

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36468

**AMERICAN ROCKY MOUNTAINEER, LLC
PETITION FOR EXEMPTION FROM
49 U.S.C. SUBTITLE IV**

PARTIAL OPPOSITION TO PETITION FOR EXEMPTION

The Brotherhood of Locomotive Engineers and Trainmen (“BLET” or “Union”) opposes, in part, the Petition for Exemption (“Petition”) filed by American Rocky Mountaineer, LLC (“ARM”) in this proceeding.

INTRODUCTION

ARM seeks to operate new passenger excursion trains between Denver, Colorado and Moab, Utah over lines of the Union Pacific Railroad (“UP”), using ARM’s own employees, including its own engineers. ARM recognizes that by engaging in the service it plans to begin, it will become a “rail carrier” “subject to the Board’s jurisdiction” (Petition at 3), but ARM seeks an exemption from virtually the entirety of Subtitle IV of Title 49, which is virtually the entirety of the Interstate Commerce Act as amended by the ICC Termination Act (“Act”).¹

BLET acknowledges that exemption from some aspects of STB regulation of rail carriers is appropriate in this case, but the Union submits that a blanket exemption from all of the

¹ Because the Board may not exempt a carrier from Sections 10502 (c) and (g), ARM does not seek exemption from those provisions, Petition at 1 n1.

provisions of the Act for which exemptions are allowed is excessive, inappropriate and unnecessary. More specifically, BLET submits that ARM should not be exempt from the following parts of Subtitle IV, Part A (Rail): Ch. 101 (general provisions), Ch. 105 (Jurisdiction), Ch. 109 (Licensing), Ch. 111 (Operations), Ch. 113 (Finance), Ch. 117 (Enforcement, Investigation, Rights and Remedies) and Ch. 119 (civil and criminal penalties).

BACKGROUND

BLET represents Locomotive Engineers and Trainmen who are employed by, and operate trains for, the major freight railroads in the United States, including UP employees, and for employees of the National Railroad Passenger Corporation (“Amtrak”). Declaration of Thomas A. Pontolillo ¶2. BLET also organizes Locomotive Engineers and Trainmen on newly formed rail carriers. *Id.* ¶4. BLET negotiates Collective Bargaining Agreements (“CBAs”) that set the rates of pay, rules and working conditions for the employees it represents; and the Union endeavors to ensure that persons working in the Locomotive Engineer and Train Service crafts enjoy rates of pay, rules and working conditions comparable to those under standard BLET agreements, so those agreements are not undercut. *Id.* ¶5. The BLET–UP CBAs contain scope rules providing exclusive rights to BLET represented locomotive engineers to operate trains on UP lines. The CBAs also include rates of pay and work rules that are specific to passenger service. *Id.* ¶¶ 8-9.

Amtrak has statutory rights to operate intercity and regional passenger service on UP lines. Amtrak Locomotive Engineers employed by Amtrak are covered by CBAs that reserve to them the right to operate Amtrak trains. Amtrak Locomotive Engineers have historically operated Amtrak trains to which special passenger cars were attached for excursion operators

such as American Orient Express, ARM corporate relative Great Canadian Railtour Company, Ltd. and the Pullman Sleeping Car Company. *Id.* ¶¶10-11.

Railroad employees represented by the BLET are covered by the Railroad Retirement Act (“RRRA”). The RRRA system is funded by tax payments made by railroad employees and by rail carriers. BLET members have an interest in the stability and financial strength of the RRRA system, which is ensured, in part, by having all employees who perform traditional railroad work covered by the RRRA, so they and their employers pay into the system. *Id.* ¶¶6-7.

Application of the Railway Labor Act (“RLA”) to a carrier and its employees is determined by the National Mediation Board (“NMB”), which administers the RLA. Application of the RRRA to a carrier and its employees is determined by the U.S. Railroad Retirement Board (“RRRB”), which administers the RRRA. The NMB and RRRB make independent determinations regarding whether an employer and its employees are covered by the respective statutes, but the definitions of “rail carrier” under the RLA and RRRA refer to the definition of “rail carrier” under the Interstate Commerce Act as amended by the Interstate Commerce Commission Termination Act of 1995 (“Act”). Pontolillo Declaration ¶12.

The standards for STB decisions on petitions for exemptions from provisions of the Act are set forth in 49 U.S.C. §10502, which provides:

- (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
 - (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
 - (2) either—

- (A) the transaction or service is of limited scope; or
- (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

In its Petition, ARM seeks an exemption from virtually all of the Act under Section 10502(a). ARM argues that no part of the Act should be applied to it because application of none of its provisions is necessary to carry out the national rail transportation policy (“NRTP”), and the transaction is of limited scope, or that application of Act is not necessary to protect shippers from the abuse of market power. Petition at 5.

ARGUMENT

The Board should not exempt ARM from the entire Act. Although regulation of ARM under certain provisions of Subtitle IV may not be necessary to carry out the NRTP, BLET submits that application of certain provisions of the Act is necessary for the carrying-out of the NRTP and for the Board’s performance of its statutory duties.

While provisions of the NRTP concerning competition among carriers, comparison of rates to the cost of capital, predatory pricing and concentration of market power, transparency of cost information, and reduction of regulatory barriers and burdens may not be relevant to ARM, certain other of the policies are still relevant to the operation planned by ARM. Among those policies are:

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

The Board has a duty to ensure that ARM's operations are safe, that ARM does not negatively impact safe and efficient operations of UP, and that ARM's operations are not detrimental to public health and safety. ARM trains will run on UP lines, be dispatched by UP dispatchers, and move through public grade crossings. The movements of ARM's trains will be integrated with the movements of UP trains, and ARM's equipment will be stored and inspected at UP yards. That ARM's operations are safe and not dangerous to the public and that ARM does not impede safe and efficient UP operations are still concerns for the Board, and within its statutory responsibilities. The policies of encouragement of honest and efficient management and encouragement of fair wages and safe and suitable working conditions are also part of the Board's mandate, and are still applicable to ARM's planned operations. That ARM's operations will involve excursion passenger rail service does not mean that these policies are irrelevant to its operation. That fair wages and safe and suitable working conditions are to be encouraged are also pertinent to ARM's planned operations.

Board functions like rate regulation (Ch. 107); certain aspects of licensing, such as those related to abandonments and solid waste (Ch. 109); certain aspects regulation of common carrier service and rates like transportation of agricultural products (Ch. 111); and provisions concerning federal and state relations (Ch. 115) may not be applicable to ARM. But other

statutory duties and functions of the Board should still be applicable to ARM.

ARM contends (Petition at 5) that “[t]he 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”. ARM further argues that “American Rocky Mountaineer’s planned operations do not implicate any freight-related aspects of the RTP”. *Id.* But the statute is not limited to freight operations. Nor is it limited in application to freight operators; a significant goal of the statute is to regulate non-carriers that might control, affect, or interact with rail carriers. If ARM believes it should be exempt from freight service related aspects of the statute, it should seek exemption from them, but not the entire Act. Additionally, since ARM would operate on lines of a freight railroad with its movements scheduled among freight movements, and its trains dispatched by UP Dispatchers, ARM’s movements will involve freight transportation.

There are provisions of the Act, and statutorily mandated functions and obligations of the Board, that are implicated by ARM’s planned entry to the rail industry. Once ARM becomes a rail carrier, it might choose to construct a railroad line for its own use that might connect with or cross an existing line of railroad. If that were to occur, it would be no different from a small freight railroad doing the same thing and it should similarly be subject to the Board’s approval or exemption under Ch. 109. Once ARM becomes a rail carrier, it should still be subject to the common carrier obligation. The common carrier obligation has its roots in British Common Law, and it historically applied to various forms of transportation service, not just transportation of freight. While some elements of the common carrier obligation under Ch. 111 may be focused on freight service, ARM should be subject to the basic obligation to serve like customers similarly,

and to provide adequate service to them. If ARM seeks freedom from any review of changes in rates or scheduling (Petition at 5), it should seek an exemption from the specific provisions it is concerned about.

Additionally, as a rail carrier, if ARM were to engage in certain transactions involving other rail carriers, then such transactions should be governed by Ch. 113. For example, ARM intends to enter an agreement with UP for ARM operations over UP's lines (Petition at 3). When a rail carrier operates over the lines of another rail carrier, that is a transaction governed by Section 11323(a)(6) (trackage rights, joint use), and if ARM engages in such a transaction, it should be subject to Board approval or exemption. And if UP were to sell a line to ARM or its parent, such a sale should be subject to Board approval or exemption under Section 11326(2). If ARM is granted a blanket exemption from virtually the entire statute, the Board would not be in a position to rule on a trackage or operating rights transaction, or on a line sale, involving ARM or its corporate parent. And because certain parts of the Act should still be applicable to ARM, ARM should not be broadly exempt from Ch. 117 and Ch. 119 regarding enforcement of statutory rights and obligations and Board orders and remedies for violations.

Additionally, the definitions of "carrier" under the RLA and RRRRA refer to the definition of "carrier" under the Act (*see* 45 U.S.C. 151 First; 45 U.S.C. §231 (a)(1)). Exemption of ARM from Subtitle IV should not create any ambiguity as to coverage of ARM under the RLA and RRRRA. Rejection of a blanket exemption, and a grant of a more narrowly tailored exemption, would prevent any possible ambiguity with respect to application of the RLA and RRRRA to ARM.

Again, BLET understands that ARM will not be engaging in certain activities and

functions that are addressed by certain elements of the NRTP, or regulated by certain provisions of the Act. But that does not mean that ARM should be exempted from the Act (other than Sections 10502(c) and (g)). Rather, ARM should only be exempted from specific provisions that truly do not apply to its operations, and where ARM is truly different from other carriers.

In support of its Petition, ARM relies on *American Orient Express Ry. Co. LLC—Petition for Declaratory Order*, F.D. 34502 (STB Dec. 29, 2005), *Pullman Sleeping Car Co., Petition for Exemption from 49 U.S.C. Subtitle IV*, F.D. 35738 (STB Feb. 5, 2015), and *Great Canadian Railtour Co., LTD*, F.D. 35851 (STB June 3, 2015), in which exemptions from Subtitle IV were granted for passenger excursion companies. Petition at 4. BLET respectfully submits that the Board should not rely on those decisions in this case. Initially, BLET notes that in none of those cases was the issue of a blanket exemption versus more specific exemptions addressed. And, in *American Orient Express*, the petitioner was only granted an exemption from Section 10901. F.D. 34502 at 7. Blanket exemptions were granted in *Pullman* and *Great Canadian Railtour*, but those petitions were uncontested (BNSF initially objected in *Great Canadian Railtour*, but that was only because Amtrak had not secured BNSF’s consent before entering its agreement with the petitioner, the objection was ultimately withdrawn). The issue of the propriety of a blanket exemption as opposed to a more limited exemption was not presented in either case and was not addressed by the Board. Finally in this regard, in all three of those cases, the petitioners were merely attaching their rail cars to Amtrak trains that were operated by Amtrak engineers represented by the BLET, whereas ARM will actually operate trains. Petition at 3. In *American Orient Express*, the petitioner argued that its employees were not “traditional rail workers”, but rather “bartenders, maids, waiters and cooks” (F.D. 34502 at 3); and the Board stated,

“Notwithstanding the fact that AOERC’s direct employees are not in typical railroad positions, such as engineers, brakemen, and so forth, AOERC does in our view provide transportation” (*id.*). In the instant case, ARM will employ traditional rail workers in typical railroad positions-- locomotive engineers and perhaps conductors or trainmen. Petition at 3--“American Rocky Mountaineer will crew the trains”. These facts render the instant petition distinguishable from the prior petition by ARM’s parent in F.D. 35851, and from the petitions in *American Orient Express* and *Pullman*.

CONCLUSION

For all of the foregoing reasons, BLET respectfully submits that ARM’s petition should be denied as presented, and that the Board should only grant exemptions from specific provisions of Subtitle IV that it finds are not relevant to ARM’s planned operations.

Respectfully submitted,

/s/ Richard S. Edelman

Richard S. Edelman

Mooney, Green, Saindon, Murphy & Welch, P.C.

1920 L Street NW, Suite 400

Washington, DC 20036

(202) 783-0010

Redelman@MooneyGreen.com

Joshua D. McInerney

Barkan Meizlish, LLP

4200 Regent Street, Suite 210

Columbus, OH 43219

jmcinerney@barkanmeizlish.com

March 15, 2021

Counsel for the Brotherhood of Locomotive Engineers
and Trainmen

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the foregoing Partial Opposition To
Petition For Exemption to be served by First Class Mail and email on the following:

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

March 15, 2021

/s/Richard S. Edelman

Richard S. Edelman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36468

AMERICAN ROCKY MOUNTAINEER, LLC

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

DECLARATION OF THOMAS A. PONTOLILLO

I, Thomas A. Pontolillo, declare as follows:

1. I am the Director of Research and Assistant to the National President of the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters (“BLET” or “Union”), and I have served in that capacity since April 2008. I joined the Union in 1973, while working for the Penn Central Railroad as a locomotive fireman, and I have been a BLET member ever since. I was promoted to locomotive engineer in 1975, worked for more than ten years in that capacity, and still hold seniority as a locomotive engineer. My current responsibilities for BLET include, among other functions, coordinating collective bargaining activities at the national level; researching and analyzing a wide range of current and historical data and records regarding the railroad industry, freight rail operations and BLET members’ working conditions nationwide; providing support for BLET’s general committees of adjustment, the Union bodies providing direct representation of BLET members working for railroads operating throughout the United States; reviewing tentative agreements for compliance with federal law and BLET policy; providing representation in administrative proceedings involving revocations of certifications of locomotive engineers and conductors; and providing administrative and research support for national union functions.

2. As part of my current duties, I have been collecting and evaluating information relating to the Petition for Exemption from Subtitle IV of Title 49 of the United States Code filed by American Rocky Mountaineer, LLC (“ARM”) in this matter.

3. BLET is a “labor organization” as that term is used in the Railway Labor Act, as amended (“RLA”). 45 U.S.C. §§ 151, *et seq.* The Union represents, among others, railroad employees in the crafts or classes of locomotive engineers, conductors and trainmen employed by major U.S. freight railroads, including Union Pacific Railroad Company (“UPRR”) and the National Railroad Passenger Corporation (“Amtrak”).

4. BLET also organizes operating employees who perform train and/or engine service for new railroad carriers under the RLA.

5. BLET negotiates Collective Bargaining Agreement (“CBAs”) that set wages, rule and working conditions, and establish national standard terms. Therefore, BLET has an interest in ensuring that persons working in the locomotive engineer and train service crafts enjoy rates of pay, rules and working conditions that are comparable to national standard rates of pay, rules and working conditions under BLET agreements so that those agreements are not undercut by persons working for lesser rates of pay, rules and working conditions.

6. Railroad employees represented by the BLET also are covered by the Railroad Retirement Act (“RRA”). 45 U.S.C. § 231.

7. The RRA system is funded by tax payments made by railroad employees and by rail carriers. BLET members have an interest in the stability and financial strength of the RRRA system, which is ensured, in part, by having all employees who perform traditional railroad work covered by the RRA so they and their employers pay in to the system, and the employees can enjoy benefits thereof.

8. Specific to this matter, BLET represents locomotive engineers employed by UPRR, which is host railroad over which ARM trains will operate.

9. The BLET–UPRR CBAs contain scope rules providing exclusive rights to BLET-represented locomotive engineers to operate trains on UPRR lines. The CBAs also include rates of pay and work rules that are specific to passenger service.

10. BLET also represents passenger engineers employed by Amtrak engineers. Amtrak has statutory rights to operate intercity and regional passenger service on UPRR lines.

11. Additionally, BLET represents the locomotive engineers employed by Amtrak who have historically operated trains for similar excursion operators such as American Orient Express, ARM corporate relative Great Canadian Railtour Company, Ltd. and Pullman Sleeping Car Company.

12. Coverage decisions made by the National Mediation Board (“NMB”), which administers the RLA, and by the U.S. Railroad Retirement Board (“RRB”), which administers the RRA, may depend, in part, on whether the Surface Transportation Board (“STB”) determines a particular entity is a carrier as that term is defined in the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). For this reason, BLET and its members have a significant interest in the outcome of this proceeding.

I declare under penalty of perjury under the laws of the United States and Ohio that the foregoing is true and correct to the best of my knowledge.

Executed at Independence, Ohio this 15th day of March, 2021.



Thomas A. Pontolillo