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B-45. 312

The Director of Retirement Claims

The General Counsel

Kaul Lumber Company (Alabama Corporation) (1887)  
Kaul Lumber Company (Delaware Corporation) (1927)

[REDACTED]

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

QUESTION

Was either the Kaul Lumber Company (of 1887) an Alabama corporation, or the Kaul Lumber Company (of 1927), a Delaware corporation, an "employer" under the Railroad Retirement Act and is service to either creditable under that Act?

OPINION

1. It is my opinion that the Kaul Lumber Company (of 1887), with the exception of the operation by it of the Sylacauga & Wetumpka Railroad, during the period July 1, 1905 to June 30, 1912, was not an "employer" under the Railroad Retirement Act and that service rendered to it in any of its other operations is not creditable under that Act.
2. It is my opinion that the Kaul Lumber Company (of 1927) was not an "employer" under the Railroad Retirement Act and service to it is not creditable under that Act.

DISCUSSION

Neither of the lumber companies referred to appears in Poor's or Moody's manuals. Information furnished by Mr. J. H. Eddy, Manager, Kaul Lumber Company (of 1932), in letters dated September 10, 1938, and August 22, 1939, is that the Kaul Lumber Company (of 1887) was incorporated under the laws of Alabama as the Sample Lumber Company and that its name was changed to Kaul Lumber Company on November 12, 1902; that

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in September 1927 it was succeeded by the Kaul Lumber Company (of 1927), a Delaware corporation, and in 1932 by a Delaware corporation of the same name.<sup>1/</sup>

From the information furnished by Mr. Eddy concerning the Kaul Lumber Company (of 1887) and the Kaul Lumber Company (of 1927), hereinafter sometimes referred to collectively as the "Lumber Company," the following appears:

In 1901 the Lumber Company built a railroad to haul logs from its timber to its mill; this railroad was known as the Sylacauga & Wetumpka Railroad<sup>2/</sup> and was operated as a common carrier during the years 1901 to 1911. In 1911 the Lumber Company discontinued the operation of the Sylacauga & Wetumpka Railroad and "at no time since 1911 has the company operated a railroad for hire." Until 1932 when it was succeeded by the Kaul Lumber Company (of 1932), the Lumber Company owned and operated a "private railroad" on its own property which was "used solely for the purpose of hauling logs to its mill." During the period prior to July 1, 1905, and during the period subsequent to June 30, 1912, the Lumber Company was not controlled by or under common control with any express company, sleeping-car company or carrier by railroad subject to part I of the Interstate Commerce Act. From July 1, 1905 to June 30, 1912 (during which period the Lumber Company was under common control with the Sylacauga & Wetumpka Railroad) the Lumber Company "by reason of this ownership \* \* \* performed services of all types for the Sylacauga & Wetumpka Railroad." In addition, during that period the Lumber Company "probably performed some incidental and casual services, such as machine shop work, small repairs to tracks and bridges near its plant, and the like, for the Central of Georgia Railroad and the Louisville & Nashville Railroad." This work was "probably performed on a cost plus basis." The Lumber Company during the same period supplied lumber to various railroads "by direct sale on quotation." The percentage of these sales to total business of the Lumber Company was "very small" - estimated to have been at no time in excess of 10%. Mr. Eddy states that

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- 1/ The Kaul Lumber Company (of 1932) has been held never to have been an "employer" under the Railroad Retirement Act. See Status of Kaul Lumber Company (Delaware) (1932), L-40-321.
  - 2/ Sylacauga & Wetumpka Railroad has been held to have been an "employer" under the Railroad Retirement Act from July 1, 1905 to June 30, 1912. See Item No. 6585 in the Employer Status List. It appears that the Sylacauga & Wetumpka Railroad was not separately incorporated but was operated by the Kaul Lumber Company as a common carrier under the Lumber Company's charter which gave the Lumber Company the right to build and operate a railroad and make such railroad a common carrier when built. Kaul Lumber Company v. Central of Georgia Ry. Co., et al (20 I.C.C. 450).

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detailed records are not available and that in furnishing this information he has, in large part, drawn upon his own knowledge represented by his association with the Lumber Company and its successor since 1903.

Mr. A. M. Yost, Auditor of Disbursements, Gulf, Mobile and Ohio Railroad Company, has submitted copies of the following trackage agreements between the Mobile and Ohio Railroad Company and the Lumber Company:

- (1) Agreement dated February 8, 1912, covering the operation by the Lumber Company of its logging trains over the rails of the carrier between a point at or near Tuscaloosa, Alabama, and a point at or near Duncanville, Alabama, "for the purpose solely of transporting its logs." With the exception of the following provision, the agreement is quite the usual form of trackage agreement:

"The Lumber Company agrees to move, operate and handle its trains under this contract under the regulations and control and under the rules of the Railroad Company; said trains to be operated at all times and only under telegraph or train orders of a kind prescribed and in use by the Railroad Company, received from the authorized employees of the Railroad Company, and employees of the Railroad Company, in giving such orders, are at the time of giving the same, considered under this contract to be performing a joint service for and to be the joint employees of the Lumber Company and Railroad Company."

- (2) Supplemental agreement dated November 20, 1916; this agreement gave the Lumber Company, in addition to the privilege granted in the agreement of February 8, 1912, and under the provisions of that agreement, the right to operate its logging trains over the rails of the carrier between Tuscaloosa, Alabama, and Hagler and Pearson, Alabama. It contains also the following provision:

"The Lumber Company agrees to pay the wages or salary of such telegraph employees as may be necessary to do telegraphing at Hagler and Pearson, in order to operate trains from said stations under telegraph orders."

- (3) Supplemental agreement dated March 15, 1921. This agreement merely changed the rates of compensation paid by the Lumber Company under previous agreements.
- (4) Agreement dated July 8, 1922. This agreement extended the term of the previous agreements and provided that the trackage between Duncanville and Tuscaloosa would be used only in cases of emergency as the business of the Lumber Company between these two points "will ordinarily be handled over the Lumber Company's own tracks."

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- (5) Agreement dated June 28, 1930. This agreement provided that the carrier would make eight connections of the Lumber Company's logging railroads with the carrier's main line, seven to be near the carrier's stations at Hagler and Pearson and one near Centerville, and gave the Lumber Company the privilege of operating over the carrier's rails between the points of connection and the Lumber Company's mill at Tuscaloosa. The Lumber Company was prohibited from transporting over the rails of the carrier any freight except its own logs and track materials, tools, logging machines and supplies. No passengers were to be transported. In addition to the usual provision that individuals engaged in the operation of the logging trains were to be skilled and experienced and that they shall have passed the usual examination required by the carrier, the agreement contained the following provisions:

"4 (g) The Railroad Company shall have the right to employ such telegraph operators at any of the points of connection and to construct such telegraph facilities as it may deem necessary; and the Lumber Company will reimburse the Railroad Company for the salaries of all such telegraph operators and for the cost of construction of all such telegraph facilities, plus ten percent (10%) for supervision."

"8. The Lumber Company will operate its trains on the Railroad Company's rails in accordance with the Railroad Company's rules and regulations and with the orders of the Railroad Company's officers, train dispatchers and telegraph operators, and will comply with all federal and state laws regulating hours of service and the operation of trains, in all respects whatsoever. Subject to the provisions governing liability hereinafter set forth, when giving such orders for the operation or movement of the Lumber Company's trains, said officers or employees of the Railroad Company shall be considered the sole agents or employees of the Lumber Company; when giving such orders for the movement or operation of the Railroad Company's trains, they shall be considered the sole agents or employees of the Railroad Company; when giving orders for the movement or operation of the trains of both companies and in relation to each other, they shall be considered the joint agents or employees of both of the parties hereto. The Railroad Company will permit the trains of the Lumber Company to be moved with all reasonable dispatch and expedition."

It is clear from the foregoing that with the exception of the period July 1, 1905 to June 30, 1912, during which it operated under the name of Sylacauga & Wetumpka Railroad, a carrier by railroad subject

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to part I of the Interstate Commerce Act, the Lumber Company was not an express company, sleeping-car company or carrier by railroad subject to part I of the Interstate Commerce Act, or a company owned or controlled by or under common control with such an express company, sleeping-car company or carrier by railroad.

Therefore, it is my opinion that with the exception of its operation of the so-called Sylacauga & Wetumpka Railroad during the period July 1, 1905 to June 30, 1912, the Lumber Company was not an "employer" under the Railroad Retirement Act and service to it in any of its other operations is not creditable under that Act.

With regard specifically to Mr. Melton Alfred McLaney, who claims service as "telegraph operator and flagman" at Tuscaloosa, Alabama, it should be noted that the trackage agreement of November 20, 1916, provided for the railroad to furnish telegraph operators at Hagler and Pearson, Alabama only and not at Tuscaloosa. Moreover, even if the provision in the agreement of June 28, 1930, for the railroad to furnish telegraph operators at points of connection with the Lumber Company's railroad were applicable in the period of McLaney's employment (1920-22), it is to be considered that the agreement contemplated employment of these operators by the railroad directly and reimbursement of the railroad by the Lumber Company. Accordingly, since we have no evidence that the provisions of either agreement for the employment of telegraph operators by the railroad were applicable to McLaney, we must conclude that he was employed by the Lumber Company directly in its own interest, and was not the employee of the railroad. Cf. General Counsel's Opinion L-39-232. In my opinion, therefore, we have no basis for crediting this claimed service.

Hyles F. Gibbons  
General Counsel

HPC:lr