

Washington, D. C.
October 31, 1939

The Director, Retirement Claims

The General Counsel

Missouri Pacific Hospital Association

Reference is made to the status of the Missouri Pacific Hospital Association under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Based on the facts and considerations hereinafter discussed, it is my opinion (1) that the Missouri Pacific Hospital Association has not been an employer under the Railroad Retirement Act since October 5, 1920, and has not been an employer under the Railroad Unemployment Insurance Act, for the reason that it has not been controlled by the Missouri Pacific Railroad Company since that date; (2) that the Hospital Association was an employer under the Railroad Retirement Act from July 27, 1912, to October 5, 1920, as a company controlled by the Missouri Pacific Railway Company and later by the Missouri Pacific Railroad Company and performing a service in connection with transportation by railroad; and (3) that service to the Hospital Department of the Missouri Pacific Railway Company during the period from 1876 to July 27, 1912, is creditable as service rendered to the Missouri Pacific Railway Companies, predecessors of the Missouri Pacific Railroad Company.

The Missouri Pacific Hospital Association, incorporated under the laws of Missouri on June 14, 1922, as a nonstock and non-profit corporation, owns and operates hospitals at St. Louis, Missouri, and Little Rock, Arkansas, and provides hospital facilities at Kansas City, Missouri. Emergency service is provided at 54 other points on the system, and free medical and surgical attention and free medicine at an additional 294 points. That these operations of the Association constitute the performance of a service in connection with railroad transportation is well settled by opinions of the General Counsel approved by the Board (Atchison, Topeka & Santa Fe Hospital Association; Chesapeake & Ohio Employees Hospital Association), and is conceded by the Hospital Association.

The Hospital Association is an outgrowth of the "Hospital Department" of the Missouri Pacific Railway Company which was organized in 1876 for the proper care and treatment of sick and injured

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employees of the Missouri Pacific Railway and its leased and operated lines. The Hospital Department "was under the exclusive control of the railroad management until 1912"*, its income being derived in part at least from payroll deductions. On July 27, 1912, the railroad management authorized a Board of Managers consisting of four elective members elected by the contributing employees of the Railway and four members appointed by the management, with the Chief Surgeon of the Railway Company as Chairman of the Board. The Chief Surgeon of the Railway Company was also Chief Surgeon of the Hospital Service and Chairman of the Executive Committee. It is apparent from this setup that control of the Hospital Service, as it was then called, remained in the Railway, especially since only five votes of the members of the Board were required to pass all matters of regular or ordinary operation and changes in general organization required a two-thirds vote of the Board, or six votes. On or about October 11, 1912, all funds in the possession of the Railroad derived from contributions to the Hospital Service were transferred to the Board and the real estate and buildings known as the Missouri Pacific Hospital in St. Louis were declared in trust for the Board of Managers. The control of the Missouri Pacific Railway Company, and later the Missouri Pacific Railroad Company, its successor, over the Hospital Service continued until October 5, 1920, when the next change was made and the Railroad's control ceased.

A reorganization of the Board was authorized by the Railroad Management effective October 5, 1920, on which date H. J. Mohler, General Chairman of the Order of Railroad Telegraphers, was elected President: resulting in the adoption of a Constitution and By-Laws on April 9, 1921. It may be noted here that Mr. Mohler is still President of the Board. The constitution provides that membership shall include all officers and employees of the Missouri Pacific Railroad and the Hospital Association and may include all employees of such other lines in which the Missouri Pacific Railroad owns a majority of the stock, as the Board of Managers shall decide to receive into the Association. Monthly assessments ranging from 50 cents to \$2.00 are accomplished by payroll deductions. The constitution also provides that four members of the Board shall be appointed by the Chief Operating Officer of the Railroad and that the employees shall be represented by their General Chairman, one from each of the fourteen organizations. An additional member is elected by the general officers, other officers and other employees not represented by the 14 organizations. Thus the employees are given a representation on the Board of 14 or 15 to the Railroad's representation of only four or five, depending on whether the 19th member may be said to represent the employees or the management.

* See 25th Annual Report of the Missouri Pacific Hospital Association for the year ending Dec. 31, 1937, pg. 146.

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Such a majority representation raises a presumption of employee control which can be rebutted only by other factors which point clearly to an opposite conclusion. Such other factors do not exist; rather, such evidence as is available tends to strengthen the presumption of employee control.

The Board of Managers elects the President of the Board, who presides at all meetings, approves all vouchers and payrolls and performs such other duties as properly belong to the office, receiving such compensation as the Board of Managers may describe. Since 1920 the President has been an employee representative. Although the constitution provides that the Local Treasurer and the Chief Accounting Officer of the Railroad shall be Treasurer and Auditor of the Association, respectively, it is expressly provided that such officers shall deposit, hold, disburse, and invest funds, and submit reports under the direction of the Board of Managers. See Carr v. Northern Pacific, 273 F. 511 (1921). The Executive Committee of seven members, which transacts such business as may be assigned them with full power to decide all questions arising during the intervals between Board meetings subject to Board approval, is composed of the President of the Board as Chairman, four members selected by the employee representatives on the Board, and two members approved by the Chief Operating Officer from the appointive members of the Board. Vacancies occurring on such committee are filled by the President of the Board until the next regular meeting of the Board. The Committee on Complaints and Claims, which reports to the Board on matters referred to it by the President or the Board, consists of four members, three selected by the employee representatives on the Board and one by the Chief Operating Officer. Vacancies on this committee are likewise filled by the President of the Board until the next Board meeting. It is true that the Chief Surgeon of the Hospital Association, who has charge of the medical and surgical work of the Association, is appointed by the Chief Operating Officer of the Railroad and receives part of his compensation from the Railroad, but this work is performed under such rules and regulations as may from time to time be adopted, and it is expressly provided that "he shall appoint, discharge and fix the compensation of all physicians, surgeons and specialists, subject to the approval of the President and review by the Board of Managers." (Underscoring supplied.) Moreover, both the constitution which provides for his appointment and the by-laws which prescribe his duties may be amended by a two-thirds vote of the Board of Managers, thereby giving the employees' representatives on the Board ample power to control the Chief Surgeon's selection as well as his activities. The Hospital Association has also been independent of financial control by the Railroad. Since about October 11, 1920, all hospital property has been held in trust for the Association and since its incorporation on June 14, 1922, all hospital property has been held in its own name. The Hospital Buildings at St. Louis, Missouri, and Little Rock, Arkansas, which were

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erected in 1923 and 1925, respectively, appear to have been constructed with Association funds and funds secured through first mortgage notes which were offered to members of the Association and oversubscribed. It does not appear that the Railroad has made any contributions during the period since October 5, 1920. The financial independence of the Association is further shown by the fact that its assets increased from October 5, 1920, to December 31, 1937, from \$354,297.28 to \$1,834,751.21, an increase of \$1,480,453.93, and as of December 31, 1937, the appropriated surplus amounted to \$1,768,178.66.

Against this overwhelming evidence of employee control and financial independence of the Hospital Association, such less determinative factors as the Railroad's supplying of free transportation and accounting assistance, as well as quarters, light, heat, and janitor service for the first aid stations at its Sedalia and Kansas City shops paying fifty per cent of the nurse's salary, and the factor of compulsory membership of railroad employees, cannot prevail. See General Counsel's Opinion dated June 13, 1938, on Missouri-Kansas-Texas Railroad Employees' Association, approved by the Board on June 23, 1938. The Association since October 5, 1920, has clearly not been under Railway control. It therefore follows that since that date the Association has not been an employer under the Railroad Retirement Act, nor has it been an employer under the Railroad Unemployment Insurance Act.

Lester P. Schoene
General Counsel