

JAN 25 1978

L 78-61

Director of Data Processing and Accounts

General Counsel

Employer status: Southern Pacific Development Company; the Southern Pacific Communications Company; the Southern Pacific Land Company; and TOPS On-Line Services, Inc.

A ruling has been requested from this office as to whether the above-listed companies are employers under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The companies are all subsidiaries of the Southern Pacific Company (Southern Pacific), a holding company which owns the Southern Pacific Transportation Company, a carrier by railroad under the above-mentioned Acts. Unattributed quotations in the following discussion are from correspondence which this office has received from Mr. D. K. McNear, President, Southern Pacific Transportation Company.

The Southern Pacific Land Company was formed in 1912 to acquire and manage properties of the Southern Pacific Company, then a common carrier by railroad. General Counsel's opinion L-39-384 stated that:

"It is not necessary * * * to determine now whether the [Southern Pacific] Land Company is an 'employer' under the Railroad Unemployment Insurance Act, in view of [the] * * * statement that 'Southern Pacific Land Company itself has no employees and all its officers and employees are officers or employees of Southern Pacific Company.' It appears from this statement that service rendered to the Southern Pacific Land Company would be, upon proper verification, creditable as service rendered to the Southern Pacific Company, an 'employer' under the * * * Acts. * * *

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In 1970 the Land Company was reorganized into three divisions: Natural Resources, Real Estate, and Administrative, and as of January 1, 1976, had 159 employees "under its jurisdiction." It also has two subsidiaries, neither of which has any employees. The Real Estate Division is responsible for handling the purchase, sale and management of Southern Pacific properties other than natural resource lands. The operating revenues of the Natural Resources Division are from sales of timber, agricultural leases, oil and gas leases, sale of property and other activities. Although "[t]he revenues of the Land Company are derived primarily from timber operations and leases and sales of its own property and oil and gas interests," it also manages and leases properties of the Southern Pacific Transportation Company and subsidiary railroads which are not required for railroad operations. It appears that the precise question involved in this case has never been ruled upon by the Bureau of Law. However, in General Counsel's opinion L-41-614 it was stated that:

"* * * The [company] * * * was continued in existence for the purpose of liquidating the realty assets and converting them into cash, and since 1902 it has been concerned solely with the management and sale of the land-grant lands. Its activities have included contracting to sell, selling, leasing and paying taxes on lands owned by it, making exchanges of land with the United States under acts of Congress, procuring patents, and paying surveying costs to the United States as required by law. The net revenues from these activities have been transferred to [the controlling railroad] * * * in the form of dividends upon its stock in the [company] * * * and then have been commingled with the other funds of [the railroad] * * *."

"* * * The liquidation of non-common-carrier lands, the proceeds of which are not set aside for any specific railroad purpose, does not constitute the performance of a service in connection with railroad transportation. * * *"

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It would appear that the qualification "non-common-carrier lands" was used to distinguish that situation from one in which the subsidiary company was managing lands which were being used by the controlling railroad in connection with railroad transportation. In the present instance, the lands involved are not being used in connection with railroad transportation. In this regard, see General Counsel's opinion L-39-822. It would also seem that the functions performed by the Land Company and the company described in L-41-614 are not distinguishable for purposes of coverage under the Acts. Therefore, it is my opinion that the Land Company has not been engaged in the performance of services in connection with the transportation of passengers or property by railroad within the meaning of the Acts.

The Southern Pacific Development Company was formed in 1970 to engage in the business of real estate investment, management, and development and is the developer or joint venture partner in commercial, industrial and residential real estate projects on lands owned by Southern Pacific as well as on lands owned by others. Neither the Development Company nor any of its own subsidiaries has any employees, their work being performed by employees of the Southern Pacific Land Company. The Development Company and its subsidiaries are engaged in such projects as the development of the New Orleans Hilton Hotel at the International Rivercenter, the Livermore Arcade Shopping Center, etc.

The Southern Pacific Communications Company was formed in 1970 to construct, operate, and maintain a communications system which provides customers with services involving voice, data, and facsimile transmissions. It may be inferred that it conducts its operations by means of its own employees. Based on the foregoing information, it is my opinion that neither the Development Company and its subsidiaries nor the Communications Company has been engaged in the performance of services in connection with the transportation of passengers or property by railroad within the meaning of the Act.

TOPS On-Line Services, Inc., is an 80 percent owned subsidiary of Southern Pacific which was formed in 1969 to market the TOPS communications programs, used by the Southern Pacific Transportation Company, to other railroads. Some of these

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railroads are located outside of the United States, and Mr. McNear advises that the purpose of the formation of TOPS On-Line Services, Inc., was "to offer data processing and related communications services to commercial and governmental organizations, including computer consulting services [sic]. * * * In essence, this company acts as a consultant to its customers. * * * It has no employees on its payroll." Therefore, it appears clear that TOPS On-Line Services, Inc., is providing services in connection with the transportation of passengers or property by railroad within the meaning of the Acts. However, it appears that TOPS On-Line Services, Inc., may be subject to segregations, with the result that only those employees actually engaged in providing services to railroads located in the United States, regardless of by whom they are paid or nominally employed, would be covered under the Acts. Accordingly, at the time your office informs TOPS On-Line Services, Inc., that it is a covered employer, it should be advised as to the possibility of, and the requirements relating to, segregation. Of course, if TOPS On-Line Services, Inc., either fails to request segregation or fails to adequately support any such request which it makes, all of its employees will be covered under the Acts.

Dale G. Zimmerman

MCL:dg