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## Employee Status Determination on Reconsideration Employee Service Determination on Reconsideration Weyerhaeuser Car Shop

BB  
KN  
GS  
DSR  
CH  
LP

### Board Coverage Decision 06-26 June 22, 2006

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This is the decision of the Railroad Retirement Board with regard to the reconsideration of the Board's decision B.C.D. 05-39, issued August 5, 2005, denying KN and BB credit with railroad service for the periods 1975 through 1984 and 1973 through 1984, respectively, with the DeQueen and Eastern Railroad (DQE); and denying GS, DSR, and CH credit with railroad service with DQE. LP has also requested reconsideration of the decision pertaining to retroactive credit. Counsel for these individuals has requested a hearing on their behalf. Counsel has also requested reconsideration of the Board's determination B.C.D. 05-17 issued May 4, 2005, refusing to reopen the initial decision regarding Weyerhaeuser Car Shop (WCS).

In 2003 BB and KN protested their BA-6's (Certificates of Service and Compensation) and alleged that service with the DQE for the periods identified in the preceding paragraph was still not reflected after their repeated attempts to get their employer, the DQE, to make the necessary corrections<sup>1</sup>. Their protest was denied and was dismissed by a hearings officer without a hearing.

With respect to BB, in his submission to hearings and appeals he indicated that in 1973 he accepted a position as "a car accountant" for Weyerhaeuser's wholly owned subsidiary, DQE. He was initially put on railroad retirement but after two days on the job was told that HR was "doing me a favor" and that he was to be removed from the railroad payroll and put back on the payroll of Weyerhaeuser while remaining an employee of DQE. This situation continued until 1984 when he was moved to DeQueen, Arkansas, and placed on DQE's payroll and thus under railroad retirement.

With respect to KN the allegations are similar. In the information she submitted to hearings and appeals she indicated that commencing February 1975 she was hired by Weyerhaeuser to do cost accounting for the DQE. However, she was carried on the Weyerhaeuser payroll until 1984 when, like BB, she was transferred to the DQE payroll. She, like BB, alleges that at that time she requested that Weyerhaeuser correct her employment records to reflect railroad retirement coverage from 1975. Weyerhaeuser and DQE have more or less put her off.

In B.C.D. 03-40.2 LP was held to be an employee of the DQE, even though he was carried on the payroll of Weyerhaeuser, due to the fact that the majority of his accounting services were for the DQE. In a similar vein, in B.C.D. 05-17, GS (superintendent of WCS), CH (car repair billing, accounts payable for DQE) and DSR (purchasing for DQE) were also found to be employees of DQE even though carried on the payroll of Weyerhaeuser.

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LP, by affidavit, has indicated that he had questioned Weyerhaeuser on a number of occasions with respect to railroad retirement coverage. He pointed to an internal report performed in 1995 indicating that DQE was subject to potential liability for not reporting under railroad retirement employees of WCS who were performing services for DQE. GS, DSR and CH also allege that Weyerhaeuser's failure to have them reported as employees of DQE was by design.

In connection with the request for reconsideration, the Board sent a copy of the administrative record regarding this matter to Weyerhaeuser Company. Ms. Janie Sheng, counsel for Weyerhaeuser, submitted a response dated February 8, 2006. Counsel for Weyerhaeuser contends essentially that the Board previously found that there was no evidence of fraud on the part of Weyerhaeuser in connection with the failure to report service by the above-named individuals and that no evidence of fraud has been submitted. Accordingly, counsel contends that the request for reconsideration should be denied. In addition counsel points out that the issue of the retroactivity regarding credit for the service of LP has already been addressed by the Board on reconsideration, and therefore should be denied on procedural grounds. However, counsel did not respond directly to the allegations of the employees.

As stated in decision B.C.D. 05-39, retroactive credit for service is 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 a general rule the Board's record of compensation and service may not be corrected after four years in the absence of fraud.

A majority of the Board (Labor Member dissenting) found no evidence of fraud in the record in connection with the failure to report the service of KN and BB, and declined to credit service and compensation for them for the period in question. B.C.D. 05-39. A similar decision, over the Labor Member's dissent, was reached with respect to LP in B.C.D. 05-21.

In Board Coverage Decision 05-17, issued May 4, 2005, the Board concluded that GS, DSR, and CH had 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.

The Board adds to the record a copy of a report issued August 16, 1995 by Anacostia & Pacific Company, Inc., entitled "Texas, Oklahoma & Eastern, DeQueen & Eastern, Benchmarking Study" for Weyerhaeuser Company, which was submitted by LP. On page 3 of that report it is stated that:

The Railroad's practice of contracting with WeyCo for the entire mechanical work force as well as certain accounting personnel is subject to challenge by the Railroad Retirement Board (RRB). In essence, the RRB position is that railroads cannot escape payment of Railroad Retirement and Unemployment Insurance Taxes by contracting an integral railroad function to an affiliate under common ownership.

The Board finds that this report did or should have put Weyerhaeuser on notice of the nature of the issue regarding the reporting of service performed by its employees for the

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affiliated carriers and created reasonable expectations that such service should be creditable under the Acts. Thus, the Board need not make a finding as to whether Weyerhaeuser willfully failed to report certain of its employees under the Railroad Retirement Act. Accordingly, with regard to GS, CH, and DSRuth, the Board finds that any service performed by them in 1995 and after should be fully creditable and neither section 9 of the RRA nor section 211.16 of the RRB's regulations should be applied to bar them from receiving these credits. See B.C.D 05-38.

Since KN and BB do not claim that there was any failure to report their creditable service after 1994, the Board's initial decision with regard to them is affirmed. Even assuming all of their allegations to be true, the Board finds that raising the issue more than 20 years after the alleged conduct on the part of Weyerhaeuser prohibits them from now pursuing the matter.

In regard to LP, the Board notes that he was provided reconsideration of the initial decision previously. See B.C.D. 05-21, issued May 17, 2005. Accordingly, the Board reopens the decision regarding LP's request for reconsideration and finds that any service performed by him in 1995 and after should be creditable.

Original signed by:

Michael S. Schwartz

V.M. Speakman, Jr.

Jerome F. Kever

<sup>1</sup> The Board's records reflect that KN and BB have each been credited with 11 months of railroad service in 1984.

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