B.C.D. 05-21

EMPLOYEE SERVICE DETERMINATION MAY 17 2005

Reconsideration

LP

This is the decision of the Railroad Retirement Board with regard to whether the Board's decision dated May 12, 2003, finding that service performed by LP was creditable as service performed for the DeQueen and Eastern Railroad (DQE) should be revised on reconsideration to permit retroactive crediting of that service.

In a decision dated May 12, 2003, LP was found by the Board to be performing services for DQE. However, credit for that service was limited to four years pursuant to section 9 of the Railroad Retirement Act which requires railroad employers to file annual reports of compensation and service with the Railroad Retirement Board. Section 9 provides that the Board's records of reported compensation and service become final unless the error in a report of compensation or the failure to report compensation is called to the attention of the Board within four years after the date on which the report of compensation was required to be made. Section 209.8 of the Board's regulations (20 CFR 209.8) requires that on or before the last day of February, each railroad employer must report the compensation and service of the employer's employees for the previous calendar year. Section 211.16 of the Board's regulations (20 CFR 211.16) provides that as general rule the Board's record of compensation and service may not be corrected after four years in the absence of fraud.

Mr. C. Burt Newell, Mr. P's attorney, submitted on behalf of Mr. P 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 with separate lines of authority, and other matters not in dispute.

Mr. P submitted an affidavit dated April 22, 2004, stating that he and DR, GS, and CH are the only individuals on the DQE/TOE Railroad Organization Chart who are not reported as employees of DQE. Mr. P contends that the responses of Weyerhaeuser Company to the Board's questionnaire represent an attempt to mislead which constitutes fraud, justifying retroactive crediting of compensation and service without payment of taxes under the Railroad Retirement Tax Act. Specifically, Mr. P contends that Weyerhaeuser Company's answer to question 6 implies that he is not a DQE employee when he had been one for over 21 years. The Weyerhaeuser Company answer to question 3 states that Mr. P does payroll for Weyerhaeuser Company employees; however, Mr. P states that these are all employees of DQE in the locomotive shop. In other words, apparently, Mr. P's position is that they are Weyerhaeuser Company employees only because Weyerhaeuser Company reports them as such. The Weyerhaeuser Company response to question 7 states that Mr. P's salary is not charged to DQE through a written service agreement or contract. In response, Mr. P states that while there may be no written agreement or contract, his salary is charged each payroll period to the DQE. The response to question 8 states that Mr. P spends four hours per week performing payroll duties for Weyerhaeuser Company; however, again, these are the locomotive shop employees and their payroll records.

A management study done by Anacostia & Pacific Company, Inc., in July 1995 states, in pertinent part, that:

> The TOE/DQE mechanical department personnel are actually employees of [Weyerhaeuser Company] and work for TOE/DQE

> on quasi-contractual basis. These employees are represented by an affiliate of the International Association of Machinists. In years past this work force apparently performed considerable mechanical or maintenance work for [Weyerhaeuser Company] and third parties. Now, however, these employees work exclusively on TOE/DQE project. They are supervised by TOE/DQE management.

Mr. P contends that the existence of the study shows that Weyerhaeuser Company had notice of the impropriety of its actions as early as 1995.

The Board finds that Mr. P's allegations of fraud by Weyerhaeuser Company, based on responses reported by Weyerhaeuser Company to the Board, are not meritorious. The responses by Weyerhaeuser Company were all submitted within the last four years and could not constitute fraud in connection with reporting compensation and service for the period more than four years before the Board's decision regarding the creditability of Mr. P's service and compensation.

Moreover, the Board regards the contention that fraud was committed as a very serious accusation and does not find that the failure of Weyerhaeuser to report Mr. P's service and compensation constituted fraud even though a management study stated that certain Weyerhaeuser Company employees worked exclusively for DQE (and another affiliated railroad). The Board notes that the same report also stated that the employees had "apparently performed considerable mechanical or maintenance work for [Weyerhaeuser Company] and third parties."

In conclusion, the Board denies correction of the Board's record of Mr. P's record of compensation and service prior to the four-year period referenced in the original decision.

Michael S. Schwartz

V. M. Speakman, Jr. (***Dissenting, Separate Dissent Attached)***

Jerome F. Kever

DISSENTING OPINION OF V. M. SPEAKMAN, JR. ON APPEAL OF LP

I cannot concur with my colleagues' decision in this case because I believe the record is insufficient to make any findings which have a reasonable basis in the evidence before the Board.

As the result of findings by the Railroad Retirement Board's division of Audit and Compliance, in BCD 03-40.2, dated May 12, 2003, my colleagues and I held LP to be an employee of DeQueen & Eastern Railroad (DQE), an employer covered under the Railroad Retirement Act (RRA), even though he had been carried on the payroll of Weyerhaeuser, DQE's parent company, for a number of years. In that decision we found that LP performed numerous accounting services for DQE that were directly integrated into the management and operation of DQE. As a result of that decision DQE was henceforth to treat LP as its employee and furthermore to report service and compensation back to 1999, consistent with section 9 of the Railroad Retirement Act (RRA) (45 USC 231h), which provides that a record of compensation and service shall be considered final, if not amended within 4 years from when the return of compensation was or should have been filed.

LP wants credit for railroad service before that date. This requires a two-part finding. First, that LP was in fact an employee of DQE prior to 1999, a finding under 20 CFR 259.1 (2004) and, secondly, that Potts can establish a basis under 20 CFR 211.16 (2004) to ignore the four-year limit of section 9.

The course of this appeal is straightforward. On June 9, 2003, LP wrote the Secretary to the Board inquiring about the ability to receive credit for service and compensation beyond the four-year restriction stated in B.C.D. 03-40.2. On October 29, 2003, LP formally requested the three-member Board to give him credit for service and compensation beyond the four-year period based upon Weyerhaeuser's alleged policy of keeping salaried employees on its payroll rather than DQE's, even though the employee may be working for DQE.

On April 22, 2004, LP, through his attorney, submitted an affidavit with six exhibits and other documents for the Board's consideration. At the same time LP requested a hearing, should the three-member Board find the written evidence insufficient.
In his affidavit LP states that in 1983 he was transferred from Weyerhaeuser Company to its subsidiary DQE. From that time to the present he alleges that he reported directly to railroad management. However, until audited by the RRB, Weyerhaeuser continued to report him on their payroll, and not DQE's, thus, denying him service credits under

the RRA. He alleges that Weyerhaeuser/DQE's failure to report his wages as covered under the RRA was by design.

With his affidavit, LP attaches the results of an outside audit which Weyerhaeuser/DQE had performed on DQE's operations. (Exhibits 5) Specifically, page 3 of the audit states that DQE's practice of contracting with Weyerhaeuser for certain accounting personnel is subject to challenge by the RRB, because these employees were performing an integral railroad function and not being reported under railroad retirement.

Accepting LP's allegations as true, and there is no evidence to suggest otherwise, LP has established that he was in the service of DQE, an employer under the RRA, since 1983. See 45 USC 231(d)(1). Thus, the only question that remains is whether LP has established a basis under 20 CFR 211.16 for avoiding the restrictions under section 9.

As noted above, section 9 of the RRA provides that a record of compensation and service shall be considered final, if not amended within 4 years from when the return of compensation was or should have been filed. The four-year restriction found in section 9 applies only to employers and employees and does not prohibit the Board from correcting a record of compensation beyond the 4 year limit. Gerend v. Railroad Retirement Board, 248 F. 2d 357 (9th Cir., 1957); Jacques v. Railroad Retirement Board, 736 F. 2d. 34, 42 (2nd Cir. , 1984). Furthermore, the General Counsel has held that the Railroad Retirement Board (RRB) has the same authority as the Internal Revenue Service to audit reports of compensation beyond years closed by a statute of limitations. See L-2000-23. Because service and compensation of employees are necessary to administer the benefit and entitlement provisions of the RRA, the RRB clearly has authority to ensure that employer reports properly reflect the service and compensation of employees. Burlington Northern v. Office of Inspector General, 983 F.2d 631 (5th Cir. 1993) at 633-634.

With respect to employees, the ability to receive credit for service and compensation beyond the four year limit is limited to the situations described in section 211.16 of the Board's regulations. LP apparently seeks service and compensation prior to the 4 year limit of section 9 based upon section 211.16(b)(1) (20 CFR 211.16(b)(1) (2004)), which provides that a record of compensation may be reopened to amend it beyond the restrictions of section 9 when the failure to post or not post compensation was the result of fraud by the employer. [1]

Section 211.16(b)(1) provides no definition of "fraud," but, we may look to section 13 of the RRA for assistance in this matter (45 U.S.C. 231l). Section 13 provides a penalty for

[1] Arguably compensation and service for LP could be credited beyond the four year limit under 20 CFR 211.16(b)(2)(iii) (2004), which provides for ignoring the four-year limit "when a determination pertaining to the coverage under the Railroad Retirement Act of an individual *** is retroactive." However, in such circumstances LP would have to show that all appropriate employment taxes for the period for which he sought credit were paid. 20 CFR 211.16(c)(1). Section 211.16(b)(1) has no such requirement.

the knowing failure or refusal to file a return or furnish information required by the RRB to administer the Act. Since section 9 of the RRA, noted above, requires employers to file reports of compensation with respect to their employees, a reasonable definition of fraud for purposes of section 216.11(b)(1) would be a "knowing failure to file a report of compensation." Furthermore, for purposes of asserting civil penalties for false and fraudulent statements under the Program Fraud Civil Remedies Act, section 355.3(d) of the Board's regulations (20 CFR 355.3(d) (2004)) provides that no proof of specific intent to defraud is required to establish liability. Thus, it would appear reasonable to conclude that no showing of specific intent to defraud need be shown under section 216.11(b)(1).

The burden of proving fraud under 20 CFR 211.16(b)(1), of course, is on the employee making the allegation, but once he or she presents evidence which raises an inference of a knowing failure to report, the burden should shift to the employer to explain the failure to file. Then the three-member Board, as finder of fact, can then evaluate the credibility of the explanation. Without this shifting of the burden of production of evidence, fraud could only be proved by direct evidence, such as an incriminating statement by an agent of the employer.

My colleagues find no evidence of fraud on the part of Weyerhaeuser/DQE, without requiring any explanation from Weyerhaeuser/DQE responding to LP's allegations. My colleagues suggest that since LP also did work for Weyerhaeuser it was reasonable for Weyerhaeuser to report him as their employee. However, this is a supposition, not a conclusion based upon substantial evidence.

I believe the best approach in this appeal is to give LP the hearing he requested. Under 20 CFR Part 258 the Board has the authority to appoint a designated examiner to make recommended findings. Such an examiner would have subpoena power and the ability to take testimony from LP, Weyerhaeuser and DQE and weigh the credibility of the testimony. The power to take testimony and cross examine witnesses would lead to a more complete record upon which the Board could make a determination.

In conclusion, although the Board has some discretion in whether or not to amend a compensation record under 20 CFR 211.16(b)(1), its decision not to apply that section must have a basis in such evidence that a reasonable mind might accept as adequate, and not merely be based upon conjecture. Richardson v. Pereales, 402 U.S. 389, 401 (1971). I agree with my colleagues that a finding of fraud is a serious matter. But we

have made such findings under 20 CFR Part 355 with respect to false claims filed against the Board. The Board has a duty to determine what 211.16(b)(1) means and how it is to be applied. The Board has not done so in this case, and this is not fair to LP.[2]

V M Speakman, Jr.

V. M. SPEAKMAN, JR.
LABOR MEMBER

[2] The Board has dealt with this section only once in the Appeal of Chandler, Claims Appeal Docket No.-AP-0025, decided July 27, 2001. In that case the Board, Management Member Dissenting, reversed a hearings officer's finding that although Chandler had established fraud under section 211.16(b)(1), he waited to long to present his claim and thus could not take advantage of that section.