
FINANCE DOCKET NO. 36468

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Public Record

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

**SMART-TD'S COMMENTS TO AMERICAN ROCKY
MOUNTAINEER'S PETITION FOR EXEMPTION**

The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers ("SMART-TD") submits the following Comments to the Petition for Exemption ("Petition") filed by American Rocky Mountaineer, LLC ("ARM") in this proceeding.¹

I. INTRODUCTION

On February 3, 2021, in Finance Docket ("FD") 36468, pursuant to 49 U.S.C. § 10502 and 49 C.F.R. Part 1121, ARM filed a Petition for Exemption, requesting that the Surface Transportation Board ("STB" or "the Board") exempt it from all of the provisions of Subtitle IV of Title 49 U.S.C. ("the Act") for which exemption is permissible. To the extent that ARM seeks a blanket exemption, such would be inappropriate under the facts in this case. Indeed, unlike the cases relied upon by ARM where the passenger excursion service merely added cars to existing National Railroad Passenger Corp. ("Amtrak") trains, the proposed service here would be

¹ Pursuant to 49 C.F.R. §1121.4(a), while public comments may not be generally sought during consideration of exemption petition proposals, they may be considered by the Board during its deliberation. Because the Board has not yet issued its decision, these Comments are timely raised.

performed by ARM operating crews with ARM equipment. Accordingly, there is no support for its blanket exemption request.

II. FACTUAL BACKGROUND

On February 3, 2021, in Finance Docket (“FD”) 36468, pursuant to 49 U.S.C. § 10502 and 49 C.F.R. Part 1121, ARM filed a Petition for Exemption, requesting that the Surface Transportation Board (“STB” or “the Board”) exempt it from all of the provisions of Subtitle IV of Title 49 U.S.C. (“the Act”) from which exemption is permissible. According to the Petition, beginning in summer 2021, ARM plans to operate a new seasonal, interstate passenger rail excursion between Denver, Colorado and Moab, Utah. (Pet. at 2). ARM advised that it intends to enter into an agreement with Union Pacific Railroad Company (“UPRR”) to facilitate the service, attaching a public version of the parties’ draft Memorandum of Understanding (“MOU”) as Exhibit A. (*Id.*). Under the proposed agreement, UPRR will provide track access and dispatch the ARM trains, and ARM will crew the trains. (*Id.* at 3). ARM additionally advised that it is under common control with Great Canadian Railtour Company Limited (“Great Canadian Railtour”), which, in 2015, petitioned the Board for an exemption from 49 U.S.C. Subtitle IV to extend its Canadian service to Seattle. (*Id.* at 3 n.4 (citing *Great Canadian Railtour Co., LTD*, F.D. 35851 (STB June 3, 2015)).²

SMART-TD represents the craft or class of train service employees, including those employed by Union Pacific Railroad Company and Amtrak, and is a “representative” as defined in Section 1 Sixth of the RLA. 45 U.S.C. 151 Sixth.

² In *Great Canadian Railtour*, the Board found that the planned operation was subject to its jurisdiction, but granted Great Canadian Railtour a Subtitle IV exemption. 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. The service to Seattle operated from May 5, 2014 until September 21, 2019.

III. LEGAL BACKGROUND

ARM acknowledges that the Board has jurisdiction over the proposed acquisition and operations because it will offer “transportation” by “rail carrier” under Section 10501(a), 49 U.S.C. § 10502. (Pet. at 4). Nevertheless, it appears to seek a blanket exemption from Subtitle IV. (Pet. at 5)³ The Board’s authority to exempt a rail carrier is set forth in Section 10502, 49 U.S.C. § 10502. That Section states, in pertinent part:

(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.

49 U.S.C. § 10502(a). Section 10101 sets forth fifteen factors that are to be considered for rail transportation policy, including:

(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;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

49 U.S.C. § 10101.

³ While ARM seeks a blanket exemption, it concedes that the Board cannot exempt it from labor protection and certain damage liability issues. (Pet. at 2 n.1 (citing 49 U.S.C. § 10502(c), (g))).

IV. SMART-TD'S POSITION

Generally, Board approval is required in order to operate over a railroad line. 49 U.S.C. § 10901. To the extent ARM requests a blanket exemption for its proposed passenger service, there is no authority which would support such a request under the facts here. Indeed, this is interstate service on mainline track over which the STB has jurisdiction.⁴ The proposed service is not passenger service operated by Amtrak, which has the express authority to enter into agreements with freight carriers by federal statute pursuant to 49 U.S.C. § 24308. Nor is it wholly intrastate passenger service operated by a contractor on rail line owned by a state; rather, it would cause Rocky Mountaineer to become a rail carrier. *See, e.g., Fun Trains, Inc. – Operation Exemption*, F.D. 33472 (STB Mar. 5, 1998); *see also All Aboard Florida – Operation Exemption*, F.D. 35680 (STB Dec. 21, 2012) (finding construction and operating of proposed line entirely within state of Florida and not part of interstate rail network not part of interstate commerce); *Massachusetts Dept. of Transp. – Acquisition Exemption*, F.D. 35312 (STB May 3, 2010) (finding 49 U.S.C. § 10901 does not apply to this sale of the physical assets in rail lines to a state agency); *Transit Solutions Group, LLC – Operation Exemption*, F.D. 34833 (March 2, 2006) (dismissing application where proposed operations of mass transportation provided by a local government authority are specifically excepted from the Board's jurisdiction by 49 U.S.C. 10501(c)).

⁴ Under 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by a rail carrier (1) between a place in a state and a place in another state, and (2) between a place in a state and another place in the same state, as long as that intrastate transportation is “part of the interstate rail network.” *See DesertXpress Enters., LLC—Pet. for Declaratory Order*, F.D. 34914, slip op. at 9 (STB served May 7, 2010). While the Board does not have authority over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks under 49 U.S.C. § 10906, the track here is mainline track and not that identified in § 10906.

In filing for what appears to be a blanket exemption, ARM relied on three prior STB cases which are inapposite here, including *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 response, BLET filed Comments asking that while there are some provisions of the Act from which ARM may be appropriately exempted, ARM should not be exempt from 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). SMART-TD agrees that ARM should not be wholly exempt from Subtitle IV and adopts and incorporates the arguments raised by BLET in its initial Opposition and Reply herein by reference. Indeed, the cases relied upon by ARM are distinguishable from the instant matter, where ARM will actually be operating the trains with its own train crew employees, and not merely attaching their passenger rail cars to Amtrak trains operated by Amtrak engineers and conductors, which are represented by BLET and SMART-TD.

V. CONCLUSION

Based on the foregoing, SMART-TD respectfully requests that ARM's request for a blanket exemption from the provisions of Subtitle IV of the Act be denied, and that the Board only exempt it from the provisions from which it should be appropriately exempted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been e-filed this 7th day of May, 2021, via the STB's e-filing system, and served via email or regular postage prepaid mail upon the parties of record.

/s/ Erika A. Diehl-Gibbons
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