B.C.D. 01-13

JAN 24 2001

EMPLOYER STATUS DETERMINATION
KBN, Inc.

This is the determination of the Railroad Retirement Board concerning the status of KBN, Inc., as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding KBN was provided by Mr. Thomas F. McFarland, counsel for KBN. On August 31, 2000, KBN acquired Minnesota Northern Railroad, Inc., and St. Croix Valley Railroad Company from RailAmerica, Inc. Minnesota Northern Railroad and St. Croix Valley Railroad are employers under the Acts (B.A. numbers, 4648 and 2646, respectively). RailAmerica is not an employer under the Acts. Mr. McFarland advises that KBN is strictly a holding company; that it has no employees and provides no services to its subsidiary railroads.

Section 1(a)(1) of the Railroad Retirement Act (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 (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

There is no evidence that KBN is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether KBN is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it provides "service in connection with" rail transportation and if it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer within section 1(a)(1)(ii).

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In a decision regarding a claim for refund of taxes under the Railroad Retirement Tax Act, the United States Court of Appeals for the Federal Circuit held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of § 3231. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed. Cir. 1993). The facts regarding common control in the Union Pacific case are indistinguishable from those presented in the case of KBN, Inc. Accordingly, a majority of the Board, Labor Member dissenting, finds that KBN, Inc. is not under common control with its rail carrier subsidiaries.

Regardless of the finding of the majority on the issue of common control, however, the evidence of record is that KBN does not provide any services to its subsidiary railroads. Accordingly, KBN does not meet the other essential criterion specified under section 1(a)(1)(ii) for a non-carrier to be an employer. It is the determination of the Board, Labor Member concurring in the result, that KBN is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Cherryl T. Thomas

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V. M. Speakman, Jr.

V. M. Speakman, Jr. (Dissenting in part; Concurring in part)

Jerome F. Kever

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