

**EMPLOYER STATUS DETERMINATION****Keolis Commuter Services, LLC (KCS)****Massachusetts Bay Commuter Railroad Company, LLC (MBCR)****Massachusetts Bay Transportation Authority (MBTA)**

This is the determination of the Railroad Retirement Board concerning the status of Keolis Commuter Services, LLC (KCS) 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.) (“the Acts”) and the continuing status of Massachusetts Bay Commuter Railroad Company, LLC under the Acts. This decision also addresses the status of the Massachusetts Bay Transportation Authority.

**I. Keolis Commuter Services, LLC**

Information regarding KCS was provided by Ronald A. Lane, counsel for KCS. According to Mr. Lane, KCS has been selected by the Massachusetts Bay Transportation Authority (MBTA) to operate the Authority’s commuter rail system in the Boston area. KCS will replace the Massachusetts Bay Commuter Railroad Company, LLC (MBCR)(BA#1910) as the contractor. MBCR has operated the Boston area commuter rail system since 2003. KCS began operations of the Boston regional commuter rail system as of July 1, 2014. An agreement was entered into effective February 5, 2014, between the Authority and KCS. KCS offered employment to all the MBCR employees formerly operating the system (a total of approximately 1900, in seniority order) and an additional small number of employees were hired prior to July 1, 2014 to assist in mobilization efforts upon finalization of the agreement in February of 2014. The Boston area commuter rail system has expanded from previous reports when MBCR took over the system in 2003. The service now is comprised of 14 lines of railroad and approximately 400 route miles. The commuter rail system continues to include a line that is used to provide regular commuter service between Boston, Massachusetts, and Providence, Rhode Island.

Mr. Lane reported that the Boston area commuter rail system and its 14 lines of railroad are part of the interstate rail network. In support of this statement, Mr. Lane explained that since its inception, the commuter service of the Boston area has been operated by railroads that were covered employers, to include the Boston and Maine Railroad, New York, New Haven, and Hartford Railroad, and the New York Central System and up to the present day when MBCR received covered status. Previously, it has been noted that freight operations are conducted by Springfield Terminal

Railway Company (BA No. 2112) on some of the lines and by CSX (BA No.1524) on certain other of the lines. Moreover, one of the commuter lines runs from Boston to Providence, Rhode Island. In addition to the commuter service provided between Providence and Boston, Amtrak provides intercity rail passenger service over that same line.

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 the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The Surface Transportation Board has jurisdiction over rail transportation in the United States between a place in a State and a place in the same or another State as part of the interstate rail network. See 49 U.S.C. 10501(a)(2)(A).

Although local government authorities, such as MBTA, may be exempt from STB jurisdiction, the governmental authority is still subject to applicable laws of the United States related to “employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers” including the Railroad Retirement and Railroad Unemployment Insurance Acts (the Acts (see 49 U.S.C. §10501(c)(3)(A)(iii)). The Board has found that to meet the definition provided of a local authority subject to the Acts, the commuter rail service conducted by the local authority must have been previously conducted by a rail carrier employer, then assumed by the local authority. To meet § 10501 (c)(3)(B), the service must meet the standards for Interstate Commerce Commission (ICC) Jurisdiction prior to January 1996. See Board Coverage Decision 09-2, *Tri-County Commuter Rail Organization, South Florida Regional Transportation Authority, Trinity Railway Express—Train Dispatching, Herzog Transit Services, Incorporated*, January 20, 2009; and B.C.D. 13-12, Bombardier Transportation Services USA Corp. May 21, 2013.

The operation of the commuter rail service over the MBTA lines has previously been referenced in Board Coverage Decisions going back several decades (recently, see B.C.D. 03-23 which states that Amtrak, BA#8301, was operating the MBTA

lines as a covered carrier since 1987; previous to that contract, the Boston & Maine RR, BA#1102, provided commuter service for MBTA). In determining that the MBTA itself was not a covered employer, Legal Opinion L-90-160 noted since its formation, MBTA had contracted with a rail carrier to conduct commuter operations. The decision determined that MBTA was merely a subsidy disbursing entity of the state government. In the current issue before the Board, the evidence provided shows that profit from railroad activities is the primary purpose of the rail activity of KCS under the contract. It operates rail lines for MBTA and the operator for which KCS took over (MBCR) was also a covered employer under the Acts.

In light of the evidence as summarized above, the commuter rail service conducted by KCS was previously conducted by a covered rail carrier and therefore, KCS meets the definition provided by 49 USC §10501(c)(3)(A) of a local authority subject to the Acts. Alternatively, the Board finds that KCS became a carrier operating in interstate commerce within the meaning of §10501(c)(3)(B) of Title 49 of the United States Code when it began operation of the lines of the MBTA commuter rail system.

The Board finds that KCS became a carrier operating in interstate commerce when it began operation of the Boston area commuter rail system. Accordingly, it is determined that KCS is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Next, it must be determined when coverage under the Acts began for KCS. Mr. Lane noted in his correspondence that employees were hired immediately for the purposes of mobilization of the transferring workforce as previously noted in this decision. The Board held in the determination for MBCR that MBCR's coverage would begin with the hiring of new employees. Mr. Lane requested that KCS receive coverage from the date employees were first hired, in lieu of the date rail operations began under the contract. The Board concurs that KCS should be covered from the date it first hired employees for the purpose of setting up its rail operation. Cf. Rev Ruling 82-100, 1982-1 C.B. 155, wherein the Internal Revenue Service ruled that a railroad becomes an employer subject to taxes under the Railroad Retirement Tax Act when the company first hires employees to perform functions directly related to its carrier operations. For the reasons stated, the Board finds that as of February 5, 2014, the date as of which KCS had authority to begin

hiring employees pursuant to the contract with the Massachusetts Bay Transportation Authority (MBTA), KCS became a railroad entity covered under the Acts<sup>1</sup>.

## II. Massachusetts Bay Commuter Railroad, Co., LLC

As described in this decision, KCS is a railroad entity that took over a contract to provide commuter rail services for the Boston, Massachusetts area under the authority of the Massachusetts Bay Transportation Authority. Previously, this service was provided by Massachusetts Bay Commuter Railroad Company, LLC (MBCR). MBCR was found to be a railroad employer covered under the Acts in B.C.D. 03-23, dated March 3, 2003.

Under cover of a letter dated September 26, 2014, Mr. Bill Tracy, the Controller for MBCR, provided information pertaining to MBCR's continued operations since the conclusion of the commuter services contract. Mr. Tracy reported that MBCR maintains a staff of several employees. MBCR continues to perform rail services in the form of commercial transactions with railroad vendors and railroad customers, service dispute resolution of issues that arose under the commuter services contract, and administrative resolution of services and contracts with the Massachusetts Bay Transportation Authority. The employees continue to be paid for these services. Mr. Tracy indicated that all work related to the commuter services contract should continue through at least June of 2015. Finally, Mr. Tracy indicated that MBCR is pursuing other railroad operations and rail service opportunities.

Based upon the report and information from Mr. Tracy, the Board finds that coverage under the Acts should continue for Massachusetts Bay Commuter Railroad Company, LLC.

## III. Massachusetts Bay Transportation Authority

As previously stated in this decision, Massachusetts Bay Transportation Authority (MBTA) was determined not to be a covered employer in Legal Opinion L-90-160.

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<sup>1</sup> Mr. Lane further reported that KCS is a Delaware Limited Liability Company, majority owned by Keolis Rail Services America, LLC which also owns Keolis Rail Services Virginia (KRSV) (BA#9411). KRSV operates the Virginia Railway Express, also known as the VRE, which has been found to be a covered employer under B.C.D. 10-41. The VRE provides commuter rail service in and out of Washington, D.C. and along the Eastern Coast of Virginia. KCS is a Delaware limited liability company that was formed to provide commuter rail services for the MBTA. This ruling will have no effect on the continued status of Keolis Rail Services Virginia.

That opinion noted that since its formation, MBTA had contracted with a rail carrier to conduct commuter operations. The decision determined that MBTA was merely a subsidy disbursing entity of the state government. Nothing in this decision changes the Board's previous holding of MBTA to not be covered under the Acts as it remains a subsidy disbursing government entity.

Original signed by:

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