

MEMORANDUM

Washington, D. C.
December 24, 1941

TO Director of Retirement Claims

FROM The General Counsel

SUBJECT [REDACTED], S.S.A. No. [REDACTED]
[REDACTED], S.S.A. No. [REDACTED]

Employer status of Barkalow Brothers (sometimes referred to as Barkalow Brothers News Company or Barkalow Brothers, Book and News Dealers) and Barkalow Brothers Company; and creditability of service rendered to Barkalow Brothers under contracts with railroad companies.

Your memoranda dated March 27, 1941 and June 13, 1941, in connection with the above cases, raise the question of the employer status, under the Railroad Retirement Act, of Barkalow Brothers (sometimes referred to as Barkalow Brothers News Company or Barkalow Brothers, Book and News Dealers) and Barkalow Brothers Company, and, more specifically, the question of the creditability of news service rendered to Barkalow Brothers under the following contracts with railroad companies:

1. Contracts with the Union Pacific Railroad Company:
 - (a) Contract dated October 31, 1898, covering a period of three years beginning August 1, 1898.
 - (b) Contract dated August 1, 1901, for the ensuing three-year period.
 - (c) Contract dated August 1, 1904, and supplemental agreement dated May 1906, covering the three-year period beginning August 1, 1904.
 - (d) Contract dated August 1, 1910, for a period of five years.
2. Contract dated April 2, 1906 with the Colorado and Southern Railway Company, for a period of five years. This contract was extended by letter agreement to April 30, 1911.

Director of Retirement Claims

3. Contract dated October 1, 1907 with the Fort Worth and Denver City Railway Company, for a period of four years.*

On the basis of the information elicited with respect to the organization, control and operations of Barkalow Brothers and Barkalow Brothers Company, and the provisions of the contracts in question, I am of the opinion that the companies have never been "employers" under the Act and that service rendered under the contracts is not creditable as "employee" service.

Barkalow Brothers, it appears, was organized as a partnership, possibly prior to 1875,** with headquarters in Omaha, Nebraska, and was engaged principally in the operation of news stands, restaurants and lunch counters in railroad stations and train news service (sale of articles such as newspapers, magazines, cigars, cigarettes, confections, beverages, etc.) on various railroads, including the Colorado and Southern Railway Company, the Fort Worth and Denver City Railway Company, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, the Oregon Railway and Navigation Company, and possibly the Denver and Salt Lake Railroad Company.

In 1914, the business of Barkalow Brothers was incorporated as the Barkalow Brothers Company, which is the present company, with general offices at [redacted].

According to statements by officers of the present company, neither Barkalow Brothers nor Barkalow Brothers Company was ever directly or indirectly owned or controlled by, or under common control with, any express company, sleeping-car company, or carrier by railroad; and neither company was ever financed by any express company, sleeping-car company or carrier by railroad. On behalf of the railroads which had contracts with the companies, it has been stated similarly that the railroads had no interest, financial or otherwise, in the companies. Moreover, as will appear from the subsequent discussion of the provisions of Barkalow Brothers' contracts with railroads, which presumably are typical of the companies' railroad contracts, the railroads have not possessed, by reason of such contracts, a right to direct the policies and business of the companies which would render them "controlled" companies within the meaning of Section 202.04 of the Board's Regulations; nor has any evidence been presented which would show that the railroads have in fact directed the policies and business of the companies.

*The news company was designated in this contract as "Barkalow Brothers, Book and News Dealers."

**Mr. [redacted], Superintendent, Relief and Employment Departments, and Chairman, Board of Pensions, of the Chicago, Burlington and Quincy Railroad Company, in a letter dated June 30, 1941, refers to a contract between the Railroad Company and Barkalow Brothers covering the period from July 1, 1875 to January 1, 1879.

Director of Retirement Claims

From the above, it is clear that neither Barkalow Brothers nor Barkalow Brothers Company has been at any time an express company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act, or a company directly or indirectly owned or controlled by, or under common control with, any such company or carrier, and, therefore, that these companies have not been at any time "employers" within the meaning of the Act.

It is also manifest, on examination of the contracts in question, that these did not reserve to the railroad companies (which are carrier-employers) a right to supervise and direct the manner of rendition of the contract service which would constitute it "employee" service to the railroad companies. The Union Pacific Railroad Company contracts were practically identical and may be described by considering the contract of August 1, 1910, which provided as follows: In consideration of certain monthly payments, the Railroad Company granted to Barkalow Brothers for a specified period the exclusive right to conduct a "news business" in the trains and designated stations of the Railroad Company, its branches and leased and operated lines; this concession was defined as the exclusive right to sell in trains and stations books, newspapers, periodicals and "such other articles of merchandise as are usually kept for sale by general railway news agents," and to check parcels in stations designated by the Railroad Company from time to time. It was provided that Barkalow Brothers should not offer for sale any article that might be considered objectionable by the Railroad Company; that the news business should be conducted "subject to such rules as the said first party [the Railroad Company] may from time to time prescribe"; and that the facilities for such business should be enjoyed "as said Railroad Company may from time to time approve or prescribe." However, it is clear from the context, and in the light of the established intent of similar provisions in railroad news contracts previously considered (see General Counsel's Opinion No. 1940 R.R. 58, and memorandum to the Director of Retirement Claims, dated July 3, 1941, L-41-323), that the above provisions were not designed to give the Railroad Company any control over the policies and business of Barkalow Brothers or a right to specify the manner in which the news service should be performed, but were merely for the purpose of assuring compliance with railroad requirements relating to the use of, and conduct upon, railroad property, for the protection of the Railroad Company, its passengers and employees.

The contract provided that the agents of Barkalow Brothers, when upon the trains, platforms, stations and other premises of the Railroad Company, should wear neat uniforms, including caps with badges thereon indicating their occupation. It recited that in accordance with the desire of Barkalow Brothers to use badges bearing the words "News Service," separated by the Union Pacific shield inscribed "Union Pacific. The Overland Route," permission of such use was granted by

Director of Retirement Claims

the Railroad Company; this was based, however, on the agreement by Barkalow Brothers to save the Railroad Company harmless from any injury to its property, or to the person or property of any passenger, railroad employee, or other person on the Railroad Company's trains, stations or premises, caused by the agents of Barkalow Brothers, wilfully, maliciously or accidentally. Obviously, the purpose of these provisions relative to uniforms and badges was not to designate the news agents as Railroad Company employees but merely to permit identification of the news agents as vendors authorized to operate on the Railroad Company's train and premises.

The contract specifically provided that the news agents on the Railroad Company premises were to be regarded and treated as employees of Barkalow Brothers and not as passengers; injuries sustained by news agents as a result of accident, negligence or otherwise, were to be regarded and treated as injuries to employees of Barkalow Brothers and not as injuries to passengers; and every employee of Barkalow Brothers, before entering upon the premises of the Railroad Company, was to be required to enter into a written agreement with Barkalow Brothers, to be kept on file by Barkalow Brothers and produced upon demand by the Railroad Company, assuming all risk incident to the business conducted by Barkalow Brothers, releasing the Railroad Company from liability for any injury to person or property received while on the trains or premises of the Railroad Company, and waiving all rights that the individual might have as a passenger. Barkalow Brothers and its agents were to have exclusive possession and control of the articles of merchandise while such articles were on the trains and stations, and Barkalow Brothers was to bear sole risk of loss with respect to such articles. Barkalow Brothers generally assumed all risk of loss connected with injury to person or property in the course of its business and agreed to indemnify the Railroad Company against, and save it harmless from, any claims for damages arising from such injuries.

It was provided that on default in any of the monthly payments, or upon violation by Barkalow Brothers of any of the terms of the contract, the Railroad Company could terminate the contract on three days' written notice. Also, the contract could be terminated by either party on thirty days' written notice.

The only respects, pertinent to this discussion, in which Barkalow Brothers' contracts with the Colorado and Southern Railway Company and the Fort Worth and Denver City Railway Company differed from those with the Union Pacific Railroad Company are that the contracts with the first two railroad companies mentioned included provisions that the news agents employed by Barkalow Brothers should be neat, clean, courteous, well-behaved, and acceptable to the railroad company; that the agents should at all times comply with railroad rules and regulations; and that they should be dismissible at the instance of

Director of Retirement Claims

the railroad company. There is no question, however, but that these provisions had no relation to any right to supervise and direct the news agents in the manner of performing their service, but were inserted by the railroad companies merely as a safeguard that the agents would present a neat appearance and would conduct themselves properly on the railroad premises, particularly in relation to passengers.

On the basis of the foregoing, it is my conclusion that neither Barkalow Brothers (sometimes referred to as Barkalow Brothers News Company or Barkalow Brothers, Book and News Dealers) nor Barkalow Brothers Company has ever been an "employer" under the Railroad Retirement Act and that service rendered under the contracts in question is not creditable as "employee" service to the railroad companies. This ruling is applicable to the status of Barkalow Brothers Company under the Railroad Unemployment Insurance Act.

[REDACTED]
General Counsel