B.C.D. 05-17

EMPLOYER STATUS DETERMINATION
EMPLOYEE SERVICE DETERMINATION
Weyerhaeuser Car Shop
GS
DSR
CH

MAY 0 4 2005

This is the decision of the Railroad Retirement Board with regard to whether the Board's decision dated May 8, 2003 (B.C.D. 03-40) holding Weyerhaeuser Car Shop (WCS) not to be an employer 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) should be reopened, and whether GS, DSR, and CH should be credited with railroad service with the DeQueen and Eastern Railroad (DQE)[1].

1) General Information Regarding Weyerhaeuser Car Shop

The Board's decision dated May 8, 2003 (B.C.D. 03-40) found that WCS provided services to rail affiliates of Weyerhaeuser Company but that WCS was a division of Weyerhaeuser and was therefore not under common control with the rail affiliates. In a letter dated May 21, 2004, Kennedy M. Weza, Senior Tax Manager, Weyerhaeuser Company, addressing inconsistencies in information previously provided, stated that Weyerhaeuser Car Shop is a division of Weyerhaeuser Company. A letter dated December 17, 2002, had stated that the Car Shop is a division of Weyerhaeuser Company, but had also stated that the Car Shop had been sold to DQE (paragraphs 1(a) and 2(f)), respectively.

The letter dated December 17, 2002 stated that employees working in the car shop perform car, wheel, and locomotive repair.

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[1] Additionally, Ms. KN and BB claim that they should be credited with railroad service for the periods 1975 through 1984 and 1973 through 1984, respectively, with DQE. These claims will be dealt with in a separate decision by the Board.

Approximately 42 percent of the work performed in the shop is car repair. The repair services performed on DQE cars represent approximately 53 percent of the total revenue derived from such services. Car repair services performed for non-railroad customers represent approximately 46 percent of the total revenue derived from car repair services.

Wheel repair services represent approximately 31 percent of the total revenue of the shop. Less than 12 percent of the wheel repair work is performed for DQE. Locomotive repair services represent 27 percent of the revenue of the shop.

Weyerhaeuser Company stated that DQE is a customer of Weyerhaeuser.

GS, DSR, and CH claim credit for railroad service with DQE. Their claims are discussed below.

2) Information Regarding Individual Claimants

GS

According to Weyerhaeuser Company, GS is responsible for assigning work to shop employees and determining the order of work.

A response to a Board questionnaire supplied by Brooks F. Burton, Region HR Manager for Weyerhaeuser Company stated that GS does not have a railroad job title or position and that GS is the Superintendent of Shops for Weyerhaeuser Company. Mr. Burton stated that "GS does not have responsibilities at DQE. * * * GS does not work for DQE, he works for Weyerhaeuser. GS's office is in the same facility as the DQE general offices. This is his sole office, however he does have job responsibilities at other locations within the region. GS only provides services to Weyerhaeuser. * * * All

business expenses are covered by DQE. DQE provides him a car. There is no written agreement with respect to expense reimbursement. * * * There are no written service agreements between GS, DQE and Weyerhaeuser."

A response to a Board questionnaire supplied by GS states that he provides services to DQE:

> I am responsible for the repair and maintenance of locomotives and railcars used by DQE. The railcars include foreign cars that are in the general rail system interchanged by the DQE. I also have weekend duty once a month as relief trainmaster. During this time I am responsible for the operation of the DQE railroad. When I accepted the position of superintendent of shops in August of 1996 [I] replac[ed] a DQE railroad employee that held the position.
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> I started working at the DQE shop in January of 1972 in the car department and transferred to the locomotive department in 1982. In August of 1996 I accepted a managing position. I am a direct report of J D Ventrcek who is Vice President & General Manager of the [DQE]. * * *

GS stated that his work schedule is set by Mr. Ventrcek and stated that "the shops are owned and operated by the DQE." He stated that he works with the superintendent of operations, trainmaster, roadmaster, accounting, interline freight clerks, and service center during his duties as Superintendent of Shops/CMO and as a manager of the DQE. GS also works with the train crews and maintenance group as a manager and relief trainmaster.

He stated that he is in charge of the AAR billing for the running repairs and the major repairs the DQE shops perform on foreign as well as leased cars. GS advised that, although his paycheck has Weyerhaeuser on it, 100% of his salary is charged to DQE. Copies

of GS's form W-2 for 2000 and for 2002, however, show Weyerhaeuser as his employer. A Weyerhaeuser form labeled "Interoffice Communication" showing "weekend call duty" lists GS as "Duty Officer." Another form entitled "DQE/TOE Railroad Organization Chart" shows J. D. Ventrcek as Vice President and General Manager with GS under him as Shop Superintendent.

Attorney C. Burt Newell submitted on behalf of GS photostats of pages from a booklet entitled "DeQueen & Eastern/Texas, Oklahoma & Eastern Railroad Repair Shops" the cover of which states at the bottom "A Subsidiary of Weyerhaeuser Company." Another page refers to "D&E/TO&E Railroad Company Maintenance Shops" (John Karr is listed as Manager). Mr. Newell also submitted a copy of a pleading in Green, et al v. Weyerhaeuser which, Mr. Newell contends, establishes that DQE is a subsidiary of Weyerhaeuser Company (and other matters not in dispute).

CH

In response to a Board questionnaire, CH stated that she provides service to DQE (according to Kennedy Weza, Senior Tax Manager, Weyerhaeuser, CH retired January 4, 2003). CH stated that she performs AAR car repair billing, payroll for DQE, accounts payable, and acts as assistant to human resources. She stated that these duties were previously performed by DQE employees. She stated that from 1978 to 1982 she worked in part for WC [apparently referring to Weyerhaeuser Company] and in part for DQE, and reported to the vice president and general manager of DQE. From 1982 to 2002, she was manager of railroad accounting and reported to BB. She stated that she worked at the DQE general office. She was given on-the-job training by DQE employees and works on DQE property. Copies of her form W-2 show her employer as Weyerhaeuser Company. A form labeled "DQE/TOE Railroad

Organization Chart" shows BB as "Director Finance/Admin" over KN, who in turn is over CH, who is over LP[2].

DSR

In response to a Board questionnaire, DSR stated that she provides service to DQE. DSR stated that she purchases all materials and supplies for DQE and schedules maintenance on DQE equipment. She stated that the maintenance scheduling was previously performed by DQE employees, and that she is Maintenance Planner, Unit Materials Management Lead, and was transferred from "Weyerhaeuser unit in 1982." She stated that she reports to "J. D. Ventrcek, Vice President & General Mgr." She stated that she was given on-the-job training by DQE employees and works at the DQE General Office. She stated that her job consists entirely of railroad-related duties and that she works with the other railroad salaried personnel along with the hourly employees. She stated she was not placed on the DQE payroll system because she was transferred from a "Weyerhaeuser Unit" to a DQE position, and that she remained on the Weyerhaeuser payroll and that her check is "charged direct" to the DQE. Copies of her form W-2 show her employer as Weyerhaeuser Company. A form labeled "DQE/TOE Railroad Organization Chart" shows her as "Purchasing Manager" under J. D. Ventrcek, Vice President and General Manager. It should be noted that "The Pocket List of Railroad Officials" for the fourth quarter of 2003 lists Ms. Ruth as Purchasing Manager for the Texas, Oklahoma & Eastern Railroad Company (TOE) (J. D. Ventrcek is listed as Vice President and General Manager and Ben J. Bramlett is listed a Director, Finance and Administration. "The Official Railway Equipment Register lists Mr. Bramlett as Controller for TOE). "The Pocket List of Railroad Officials" for the second quarter of 2002 lists DSR as Purchasing Manager for DQE (J. D. Ventrcek is listed as Vice President and General Manager and Ben J. Bramlett is listed a Director, Finance and Administration).

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[2] LP was previously found to be performing creditable railroad service.

Ms. Weza, responding to a Board questionnaire for Weyerhaeuser Company, stated that Ms. Ruth's job title is Purchasing Manager and that she performs purchasing duties for Weyerhaeuser Company and DQE. She additionally performs maintenance planning duties for Weyerhaeuser Company Car Repair Shop. The current assignments performed by DSR are a combination of duties that have been performed by both Weyerhaeuser Company and DQE employees in the past.

Ms. Weza further stated that Ms. Ruth was hired in 1978 as a Wood Products Accounting Clerk for Weyerhaeuser Company and in 1980 she was promoted to Weyerhaeuser Company's Central Stores group as a Purchasing Assistant. This group provided a centralized purchasing support to Weyerhaeuser locations and to the DQE. In 1983, she was promoted to Purchasing Administrator/Coordinator of this central stores group and finally to Purchasing Manager in 1986. A reorganization of Weyerhaeuser Company resulted in the elimination of the central stores. DSR assumed duties of purchasing for the DeQueen Treating Plant, a Weyerhaeuser Company operation, in 1997, in combination with purchasing duties for Weyerhaeuser Company and DQE. Subsequent changes to Weyerhaeuser Company's support functions resulted in the current job duties for DSR, including purchasing for Weyerhaeuser Company and DQE, and maintenance planning for Weyerhaeuser Company operations.

Ms. Weza stated that DSR reports to J.D. Ventrcek, who is a Vice President/General Manager of DQE, and that roughly one half of DSR's time is spent performing duties for DQE.

3) Conclusion: Weyerhaeuser Car Shops

For the reasons stated below, the Board finds it unnecessary to reopen its decision dated May 8, 2003 (B.C.D. 03-40) holding WCS not to be an employer.

4) Conclusion: GS, DSR, and CH

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. § 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

The evidence in the record concerning GS, DSR, and CH is conflicting in parts. However, there does not appear to be a conflict in the evidence as to their being supervised by an employee of DQE. More specifically, the evidence indicates that GS and DSR are supervised by J. D. Ventrcek, who is Vice President and General Manager of DQE, and that CH was supervised by KN. Accordingly,

the Board concludes that GS, DSR, and CH have been performing service subject to the continuing authority of DQE to supervise and direct the manner of rendition of their service and that, consequently, their service and compensation may be credited to the extent permitted by section 9 of the Railroad Retirement Act and section 211.16 of the Board's regulations.

5) Conclusion: Employees of Weyerhaeuser Company

Additionally, it is apparent from the evidence above-described that this determination regarding GS, DSR, and CH applies as well to any employee of WC supervised by J. D. Ventrcek, Vice President and General Manager of DQE, or by any other employee of DQE, specifically GS, Superintendent of Shops of WC. The identity of these individuals and the periods for which they should be credited with service to DQE is to be determined by the Board's Office of Assessment and Training. Service and compensation may be credited to the extent permitted by section 9 of the Railroad Retirement Act and section 211.16 of the Board's regulations[3].

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

[3] The issue of retroactivity for crediting of service for these individuals will be dealt with by the Board in the decision involving the crediting of service for Ms. Karen Neumeier and Mr. Ben Bramlett.