

SERVICE DATE — MAY 28, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36468

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

Digest:¹ The Board finds that it has jurisdiction over a company's provision of passenger rail service on an existing route between Denver, Colo., and Moab, Utah, but exempts that service from most of the Board's regulations.

Decided: May 27, 2021

On February 3, 2021, American Rocky Mountaineer, LLC (ARM), filed a petition for exemption under 49 U.S.C. § 10502 from subtitle IV of title 49 of the U. S. Code (subtitle IV). ARM requests Board authorization to provide luxury passenger rail service between Denver, Colo., and Moab, Utah, on lines of Union Pacific Railroad Company (UP), pending entry into a final agreement with UP to provide track access and dispatch ARM trains. ARM requests an exemption from all obligations in subtitle IV with respect to the proposed acquisition of operating rights from UP and the proposed service, to the extent permitted by statute.

The Brotherhood of Locomotive Engineers and Trainmen (BLET) filed a partial opposition to ARM's petition on March 15, 2021. ARM replied to BLET's partial opposition on April 5, 2021, and BLET filed a surreply on April 13, 2021.

The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) submitted comments to ARM's petition on May 7, 2021. ARM replied to SMART's comments on May 11, 2021.

The Board finds that ARM's proposed passenger rail service is subject to Board jurisdiction. Given the factual circumstances here, however, it is reasonable to exempt ARM's acquisition of operating rights from UP and its proposed service (and any future passenger rail services of the same nature and scope as described in the petition) from subtitle IV, except for

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

those provisions specifically excluded from exemption by statute.² Notably, ARM requested a decision on the petition by May 31, 2021. (Pet. 6.) Because the Board is ruling on the petition in its entirety before May 31, 2021, it need not address ARM's separate request that the Board grant a partial exemption in the event that the Board cannot rule on the entire petition by that date, or the responses to that request. (See ARM Letter, May 7, 2021; see also SMART Letter, May 17, 2021; BLET Letter, May 12, 2021.)

BACKGROUND

ARM, a newly formed company and a non-carrier, states that it plans to operate a new luxury passenger rail excursion between Denver and Moab beginning in summer 2021. (Pet. 2.) ARM states that it intends to enter into an agreement with UP to facilitate the passenger service. (Id.) Although ARM and UP have not finalized an agreement, they have entered into a Memorandum of Understanding outlining the terms of the planned agreement. (Pet. 2, Ex. A.) ARM states that UP will provide track access and dispatch the ARM trains, while ARM will crew the trains. (Pet. 3.) ARM states that its proposed passenger transportation service will be subject to the Board's jurisdiction and that ARM will become a rail carrier subject to the Board's jurisdiction upon commencement of service. (Id.) Pursuant to 49 U.S.C. § 10502, ARM seeks an exemption from the provisions of subtitle IV "to the full extent permitted by law," arguing that regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (RTP) or protect shippers from the abuse of market power. (Pet. 3-4.)

In its partial opposition to ARM's petition, BLET urges the Board not to grant ARM a "blanket exemption" from subtitle IV. (BLET Reply 1.) Although BLET states that regulation under certain provisions of subtitle IV may not be necessary here, it argues that a blanket exemption from subtitle IV "is excessive, inappropriate and unnecessary." (Id. at 2, 4.) BLET asserts that ARM should not be exempt from all parts of chapters 101, 105, 109, 111, 113, 117, and 119 of subtitle IV. (Id. at 2.) BLET further argues that Board regulation is necessary to carry out RTP provisions (3), (8), (9), and (11). (Id. at 5.) BLET also states that a blanket exemption would prohibit the Board from ruling on future actions involving ARM, such as a trackage rights or operating rights transaction or a line sale. (Id. at 7.)

In a reply filed on April 5, 2021, ARM argues that regulation is not necessary under the RTP, including provisions (3), (8), (9), and (11), and that BLET had not provided adequate evidence to support its claims with respect to these provisions. (ARM Reply 7-13, April 5, 2021.) ARM also explains that it was seeking an exemption only for the planned passenger rail excursion service addressed in its petition, which would not preclude the Board from acting if ARM engaged in new types of operations or services. (Id. at 14-15.) In a surreply, BLET reiterates its argument that a blanket exemption is not necessary and that such an exemption would prohibit the Board from asserting jurisdiction over future transactions involving ARM. (BLET Surreply 4.)

² The Board is statutorily precluded from exempting ARM's operations from certain aspects of subtitle IV, such as labor protection and certain damage liability issues. See 49 U.S.C. § 10502(e), (g).

In comments filed on May 7, 2021, SMART states that ARM “should not be wholly exempt from Subtitle IV” and that it “adopts and incorporates the arguments raised by BLET.” (SMART Comments 5.) Further, SMART argues that the Board should not grant ARM’s request for a blanket exemption for its proposed passenger service because ARM will operate and crew its trains. (*Id.* at 4-5.)

ARM replied to SMART’s comments by stating that the Board should exempt the proposed service from subtitle IV pursuant to 49 U.S.C. § 10502 and that SMART had not adequately explained why the identity of the operator and crew matters.³ (ARM Reply 3-4, May 11, 2021.)

On May 4, 2021, the Board instituted a proceeding.⁴

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10501(a), the Board has jurisdiction over “transportation” by “rail carrier” as part of the interstate rail network. As ARM acknowledges, (*see* Pet. 4-5), ARM’s proposed operations would be subject to the Board’s jurisdiction. “Transportation” is defined, among other things, as services related to the movement of passengers, property, or both by rail. 49 U.S.C. § 10102(9). The service that ARM plans to offer includes the interstate transportation of passengers by rail between Denver and Moab.

Further, as “a person providing common carrier railroad transportation for compensation,” ARM will be a rail carrier. 49 U.S.C. § 10102(5). ARM will not own track, but it expects to secure access and operating rights from UP under a pending agreement. (Pet. 4, Ex. A); *see* 49 U.S.C. § 10102(6)(B). Additionally, ARM will hold itself out to the public as engaged in the business of transporting persons or property from place to place for compensation. *See Am. Orient Express Ry. v. STB (American Orient Express II)*, 484 F.3d 554, 557 (D.C. Cir. 2007).⁵

³ The Board will accept ARM’s reply to BLET, BLET’s surreply, SMART’s comments, and ARM’s reply to SMART in the interest of compiling a complete record. *See City of Alexandria, Va.—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

⁴ This transaction is related to a concurrently filed verified notice of exemption in *Armstrong Hospitality Group, Ltd.—Continuance in Control—American Rocky Mountaineer LLC*, Docket No. FD 36469. In that docket, Armstrong Hospitality Group, Ltd., Invictus Maneo Ltd., Oceaneer Investments Ltd., No. 245 Dynamic Endeavors Inc., The PRBA Alter Ego Trust, and Peter R. B. Armstrong, all noncarriers, filed a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to continue in control of ARM upon its becoming a Class III rail carrier. Notice of that exemption was served and published in the Federal Register on February 19, 2021 (86 Fed. Reg. 10,398).

⁵ In *American Orient Express II*, the court affirmed the Board’s finding that it has jurisdiction over the operations of a passenger rail company that marketed and sold vacations aboard railcars attached to National Railroad Passenger Corporation (Amtrak) train consists.

Consistent with prior cases finding that the Board had jurisdiction over similar passenger operations, the Board finds that the service ARM plans to provide is “transportation” by “rail carrier” and thus is subject to our jurisdiction under 49 U.S.C. § 10501.⁶

Having found that ARM is a rail carrier subject to our jurisdiction under 49 U.S.C. § 10501, the Board must now determine whether and to what extent ARM’s acquisition of operating rights from UP and its proposed service should be exempt from Board regulation. Under 49 U.S.C. § 10502(a), in a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under part A of subtitle IV, the Board, to the maximum extent consistent with such part, shall exempt a person, class of persons, or a transaction or service from regulation when the Board finds that the application in whole or in part of a provision of part A: (1) is not necessary to carry out the RTP; 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 necessary to protect shippers from the abuse of market power. Here, ARM seeks a blanket exemption from subtitle IV, limited to the operations and services described in its petition. ARM relies on Pullman and Great Canadian, in which the Board granted broad exemptions from the provisions of subtitle IV for passenger excursion services.

The Board finds that regulation here is not necessary to carry out the RTP. Consistent with 49 U.S.C. §§ 10101(5), (7), and (9), an exemption would foster sound economic conditions in transportation and encourage efficient management by allowing ARM to make minor modifications to its service without the need for regulatory approval. In addition, an exemption from subtitle IV would be consistent with 49 U.S.C. § 10101(2) by minimizing the need for regulatory control. See Great Canadian, FD 35851, slip op. at 5; Pullman, FD 35738, slip op. at 3.

Additionally, contrary to BLET’s assertions, regulation is not necessary to carry out 49 U.S.C. § 10101(3), (8), (9), and (11). With regard to § 10101(3), as ARM points out, (see ARM Reply 7-8, April 5, 2021), BLET does not explain why granting an exemption will prevent ARM from earning adequate revenues, and it provides no evidence to support such an argument. Furthermore, § 10101(3) is directed at adequate carrier revenues, and ARM, as the party seeking the exemption, has concluded that it does not require Board regulation to earn adequate revenue.

Similarly, in its argument based on § 10101(8), BLET raises vague and speculative safety concerns that are not specific to ARM or its proposed operations. (See BLET Reply 5.) ARM

⁶ See Great Canadian Railtour Co.—Pet. for Exemption from 49 U.S.C. Subtitle IV (Great Canadian), FD 35851, slip op. at 4 (STB served June 3, 2015) (finding that the Board has jurisdiction over a company providing rail passenger service between Vancouver, B.C., and Seattle, Wash., pursuant to a contract with Amtrak); Pullman Sleeping Car Co.—Pet. for Exemption from 49 U.S.C. Subtitle IV (Pullman), FD 35738 (STB served Feb. 5, 2015) (finding that the Board has jurisdiction over a company providing sleeping car service and dining and lounge facilities in rail cars attached to Amtrak trains pulled by Amtrak locomotives); Am. Orient Express Ry.—Pet. for Declaratory Order (American Orient Express I), FD 34502, slip op. at 7 (STB served Dec. 29, 2005), aff’d American Orient Express II.

points out that BLET submitted no evidence relating to the safety record of UP or ARM's rail operating affiliate offering similar passenger rail service in Canada. (ARM Reply 8, April 5, 2021.) Further, ARM notes that it will be subject to Federal Railroad Administration (FRA) regulations and states that it is engaged with FRA on a "new start compliance plan" and is working with UP to ensure the safe introduction of its trains on UP's line. (ARM Reply 9, Ex. B, April 5, 2021.) Given ARM's steps to ensure compliance with FRA safety regulations and BLET's failure to demonstrate why ARM's operations would raise safety concerns, the Board concludes that regulation is not necessary to carry out this aspect of the RTP. See Delmarva Cent. R.R.—Lease & Operation Exemption with Interchange Commitment—Norfolk S. Ry., FD 36071, slip op. at 3 (STB served Mar. 8, 2017) (noting that "[t]he Board takes safety concerns seriously" but that concerns about safety raised in the petition to revoke a lease and operation exemption were "vague and speculative" and did not establish specific shortcomings).

Regarding § 10101(9), BLET provides no specific evidence and only offers a general allegation that ARM's operations should be regulated to ensure that they do not impede the efficient management of UP's network. (See BLET Reply 5; BLET Surreply 4.) In response, ARM submitted a verified statement of Rodney Doerr, Vice President, Labor Relations of UP, which indicates that the introduction of ARM trains will not impede the efficient operations of UP and notes that UP dispatches numerous other trains on its lines without negative impacts on its efficiency. (ARM Reply, Ex. A, April 5, 2021.) As BLET provides no specific examples of how ARM's operations would negatively impact the efficient management of UP's network and an officer of UP has represented that ARM's operations can be integrated without negative effect, the Board finds that regulation is not needed with regard to this section of the RTP.

Finally, regulation is not necessary under § 10101(11). BLET provides no evidence or argument that shows Board regulation is necessary to encourage fair wages and safe and suitable working conditions by ARM. Importantly, the Board is statutorily prohibited from exempting ARM's operations from certain labor provisions. See 49 U.S.C. § 10502(g). Further, an exemption will not alter the applicability of the Railway Labor Act or the Railroad Retirement Act. See 45 U.S.C. §§ 151, 231(a)(1).⁷ And to the extent that BLET contends that its members have exclusive rights to operate trains on UP lines through a collective bargaining agreement, the Doerr verified statement submitted by ARM clarifies that BLET-represented crews do not have exclusive rights to operate passenger trains on UP lines. (ARM Reply, Ex. A at 3, April 5, 2021.) In its surreply, BLET does not contest this assertion from the verified statement.⁸ Other aspects of the RTP would not be adversely affected.

⁷ BLET argues that an exemption could create ambiguity because the definition of "carrier" in both of these statutes refers to the definition of "rail carrier" in subtitle IV. (BLET Reply 7 (citing 45 U.S.C. §§ 151, 231(a)(1)).) But an exemption from the requirements of subtitle IV would not alter the definition of "rail carrier" that appears in subtitle IV.

⁸ Further, BLET made no argument as to how the Board would even account for a dispute over application of the collective bargaining agreement when assessing the statutory exemption criteria and determining whether to exempt the activities described here from subtitle IV. In any event, the Board generally is not the appropriate forum for determining parties' rights under a contract. See, e.g., V&S Ry.—Pet. for Declaratory Order—R.R. Operations in

BLET also references various chapters within subtitle IV in its partial opposition, (see BLET Reply 2, 6-7), but it has not sufficiently explained why Board regulation of ARM's passenger rail service is necessary under those chapters. BLET's general overbreadth concerns also are misplaced. The Board has granted exemptions from subtitle IV for passenger rail service in Pullman and Great Canadian, and BLET does not persuasively show that those cases are distinguishable merely because BLET has filed a partial opposition or because ARM will own and operate trains. (See BLET Reply 8-9; BLET Surreply 5-6.) Similarly, SMART does not show that those cases are distinguishable merely because ARM's proposed passenger service will not be operated by Amtrak. (SMART Comments 4.) Neither Pullman nor Great Canadian cited the identity of the operator or crew as a relevant factor in the decision to grant a subtitle IV exemption, and the fact that ARM is performing these activities itself does not undermine the rationale for such an exemption. An exemption from nearly all of subtitle IV here is consistent with § 10502(a), which directs the Board to exempt a transaction or service "to the maximum extent consistent with this part." See also Chi. & N.W. Transp. Co. Aban. & Discontinuance of Serv. Exemption in Hennepin Cnty., AB 1 (Sub-No. 252X) (ICC served Dec. 20, 1995) (exempting, sua sponte, a railroad line acquisition from subtitle IV, to the extent possible).

Regulation also is not needed to protect shippers from an abuse of market power. ARM states that its planned acquisition of passenger train operating rights and the planned luxury tourist operations are unrelated to freight service provided to shippers. (Pet. 5.) ARM's proposal is also of limited scope, offering seasonal luxury passenger service between designated points for its customers. (See Pet. 1.)

Accordingly, ARM's request for exemption from subtitle IV for the transaction and operations as described in its petition will be granted, with the exception of provisions specifically precluded from exemption by statute. The exemption granted by this decision applies only to passenger rail operations and services of the same nature and scope as those described in ARM's petition, and does not extend to new operations ARM may offer in the future or to any service offered in conjunction with any carrier other than UP. For example, this exemption would not extend to activities about which BLET expresses concern, such as constructing or purchasing a railroad line or entering agreements with entities other than UP. (See BLET Reply 7; BLET Surreply 4.) ARM would need to seek Board approval in such situations. This exemption is consistent with the exemptions granted in Pullman and Great Canadian and with the findings there that requiring Board approval is an unnecessary burden for this specific type of service.

It is ordered:

1. ARM's proposed acquisition of operating rights from UP, as well as its proposed

Hutchinson, Kan., FD 35459, slip op. at 6-7, 13 n.22 (STB served July 12, 2012) (noting that questions of contractual interpretation are generally for courts to decide, not the Board).

operations, as described in its petition, are exempted from subtitle IV, except for those provisions statutorily precluded from exemption.

2. The exemption granted to ARM here shall also apply to any future passenger rail operations and services ARM may undertake pursuant to its planned agreement with UP, so long as the operations and services are of the same nature and scope as those described by ARM in its petition.

3. All filings submitted to date are accepted.

4. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.