

Digest

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The Director of Retirement Claims

The General Counsel

Robert Sherer & Company

[REDACTED]
"as foreman at Los Angeles from July 1900 to May 1907,
under contracts with the Pacific Electric Railway Company

In response to your request, I herewith submit my opinion on the following:

QUESTION

Is service under various contracts between Robert Sherer & Company and the Pacific Electric Railway Company or its predecessors, covering the construction of various lines of railway, creditable under the Railroad Retirement Act?

OPINION

It is my opinion that such service is not creditable.

DISCUSSION

Robert Sherer & Company is no longer in existence. Mr. C. E. Crowley, one of the former principals of Robert Sherer & Company, in a letter dated April 7, 1941, states that "I wish to state that the So Pacific R R Co or any other Railroad Co had any interest whatever in Robert Sherer and Co Robert Sherer and C E Crowley were sole owners of that firm." Mr. H. S. Wade, Secretary, Pacific Electric Railway Board of Pensions, in a letter dated May 8, 1941, states that "There are no records in our files to indicate that Pacific Electric Railway Company or any of its predecessor or affiliated companies had any interest, financial or otherwise, in Robert Sherer and Company." There are in our files copies of a number of letters on the letterheads of Robert Sherer & Company which have at the top "Railroad and Grading Contractors." Since from the foregoing, which includes all the information available, it does not appear that Robert Sherer & Company was

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an express company, sleeping-car company or carrier by railroad subject to part I of the Interstate Commerce Act or a company which was owned or controlled by or under common control with any such express company, sleeping-car company or carrier by railroad, it must be concluded that the company was not an "employer" under the Railroad Retirement Act.

The Pacific Electric Railway Company has submitted contracts (photostats of which are in our files) ranging in date of execution from June 7, 1901 to October 7, 1907, and covering the construction of various portions of the line of the Pacific Electric Railway Company and its predecessors, principally the Los Angeles & Interurban. All the contracts (25 in number) except five, call for the furnishing by the contractor of all tools and appliances and all materials not required by the specifications and the performance of all labor for "constructing, building and in every respect completing all the grading and other work required" for a specified line of railway. Each job was to be completed on a specified date and payment was to be on the basis of unit prices; that is, so much per cubic yard or square foot, etc. In each instance a bond was posted by Sherer conditioned on the faithful performance of the contract. All of the foregoing provisions are strongly indicative of the independent status of Sherer. Cf. General Counsel's Opinion L-44-549. Some measure of control by the carrier over the contractor is found in provisions that the work was to be done "under the direction and inspection of the Company's Engineer appointed to superintend the same * * *" and that if in the opinion of the Engineer the progress or character of the work was not satisfactory, the carrier had the right to order an increase in force. However, it is clear that these factors are outweighed by the factors pointing to the independent status of the contractor. Cf. General Counsel's Opinion L-42-476. The other five contracts, in the form of letters, were for additional grading and the carrier agreed to pay the contractor a specified sum per day for a team of horses and driver and cost of other labor plus 10 per cent. While these contracts are somewhat different in form from the others, obviously, as the parties doubtless intended, the relationship between the parties was no different from that resulting from the other contracts.

On the basis of the foregoing it is my opinion that individuals engaged in service under the contracts in question were the employees of Robert Sherer & Company and not of the carrier and that such service is not creditable under the Railroad Retirement Act.

Myles F. Gibbons
General Counsel

HPC:lr