B.C.D. 03-40

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EMPLOYER STATUS DETERMINATION
Weyerhaeuser Car Shop

This is the decision of the Railroad Retirement Board with regard to the coverage Weyerhaeuser Car Shop (WCS) under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

According to information supplied by Mr. Kennedy Ketterman, Tax Audit Manager for Weyerhaeuser, WCS is a division of Weyerhaeuser Company, a large publicly traded (NYSE symbol WY) forest products company. Weyerhaeuser owns several railroad subsidiaries, the Columbia & Cowlitz (C&C) (BA 3602), the DeQueen & Eastern (DQE) (BA 2805), the Golden Triangle (GT) (BA 3592), and the Mississippi & Skuna Valley Railway (M&SV) (BA 3549). In addition, WCS operates a rail car facility in DeQueen, Arkansas. A substantial portion of the repair work performed by WCS is on equipment owned or leased by DQE, an affiliate of Weyerhaeuser. Car repair services performed on DQE cars represents approximately 53% of the total revenue of WCS derived from car repair services. WCS also performs wheel repair services that represent approximately 31% of the total revenue of WCS. Less than 12% of the wheel repair work is done for DQE.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code;
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. 351(a) and (b) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3231.

WCS is clearly not a carrier by rail. However, there is no doubt that the service being performed by WCS for its affiliates is a service in connection with railroad transportation. See Livingston Rebuild Center. v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992). The determination of whether WCS is covered as a rail carrier affiliate thus depends on whether it is under common control with a rail carrier. A decision of the United States Court of Appeals for the Federal Circuit regarding a claim for a refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of section 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). In this case WCS is a division of Weyerhauser Company, the corporate parent of the rail carrier subsidiaries. Under the Union Pacific decision, WCS is not under common control with those rail carrier subsidiaries. Therefore, despite its clearly performing a service in connection with railroad transportation, WCS could not be found to be a covered employer under the Acts.

For the reasons explained above, a majority of the Board finds that WCS is not an employer subject to the Acts administered by the Board.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever