

EMPLOYEE STATUS DETERMINATION
Southern Pacific Transportation Company
Data Processing Services Provided by
Integrated Systems Solutions Corporation

This is the determination of the Railroad Retirement Board concerning the question of whether certain individuals furnished by Integrated Systems Solutions Corporation (ISSC) should be considered to be employees of Southern Pacific Transportation Company (BA No.1713) (SPTC) under the definition of "employee" in the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). The employees involved perform data processing services for SPTC that used to be performed by SPTC employees and SPTC subcontractors. Information about ISSC's contract with SPTC was obtained during a compliance audit of SPTC by the Board's Division of Audit and Compliance.

ISSC is a wholly-owned subsidiary of the International Business Machines Corporation (IBM). ISSC was incorporated on March 19, 1991 and began operations on May 17, 1991. An ISSC information brochure, entitled "Vision and Values: Winning Ways in a Changing World," indicates that ISSC has on its books more than 2,000 contracts with a cumulative value of more than \$15 billion. Another ISSC brochure, entitled "ISSC Solution Centers," states that ISSC has some 15,000 U.S. employees serving more than 3,000 customers. A description of ISSC in Moody's Industrial Manual states that ISSC offers information technology services that provide enterprise solutions including systems integration, consulting, business recovery services, voice and data networking, systems operations, and applications software development to both external customers and internal IBM customers in the United States.

On November 8, 1993, ISSC entered into an agreement with SPTC to provide information systems operations and related services and functions which were at that time performed by SPTC employees or by subcontractors of SPTC. ISSC began providing services to SPTC pursuant to that contract on January 1, 1994. ISSC provides computer operations, help desk, application development and maintenance, voice response unit development and maintenance, systems programming, accounting data entry, logical network management, vendor purchasing and payment administration, and desktop and printer inventory management. ISSC stated that activities of these types were previously performed by SPTC employees, but the activities are performed in new ways

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using ISSC processes and procedures and will continue to be modified pursuant to ISSC direction. In addition, ISSC stated that these activities have been and will be further modified as a result of new technologies, equipment and capabilities introduced by ISSC. ISSC also performs services for SPTC that SPTC did not perform in the past, including business recovery services, rapid solutions development and information technology strategy and planning, migration of the communications data center, and business process mapping and re-engineering.

ISSC uses a mixture of contractor and ISSC employees to perform services for SPTC. SPTC employees and three subcontractors, Toner, Gentry, and Application Group, previously performed application development and maintenance work for SPTC. ISSC has retained the three subcontractors, but has reduced their workload and has also contracted with other vendors for assistance in some applications tasks. ISSC moved the computer operations, system programming, help desk, logical network management, and data entry functions from San Francisco to ISSC's Boulder, Colorado location after ISSC began performing these services.

As of September 30, 1994, of the 266 ISSC employees who performed services for SPTC, 204 worked on SPTC owned or leased property in San Francisco, California; 59, at the ISSC facility in Boulder, Colorado; and 3, on SPTC property in Denver, Colorado. Approximately 204 ISSC employees are former SPTC employees.

The audit indicated that a total of 297 SPTC employees were affected by the outsourcing of work to ISSC. The Board's Division of Audit and Compliance sent questionnaires to 45 of the affected employees. Of the 35 who responded, 33 accepted positions with ISSC, and two took other positions with SPTC. Twenty-seven of the respondents stated that they spend all of their time on SPTC business, and four indicated that they spend 90% or more of their time on SPTC business. Thirty-one stated that they perform either the same or similar work duties previously performed while employed by SPTC.

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ISSC confirmed that some former SPTC employees are working on the same application development and maintenance projects and applications which they previously performed as employees of SPTC and that some are working on other projects and applications. ISSC also stated that as the SPTC services are fully transitioned to ISSC, the ISSC organization serving SPTC will deliver services to other companies, including non-railroad customers.

Section 1(b)(1) of the RRA [45 U.S.C. §231(b)(1)] provides that the term "employee" means any individual in the service of one or more covered employers for compensation. Section 1(d)(1) provides that an individual is in the service of an employer if:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations. [45 U.S.C. §231(d)(1)(i)].

Section 1(e) of the RUIA [45 U.S.C. §351(e)] contains essentially the same definition.

Information gathered in the audit of SPTC indicates that SPTC entered into a contract with ISSC for data processing services formerly performed by SPTC employees and SPTC subcontractors. A number of former SPTC employees are now employees of ISSC and perform work only for SPTC. However, in the view of the majority, none of the information gathered indicates that SPTC retains the right to direct how any ISSC employees perform their work. In fact, the information indicates that ISSC controls the manner in which it performs its services. ISSC employees were not given training by SPTC. Rather, former SPTC employees have received extensive ISSC training in ISSC development and operations procedures, methodology, and people and project management practices. ISSC also developed a Procedures Manual describing a standard set

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of disciplines for managing systems information that ISSC is using in providing service. In addition, procedures for management and reporting of time by ISSC employees were defined by ISSC and are not for SPTC review or approval. ISSC employees providing services are required to follow ISSC procedures and not SPTC specifications, requirements, or operating procedures. For example, application development work pattern management was changed from SPTC procedures to ISSC procedures. Former SPTC employees were required to learn and adhere to this ISSC approach for project releases rather than using previous SPTC "parent/child" application development procedures. SPTC does not have the right to review ISSC's operating procedures; certain high level processes are described in Schedule E of the contract which ISSC committed to use to assure quality application development. A majority of the Board finds that the record shows that ISSC, and not SPTC, has the right to direct the manner in which ISSC employees perform their services. A majority of the Board therefore finds that the definition of employee in section 1(d)(1)(i)(A) of the RRA does not apply to ISSC employees performing services for SPTC.

Turning to the definitions in section 1(d)(1)(i)(B) and (C), a majority of the Board notes that in making a determination of employee status under these two sections, it has long followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953). Under Kelm, paragraphs (B) and (C) are not used to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts.

ISSC was established in 1991, almost three years before it began to perform services for SPTC in January 1994 pursuant to the contract of November 8, 1993.

ISSC has hundreds of contracts in addition to its contract with SPTC. ISSC is a subsidiary of IBM, which is a manufacturer of information processing equipment and systems. ISSC provides a range of information services that are compatible with the business conducted by its parent corporation. There is no

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indication in the record that ISSC was established to avoid coverage under the RRA and the RUIA. Accordingly, under Kelm, a majority of the Board finds that ISSC employees who perform work for SPTC are not employees of SPTC under section 1(d)(1)(i)(B) or (C) of the RRA.

Glen L. Bower

V. M. Speakman, Jr. (***Dissenting
Opinion Attached***)

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Dissenting Opinion of the Labor Member

I hereby dissent from the opinion of the majority of the Board concerning the status of former employees of Southern Pacific Transportation Company (SPTC) who now are on the payroll of Integrated Systems Solutions Corporation (ISSC). Prior to the time that they became employees of ISSC, the former SPTC employees in this case performed data processing services for SPTC, and little has been done to remove the identity of these employees as railroad employees. For example, when they were transferred to the ISSC payroll, their salaries remained the same; and their SPTC seniority was used toward their new pension and vacation credits. In addition, the working environment and location is the same, and SPTC provides much of the material and space needed by ISSC. ISSC employees work to a large extent with railroad employees. In fact, most former SPTC employees now on the payroll of ISSC work exclusively on SPTC projects.

Contrary to the holding of the majority that ISSC, and not SPTC, has the right to direct the manner in which former SPTC employees perform their services, this case contains evidence that SPTC retains that control. For example, SPTC can object to or request the replacement of an ISSC employee. In addition, SPTC must approve the ISSC procedures manual which describes the operating process and procedures relating to the performance of services. In my view, the evidence establishes that the ISSC employees meet the definition of employee in section 1(d)(1)(i)(A) of the Railroad Retirement Act and are employees of SPTC under that section.

With respect to the definition of employee in section 1(d)(1)(i)(B) and (C) of the Railroad Retirement Act, I find that the majority's reliance on the decision in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953) is misplaced, given the facts in this case. The railroad involved in the Kelm case had historically contracted for the services in question. That fact is in direct contrast to the situation in this case. In this case, little has been done to change the identity of the former SPTC employees who now work for ISSC, while

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they in fact remain integrated into the operations of SPTC. The assumption referenced by the majority that the future duties of the former SPTC employees may move away from the railroad work they continue to do is irrelevant to this determination of their current status. In my view, the ISSC employees are employees of SPTC under section 1(d)(1)(i)(B) and (C) of the Act.

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For these reasons, I respectfully dissent from the decision of the majority.

V. M. Speakman, Jr.

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