

**EMPLOYER STATUS DETERMINATION****Trans-Serve, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Trans-Serve, Inc., as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

Information regarding Trans-Serve has been obtained from Trans-Serve, from two decisions by the U.S. District Court in 2004 and 2006 in Trans-Serve, Inc. v. United States of America, (U.S.D.C., W.D. Louisiana, No. 00-1017), and from the findings of fact by the U.S. Court of Appeals in Trans-Serve Inc. v. U.S., 521 F. 3d 462 (5<sup>th</sup> Cir., 2008). The evidence from these sources is that Trans-Serve was incorporated in Delaware on September 30, 1965, as a wholly-owned subsidiary of Southern Industrial Services, Inc. Southern Industrial Services is in turn a wholly-owned subsidiary of Kansas City Southern Industries (KC So. Industries). KC So. Industries is a publicly traded holding company. KC So. Industries also owns Kansas City Southern Railway Company (KC Southern Rwy). KC Southern Rwy is a class I rail carrier subject to the Interstate Commerce Act, operating in fourteen states. The Board has determined that the KC Southern Rwy is a covered rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, with service creditable beginning March, 1900.

From the date of incorporation in 1965 until 1969, Trans-Serve maintained motor trucks and freight trailers. After 1969, Trans-Serve became a dormant corporate shell. In 1978, KC So. Industries decided to manufacture railroad cross ties, designating Trans-Serve as the owner and operator. Trans-Serve built a manufacturing plant in Vivian, Louisiana on 100 acres deeded from another KC So. Industries Company. On January 1, 1980, Trans-Serve, doing business as Superior Tie and Timber, concluded an agreement with KC Southern Rwy to act as purchasing agent for raw lumber to be used as cross ties and bridge lumber. Trans-Serve purchased, stored, and treated lumber; Trans-Serve also made and delivered ties to KC Southern Rwy. During the period 1984 through 1996, Trans-Serve earned 71.6 percent of revenue from the KC Southern Rwy agreement; in 2007, Trans-Serve conducted 87 percent of its business with KC Southern Rwy. As of June 2008, Trans-Serve states it has 28 employees.

From 1982 through 1997, Trans-Serve also operated a division under the name Fleet Maintenance (Fleet). The Fleet division repaired and maintained hybrid motor vehicles adapted to both drive over roads and operate on railroad right

of way. Fleet was based in a warehouse on the Vivian, Louisiana, tie plant from 1982 through June 1989. In June 1989 it moved to a building in Shreveport, Louisiana, leased from KC Southern Railway. Fleet performed vehicle maintenance services for KC So. Industries, for KC Southern Railway and other KC So. Industries subsidiaries, and for unrelated third parties. During calendar years 1984 through 1996, revenues from the Fleet division comprised an average of approximately 8 percent of total Trans-Serve revenues.

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.

On March 19, 2008, the United States Court of Appeals for the Fifth Circuit entered a decision affirming the decision of the United States District Court for the Western District of Louisiana, which found that Trans-Serve owed taxes for years 1987 through 1996 as a covered employer under section 3231(a) of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3231(a). See: Trans-Serve Inc. v. U.S., 521 F. 3d 462 (5<sup>th</sup> Cir. 2008). Citing the Eleventh Circuit Court of Appeals decision on essentially the same issue in Railroad Concrete Crosstie Corporation v. Railroad Retirement Board, 709 F. 2d 1404 (1983), the Court of Appeals found that by providing KC Southern Rwy with a product essential to its rail transportation business, Trans-Serve performed a service in connection with railroad transportation within the meaning of the RRTA. The Court of Appeals further held that in view of the small proportion of total Trans-Serve revenue

generated by the Fleet division, the entire company performed services in connection with railroad transportation on the basis of the cross tie business without regard to the auxiliary road/rail vehicle maintenance function. Finally, because Trans-Serve did not contest the District Court's finding that as a sister subsidiary of KC Southern Rwy, Trans-Serve was under common control with the rail carrier,<sup>1</sup> the Court of Appeals concluded Trans-Serve met both parts of the definition of a covered employer under the RRTA.

The Court of Appeals decision in Trans-Serve is based on facts relevant to the 1987 through 1996 period for which RRTA taxes were assessed. The evidence before the District Court and on appeal to the Court of Appeals regarding Trans-Serve's business for that time period is essentially identical to that before the Board. As noted above, the definition of covered employer under the RRTA is essentially identical to the definition of covered employer under the RRA and RUIA. The Board therefore finds that for the reasons stated by the Court of Appeals and the District Court in the decisions applying the definition under the RRTA, Trans-Serve met the definition of a covered employer beginning January 1987 under the RRA and RUIA as well.

The Court of Appeals did not reach the question of whether Trans-Serve met the definition of employer under the RRTA for years prior to 1987 because RRTA taxes were no longer an issue for those years.<sup>2</sup> However, the evidence before the Board is that Trans-Serve performed a substantial portion of its business with KC Southern Rwy since at least 1984. Moreover, there is no evidence of record indicating that the proportion of Trans-Serve's business conducted with the affiliated rail carrier was at any time since January 1980 so irregular or infrequent as to afford no substantial basis for inference that such service or operation would be repeated, or that such service was insubstantial. See regulations of the Board at 20 CFR 202.6, defining casual service; and B.C.D. 93-79 *VMV Enterprises*, finding 2.5 percent of business with affiliated rail carrier to be insubstantial service. Finally, the evidence is that Trans-Serve has been a subsidiary of KC So. Industries through ownership of Trans-Serve by Southern Industrial Services since incorporation of Trans-Serve in 1965.

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<sup>1</sup> The District Court held that although Trans-Serve was the subsidiary of Southern Industrial Services while KC Southern Rwy was the subsidiary of KC So. Industries, the fact that KC So. Industries owned and controlled Southern Industrial placed Trans-Serve under common control with KC Southern Rwy. Trans-Serve, Inc. v. United States of America, (U.S.D.C., W.D. Louisiana, No. 00-1017, March 31, 2004), 2004 U.S. Dist. LEXIS 7784.

<sup>2</sup> The Court of Appeals noted that the Office of Appeals of the IRS determined Trans-Serve had not been an employer for purposes of an earlier assessment for years 1983 through 1986. 521 F. 3d at 465.

In sum, Trans-Serve has been under common control with KC Southern Rwy, and has performed services in connection with railroad transportation by supplying KC Southern Rwy with wooden cross ties and bridge lumber. Accordingly, the Board finds that Trans-Serve has been a covered employer under section 1(a)(1)(ii) of the RRA and section 1(a) of the RUIA<sup>3</sup> effective January 1, 1980, the date Trans-Serve concluded its agreement with KC Southern Rwy to act as purchasing agent for raw lumber to be used as cross ties and bridge lumber.

Generally, when a coverage decision finds that a company became a covered railroad employer as of a date that occurred some years prior to the date of the Board's decision, we will find that service is creditable as permitted by section 9 of the RRA and section 211.16 of the Board's regulations. This finding is intended to ensure that, except in the case of fraud on the part of the employer, no service credit will be given unless an employee can establish to the satisfaction of the Board that the appropriate employment taxes have been paid [20 CFR 211.16(c)]. We find that this limitation should not be applied to employees of Trans-Serve for the reasons explained below.

The United States Court of Appeals for the Fifth Circuit noted in its decision that between 1984 and 1996, the IRS audited Trans-Serve five times, determining each time that Trans-Serve was an employer under the Railroad Acts and that it had under-reported and underpaid its employment taxes. Trans-Serve protested each examination report and appealed each tax assessment through the IRS's administrative appeals process and lost four of its five appeals. Trans-Serve's only successful appeal covered the tax years 1983 through 1986, for which years the IRS Office of Appeals held that Trans-Serve had not been a railroad employer. When the IRS denied the last of Trans-Serve's appeals in January 2000, Trans-Serve paid all railroad retirement taxes that it owed. 521 F.3d 462, 465 (5<sup>th</sup> Cir. 2008).

Because the IRS found that no taxes were payable for the years 1983 through 1986, it is not possible for an employee who worked for Trans-Serve during those years and who wanted to be credited with railroad service and compensation for that time period to pay any railroad retirement employment taxes for those years. Thus, although the facts in this case provide substantial evidence that Trans-Serve did fall within the definition of a covered employer for these years, our standard finding with respect to crediting retroactive service would place employees who worked for Trans-Serve in an impossible situation for those years. They would not be able to pay any additional employment taxes for those

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**3 Trans-Serve has requested that the Board apply this coverage ruling without retroactive effect with respect to contribution due for years prior to 2008 under section 8 of the RUIA. The Board will notify Trans-Serve of the Board's decision on that request under separate cover.**

years, since the IRS found that no railroad retirement taxes were payable for those years. In light of this particular set of circumstances, we find that all appropriate railroad retirement employment taxes have been paid for the years 1983 through 1986. The same analysis would apply to the years 1980 through 1982.

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