

**EMPLOYER STATUS DETERMINATION**

**Berkman Rail Services, Inc. d/b/a  
Kiski Junction Railroad n/k/a  
Berkman Consulting Services**

This is the determination of the Railroad Retirement Board concerning the continuing status of Berkman Rail Services, Inc. d/b/a Kiski Junction Railroad (Berkman) (B.A. No. 4273) 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). Berkman has been found to be a covered employer under the Acts with service creditable from July 13, 1995 (B.C.D. 97-20).

In B.C.D. 05-41 we found that following the sale of the rail line from Berkman to Kiski on April 14, 2005, Kiski became a carrier operating in interstate commerce, and therefore Kiski was found to be a covered employer under the Acts as of April 14, 2005, the date on which the rail line was transferred. In order to make a finding as to the continuing status of Berkman, the agency's Division of Audit and Compliance contacted Mr. Dale Berkley, President of Berkman Rail Services, Inc.

In response to that inquiry, Mr. George M. Freed, an attorney for Berkman, advised the Board in a letter dated August 30, 2005, that Berkman Rail Services, Inc. ceased rail operations on May 31, 2005, which was also the last date any employees of Berkman received compensation. Mr. Freed advised that the sale to Kiski was a total assets sale, with all rail line and equipment the subject matter of the sale. Berkman is still a "viable corporation"; however, "there is no relationship whatsoever between Berkman Rail Services, Inc. and Kiski Junction Railroad, Inc." Berkman is described as a "stand alone corporation", with shareholders and officers. Mr. Freed also stated that Berkman is "currently a non-rail carrier", which "does contract with railroads from time to time and any future relationship would be purely a contractual one".

In a letter dated October 23, 2006, Mr. Freed was asked to provide additional information regarding the owner(s) of Berkman, the officers and directors of Berkman, and the individuals who are performing services for the railroads which have contracts with Berkman.

In response to a letter from the agency's division of Compensation and Employer Services requesting the Annual Report of Creditable Compensation from Berkman, Mr. Freed again advised the agency that Berkman had sold its

assets and "was no longer involved in rail carrier service", and that "since May 31, 2005, Berkman Rail Services, Inc., has been a non-rail company and its main services include consulting." In response to Mr. Freed's letter, in a letter dated December 31, 2007, Mr. Freed was advised that the information requested in our letter of October 23, 2006, was needed before any determination could be made as to the continued status of Berkman as an employer under the Acts.

As no response was received to the letter of December 31, 2007, on February 27, 2008, the General Counsel advised the Chief of the agency's Audit and Compliance Division that the file on Berkman could be closed, with no formal determination as to the termination of the status of Berkman as an employer under the Acts.

With a letter dated July 1, 2009, Mr. Freed submitted a copy of filings with the Pennsylvania Department of State, indicating that Berkman Rail Services, Inc., had changed its name to Berkman Consulting Services, Inc., effective September 28, 2007. In his letter Mr. Freed advised the agency that the president of Berkman, Mr. Dale K. Berkeley, "not only had the name of the business changed but has also changed the focus of the business". According to Mr. Freed, Berkman "now does general business consulting and is no longer affiliated with or performs any services pertaining to rail service". Mr. Freed concluded

Based on the above Berkman Consulting Services is no longer under the preview of the railroad retirement board and needs to make no further contributions or accrue any benefits from the Railroad Retirement Board (sic).

In response to this letter, the General Counsel advised Mr. Freed that decisions as to what entities are considered employers covered by the Railroad Retirement and Railroad Unemployment Insurance Acts, as well as whether the employer status of an entity should be terminated, are made by the three-Member Board that heads the agency; no entity can decide on its own to either be covered by the Acts, or remove itself from coverage. Mr. Freed was further advised that if Mr. Berkley wanted the Board to consider the issue of terminating Berkman's status as an employer under the Acts, the information which had been previously requested needed to be provided.

In a letter dated August 20, 2009, Mr. Freed confirmed information previously provided regarding the sale of Berkman rail line and assets to Kiski Junction

Railroad, Inc., and the name change of Berkman. In addition, Mr. Freed explained that Berkman now "provides consulting services with businesses that use rail, consults in the design of rail facilities and does feasibility studies for clients for the use of shipment by rail versus other types of transport". Mr. Freed

also stated that all employees of Berkman Rail Services, Inc., were transferred to Kiski Junction Railroad, Inc.

Section 202.11 of the Board's regulations provides that:

The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status.

Based on the information set forth above, although Berkman has not yet dissolved as a business organization, it is clear that its character as a railroad no longer exists inasmuch as all of its railroad assets have been sold. Therefore, it is the determination of the Railroad Retirement Board that Berkman Rail Services, Inc., ceased being an employer under the RRA and RUIA on May 31, 2005, the date on which it last compensated its employees. The Board also notes the change of name for Berkman Rail Services, Inc., to Berkman Consulting Services, Inc.

Original signed by:

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