

February 24, 1945

Mr. Irving T. Bush, President
Bush Terminal Company
100 Broad Street
New York, New York

Dear Sir:

In an opinion of August 23, 1939, affirmed February 20, 1941, this office ruled that the Bush Terminal Company, in its entirety, has been an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act at least since August 28, 1935 as a company under common control with a carrier by railroad subject to part I of the Interstate Commerce Act and regularly performing substantial services, other than trucking, in connection with transportation by railroad and receipt, delivery, storage, and handling of property transported by railroad. We have since, however, received additional information from the Company which requires that our previous ruling be modified to the extent of restricting the coverage of the Company under the Railroad Retirement Act and the Railroad Unemployment Insurance Act to its "Railroad Department" and to hold that it completely ceased to be a covered "employer" as of December 31, 1944.

According to the new information, the Company, clearly, is primarily engaged in the business of renting industrial buildings to various manufacturing companies, renting piers to steamship companies, in operating trucks, ordinary commercial warehousing, and other incidental and non-railroad operations. For the most part, the goods stored in the Company's warehouses are transported to or from such warehouses by steamship or motor truck; very little is handled by rail and none is "storage-in-transit". The Company's railroad-connected business, namely, the receipt and delivery of goods at New Jersey rail heads and at the Company's terminal in Brooklyn, as agent for the trunk lines, constitutes only a little over one-fourth of the Company's business whether computed in terms of revenues or employees. It now appears, therefore, that the Company is principally engaged in "non-employer" operations. Accordingly, Regulations 202.9 (20 C.F.R. 202.9) and 301.4 (20 C.F.R. Cum. Supp. 301.4), which provide that a company principally engaged in "non-employer" activities may be held to be an "employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act with respect to less than the entire entity if it is found that the Company's "employer" activities are conducted as a separate and identifiable enterprise, are applicable. Board Decision on Utah Copper Company, Jurisdictional Docket No. 5, affirmed, Utah Copper Company v. Railroad Retirement Board, 129 Fed. (2d) 358 (C.C.A. 10th, 1942), cert. denied 317 U. S. 687; cf. California v. Anglin, 129 Fed. (2d) 455 (C.C.A. 9th, 1942); see House Report 728 (pp. 73-74), 76th Congress, First Session, accompanying H. R. 6635, Social Security Act Amendments of 1939; Senate Report No. 734 (p. 88), 76th Congress, First Session, on the same bill.

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As to whether the Company's employer services, that is, its activities as agent for the trunk lines, constitute a separate and identifiable enterprise, the new information shows that these activities have always been conducted (up to December 31, 1944) by a unit in the Company known as the "Railroad Department". This department is readily recognizable in view of the special nature, and place of performance, of its operations. Except for certain executive personnel whose salaries are apportioned as between the Company's Railroad and other departments, the persons employed in the Railroad Department perform, ordinarily, no duties in other departments and when they do, appropriate pay roll account is taken. For this department separate accounts, not only for pay roll but for all other purposes, have always been maintained. The Railroad Department has been, therefore, a separate and identifiable enterprise within the meaning of the Regulations and only that enterprise should be held to be the "employer". General Counsel's Opinion on Somers Lumber Company, L-43-837. Additional support for this conclusion may be found in the fact that the Company, pursuant to Interstate Commerce Commission authorization (Finance Docket 14137, July 28, 1944), was able, without difficulty, to turn over on January 1, 1945 all the operations performed by its Railroad Department to its subsidiary railroad, the Bush Terminal Railroad Company. While there are some additional services, purchasing and pay roll accounting, in connection with the Railroad Department which other departments of the Company have performed and which might be regarded as "services in connection with railroad transportation", such services have been merely incidental to and constituted only an insignificant portion of the Company's business so that such services may be classed simply as "casual" within the meaning of the exception to coverage. General Counsel's Opinion on Jay Street Terminal, L-44-315.

As mentioned above, the Company turned over as of January 1, 1945, to the Bush Terminal Railroad Company, all operations theretofore conducted by the Railroad Department. At that time, therefore, it ceased in all respects to be an "employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Yours very truly,

Myles F. Gibbons
General Counsel