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SERVICE DATE - JUNE 23, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34502

AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC –
PETITION FOR DECLARATORY ORDER

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for comments.

SUMMARY: The Surface Transportation Board is instituting a declaratory order proceeding and requesting comments on the petition of American Orient Express Railway Company LLC's (AOERC) for an order declaring that AOERC is not a common carrier by rail subject to the Board's jurisdiction.

DATES: Any interested person may file with the Board written comments concerning this issue by July 13, 2004.

ADDRESSES: Send an original and 10 copies of any comments referring to STB Finance Docket No. 34502 to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, send one copy of any comments to: Robert Bergen, Holland & Knight LLP, 195 Broadway, New York, NY 10007.

FOR FURTHER INFORMATION CONTACT: Eric S. Davis, (202) 565-1608. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877-8339.]

SUPPLEMENTAL INFORMATION: By petition filed on April 30, 2004, AOERC asks the Board to issue an order declaring that it is not a common carrier by rail subject to the Board's jurisdiction.

On February 9, 2001, the Railroad Retirement Board (RRB) issued a decision concluding that AOERC is a covered employer for purposes of the Railroad Retirement Act, 45 U.S.C. 231 et seq. (2004), and Railroad Unemployment Insurance Act, 45 U.S.C. 351 et seq. (2004) (collectively Railroad Retirement Acts) because it determined that AOERC was a "reincarnation" of a previously covered sleeper car carrier. AOERC sought a reconsideration of that decision. The RRB appointed a Hearing Examiner, who, on May 21, 2002, held a hearing on the petition for reconsideration. On May 16, 2003, the Hearing Examiner issued a recommendation to the RRB suggesting that AOERC is a covered employer not because it was a "reincarnation" of a covered sleeper car carrier but because it provides common carrier rail

transportation and, therefore, is under the Board's jurisdiction. The RRB has not acted on the petition for a reconsideration or on the Hearing Examiner's recommendation because the scope of the Board's jurisdiction over AOERC is the only issue on which the questions of coverage depends. The RRB has stayed its reconsideration proceeding until July 1, 2004, to allow the Board to rule on the question of jurisdiction.

AOERC is a land excursion company that uses restored vintage railroad coaches, diners and sleepers as the central feature of its vacation packages. It does not own or operate any locomotives or railroad track. Rather, it contracts with the National Passenger Railroad Corporation (Amtrak) to provide all railroad related services including locomotive power and train and engine crews (Amtrak Contract). As part of the vacation packages, specially tailored meals, luxury accommodations, on and off the train, and various excursions, including walking tours of historic and natural sites, lectures and live music are included. AOERC operates seasonally and does not have set routes. AOERC's trips and itineraries change annually depending on its negotiations with Amtrak. Additionally, AOERC may cancel a planned excursion if there are not enough customers or it may add a charter trip on a different route. Most of AOERC's employees are part-time seasonal employees, and AOERC states that it does not employ traditional rail workers because it provides only non-railroad amenities and services.

Amtrak does not own most of the track over which it operates; it obtains trackage rights from other railroads to provide service to AOERC. Amtrak pulls AOERC's vintage rail cars pursuant to a schedule for each excursion that meets Amtrak's and the host railroad's (the track owner or operator) availability. AOERC proposes itineraries to Amtrak, usually 2 years in advance, so that Amtrak can determine, based on its own schedule and the availability of the track routes requested, whether they are possible. AOERC cannot offer itineraries that have not been approved by Amtrak. Even if an itinerary has been approved, the Amtrak Contract does not guarantee that the chosen route will be served. Amtrak has the right to cancel or change scheduled routes, stops or entire trips. According to AOERC, Amtrak has exercised this right on more than one occasion.

Under the Amtrak Contract, AOERC is responsible for providing its car consists in good order and on time to meet Amtrak's and host railroads' schedules. Additionally, the train consists must be submitted to Amtrak for inspection at the beginning of each touring season and before each trip. Amtrak may refuse to pull cars that do not pass its inspections.

Under 49 U.S.C. 10501(b), the Board has exclusive jurisdiction over transportation by rail carriers. The term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation" under 49 U.S.C. 10102(5). AOERC asserts that it does not meet the definition of a "railroad" under 49 U.S.C. 10102(6) because it does not own or operate any of the listed equipment; it does not own or operate any road or railroad right-of-way; and it does not own or operate any of the listed facilities or equipment. AOERC maintains that it cannot be considered a "rail carrier" subject to the Board's jurisdiction because it does not meet

the definition of a “railroad.”

Moreover, AOERC argues that it does not fit the definition of a common carrier because it does not hold itself out to the general public as a company engaged in the business of transporting persons or property from place to place for compensation. AOERC maintains that it does not provide scheduled transportation service on a regular basis between points. It claims that, in order to move its cars, it must rely entirely on Amtrak and the railroad owners of the track it uses for permission to travel. Additionally, AOERC asserts that its schedules are based entirely on the availability of Amtrak locomotives and crews and railroad trackage, all of which is determined by Amtrak and the owners of the track.

Finally, AOERC asserts that its excursion business has certain similarities to sleeping car service, express service and car rental companies all of which, AOERC asserts, are outside of the Board’s jurisdiction.

Accordingly, by this notice, the Board is requesting comments on this matter.

Board decisions and notices are available on our website at “WWW.STB.DOT.GOV.”

Decided: June 17, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary