B.C.D. 04-19

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EMPLOYER STATUS DETERMINATION
L.P.M. Holding Company, Inc.

This is the determination of the Railroad Retirement Board concerning the status of L.P.M. Holding Company, Inc. (LPM), doing business as Epicurean Feast, as an employer under the Railroad Retirement Act (RRA)(45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (RUIA)(45 U.S.C. § 351 et seq.).

On October 5, 2001, LPM entered into a contract with Northern New England Passenger Rail Authority to provide food service on The Downeaster. Northern New England was held by the Board not to be an employer under the Acts (B.C.D. No. 03-27). It was established as a state agency by the State of Maine for the purpose of promoting passenger rail service. On December 2, 1996, it entered into an agreement with Amtrak for provision by Amtrak of passenger service between Portland and Boston. That service, known as "The Downeaster," began on December 15, 2001.

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).

LPM clearly is not a carrier by rail. Further, the available evidence indicates that it is not owned by a railroad and is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, LPM is not a covered employer under the Acts.

This conclusion leaves open, however, the question as to whether the persons who perform work for LPM under its arrangement with Northern New England should be considered to be employees of Amtrak rather than of LPM. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

The contract between LPM and Northern New England shows that Amtrak is not involved in the supervision of work by LPM's employees. Accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). LPM is the thirtieth largest food service company in the country, and it manages dining rooms, cafeteria, and catered events for corporations throughout the New England area. It has been in business for over 50 years. Accordingly, LPM is clearly an independent enterprise as that term is used in Kelm.

Therefore, a majority of the Board[1] concludes that services provided by employees of LPM to Amtrak under the terms of LPM's contract with Northern New England are not covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Michael S. Schwartz

Jerome F. Kever

[1] The Labor Member abstained.