

SEP 3 1945

The Director of Retirement Claims

The General Counsel

L-46 557

Hugh Davey & Son
(15 Second Street, Southwest, Mason City, Iowa)

I herewith submit my opinion on the following:

QUESTION

Is service under a contract dated July 10, 1944, between the above-mentioned firm and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, covering the construction of 4 water storage tanks, one each at Watertown, Wisconsin; Algona, Iowa; Fairmont, Minnesota, and Highwood, Montana, creditable under either the Railroad Retirement Act or the Railroad Unemployment Insurance Act?

OPINION

It is my opinion that such service is not creditable.

DISCUSSION

Information furnished by Mr. John N. Moen, Hugh Davey & Son, in a letter dated March 27, 1945, is to the effect that Hugh Davey & Son has never been directly or indirectly owned or controlled by or under common control with any express company, sleeping-car company or carrier by railroad; that it has been engaged generally in construction work under contract and that it has never been set up in business or otherwise financed (other than through contract payments) by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company or any other express company, sleeping-car company or carrier by railroad. Since it appears from the foregoing that Hugh Davey & Son has been engaged in general construction work under contract and has not been an express company, sleeping-car company or carrier by railroad and that it has not been owned or controlled by or under common control with

Memorandum to
The Director of Retirement Claims

any such company or carrier, it is my opinion that Hugh Davey & Son has not been an "employer" within the meaning of either the Railroad Retirement Act or the Railroad Unemployment Insurance Act.

Furthermore, it is my opinion that the individuals engaged in service under the contract in question were not, within the meaning of either the Railroad Retirement Act or the Railroad Unemployment Insurance Act, the "employees" of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company but were the employees of Hugh Davey & Son. The contract, written on what appears to be a standard construction contract form of the carrier and let after competitive bidding to a company engaged in general construction work, called for the completion of four specific jobs on or before a specified date and for lump sums. The contractor was to furnish all labor, tools, equipment and materials. The contractor agreed to assume all risk of loss or damage to his property, however, caused, and all risk of damage resulting from death or injury to himself, his agents and servants while engaged in work under the contract and while travelling to and from the work. He agreed to indemnify the carrier against all loss, cost and expense arising out of injury to or death of any employee of the carrier caused by the negligence of the contractor or any of his employees or arising out of any injury to any property whether belonging to the carrier or not, caused by any negligence of the contractor or any of his employees. He was required to post a bond conditioned on the faithful performance of the contract. It was provided that "The Contractor specifically represents that in performing work covered by this agreement, his status is that of an independent contractor; that he is the employer of all labor to be furnished in the performance of the work covered by this agreement within the meaning of all Federal and State Unemployment Compensation, Insurance or other Laws and all State Workmen's Compensation Acts; and that his employees and the employees of his sub-contractors are not the employees of the Railroad for any purpose whatsoever; and that the Contractor accepts exclusive liability for all contributions, taxes, interest and penalties necessarily paid by the Railroad under Unemployment Compensation, Insurance or other Laws on account of all persons employed by the Contractor or his sub-contractors hereunder, and the Contractor hereby agrees to reimburse the Railroad for all contributions, taxes, interest and penalties necessarily paid by the Railroad under Unemployment Compensation, Insurance or other Laws covering employees of the Contractor or his sub-contractors." The foregoing considerations are strongly indicative of the independent status of the contractor under the contract, General Counsel's Opinion L-44-549, and there is nothing in the contract which would give the carrier control over the contractor in the manner of performing the work.

Memorandum to
The Director of Retirement Claims

Accordingly, service under the contract in question is not creditable under either the Railroad Retirement Act or the Railroad Unemployment Insurance Act.

Myles F. Gibbons
General Counsel

HPC:lr