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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36468

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

**RESPONSE TO REPLY TO PARTIAL OPPOSITION TO
PETITION FOR EXEMPTION**

The Brotherhood of Locomotive Engineers and Trainmen (“BLET” or “Union”) submits this response to the American Rocky Mountaineer, LLC’s (“ARM”) reply to BLET’s partial opposition to ARM’s petition for 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’s partial opposition was not a late-filed reply.

ARM suggests that BLET’s opposition to ARM’s petition was a late-filed reply, which therefore supposedly justifies the filing of ARM’s reply, which is a reply to BLET’s reply. ARM Sur-Reply at 4 n. 5. But ARM cited no provision of the Act, no STB regulation or Board order establishing a due date for BLET to respond to ARM’s petition. In fact, ARM carefully does not actually assert that BLET’s response was late. Instead, it states “**If** the BLET Opposition is a late-filed reply to the ARM Petition and the Board allows it stay in the record, ARM hereby moves that the Board also accept ARM’s Reply as a sur-reply”. *Id.*, emphasis added. By

suggesting that the BLET partial opposition was late, without actually asserting it was late (or citing a basis for such an assertion), ARM was presumably trying to avoid having to justify its own filing of a sur-reply to BLET's partial opposition. But BLET's partial opposition was not late.

No provision of the Act, no regulation, and no order required earlier filing of BLET's partial opposition. Indeed, the Board's regulations on proceedings in exemption cases set no deadline for the filing of responses to exemption petitions. 49 C.F.R. §1121.4(a) states that "Exemption proceedings are informal, and public comments are generally not sought during consideration of exemption petition proposals [except in cases where the Board seeks additional information or comments]. However, the Board may consider during its deliberation any public comments filed in response to a petition for exemption". Accordingly, there is no due date for responses to petitions for exemptions; and the regulation says the Board may consider public comments without setting a time for filing of comments. The regulation further provides that if the petition satisfies the exemption criteria, the Board will issue the exemption and publish a notice in the Federal Register; and parties may file petitions to revoke exemptions "at any time". 49 C.F.R. §1121.4 (b) and (d), emphasis added. Accordingly, BLET's filing was not late under the Board's exemption procedures.¹

¹ If ARM was relying on the Board's general procedural rules, such reliance was misplaced. While those rules say that a reply to a pleading is due 20 days after the pleading is filed (49 C.F.R. §1104.13), a pleading is a document that must include a certificate of service stating that it was served on all parties of record (49 C.F.R. §1104.12). Here there were no parties to the proceeding besides ARM before BLET's filing, and the petition for exemption was not served on BLET. So even if the Board's general procedural rules were applicable instead of

Because BLET's partial opposition was not untimely, there is no basis for rejection of BLET's filing. Nor was the date of BLET's filing justification for ARM's filing of a sur-reply. Accordingly, if the Board allows the filing of ARM's sur-reply, it should accept BLET's response to the sur-reply under the rationale of the cases cited in ARM's sur-reply at 4, n. 5.

2. ARM has not refuted BLET's showing that certain elements of the National Rail Transportation Policy ("NRTP") are applicable to ARM's operations.

ARM's response as to each of the NRTP that BLET asserts are applicable to ARM is to say that BLET has not demonstrated that the conduct or plan of ARM is inconsistent with the policy cited. For example, ARM argues that BLET has not shown that ARM would put public health and safety at risk, that its management would not be honest and efficient, or that it will not provide safe and adequate working conditions. Sur-reply at 7-10. But the question is not whether ARM is unfit or acting contrary to the NRPT; if that was BLET's contention, it would have argued that the exemption should not only be denied in its entirety, but that ARM should be barred from operating. The actual question by ARM's Petition as to the NRPT is whether all of them are irrelevant to ARM so it should be exempted from virtually all of Subtitle IV, or whether the nature of ARM's operation is such that certain of the NRTP are applicable to ARM so it should not be completely exempted from STB oversight.

BLET has conceded that certain of the NRPT are not relevant to the sort of operation planned by ARM (ARM will not transport freight, it will not own track, it will not have to invest

the exemption proceeding rules (which they were not), ARM has no basis under those rules for asserting that BLET's filing was late.

capital to maintain rail infrastructure, and it will not be in a position to exert market power or exclude competitors). But ARM will still be a carrier operating on the interstate rail system. As such, policies that carriers not put public health and safety at risk, that carrier management be honest and efficient, and that it provide safe and adequate working conditions are all relevant to ARM. The issue is not whether ARM's plan is contrary to or inconsistent with all of the NRTP, but whether the nature of ARM's operations are such that certain of the NRTP are applicable to ARM so it should not be exempted from virtually all of Subtitle IV.

Furthermore, once ARM becomes a carrier, certain regulatory functions of the Board should apply to ARM, even if it is not a freight rail carrier. For example, after it becomes a rail carrier, ARM might decide to buy a rail line, construct a new line, acquire trackage rights, or enter a joint operating arrangement. Transactions of those types are regulated under the Act. If ARM engages in such a transaction, the transaction should be subject to STB review or exemption from review. But, if ARM is exempt from the Act in its entirety, how is the Board to review or exempt such a transaction? Once ARM is a rail carrier, it should be subject to Board jurisdiction for regulation or exemption from regulation for activities and transactions that ARM would be capable of engaging in. For that to be so, the Board must have authority over ARM with respect to those activities and transactions, and the Board must be able to review or exempt ARM with respect to those activities and transactions.

ARM dismisses any concerns about the Board's ability to address these sorts of activities and transactions "because all of these activities and transactions are beyond the scope of the transaction and the planned service for which the Subtitle IV exemption is sought". Sur-reply at 14. But ARM has not explained how the Board would exercise jurisdiction and review or exempt

such activities and transactions if it exempts ARM from virtually all of Subtitle IV. But the Board can retain jurisdiction over ARM with respect to such activities and transactions if it limits an exemption to certain specific provisions of the Act.²

3. The exemption orders on which ARM relies are not controlling or persuasive with respect to the issue raised in BLET's partial opposition to the petition.

ARM disputes BLET's assertion that the petitions in *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) were uncontested. Sur-reply at 12. But review of those exemption orders shows that they were indeed uncontested (BNSF initially objected to the petition in *Great American Railtour*, but it ultimately withdrew the objection). ARM also argues that it does not matter that those exemptions were uncontested. Sur-reply at 12. But, given the procedure for handling exemption petitions, there is no reason to assume that the Board analyzes an unopposed petition for exemption in the same manner that it analyzes a contested petition. And in our adversary system, it is reasonable to assume that a decision issued

²An odd argument advanced by ARM in response to BLET is the assertion that there is no basis for assuming that ARM will adversely affect UP such that the possible effects on UP implicate the NRTP. Sur-reply at 9. ARM has submitted statements from UP officials affirming that UP will not be negatively impacted by ARM's operations. *Id.* But it is not UP that has filed a petition for exemption in this proceeding. And the issue is not whether the possible effects on UP are inconsistent with the NRTP. The issue is whether any or some of the NRTP are applicable to ARM such that continuing application of provisions of Subtitle IV to ARM and regulation of ARM under Subtitle IV is necessary to furtherance of the policies of the Act.

after a contested proceeding is a more substantial one than an exemption that takes effect essentially as a matter of course.

ARM is also wrong in arguing that BLET erroneously claimed that its argument about the propriety of a blanket exemption from Subtitle IV as opposed to a more limited was not addressed in *Pullman* and *Great Canadian Railtour*. Sur-reply at 12. BLET's point was that those decisions did not consider whether something less than a blanket exemption would be appropriate because no one urged that outcome. BLET Partial Opposition at 8.³ The choice before the Board need not be a blanket exemption versus no exemption. The Board should consider whether ARM has truly made the case for the blanket exemption, whether certain elements of the NTRP are implicated by ARM's planned operations, and whether the Board should retain the ability to review, oversee and regulate ARM with respect to certain activities and transactions.

4. ARM has failed to explain why exemption from virtually all of Subtitle IV is necessary.

In its petition, ARM blithely asserted that the blanket exemption it seeks is necessary without explaining why it should be exempt from specific sections of the Act. When confronted with BLET's partial opposition, which did not dispute exemption from various parts of the Act, ARM (unsuccessfully) attacked the arguments advanced by BLET. At this point, ARM has failed to answer the ultimate questions raised by its petition – why it should be exempt from virtually

³ BLET actually stated, "Initially, BLET notes that in none of those cases was the issue of a blanket exemption versus more specific exemptions addressed" and "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." BLET Partial Opposition at 8.

every provision of the Act, and why it should not be exempt only from specific provisions based on a showing by ARM that it should be exempt from those specific provisions.

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,

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CERTIFICATE OF SERVICE

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

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