

B.C.D. 10-1.11
EMPLOYEE SERVICE DETERMINATION
S.S.A. XXX-XX-2096 NDD

JAN 15 2010

This is the decision of the Railroad Retirement Board regarding the status of NDD as an employee of a covered railroad employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (RRA and RUIA). For the reasons discussed below, the Board grants service credit for a portion of the period claimed.

NDD claims service as an employee of the DeQueen & Eastern Railroad Company (DQ&E RR) from May 1981 to the present day based on performing work as a certified journeyman in the car repair shop with his time split between the DQ&E RR and its corporate parent Weyerhaeuser Company.

The Court of Appeals for the Seventh Circuit, in the case of Weyerhaeuser v. U.S. Railroad Retirement Board (Docket Nos. 06-3455 and 06-3763) affirmed the Board's Decision in B.C.D. 06-26 to deny service credit for certain Weyerhaeuser employees prior to 1995. That decision decided the rights of parties claiming railroad service credit for work for these companies with respect to work performed in years prior to 1995. (Hereinafter, these individuals will be collectively referred to as "the Court Group".) That decision was based upon a report issued August 16, 1995 by Anacostia & Pacific Company, Inc. entitled "Texas, Oklahoma & Eastern, DeQueen & Eastern, Benchmarking Study" for Weyerhaeuser Company. The report stated:

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's 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 determined, and the Court of Appeals agreed, that this report did put Weyerhaeuser on notice of the nature of the issue regarding the reporting of service performed by its employees for the affiliated carriers and created reasonable expectation that such service should be creditable under the Acts. Thus, the question remaining for NDD is to determine service credit for work years starting in 1995.

In this case, NDD is claiming retroactive service credit for work performed from 1995 through the present day. Pursuant to section 9 of the Railroad Retirement Act, 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.

Despite this general rule, on April 22, 2008, in Board Order No. 08-36, the members of the Board unanimously directed the Board's Chief of Compensation and Employer Services to enter into the Board's records as railroad compensation for members of the Court Group the amount of earnings previously reported for those individuals by Weyerhaeuser Company to the Social Security Administration. The order did not require that the DQ&E file any returns of compensation for the years involved. The Board also directed that no contributions for these years were to be assessed against the employer under section 8 of the RUIA.

The Board finds no reason to treat NDD any differently than the members of the Court Group who participated in the Federal litigation which gave rise to Board Order No. 08-36. The Board has searched the service record of MDD and finds that he has been credited with railroad service since 2001. It is the direction of this Board that his current claim, which is seeking credit between 1995 (the earliest date Weyerhaeuser was on notice to report service credit) and 2000 (the last year the claimant alleges he did not receive service credit) should be granted. The Board further directs the Board's Chief of Compensation and Employer Services to enter into the Board's records as railroad compensation the amount of earnings previously reported for NDD by Weyerhaeuser Company to the Social Security Administration. The Board further notes that this decision will not

impose any burden on DQ&E under the Acts to file any return or report of compensation with the Board for these years or require DQ&E to make any payment to the Board for these years under the RUIA.

Original signed by:

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