

MAY 17 1945

The Director of Retirement Claims

The General Counsel

The Terry & Tench Company, Inc.

[REDACTED]
[REDACTED] in the New York Central and Hudson
River Railroad Company

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

QUESTION

Is service under a contract dated May 13, 1907, between The New York Central and Hudson River Railroad Company and The Terry & Tench Company, Inc., covering the erection of structural steel in connection with the construction of Grand Central Terminal, New York, New York, creditable under the Railroad Retirement Act?

OPINION

It is my opinion that such service is not creditable.

DISCUSSION

An examination of Poor's and Moody's manuals does not reveal the name of The Terry & Tench Company, Inc. Mr. F. P. Fleuchaus, Secretary, Board of Pensions, The New York Central System, in a letter dated June 22, 1944, with which he submitted a copy of the contract referred to above, states that "We are advised that the Terry and Tench Company, Inc. is not in existence today and our people have no information as to any person who may be able to advise as to its former ownership, control and operation" and that "We are also advised that neither the New York Central Railroad Company, nor any of its predecessor or affiliated companies, had at any time, any interest, financial or otherwise, in the Terry and Tench Company, Inc." It appears from the contract mentioned above, and other information we have, that Terry & Tench was engaged in

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a general construction business. Since from the foregoing, which includes all the available information concerning the company, it does not appear that The Terry & Tench Company, Inc., was an express company, sleeping-car company or carrier by railroad, or that it was owned or controlled by or under common control with any such company or carrier, it must be concluded that it was not an "employer" under the Railroad Retirement Act. General Counsel's Opinion L-45-241.

Furthermore, it is my opinion that the individuals engaged in service under the contract in question were not, within the meaning of the Railroad Retirement Act, the employees of the New York Central but employees of The Terry & Tench Company, Inc. Under the contract the contractor, who was engaged in the construction business, agreed to "furnish all labor, tools, paint and plant, and to erect" the structural steel for the job. Compensation was provided for on the basis of unit prices, that is, so much per ton of steel erected. The contractor was required to post a bond conditioned on the faithful performance of the agreements in the contract, and agreed to assume all responsibility for any damage to the work "prior to the use for regular operation." All the foregoing considerations are strongly indicative of the independent status of the contractor. Cf. General Counsel's Opinion L-44-549. Some measure of control by the carrier over the contractor is found in the provision that "All directions, explanations, superintendence, and instructions, spoken of, or required under this contract, will be given by the Chief Engineer [of the carrier]"; that the contractor was required to discharge any employee who refused or neglected "to obey the orders of the Engineer [of the carrier] in charge of the work"; and that "If so required by the Engineer [of the carrier], the work shall be carried on night and day * * *." However, these provisions are clearly outweighed by the factors pointing to the independent status of the contractor. Cf. General Counsel's Opinion L-42-476.

I conclude accordingly that service under the contract in question is not creditable under the Railroad Retirement Act.

Hyles F. Gibbons
General Counsel

HPC:lr