

**EMPLOYER STATUS DETERMINATION  
KM Railways, LLC**

This is the determination of the Railroad Retirement Board concerning the status of KM Railways, LLC (KMR) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.) (RUIA).

Information regarding KMR was provided by David Coburn, Attorney for KMR, and was also taken from verified notices of exemption before the Surface Transportation Board (STB) filed by Koch Industries, Inc. (Koch) a non-carrier, and KMR. In STB Finance Docket No. 35320, Koch filed a verified notice of exemption to continue in control of KMR, upon KMR becoming a Class III rail carrier. Koch controls directly or indirectly three Class II rail carriers, Old Augusta Railroad, LLC (OAR)(B.A. No. 5590), Blue Rapids Railway Company, LLC (Blue Rapids), and Moscow Camden and San Augustine Railroad LLC (Moscow)(B.A. No. 2892).

In STB Finance Docket No. 35321, KMR filed a verified notice of exemption to acquire 2.5 miles of rail line owned by OAR pursuant to an executed Asset Purchase Agreement, and, in a related transaction, lease the track and other physical assets needed to operate the line back to OAR. KMR certified that, as a result of this transaction, it would not become a Class II or Class I rail carrier. KMR also provided that its projected annual revenues will not exceed \$5 million.

In a letter dated January 8, 2010, Mr. Coburn stated that KM Strategic Investments, LLC is the parent of KMR, with the ultimate parent being Koch Industries, Inc. Mr. Coburn explained that KMR, which was organized on October 27, 2009, acquired the line in question from OAR on December 18, 2009, as part of an internal reorganization for corporate purposes and the transaction "has no rail implications". KMR does not conduct any physical operations, has no railroad employees, and does not do any business with other rail carriers other than the lease which it maintains with OAR.

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;

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).

In its decision regarding the employer status of Railroad Ventures, Inc. (B.C.D. 00-47), the Board held that an entity that has STB authority to operate a rail line, but leases or contracts with another to operate the line in question, is covered under the Acts administered by the Board unless the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. 00-47 to be applied in making this determination. An entity that leases a line to another company or contracts with another company to operate the line is a carrier under the Railroad Retirement Act unless the Board finds that all three of the following factors exist: 1) the entity does not have as a primary business purpose to profit from railroad activities; 2) the entity does not operate or retain the capacity to operate the rail line; and 3) the operator of the rail line is already covered or would be found to be covered under the Acts administered by the Board.

Factors which the Board will consider in determining whether a primary business purpose of an entity is to profit from railroad activities include, but are not limited to: (1) the reasons stated in the STB decision for the entity's acquisition of authority to operate the rail line; (2) the existence of a State statute which authorized the formation of the entity and/or authorizes the entity to acquire one or more rail lines for the purpose or purposes set out in the authorizing statute; (3) proof that the entity is considered by the Internal Revenue Service to be a non-profit entity; (4) circumstances surrounding the acquisition of line which would show intent simply to maintain service such as a history of unprofitability of line acquired, potential or actual abandonment of line, or decrease in rail traffic over the line; (5) whether the entity is affiliated with other carriers. An entity that is affiliated through common ownership with other for profit carriers will be presumed to have as a primary business purpose to profit from the ownership of the line.

Applying this to the facts of KMR, the Board determines that KMR is an employer covered under the Acts. The Board finds that because KMR is affiliated through common ownership with other for profit rail carriers (OAR, Blue Rapids and Moscow), the presumption that the primary business purpose of KMR is to profit from railroad activities is met. The second and third parts of the Railroad Ventures test are satisfied, inasmuch as KMR owns no rail equipment and therefore does not have the capacity to operate the line, and the subleased railroad operations are conducted by Old Augusta Railroad, LLC, a rail carrier employer. However, it is clear that KMR has not satisfied the first part of the test.

Therefore, the Board finds that KM Railways, LLC is a covered employer under the test set out in our Railroad Ventures decision, effective December 18, 2009, the date it acquired the line in question.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever