

**Employer Status Determination  
Rail Management and Consulting Corporation**

This is the decision of the Railroad Retirement Board regarding the status of Rail Management and Consulting Corporation (Rail Management) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Rail Management was previously determined to be an employer under the Acts, with service creditable from January 1982. The Board later determined that service under the Railroad Unemployment Insurance Act would be creditable from July 1991. Rail Management now requests a determination of its status as a result of a change in ownership structure.

As recounted in prior determinations, Rail Management was incorporated January 26, 1982, as a close corporation owned entirely by Mr. K. Earl Durden. At that time, Rail Management engaged in the business of accounting and clerical services; the company provided advice regarding operational problems, personnel issues, marketing, and general management. Two-thirds of Rail Management's total revenue derived from performing these services for rail carriers which were determined at that time to be under common control with Rail Management. Accordingly, on the basis of this information, Rail Management was determined to be an employer under the Acts as a holding company which was under common control with its railroad subsidiaries and which provided administrative services to these subsidiaries. See Legal Opinion L-91-102.

In a letter dated May 21, 1997, Rail Management stated that ownership of Rail Management was split in two, with 50 percent remaining with Mr. K. Earl Durden, and 50 percent vesting in Green Bay Packaging, Incorporated. Rail Management in turn became a 1 percent general partner in Rail Partners, L.P., together with Mr. Durden and Green Bay Packaging. Mr. Durden and Green Bay each had a 49.5 percent partnership interest in Rail Partners.<sup>1</sup> Rail Partners itself was formed on May 1, 1991, to hold the consolidated interests of Mr. Durden and Green Bay in five railroads. Rail Partners has been determined not to be an employer under the Acts because it is not under common control with the five railroads. See B.C.D. 94-33.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(a)(1)), insofar as relevant here, defines a covered employer as:

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<sup>1</sup>Rail Management furnished documentation of the restructured ownership by a second letter date July 15, 1997.

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(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).

Section 259.6 of the regulations (20 CFR 259.6) provides that a final determination of employer status by the Board is subject to reopening if the law or facts have changed sufficiently to warrant a contrary determination. The evidence now is that Rail Management, which is not a carrier by rail, is merely a one percent share owner of a limited partnership, which in turn holds the ownership of the several railroads. Rail Management's minimal interest in Rail Partners removes even potential control over the partnership. Moreover, a decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owned a rail carrier subsidiary was not under common control with the subsidiary within the meaning of § 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed. Cir. 1993). In the opinion of a majority of the evidence regarding Rail Management's control of the railroads is therefore even weaker than presented in the Union Pacific case. Accordingly, a majority of the Board determines that Rail Management is not an employer under the Acts, because it is not under common control with the rail carriers controlled by Rail Partners.

Rail Management requests that coverage be terminated retroactively to June 1, 1991, the date that it became a one percent interest partner in Rail Partners, on grounds that it no longer satisfied the definition of common control as of that date. This is consistent with section 202.11 of the Board's regulations (20 CFR 202.11) which provides that employer status ends when the characteristics essential to an employer status are lost. Based on section 202.11 of the agency's regulations, a

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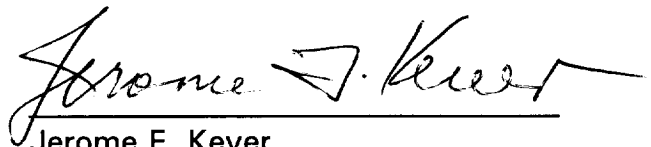
majority of the Board finds that Rail Management ceased to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective June 1, 1991.

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Glen L. Bower

A handwritten signature in cursive script, appearing to read "V. M. Speakman, Jr.", written over a horizontal line.

V. M. Speakman, Jr. (Dissenting)

A handwritten signature in cursive script, appearing to read "Jerome F. Kever", written over a horizontal line.

Jerome F. Kever

**DISSENT OF V. M. SPEAKMAN, JR.  
EMPLOYER STATUS DETERMINATION  
RAIL MANAGEMENT AND  
CONSULTING CORPORATION**

Notwithstanding the Union Pacific case, I would find Rail Management and Consulting Corporation (Rail Management) to be under common control with its affiliated railroads. Mr. K. E. Durden is a director and principle officer of the affiliated railroad carriers. Two other individuals are also directors and principle officers of Rail Management as well as other affiliated railroad carriers. Moreover, Mr. Durden is a 50% owner of Rail Management as well as 100% owner of affiliated Galveston Railway, Inc. Common control clearly exists.

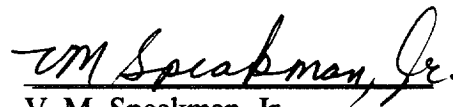
Even if I was to find that Rail Management should not be covered, as the majority of the Board has done, coverage should not be terminated effective June 1, 1991. Regulations of the Board provide at sections 202.12(c) and 209.3 (20 CFR 202.12(c) and 209.3) that it is the duty of each employer to promptly bring to the Board's attention any change in operations affecting status as an employer under the Acts. Absent evidence to the contrary employer status is presumed to continue. Section 9 of the Railroad Retirement Act provides that a return of compensation becomes final four years after the date it was required to be filed. (Regulations of the Board provide that employers' annual returns of service and compensation must be filed by the last day of February in the following year. 20 CFR 209.6(a).) The file reflects that the Board's former Bureau of Research and Employment Accounts (BREA) opened the inquiry into the status of Rail Management under the Acts by letter of June 21, 1990, addressed to Ms. Linda Gray. Ms. Gray's response dated November 9, 1990, was referred to the Board's Bureau of Law for consideration. That bureau requested Rail Management to respond to a series of 30 questions listed in a letter dated November 9, 1990. The company responded by letter of January 3, 1991, including, at item 5, that "Mr. K. Earl Durden is the sole shareholder of RM&CC." Legal Opinion L-91-102 was issued July 29, 1991, based upon the information accompanying the January 1991 letter.

While the matter of the status of Rail Management was pending, BREA also initiated a separate inquiry regarding the status of Rail Partners. Sometime in June 1991, BREA obtained as part of this inquiry, apparently through the Railway Labor Executives' Association rather than from any of the parties to the Rail Management reorganization, a copy of the verified notice of exemption filed with the former Interstate Commerce Commission in Green Bay Packaging, Inc.; K. Earl Durden; Galveston Railway, Inc.; Rail Management and Consulting Corporation; and Rail Partners, L.P., Finance Docket No. 31869. This document described at page 4 the transfer of interests between Mr. Durden, Green Bay, and Rail Management which resulted in formation of Rail Partners. However, BREA did not forward a copy of this information to the Bureau of Law until April 1992,

when it submitted the matter of the status of Rail Partners for consideration. During the June 1991 through April 1992 period, the file shows that Ms. Gray responded to an inquiry from the Board regarding the status of Rail Partners under the Acts without mentioning the change of ownership of Rail Management; further, the attorney for Rail Management corresponded with the Board in November 1991, July 1992, and February 1993, regarding the status of Rail Management without noting the change that had taken place since his reply in January. Finally, Rail Management did not contact the Board after the decision that Rail Partners was not an employer was issued on March 22, 1994, even though the Court of Appeals had decided the Union Pacific case on September 17, 1993.

Although the agency did have in its records information regarding the change in ownership of Rail Management, the file clearly shows that despite several opportunities, Rail Management failed to affirmatively bring this change to the Board's attention until May 1997. At that time, the returns of compensation through 1992 had become final under the four year limit set by section 9 of the Act. The 1992 returns were due in February 1993.

Without prejudice to my position that Rail Management should remain covered, termination should not take place prior to January 1, 1993, the first day of the calendar year for which returns have not become final pursuant to section 9 of the Act.

  
V. M. Speakman, Jr.

9-9-97  
Date