

MEMORANDUM

L-45-741

M-171

November 8, 1945

TO: The Director of Retirement Claims

FROM: The General Counsel

SUBJECT: Sharp and Fellows Contracting Company
(533 Central Building, Los Angeles, California)
L. R. Wattis Company

[REDACTED]
Service claimed (to Wattis & Utah Construction Company)
as carpenter helper at Kingman, Arizona, from March to
May 1923, under a contract with The Atchison, Topeka
and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe has informed us that it has no record of any contract or agreement between Wattis & Utah Construction Company and the carrier covering work at Kingman, Arizona, during the period in question, and that the work in question was performed under a contract between the Sharp and Fellows Contracting Company and the carrier under which the Wattis & Utah Construction Company may have been a subcontractor. However, the Sharp and Fellows Contracting Company has informed us that L. R. Wattis Company was the subcontractor on the work and not the Wattis & Utah Construction Company. Therefore, I herewith submit my opinion on the following:

QUESTION

Is service to the L. R. Wattis Company, a subcontractor under a principal contract dated March 1, 1922, between the Sharp and Fellows Contracting Company and The Atchison, Topeka and Santa Fe Railway Company, covering changes of line and second track between Yampai and Griffith, Arizona, creditable under the Railroad Retirement Act?

OPINION

It is my opinion that such service is not creditable.

Memorandum to The Director
of Retirement Claims

DISCUSSION

An examination of Poor's and Moody's manuals does not reveal the name of the Sharp and Fellows Contracting Company. In a letter dated January 3, 1940, Mr. N. J. Gannon, President, Sharp and Fellows Contracting Company, states that the Sharp and Fellows Contracting Company 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 Sharp and Fellows Contracting Company "is engaged in general railroad contracting business, and practically all of our work has been performed on the Atchison, Topeka & Santa Fe Railway System. While most of the work has been performed under contract, our outfit and equipment has always been held at the disposal of the Railway Company for use in cases of emergency, washouts, etc. and a large amount of such work has been done by us without contract"; and that Sharp and Fellows Contracting Company was not set up in business, or financed in any way, by The Atchison, Topeka and Santa Fe Railway Company. Since it does not appear from the foregoing that the Sharp and Fellows Contracting Company, which has been engaged in general railroad construction work, has ever been an express company, sleeping-car company or carrier by railroad, and since there is no showing that it has ever been owned or controlled by or under common control with any such company or carrier, it is my opinion that Sharp and Fellows Contracting Company has never been an "employer" under either the Railroad Retirement Act or the Railroad Unemployment Insurance Act.

An examination of Poor's and Moody's manuals does not disclose the name of the L. R. Wattis Company. Information furnished by the Sharp and Fellows Contracting Company in a letter dated September 20, 1945, is that "At the time the Wattis Company contracted to do this work for us they had their headquarters at Salt Lake City, Utah, and as far as we ever knew, were in no way connected with any railroad company but were operating as independent contractors, offering their services to the general public." Since it does not appear from the foregoing that the L. R. Wattis Company was an express company, sleeping-car company or carrier by railroad and since there is no showing that it was owned or controlled by or under common control with any such company or carrier, it is my opinion that the L. R. Wattis Company was not an "employer" within the meaning of the Railroad Retirement Act.

Furthermore, it is my opinion that the relationship between the Sharp and Fellows Contracting Company and the Atchison, Topeka & Santa Fe under the principal contract of March 1, 1922, was that of an independent contractor. The contract, let to a company engaged in general railroad construction work and apparently after competitive bidding, was written on a printed standard construction contract form of

Memorandum to The Director
of Retirement Claims

the Atchison, Topeka & Santa Fe System (Form No, 1902) and provided for the completion of a specific job on or before a specified date. The contractor was to furnish all labor, tools, equipment and, with certain exceptions, the material. Compensation was provided for on the basis of unit prices, that is, so much per acre for clearing, so much per cubic yard for excavation, etc. The contractor agreed to indemnify the carrier against all claims or liability for injury to persons or damage to property due to the negligence of the contractor, subcontractor or their employees in connection with work under the contract. The foregoing considerations are strongly indicative of the independent status of the contractor. General Counsel's Opinion L-44-549. Some slight measure of control by the carrier over the contractor might be found in the provision that the work was to be performed under the supervision and according to the directions of the Chief Engineer of the carrier. However, this provision is outweighed by the factors pointing to the independent status of the contractor. General Counsel's Opinion L-42-476. It should be noted that in a memorandum dated July 7, 1945, the Bureau of Internal Revenue held that for the purposes of Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, certain contracting companies performing work for the Atchison, Topeka & Santa Fe under contracts prepared on the standard form 1902 were independent contractors.

Accordingly, service under the contract in question, whether rendered to the Sharp and Fellows Contracting Company or to the L. R. Wattis Company, is not creditable under the Railroad Retirement Act.

Myles F. Gibbons
General Counsel

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