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February 3, 2021

By Electronic Submission

Ms. Allison C. Davis, Director
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
February 3, 2021
Part of
Public Record

Re: Finance Docket No. 36468, *American Rocky Mountaineer, LLC – Petition for Exemption from 49 U.S.C. Subtitle IV*

Dear Ms. Davis:

Enclosed for filing in the above-captioned proceeding is the Petition for Exemption from 49 U.S.C. Subtitle IV of American Rocky Mountaineer, LLC pursuant to 49 C.F.R. Part 1121. The filing fee of \$10,300 is being paid electronically via *Pay.gov*.

I have also included a Motion for Protective Order to file a confidential version of the Petition for Exemption under seal. The Confidential Information in the Petition for Exemption is located only in its Exhibit. A complete copy of the confidential version of the Petition for Exemption will be filed simultaneously but separately under seal.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance in this matter.

Respectfully submitted,

/s/ Carolyn Gaut Kraska
Carolyn Gaut Kraska

Associate
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FILED
February 3, 2021
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
February 3, 2021
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36468

AMERICAN ROCKY MOUNTAINEER, LLC

**PETITION FOR EXEMPTION FROM
49 U.S.C. SUBTITLE IV**

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Dated: February 3, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**PETITION FOR EXEMPTION FROM
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Introduction

Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. Part 1121, American Rocky Mountaineer, LLC, (“American Rocky Mountaineer” or “Petitioner”), files this Petition for Exemption from all of the provisions of Subtitle IV of Title 49 U.S.C. for which exemption is permissible.¹

I. Statement of Facts

American Rocky Mountaineer, a newly-formed company and a non-carrier, plans to operate a new passenger rail excursion between Denver, Colorado and Moab, Utah beginning in summer 2021. The one-way trip will last two (2) days and be offered to customers starting in Denver or Moab. American Rocky Mountaineer plans that westbound passengers will board in Denver, ride through Rocky Mountain National Park, and disembark for an overnight stay in Glenwood Springs, Colorado. The following day, passengers will continue westward, crossing into Utah and arriving in Moab, Utah, near the Arches and Canyonlands National Parks. Eastbound passengers will ride the same route in reverse, with an over-night stop in Glenwood Springs. The service will be offered seasonally, between April and October.

American Rocky Mountaineer and Union Pacific Railroad Company (“UPRR”) intend to enter into an agreement to facilitate the service. The parties have not finalized the agreement, but have entered into a Memorandum of Understanding (“MOU”) outlining the terms of the planned agreement. The

¹ The Board is statutorily precluded from exempting American Rocky Mountaineer’s operations from certain aspects of Subtitle IV, such as labor protection and certain damage liability issues. See 49 U.S.C. § 10502(c), (g).

public version of the MOU is provided as Exhibit A.² UPRR will provide track access and dispatch the American Rocky Mountaineer trains. American Rocky Mountaineer will crew the trains. The train consist will be two (2) locomotives, one (1) power generator car, six (6) passenger cars, and three (3) crew/supply/lounge cars. American Rocky Mountaineer will store trains at the UPRR 36th Street Yard in Denver and in Glenwood Springs, CO during layovers.

American Rocky Mountaineer is under common control with Great Canadian Railtour Company Limited (“Great Canadian Railtour”).³ Great Canadian Railtour operates luxury rail service on routes in western Canada. In 2015, Great Canadian Railtour petitioned the Board for an exemption from 49 U.S.C. Subtitle IV to extend its Canadian service to Seattle.⁴ The Board found that the planned operation was subject to its jurisdiction, but granted Great Canadian Railtour a Subtitle IV exemption.⁵ The service to Seattle operated from May 5, 2014 to September 21, 2019. Amtrak provided train and engine crews and operated the Great Canadian Railtour trains on lines of BNSF Railway Company (“BNSF”) under the terms of Amtrak’s agreement with BNSF.

II. Argument

American Rocky Mountaineer’s planned luxury rail tourism service will be subject to the Board’s jurisdiction and when American Rocky Mountaineer commences the service it will become a rail carrier subject to the Board’s jurisdiction. However, the Board should grant American Rocky Mountaineer a Subtitle IV exemption to the full extent permitted by law, because Board regulation of American Rocky Mountaineer’s acquisition of operating rights from UPRR and the planned luxury rail tourism service is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 and, as the acquired rights

² The MOU attached as Exhibit A contains redactions of commercially sensitive and confidential terms and information. The unredacted MOU is being simultaneously filed under seal pursuant to a Motion for Protective Order.

³ Simultaneously with this Petition, the companies and the individual in control of Armstrong has filed a Notice of Exemption to continue in control of Great Canadian Railtour and American Rocky Mountaineer will file a Notice of Exemption to continue in control of once American Rocky Mountaineer becomes a rail carrier.

⁴ See Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer Petition For Exemption From 49 U.S.C. Subtitle IV (“Great American Railtour”), FD 35851 (STB served June 3, 2015).

⁵ Id., slip op. at 4–5.

and the planned service are not freight rights or freight service, Board regulation is not necessary to protect shippers from the abuse of market power.⁶

A. The Board has Jurisdiction Over Petitioner’s Planned Rail Tourism Service

The Board has jurisdiction over American Rocky Mountaineer’s proposed acquisition and operations, because American Rocky Mountaineer will offer “transportation” by “rail carrier.” 49 U.S.C. § 10501(a). “Transportation” is defined in part as “services related to the movement of passengers, property, or both by rail.” See 49 U.S.C. § 10102(9); Great American Railtour, slip op. at 4. The statute only requires that rail movement is involved, regardless of the purpose or primary purpose of the movement, so transportation for tourism is included within the Board’s jurisdiction. Id. Additionally, the planned service will run from one State into another State which makes it part of an interstate network and thus subject the Board’s jurisdiction under 49 U.S.C. § 10501(a)(2)(A).

Upon commencement of the planned service, American Rocky Mountaineer will be a “rail carrier” under the 49 U.S.C. § 10102(5) definition: “a person providing common carrier *railroad* transportation for compensation.” (Emphasis added.) The term “railroad” in this context includes persons “that use tracks owned by another entity and [] ‘operated under an agreement.’” American Orient Express Railway Co., LLC v. Surface Transportation Board, 484 F.3d 554, 556 (D.C. Cir. 2007) (American Orient Express II), citing 49 U.S.C. § 10102(6)(B). As noted above, American Rocky Mountaineer will not own track but has secured access and operating rights from UPRR. Tourist railroad excursion companies such as American Rocky Mountaineer are common carriers because they “hold[themselves] out to the general public as engaged in the business of transporting persons ... from place to place for compensation.” See The Pullman Sleeping Car Co. Petition for Exemption from 49 U.S.C. Subtitle IV (Pullman), FD 35738 (STB served Feb. 5, 2015); American Orient Express Railway Company LLC – Petition For Declaratory Order (American Orient Express I), FD 34502, slip op. at 4–7 (STB

⁶ Satisfaction of either 49 U.S.C. § 10502(2)(a) or (b) satisfies the requirements of § 10502(2), but it is worth noting that the acquisition of operating rights from UPRR and the planned service are of limited scope. See Great American Railtour, slip op. at 5; Pullman, slip op. at 4.

served Dec. 29, 2005), aff'd American Orient Express II. Furthermore, a passenger railroad may establish a business niche – such as luxury scenic operations – and still be holding itself out to the public and thereby be a common carrier. Pullman, slip op. at 3; American Orient Express I, slip op. at 5. Despite offering only luxury scenic operations, American Rocky Mountaineer will be a common carrier because it will hold itself out to the public as engaged in the transportation of people from place to place for compensation.

B. However, Petitioner Should be Exempt from Requirements of Subtitle IV

Pursuant to 49 U.S.C. § 10502, the Board will exempt a transaction or service from regulation when: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Regulation of American Rocky Mountaineer's planned acquisition and operations is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 ("RTP"). The rate and service requirements of Subtitle IV are primarily intended to regulate freight operations, but American Rocky Mountaineer will not acquire freight rights and will not be a freight operator. Thus, American Rocky Mountaineer's planned operations do not implicate any freight-related aspects of the RTP. In fact, relieving American Rocky Mountaineer from the restraints of Subtitle IV will give it flexibility to change its rates, schedule or service frequency without regulatory constraints. This flexibility would foster sound economic conditions and encourage efficient management, consistent with 49 U.S.C. § 10101(5), (7), and (9). See Great American Railtour, slip op. at 5. Requiring American Rocky Mountaineer to seek Board authority to change its rates, service plan or service frequencies would be an unnecessary regulatory burden. Id.; Pullman, slip op. at 4.

For the same reason, regulation of American Rocky Mountaineer's planned acquisition of passenger train operating rights and the planned luxury tourist operations is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10502(2) (b). The acquisitions and operations are unrelated to freight service provided to shippers.

III. Request for Expedited Consideration

American Rocky Mountaineer respectfully requests expedited consideration of this petition for exemption. American Rocky Mountaineer and UPRR have worked diligently to agree on the terms of the agreement governing the planned passenger rail tourist operations. The agreement has not been finalized, but the parties have now executed the MOU that fully describes the planned rail tourist operations. Expedited consideration of the Petition and the issuance of the Subtitle IV exemption with an effective date on or before May 31, 2021 would allow American Rocky Mountaineer to work smoothly towards a commencement date for the service in June of 2021.

IV. Conclusion

For the foregoing reasons, American Rocky Mountaineer respectfully requests that the Board grant the requested Subtitle IV exemption.

Respectfully submitted,



Kevin M. Sheys
Carolyn G. Kraska
Hogan Lovells US LLP
555 13th Street NW
Washington, D.C. 20004

Counsel for American Rocky Mountaineer, LLC

Dated: February 3, 2021

EXHIBIT A

Memorandum of Understanding
(Public Version - Commercially Sensitive and Confidential Terms Redacted)

**MEMORANDUM OF UNDERSTANDING
ROCKY MOUNTAINEER EXCURSION PASSENGER RAIL OPERATIONS**

THIS MEMORANDUM OF UNDERSTANDING ("MOU") is made and entered into as of this _____ day of _____ 20____ (**"Effective Date"**) by and between American Rocky Mountaineer, LLC, duly incorporated and authorized under the laws of Colorado ("RM") and the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Railroad"). RM and Railroad are hereinafter sometimes individually referred to as a "Party" and jointly referred to as the "Parties."

RECITALS

- A. Railroad owns, operates, maintains, and dispatches a significant network of critical freight rail routes and also hosts both intercity and commuter passenger rail service. Railroad plays a vital role for both the national and the state economies and security by maintaining and expanding its ability to move freight by rail; to serve the state's shippers; and to relieve the state's crowded highway network by facilitating the transportation of goods by rail rather than truck, thus reducing traffic congestion, air-pollutant emissions, greenhouse gas emissions, and energy consumption; and
- B. RM operates a multi-day "land cruise" excursion train service. Over the past 30 years, RM has become the world's largest privately-owned luxury tourism train service. RM has provided service to over 2 million rail passengers. RM operates over Canadian National and Canadian Pacific's routes in western Canada. RM trains run during the daylight hours over scenic routes, offering vacation packages with various destinations. The trains have a leisurely "schedule" with equal priorities to freight trains and flexible arrival time at the day's end destinations. The company rosters over 50 passenger cars and a dozen locomotives; and
- C. Railroad and RM are negotiating an operating agreement for RM rail passenger operations over Railroad rail lines between Denver, CO and a location at/near Moab, UT; and
- D. The Parties enter into this non-binding MOU to memorialize the Parties strategic direction.

NOW THEREFORE, in consideration of the foregoing Recitals, which are hereby incorporated into and made a part of this MOU and the mutual covenants and agreements set forth herein, and other good and valuable consideration the Parties agree to the following:

Section 1. Access to Rail Lines. Railroad will grant RM access right to Railroad's rail lines for the term of operating agreement.

Section 2. Route. Routing will be from Denver to Moab (and return) and will be via Railroad's Moffat Tunnel, Glenwood Springs, Green River and Cane Creek Subdivisions.

Section 3. Passenger Schedule. During the first year of operating, RM will operate up to [REDACTED]. The passenger schedule will be a 3-day schedule and consist of a roundtrip from Denver to Moab, then Moab to Denver described in Exhibit 1. The passenger train will overnight layover at Glenwood Springs,

CO during 2 nights of the 3-day period. A roundtrip between Denver and Moab (or proximate location) is 840 miles.

Section 4. Passenger Access Points. RM proposes to board and de-board passengers at [REDACTED].

Section 5. Service Initiation Date. "Service Initiation Date" shall mean the date the named rail passenger service will commencement operations. The Parties anticipate the RM rail passenger service will commence on or before December 31, 2021.

Section 6. Franchise Access and Operations & Maintenance Fee. [REDACTED]

Section 7. Operating Agreement. The operating agreement will consist of [REDACTED]

Section 8. Agreement Term. The Parties anticipates entering into a [REDACTED] subject to operating conditions and a negotiated rate escalator.

Section 9. Insurance Requirement and Deviation Analysis. [REDACTED]

Section 10. Train Operations. RM train will operate [REDACTED]

[REDACTED]. Railroad shall have sole control of the operation of RM trains while on the rail lines. All personnel rendering any services which involve responsibility for Railroad's operating facilities or for the handling or movement of any RM Train shall be subject to the direction, supervision and control of Railroad, and such services performed by or for RM shall be governed by and subject to all then-current operating and safety rules, orders, procedures and standards of Railroad with respect thereto. [REDACTED]

[REDACTED]

Section 11. Equipment. Equipment to be operated will be subject to Railroad Mechanical Dept. inspection and approval for operation and cleared by the Railroad Clearance Bureau. If operating in push-pull configuration on the train, the locomotives must be equipped with Distributed Power capability and operated in linked Distributed Power mode.

Section 12. Regulatory Requirements. RM shall comply with all state & federal regulatory requirements as related to the operation and servicing of RM trains. This includes, but is not limited to, any needed environmental permit or PTC-related compliance.

Section 13. PTC Operations. Train must be operated in enabled PTC mode while on PTC-active lines. Per current FRA guidance, additional PTC installation on other lines is not currently required. If at a future date, PTC becomes mandated on the additional lines not currently equipped with PTC, it will be a requirement that RM install PTC on those lines at its sole expense. For non-Railroad locomotives to access the Railroad PTC support network, [REDACTED].

Section 14. Locomotive Lease. [REDACTED]

Section 15. Track Lease. [REDACTED]

Section 16. Notices and Communications. All notices, reports and other communications under this MOU shall be coordinated by the following designees:

RM Designee:

Dwayne Dergusoff
General Manager, Operations and Mechanical
Rocky Mountaineer
526 CN Road
Kamloops, British Columbia, V2H 1K3
DDergousoff@rockymountaineer.com

Railroad Designee:

Victor Stone
Sr Manager Interline & Transportation Research
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68114
402-544-3049
vfstone@up.com

Section 17. General Provisions.

Section 17.1 Disputes. In the event any dispute, claim, or controversy arising out of, relating to, or in connection with this MOU or the actual or alleged breach, enforcement,

interpretation, or validity of this MOU, whether based on contract, tort, statute, or other legal or equitable theory (collectively, "Dispute") is not resolved through informal efforts, either Party may initiate informal dispute resolution by transmitting written notice describing the nature of the Dispute ("Dispute Notice"). Within three (3) business days of receipt of a Dispute Notice, the Parties will initiate prompt and diligent negotiations to resolve the Dispute.

Section 17.2 Third Party Beneficiaries. This MOU is for the exclusive benefit of the Parties not for the benefit of any third party.

Section 17.3 Entire MOU. This MOU contains the entire understanding of the Parties and any and all prior agreements or oral understandings between the Parties with respect thereto.

Section 17.4 Termination. Either Party may terminate this MOU, with or without cause, by giving thirty (30) days written notice to the other Party.

Section 17.5 Severability. If any part of this MOU is determined to be invalid, illegal or unenforceable, such determination shall not affect the validity, legality, or enforceability of any other part of this MOU, and the remaining parts of this MOU shall be enforced as if such invalid, illegal, or unenforceable part were not contained herein.

Section 17.6 Assignment. Except as provided in this Section, this MOU and any rights and obligations created by it may not be assigned in whole or in part by either Party without the prior written consent of the other Party.

Section 17.7 Force Majeure. The obligations of the Parties hereunder, other than payment, shall be subject to force majeure (which shall include strikes, riots, floods, accidents, pandemics, acts of terrorism, Acts of God, and other causes or circumstances beyond the reasonable control of the Party claiming such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

Section 17.8 Governing Law. Except on subjects preempted by Federal law, this MOU shall be governed by and construed in accordance with the laws of the State of Nebraska without regard to its conflict of law rules. Nothing herein is meant to be or will be interpreted as a waiver of principles of legal preemption or preclusion applicable to Railroad because of its status as a common carrier under Federal law. Venue for state law issues shall be deemed appropriate in the District Court for Douglas County, Nebraska.

Section 17.9 Amendments. This MOU shall not be modified, amended or altered without the written consent of both Parties.

Section 17.10 Non-Binding MOU. The Parties confirm their understanding that: (a) this MOU does not constitute a complete statement of all essential terms for an operating agreement or constitute a legally binding and enforceable agreement; (b) this MOU does not obligate either party to enter into any negotiations or agreements, and (c) neither party will (i) be bound by any written or oral representations or negotiations between them, either directly or through any intermediary, (ii) have any liability hereunder for refusing to compromise on any issue, or terminating negotiations at any time for any reason or no reason, (iii) be bound unless and until (and then only to the extent) an agreement has been executed and delivered, and (iv) have any liability hereunder or bring suit against the other in connection with the terms of this

MOU. In addition, this MOU will not give rise to any demand for injunctive relief or any claim based on promissory estoppel, partial performance, detrimental reliance or any other equitable theory.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto have executed this MOU as of the day and year first written above.

**UNION PACIFIC RAILROAD
COMPANY**

ROCKY MOUNTAINEER

By: _____
John W. Turner
VP Network Planning & Operations
Union Pacific Railroad Company

By: _____
Mark Southern
Chief Operating Officer
Rocky Mountaineer

Exhibit 1 – Rocky Mountaineer Proposed Route and Schedule

Day 1 – Denver-Glenwood Springs

**Day 2 – Glenwood Springs-Moab-
Glenwood Springs**

Day 3 – Glenwood Springs-Denver

Mileage: Days 1 & 3 – 225 miles

Day 2 – 390 miles

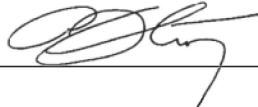
1 roundtrip = 840 miles



VERIFICATION

I, Peter R. B. Armstrong, President of American Rocky Mountaineer, LLC, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on January 28, 2021.



Peter R. B. Armstrong