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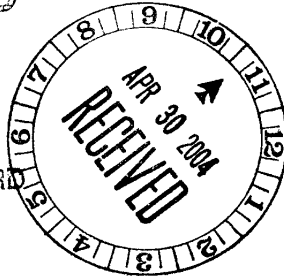
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Re: In the Matter of American Orient Express Railway Company
Finance Docket No. FD-34502

Dear Mr. Williams:

Enclosed for filing, please find an original and ten copies of a petition for the initiation of a declaratory proceeding in the above matter. Also enclosed please find a check in the amount of \$1400 as the filing fee.

Please advise whether any further action is required on my part. Thank you.

Sincerely,


Robert Bergen

RB:mf

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. FD-34502

**PETITION FOR DECLARATORY ORDER
REGARDING THE NON-COMMON CARRIER STATUS OF
AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC**

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| Exhibit E | Operating and Maintenance Agreement between Amtrak and American Orient Express Railway Company |
| Exhibit F | American Orient Express Railway Company Travel Brochures |

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**PETITION FOR DECLARATORY ORDER
REGARDING THE NONCOMMON CARRIER STATUS OF
AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC**

On February 9, 2001, the Railroad Retirement Board ("RRB") issued a decision ("Coverage Decision")¹ in which it concluded that American Orient Express Railway Company LLC ("AOERC") is a covered employer for purposes of the Railroad Retirement, 45 U.S.C. § 231 et seq. (2004), and Railroad Unemployment Insurance Acts, 45 U.S.C. § 351 et seq. (2004) (together, the "Railroad Retirement Acts"). AOERC is a land excursion company that uses restored vintage railroad coaches, diners and sleepers as the central feature of its vacation packages. AOERC does not own or operate any locomotives or own, operate or control any railroad track. AOERC contracts with the National Passenger Railroad Corporation ("Amtrak") to provide all railroad craft employees and all railroad-related functions, including but not limited to arranging for the use of track. AOERC operates seasonally and is not, and does not hold itself out as being, a common carrier by rail.

¹ Employer Status Determination, American Orient Express Company, B.C.D. 01-20 (Feb. 9, 2001) (copy attached hereto as Exhibit A).

As permitted by the RRB's regulations, AOERC sought a redetermination of the Coverage Decision. The RRB appointed a Hearing Examiner, who held a hearing on the petition for redetermination on May 21, 2002. The Hearing Examiner issued a recommendation to the RRB on May 16, 2003 suggesting a finding that AOERC is a covered employer but based upon entirely different reasoning than that which formed the basis of the RRB's initial determination. The RRB has not acted on the petition for a redetermination or on the Hearing Examiner's recommendation. Instead, because the scope of the Board's jurisdiction over AOERC is the only issue upon which the question of coverage depends, the RRB has stayed its reconsideration proceeding until July 1, 2004 to allow the Board to rule on the matter. Once the Board issues a determination, the RRB will remove the stay and decide the redetermination proceeding before it.²

For the above reasons and as set forth more fully below, AOERC hereby petitions the Surface Transportation Board ("STB" or the "Board") to commence a declaratory order proceeding and issue a decision to the effect that AOERC is not subject to the STB's jurisdiction.

² The RRB issued a stay of AOERC's reporting requirements under the Railroad Retirement Acts for the duration of the redetermination proceeding and has recently continued the stay through July 1, 2004.

STATEMENT OF FACTS³

The Nature of the AOERC Business

AOERC offers luxury vacation packages to historic or scenic locations in conjunction with incidental transportation on vintage rail cars. The vacation packages are offered only on a seasonal basis, typically from February until November, and vary from year to year based on economic factors, route availability, customer demand and other business considerations. During the tour seasons beginning in 1998 to 1999 and through 2002 to 2003, AOERC offered tours of such diverse locations as Glacier and Yellowstone National Parks, various Rocky Mountain destinations, Fort Lauderdale and the Kennedy Space Center, the Southeast, New England, the Northwest and other scenic or historic locales. Virtually all the excursions involve travel between two or more states. While most tours also operate in reverse direction as a separate packages, a few operate in a circuit, beginning and ending at the same place.

Accommodations on restored vintage rail cars are a central feature of the packages. The rail travel, however, is only one element of the vacation packages offered by AOERC. Each trip includes specially tailored meals, luxury

³ The facts stated in this Petition derive from (i) the RRB's record supporting its initial Coverage Decision, (ii) the RRB's decisions and the supporting records in L-90-38 and B.C.D. Nos. 93-68 and 96-77 (collectively assembled as Exhibit B hereto), (iii) the formal record developed during the hearing before the RRB Hearing Examiner, which included an agreed Statement of Facts Not in Dispute (the Statement of Facts Not in Dispute is attached hereto as Exhibit C) and (iv) the transcript from the Hearing before the RRB on May 21, 2002, specifically the testimony of Elizabeth Schellberg of AOERC (attached hereto as Exhibit D). The few additional facts that have been added to describe the AOERC service since the RRB hearing have been provided by officials and employees of petitioner AOERC. For purposes of this Petition, all facts concern AOERC's operations in the United States of America and not any tours it provides in Canada or Mexico, where its operations may differ in some respects.

accommodations (on and off the rail cars) and various forms of exercise and entertainment. By way of example, customers on a particular excursion might attend lectures given by naturalists, geologists, or historians, listen to live music, take walking tours of historic and natural sites and enjoy numerous other cultural and social events.

In addition, at most stopping points customers disembark and travel by bus or other forms of transit to visit the historic and cultural locations that are a focus of the vacation package. Tours often follow indirect routes and sometimes cover the same rail line a second time in order for customers to visit as many sites as possible along the way. For example, one package excursion from Denver, Colorado to Salt Lake City, Utah retraced 213 miles of rail line and lasted over 8 days from departure to destination.

Although AOERC uses restored vintage rail cars, it does not own or operate locomotives or own or operate trackage or trackage rights in connection with the provision of its excursions in the United States.⁴ Instead, AOERC has entered into a contract with Amtrak for the provision of all railroad-related services a copy of which is included as Exhibit E (the "Amtrak Contract").

Under the Amtrak Contract, Amtrak provides AOERC with locomotive power and train and engine crews. Amtrak pulls the AOERC vintage rail cars pursuant to a schedule for each excursion that meets Amtrak's and the host railroad's availability. Inasmuch as Amtrak does not own most of the track over which it

⁴ AOERC presently uses 31 cars owned by an affiliated company, American Orient Express Equipment Company ("AOE Equipment Company") from which it creates two consists to provide its various excursions.

operates, it obtains trackage rights from other railroads to provide AOERC this hauling service, categorizing AOERC in such arrangements as a "special train" outside of any standard operating agreement Amtrak may have with the host rail carrier. AOERC proposes the itineraries it wishes to market usually two years in advance so that Amtrak can determine, in terms of its own needs and the availability of the track routes requested, whether they are possible and arrange for them. AOERC cannot and does not offer any itineraries that have not been approved by Amtrak. Even after AOERC has met all of these requirements, the Amtrak Contract does not guarantee that the chosen routes will be served. Amtrak reserves the right to cancel or change scheduled routes, stops or entire trips, a right it has exercised on more than one occasion.

Pursuant to 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. The Amtrak Contract also requires that train consists be submitted to Amtrak inspection at the beginning of each tour season and before each trip. Amtrak has the right, which it has exercised on occasion, to refuse to pull cars that do not pass its inspections.

AOERC does not employ rail workers in traditional titles such as conductors, engineers, mechanics, track workers, signalmen, firemen, or brakemen. AOERC supplies only non-railroad amenities and services to its clientele. Excursion tours on AOERC typically involve forty-two to forty-six employees or independent contractors, depending on the number of customers and the configuration of the

consists. Three of these are tour leaders (who are sometimes independent contractors), three are maintenance staff and the remaining number are hotel staff and up to four managers. The hotel staff is comprised of chefs, assistant chefs, dishwashers, bartenders, wait staff, housekeepers, laundry personnel and pursers. All but a handful of AOERC's employees are part-time seasonal employees; the permanent exceptions are in titles such as executive chef and hotel manager.

During the years that the AOERC service has operated, hotel staff turnover has been high. Furthermore, except for a few year-round permanent positions at the managerial level, the substantial percentage of employees who do remain for an entire season do not return for a second year of employment. The average age of the hotel staff has remained at less than 30 years of age for the duration of AOERC. No on-board staff member has worked for the company since its inception in 1999.

Excursions on AOERC are not marketed or scheduled for regular transportation between two points. The price of an excursion on AOERC, for instance, greatly exceeds the price of travel on an Amtrak passenger train for a trip between the same or comparable points, even though the Amtrak trip is of

considerably shorter duration.⁵ In addition, each AOERC excursion is offered at a specific price or range of prices depending upon the services, amenities and accommodations provided. There is no price differential for distance traveled, as there typically is on Amtrak and other passenger rail carriers, and no refunds or price reductions are offered by AOERC even if customers leave the tour short of the final destination. This is true even on excursions that pass through major urban centers; transportation between points is simply not an element of the experience.

AOERC does not offer round-trip service. Each excursion is a self-standing vacation package, although a customer may purchase the reverse excursion of a particular route if it is offered. Furthermore, AOERC tours do not include transportation to and/or from the start and end points of the excursions; customers are specifically advised that such travel arrangements, whether by rail, road or air, are their responsibility to make and purchase. Nor is there any through ticketing between AOERC and Amtrak; a ticket purchased from one company does not entitle the holder to any service from the other. There is also no passenger interconnection between an Amtrak train and an AOERC consist, and riders cannot move from one to the other. Even AOERC staff is not permitted to enter Amtrak's locomotive.

⁵ Comparisons of current Amtrak rates and schedules, available at www.amtrak.com, with those of AOERC, available at www.americanorientexpress.com, demonstrate the extreme differences in price and length of travel between comparable places. As but one example, AOERC's Antebellum South excursion beginning in Washington D.C. and terminating in New Orleans takes 8 days and 7 nights and the cost for a single passage ranges from \$2,690 to \$5,290, depending upon nature of accommodations and the use of advance booking discounts. A comparable trip on Amtrak would be the Washington D.C. to New Orleans portion of the Crescent service (Amtrak trains 19 and 20). The cost for this trip ranges from \$103 for a one-way single rail fare to \$553 if deluxe accommodations are included; its scheduled duration is 24 hours and 45 minutes in the southerly direction and 26 hours and 30 minutes heading north. AOERC's Antebellum South excursion will operate only 3 times in each direction during AOERC's entire 2004 season. Amtrak's Crescent service, by contrast, operates daily throughout the year.

There are other differences between the passenger service provided by Amtrak and, presumably, any other typical rail passenger carrier and the vacation excursions provided by AOERC. While under normal conditions common carriers by rail such as Amtrak operate their scheduled routes regardless of the number of tickets sold, AOERC does not conduct a planned vacation excursion if there is inadequate enrollment. Since AOERC began operating its tour business in 1998, its various itineraries have had numerous cancellations due primarily to insufficient sales—four trips were cancelled in 1998, two in 1999, thirteen in 2000 and two in 2001. During the 2002 season, a new itinerary was added to the pre-existing complement of seven but, overall, fourteen of an initially scheduled fifty-seven trips were cancelled. During the 2003 season, another itinerary was added. Even so, of a total of ~~sixty~~-six scheduled excursions, eleven were cancelled. Finally, for the 2004 season AOERC added three new itineraries, but one of those has already been cancelled due to lack of adequate enrollment. In total, of seventy-eight planned trips for the 2004 season, it is anticipated that twenty-eight will be cancelled.

In addition and as previously noted, AOERC's trips and itineraries are always subject to change and in fact do change quite often. By way of example, during 2001 all six AOERC itineraries in the United States operated along routes that differed in varying degrees from the itineraries published in AOERC's brochures. In addition, AOERC has operated tours that were not advertised in its published brochure. There were two special charter trips on two different routes in 1998, two in 1999 (on routes different from the special charters in 1998) and an

entirely different special charter in 2000. Just this year, AOERC completely restructured the route of a previously advertised itinerary and added two new ones to its offerings that were not mentioned in its printed 2004 brochure. In contrast, it is commonly accepted that, except for emergency or unusual circumstances, common carriers by rail such as Amtrak do not alter their routes, stops and schedules.

Another distinction between the excursion vacation packages provided by AOERC and the rail passenger services provided by Amtrak and other rail passenger carriers is that AOERC does not offer or sell its packages indiscriminately to the general public. AOERC's marketing is designed to attract not all passenger rail users but only those with the time, resources and interest to indulge in such luxury excursions. Among other notable factors, AOERC does not market its services in transportation facilities such as railroad terminals or through railroad providers such as Amtrak. Further, AOERC requires that all customers be able and willing to meet the physical and social requirements of the various tours offered. Children under the age of eight years old are not permitted to participate in AOERC excursions and children between the ages of eight and sixteen must be accompanied by an adult at all times. As for adults, AOERC's policy on "Eligibility" published in its brochures (a selection of which are attached hereto as Exhibit F) states, in full:

We consider this a mildly physical program, involving some walking and stair climbing. Life on the train is relaxed and casual. All members of the trip are

expected to be in good health and enjoy traveling as part of a group. Please advise us of any special medical or dietary conditions.⁶

Finally, on this score, AOERC's restored vintage rail cars are not accessible to the mobility impaired. Potential customers are notified of this in the company's brochure in the following manner:

The American Orient Express was refurbished before the American Disabilities Act [sic]; and therefore, it does not comply with ADA standards. Certain safety regulations affecting the design of the train may cause difficulty for persons with limited mobility. The carriages cannot accommodate wheelchairs or most walkers. The hallways in the sleeping carriages are 23 inches wide, and doorways leading into the cabins are 18 inches wide.

Because AOERC excursions are marketed and sold most often by travel agents, who are well informed about the nature of the service and the type of clientele that can best be served, AOERC has found that directly excluding people from its tours or ejecting people who have enrolled is rarely required. Self-selection based upon the information provided about the tours has been an effective means of limiting the company's clientele to people who have the interests, physical and social attributes, leisure time and means to participate fully in them.

History of the AOERC Coverage Decision

Because of the nature of the Coverage Decision, it is necessary to briefly summarize some of the history of the rail cars used by AOERC in its consists.

⁶ AOERC has on occasion exercised its discretion with respect to passenger eligibility by refusing to sell excursions to ineligible persons and also by requesting that persons who purchased an excursion package leave the tour prior to its conclusion.

On November 14, 1997, twelve vintage cars owned by a Delaware corporation named American Orient Express Equipment Company, which was controlled at the time by a Swiss company called Riesboro Mittlethurgau, were sold to Oregon Rail Corporation ("ORC"). Two months earlier, ORC had purchased from Space Expeditions, Inc. and AOE, Inc., two Washington corporations, the rights to trade names such as American Orient Express Railway Company and AOE, among others, and to telephone numbers, equipment, accounts receivable, leases and other rights and property connected with the operation of excursion tours by vintage rail cars then being operated by Space Expeditions in a joint venture with Riesboro Mittlethurgau.

Eleven of the twelve vintage rail cars that were conveyed to ORC in 1997 had been acquired in 1994 by Riesboro Mittlethurgau. Between 1991 and 1994, those cars remained in storage, unused; the record does not provide clear evidence of their ownership during that period. From August, 1989 until October, 1991 these same eleven cars were owned and operated by a company unrelated to Riesboro Mittlethurgau or to AOERC called American European Express ("AEE"). AEE used some of the cars to operate a service under contract with Amtrak. As explained in the initial coverage decision involving AEE (L-90-38) and in the RRB's decision on redetermination in that case (B.C.D. 93-68), this was a regular route service between Chicago and Washington D.C.; it operated five days a week, twelve months a year on the same schedule as Amtrak trains 29 and 30, to which the vintage cars were attached. This initial service was designed for and marketed to business

travelers. Although the service later changed to include additional intermediate stops and other large cities as destinations, for most of its brief existence AEE's service was characterized by its regularity and its purpose to provide transportation between major urban areas.

The RRB's initial coverage decision as to AEE, issued March 20, 1990, was rendered, as was permitted at the time, by the RRB's Deputy General Counsel (L-90-38). It concluded that AEE was subject to the jurisdiction of the Interstate Commerce Commission ("ICC") pursuant to 49 U.S.C. §§ 10101(23) and 10501(a)(1) (originally enacted as Act of Oct. 17, 1978, Pub. L. No. 95-473, § 1, 92 Stat. 1337, as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, Title I, § 102(a), 109 Stat. 804) because it was a "sleeping car carrier." As noted in L-90-38, under the Railroad Retirement Acts (as those statutes then provided) a sleeping car company was defined as a covered employer under 45 U.S.C. §231(a)(1)(i) (originally enacted as Act of Oct. 16, 1974, Pub. L. No. 93-445, Title I, § 1, 88 Stat. 1305) and 45 U.S.C. §351(b) (originally enacted as Act of June 24, 1938, ch. 690, § 1, 52 Stat. 1094).

Upon AEE's application for a redetermination, the RRB affirmed the initial coverage decision. Among other things, for purposes of determining whether the service provided by AEE made the company subject to ICC jurisdiction, the RRB analyzed the distinction between private and common carriers. As to AEE, the RRB concluded that, by providing a regularly scheduled sleeping car service between Washington, D.C. and Chicago and holding itself out to the public as providing such

service, AEE was a sleeping car carrier subject to ICC jurisdiction. In response to an argument made by AEE, the RRB also emphasized that the term "sleeping car company" remained in the underlying statutes despite the demise of the Pullman Company and even after those statutes had undergone certain unrelated amendments by Congress. This indicated to the RRB a continuing congressional intention to subject sleeping car companies to ICC jurisdiction. Finally, in an acknowledgement of a news report that AEE was considering using locomotives of its own to pull its consists instead of contracting with Amtrak for that railroad service, the RRB stated that such an eventuality could lead to a finding that AEE was a common carrier by rail (rather than a sleeping car carrier).

Even as the RRB was considering AEE's request for reconsideration, AEE ceased its operations in mid-1991, in part due to an accident that damaged some of its vintage rail cars. In a decision issued in August, 1996 (B.C.D. 96-77), the RRB recognized this fact and terminated AEE's status as a covered employer effective October 31, 1991.

As noted earlier, AEE's vintage cars lay unused for a few years and then were owned and used in diverse ways by a series of companies unrelated to AOERC for a number of years.⁷ During that time, Congress enacted the ICC Termination Act of 1995, 49 U.S.C. § 101 et seq., Pub. L. No. 104-88, 109 Stat. 803, which, among other

⁷ Nothing in any of the records before the RRB indicates that anyone ever again used the vintage cars in regularly scheduled service between cities after AEE's demise. As for the two different seasonal or intermittent vacation-oriented and excursion operations that existed under the American Orient Express name from 1994 until 1997 and which used some of the same vintage rail cars as AEE, the RRB never concluded that the companies that operated them were "covered employers," either as "reincarnations" of AEE or as common carriers by rail.

things, deleted all references to sleeping car companies from the ICC Termination Act as well as from the Railroad Retirement Acts and virtually eliminated any STB jurisdiction over passenger rail (see discussion in Sections C and E below). Despite these facts, when the RRB considered in 1999 whether AOERC was a covered employer, it resurrected its earlier coverage decisions involving AEE. In the Coverage Decision, it found AOERC to be a "reincarnation" of AEE and, on that basis, a sleeping car carrier subject to the jurisdiction of the STB and hence a covered employer.⁸ The Coverage Decision did not explain or cite to any factual or legal basis for this finding of "reincarnation."

In its application to the RRB for a redetermination that it is not a covered employer, AOERC set forth, among other things, the facts that demonstrate that there is no legal or operational continuity or connection between AEE and AOERC. Many of those facts have been recounted above. It is to be noted, in addition, that no corporate assets, liabilities, shareholders, officers or employees of AEE accompanied the transfer of its vintage car assets through a series of owners before ending up with AOERC.

In his recommendation to the RRB with respect to AOERC's redetermination application, the RRB Hearing Examiner concluded that, when it obtained some of the vintage cars that were once used by AEE, AOERC did not "acquire the assets of a covered employer" for purposes of the RRB's regulations. The intervening

⁸ To avoid the clear impact of Congress' elimination of "sleeping car carriers" from STB jurisdiction and from the Railroad Retirement Acts, the Coverage Decision interpreted 49 U.S.C. §10501(c)(3)(B) as, in effect, a savings clause that reaches back and recaptures the very jurisdiction over certain types of companies that Congress was ending under the same enactment that terminated such jurisdiction. This circular and erroneous logic is refuted at page 28 below.

ownership and use of the cars by companies that had never been determined by the RRB to be covered employers was determinative on this score. Inasmuch as this finding, if accepted by the RRB, would establish AOERC as a "new employer" not liable for any contributions owed by AEE, the Hearing Examiner found it irrelevant to explore further whether AOERC was a corporate "reincarnation" of AEE.

The Hearing Examiner's report also recommended to the RRB, in disagreement with the RRB's Coverage Decision, that AOERC should be not deemed a covered employer based upon a notion of it being a sleeping car carrier. The Hearing Examiner's recommendation surveyed the history of sleeping car companies, most notably the Pullman Company. He noted that sleeping car companies provided only accommodations and that their customers were required to purchase transportation separately from the rail carrier to which the Pullman Company attached its consists. But for the federal legislation that made sleeping car companies subject to ICC jurisdiction and hence subject to the Railroad Retirement Acts, they would not have met the prevailing definition of common carriers. The Hearing Examiner's recommendation that the RRB reverse its conclusion that AOERC is a sleeping car company is based entirely on his conclusion that AOERC does not only provide accommodations but rather provides common carrier rail transportation as well. In his view, the fact that AOERC makes the arrangements with Amtrak to have its consists hauled rather than

requiring its customers to contract with Amtrak as the common carrier distinguishes AOERC from true sleeping car companies.⁹

ARGUMENT

BECAUSE AOERC DOES NOT OWN OR OPERATE RAILROAD TRACKS OR LOCOMOTIVES AND DOES NOT PROVIDE COMMON CARRIER SERVICE BY RAIL BUT INSTEAD PROVIDES ONLY A SCENIC AND HISTORIC EXCURSION SERVICE IN VINTAGE RAIL CARS, THE BOARD SHOULD DECLARE THAT AOERC IS NOT SUBJECT TO ITS JURISDICTION

The question brought before this Board and the essential facts underlying this petition are relatively straightforward. Under the Railroad Retirement Acts, the term "employer" includes "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of Title 49." 45 U.S.C. § 231(a)(1)(i); 45 U.S.C. § 351(b). It is in order to obtain a definitive answer to the question of whether the STB has jurisdiction over AOERC that this petition has been brought.

AOERC is a seasonal excursion company that provides luxury land cruises, including fine dining, historic tours, lectures and entertainment on refurbished vintage rail cars. It does not hold itself out as a common carrier by rail, it lacks the

⁹ By reaching this result, the Hearing Examiner avoided the need to address the RRB's illogical conclusion that Congress' deletion of "sleeping car carriers" as companies subject to the Board's jurisdiction and covered by the Railroad Retirement Acts was an act of no significance and that such companies continued to be covered employers and subject to the Board's jurisdiction.

means of operating as one and it performs no railroad work or service that would be subject to the STB's jurisdiction. AOERC requests that the Board institute a declaratory order proceeding and determine that AOERC's operation of the excursion business described in this petition does not render it a rail carrier subject to the jurisdiction of the STB.

Although the facts and the law are straightforward, the procedural history of the matter requires that issues be addressed that may seem peripheral. For instance, there is still in effect the determination of the RRB that AOERC is subject to the STB's jurisdiction and is hence a covered employer for purposes of the Railroad Retirement Acts on the ground that it is a sleeping car carrier. Although the RRB's Hearing Examiner has recommended that the RRB reverse this determination, the RRB has not done so. In addition, the Hearing Examiner has recommended a finding to the RRB that AOERC is subject to this Board's jurisdiction by virtue of being a common carrier by rail. Although the RRB has not acted on this recommendation either, it too must be addressed as the issue is central to this petition for a declaratory order.

The balance of this petition shall first address the reasons why the Board should conclude that AOERC is not a common carrier by rail subject to its jurisdiction. Second, this petition shall also demonstrate that there is no other basis upon which to conclude that AOERC is subject to the STB's jurisdiction, including the resemblance some of its service has to sleeping car service.

A. The STB Has the Authority to Issue a Declaratory Order

Pursuant to 5 U.S.C. § 554(e) (2004) and 49 U.S.C. § 721 (2004), the STB has the authority to issue a declaratory order. See, e.g., H & M International Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34277 (decided November 10, 2003). Furthermore, the issue presented is the STB's jurisdiction with respect to a particular type of railroad-related service, a matter that requires the STB's expertise to handle.

It is to be noted that, one way or another, it will be a federal board that resolves the question of whether or not AOERC is subject to this Board's jurisdiction and therefore is an employer covered under the Railroad Retirement Acts. In the absence of a decision on the matter by the Board, the RRB will resume its deliberations and issue a determination. While a decision by the Board as to its own jurisdiction would be entitled to judicial deference (see, e.g., Bhd. of Locomotive Eng'rs v. United States, 101 F.3d 718, 726 (D.C. Cir. 1996) (reviewing court grants deference to the STB's interpretation of its own jurisdiction)), a determination by the RRB as to the STB's jurisdiction might not (see, e.g., Citizens Against Rail-to-Trails v. STB, 267 F.3d 1144, 1150 (D.C. Cir. 2001) (court need not defer to agency that interprets statutes other than its own)). In order to assure that its insight controls with respect to an interpretation of its own statute, and in light of the fact that the RRB has stayed its own coverage proceeding while the Board considers this matter, it is urged that the Board institute a proceeding and issue a decision in this matter.

B. The Scenic and Historic Excursions Provided Seasonally by AOERC Do Not Fit any Definition of Common Carrier by Rail and the Board Should Declare that It Has No Jurisdiction over AOERC

The STB has "exclusive" jurisdiction over transportation by rail carriers. 49 USC § 10501(b) (2004). The term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5) (2004) (emphasis added). As will be shown, AOERC is not a rail carrier.

The statutory definition of railroad is divided into three sections, none of which fits AOERC. The statute, 49 U.S.C. § 10102(6), provides the following definition:

"railroad includes—

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in conjunction with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and
- (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

AOERC does not own or operate any of the equipment listed in subdivision (A). It neither owns nor operates any road or railroad right of way as provided in subdivision (B). Similarly, AOERC does not own or operate any of the facilities or equipment listed in subdivision (C). Because AOERC does not fit the statutory

definition of "railroad," it cannot properly be held by the STB to be a common carrier by rail subject to its jurisdiction.¹⁰

Nor does AOERC fit the definition of a common carrier. Common carriers have traditionally been held to be those persons or entities who hold themselves out to the general public as engaged in the business of transporting persons or property from place to place for compensation. See, e.g., State of Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207, 211-12 (1927); Kelly v. General Elec. Co., 110 F. Supp. 4, 4 (E.D. Pa.), aff'd 204 F.2d 692 (3d Cir. 1953). The U.S. Supreme Court has held that whether a railroad is a common carrier depends upon the character of its service and upon the consequent right of the public to use the railroad's transportation facilities and to "demand service of it" and not upon the mere fact of its existence or the extent of its business. The Tap Line Cases, 234 U.S. 1, 24 (1914); see also Market Transport, Ltd. v. Maudlin, 725 P.2d 914, 921 (Or. 1986) (noting that a common carrier is one that is "obligated" to transport goods generally for anyone); Kelly, 110 F. Supp. at 6 (stating that a common carrier is "regarded in some respects as a public servant.").

Common carriage is thus identified by a core characteristic: the legal obligation imposed on a common carrier, as a public servant, to provide service. Based on well-established federal case law, the "real criterion determinative" of

¹⁰ The statute defines "transportation" as including, inter alia, cars "related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9)(A). An accurate reading of the statute requires that the terms "railroad" and "transportation" be considered in tandem and as serving to define one another. Thus, under 49 U.S.C. § 10102(5), a "rail carrier" is a person providing common carrier service, using cars and other instrumentalities related to the movement of passengers and property ("transportation"), over a road owned by it or operated by it under an agreement ("railroad"). While AOERC's service might meet the statutory definition of "transportation," it does not fit the definition of "railroad," and hence it cannot be defined as a "rail carrier."

whether an entity is a common carrier is the right of the public to use its facilities and to demand service of it. Tap Line Cases, 234 U.S. at 24.¹¹ A common carrier is "a public utility, operated for the accommodation of the public generally, required to give service to all who apply," Mitchell v. New York Life Ins. Co., 75 F.2d 107, 110 (7th Cir. 1934), and to do so "indifferently," id. at 109.¹²

As a public utility, a common carrier operates under a public charter granting special privileges and imposing consequent duties. See, e.g., id. at 110; Indianapolis Traction & Terminal Co. v. Lawson, 143 F. 834, 837 (7th Cir. 1906); Michigan Pub. Util. Comm'n v. Duke, 266 U.S. 570, 576-77 (1925). Some of those special privileges traditionally have been a franchise or monopoly and an exclusive right to use a road or railway; they have sometimes also included power of eminent domain. Mich. Pub. Util. Comm'n, 266 U.S. at 576. The consequent duties generally included a capped rate of return on investment, a regulated fare and service structure, including restrictions on discontinuance of approved routes or service, and an obligation to serve all like-situated users "indifferently." Kuykendall, 275 U.S. at 212; N. Pac. Ry. Co. v. North Dakota, 236 U.S. 585, 595 (1915).

¹¹ For public policy reasons unrelated to matters of federal jurisdiction, courts in many state court liability cases often take a broader view of whether a company is a common carrier because doing so elevates the standard of care owed to its passengers. See, e.g., Hicks v. Scott, 120 P.2d 107, 109 (Cal. App. 1941) (holding that a sleeping car company, "even if not a common carrier," is "required . . . to exercise a high degree of care for the personal safety and comfort of its passengers"). Courts in such cases tend to be less concerned with the public utility and franchise aspects of common carriage, factors critical to AOERC's circumstances in this petition.

¹² "Indifference" in this context does not mean the carrier does not care whom it serves, but rather that access to the service, including the rates to be charged, cannot be structured in such a way as to be discriminatory in its application to similarly situated users. See N. Pac. Ry. Co. v. North Dakota, 236 U.S. 585, 595 (1915); Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1333-36 (11th Cir. 2001).

A comprehensive description of what constitutes a common carrier was provided by the United States Court of Appeals for the Seventh Circuit in Indianapolis Traction, 143 F. at 837:

A public, common carrier of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, and for a reasonable compensation, furnish reasonable accommodations, must continuously operate its line, and submit to reasonable regulation. It has the franchise of taking tolls, . . . and the right of way over all private means of transportation. Owning these public duties, possessing these public franchises, and having the burden of caring for innumerable human lives, it is justly held to the highest degree of care and skill.

AOERC does not meet any of the characteristics of a common carrier as set forth above. AOERC has no "franchise." To the contrary, it depends entirely on Amtrak and the railroad owners of the track it uses for permission to travel over the trackage. Rather than having a "right of way over all private means of transportation," AOERC's schedules are based exclusively on the availability of Amtrak locomotives and crew and railroad trackage, all as determined by Amtrak and the owner of the track in question in their absolute discretion. Furthermore, even though AOERC customers pay a premium for their experience, other Amtrak train movements and common carrier freight needs take priority over AOERC consists.¹³

Nor does AOERC carry "all alike." AOERC markets to a limited segment of the population and declines to serve those who do not meet its requirements,

¹³ The company's relationship with Amtrak and other railroads with respect to rail operations and any competing needs of the common carriers was described by an AOERC official at the RRB hearing as being "the lowest on the totem pole." Thus, AOERC consists can be delayed or re-routed based upon the needs of Amtrak or the rail carriers over whose track AOERC cars are traveling.

regardless of whether such persons desire service. The company is not subject to any regulation that would require it to charge its customers "reasonable compensation" when compared to the rates paid by purchasers of common carrier transportation services such as Amtrak.¹⁴ Likewise, the accommodations provided by AOERC are not "reasonable"; its dining, viewing and entertainment experiences are far beyond the accommodations expected by an average traveler.

AOERC does not "continuously operate its line." In fact, AOERC does not operate any rail line at all. It has no track, no trackage rights, no qualified railroad employees and no locomotives. Amtrak is the rail common carrier that actually operates the rail service that AOERC relies upon. AOERC must even rely upon Amtrak to arrange with freight railroads for the right to use their trackage. While some of AOERC's itineraries have been offered on a repeat basis over its few years of existence, the various excursions operate only between January and November. In its promotional materials and reservation package, AOERC reserves the right to "make alterations to this published itinerary . . . [and] to cancel the tour prior to departure, in which case the entire payment will be refunded without further obligation." AOERC often cancels or alters itineraries. Finally, AOERC does not undertake any of the railroad functions involved in hauling its cars, all of which are reserved to Amtrak.

The other side of the requirement that a common carrier "continuously operate its line" is that the regulator, which in the case of railroads is the STB, can

¹⁴ For instance, in 2004, the least expensive AOERC fare is \$2,690 for an early booking on a Vintage Pullman Car on the Washington, D.C. to New Orleans itinerary. A similar Washington-to-New Orleans fare on common carrier Amtrak, even including deluxe sleeping accommodations, is \$563.

require the common carrier to do so. An illustration of this principle is found in Section 13a of the Interstate Commerce Act (ICA), P.L. 86-625, § 5, 72 Stat. 662 (1958), which required that a passenger rail carrier seeking to discontinue service demonstrate to the ICC that doing so would not have a negative effect "upon the public convenience and necessity" of interstate operations and commerce.¹⁵ S. Ry. Co. v. North Carolina, 376 U.S. 93, 104 (1964). Among the factors to be considered were the population of the territory served, the use made by the public of the service, other available transportation in the area and the general financial condition of the carrier, including losses suffered. Id. at 96-97. Public use of, and reliance upon, the passenger rail service was expected to be a vital consideration in the ICC's grant of approval for discontinuance.

While AOERC advertises its excursions to a limited and defined segment of the population, it does not hold itself out as providing common carriage railroad transportation. Its itineraries are neither designed nor advertised to transport passengers from one place to another. AOERC provides no service that any member of the public may rely upon or demand. While its tours are arranged for specified times and between specific locations, AOERC does not operate a scheduled

¹⁵ Section 13a of the ICA was modified, although not repealed, by the Railway Passenger Service Act of 1970, 49 U.S.C. § 24301 et seq. (2004), and it exists in its present form following the enactment of the ICC Termination Act of 1995 at 49 U.S.C. § 10903 (2004). However, a recent search of the STB website, www.stb.dot.gov/publications/whoswho.htm, under the heading "Eliminated Functions," revealed that under the ICC Termination Act, STB approval is no longer required for the discontinuance of passenger rail lines. This is in keeping with Congress' general relinquishment of jurisdiction by the STB over passenger rail operations, as discussed further in Section E below. Yet it in no way detracts from the argument that, where common carriers are concerned, the public convenience and necessity of the service are primary considerations. For a useful history of Section 13a and its relation to passenger rail operations, see Charles A. Spitulnik and Jamie Palter Rennert, Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property, 26 Trans. L.J. 319 (1999) [hereinafter Spitulnik and Rennert].

transportation service. Customers must arrange their own transportation to and from the start and end points of an AOERC excursion and none of AOERC's trips accommodate, either in intermediate destination points or in price differentials, stops other than the origin and termination points of an excursion.

Certainly no service operated by AOERC is intended to meet the "convenience and necessity" of the traveling public. The service is neither marketed nor purchased as transportation designed to bring passengers from one place to another; it is a luxury vacation. There is no population that is or could reasonably be dependent upon AOERC for transportation. Among other factors, AOERC does not provide scheduled transportation service on a daily or even regular basis between points. The excursion service it does provide is seasonal and subject to change.

AOERC reserves the right to reject passengers on the basis that they are simply "inappropriate" for the excursions or the accommodations. In addition to outright rejection of passage or termination of an individual's trip even after it has begun, AOERC's marketing approach is to narrow its customer pool so as to avoid such incidents. For instance, its preferred source of business is travel agents, who, through familiarity with their customers and AOERC, steer inappropriate passengers away.¹⁶ AOERC also reserves the right to cancel trips and has done so in every year that it has operated the American Orient Express excursions. AOERC

¹⁶ As compared to a private carrier, who "may refuse at will" to carry a passenger "without incurring any liability whatever," Hutchinson on Carriers § 35 (3d ed. 1909), a common carrier may not refuse a passenger willing to pay the fare where it has the room to accommodate him. Indianapolis Traction, 143 F. at 837.

could discontinue its entire service tomorrow, even if it had already planned itineraries and booked passengers, and there would be no public complaint and no right of anyone to bring suit anywhere.

Under 49 U.S.C. §10903(d), the STB has authority to approve (or disapprove) the discontinuance of the operations by a rail carrier "of all rail transportation over any part of its railroad lines." Inasmuch as AOERC does not own any "railroad lines," the STB's jurisdiction would not extend to a decision by AOERC to cease all or any portion of its service. This lack of a public right to demand service or a statutory or regulatory mechanism for requiring the continuation of service is further confirmation that AOERC does not meet the criteria of being a common carrier by rail.

C. The Characteristics that AOERC's Excursion Business Shares with Sleeping Car Service, Express Service and Car Service Supports a Determination that the STB Lacks Jurisdiction over AOERC

1. *Sleeping car companies have been eliminated from the jurisdiction of the STB.*

The RRB's determination, in B.C.D. No. 01-20, that AOERC is subject to the STB's jurisdiction is based upon a conclusion that AOERC is the successor to AEE, "a sleeping car company within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. 231(a)(1)(i)) and section 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. 351(b))." See B.C.D. No. 93-68 at 7. Under the Interstate Commerce Act ("ICA") as it existed prior to 1996, 49 U.S.C. § 10102(23) and § 10501(a)(1) (originally enacted as Act of Oct. 17, 1978, Pub. L.

No. 95-473, § 1, 92 Stat. 1337), a finding that AEE was a sleeping car company would have sufficed to establish the STB's jurisdiction over that company. Since then, however, Congress has eliminated STB jurisdiction over sleeping car companies so that, even if AOERC could be characterized as a sleeping car company, the STB would no longer have jurisdiction over it.¹⁷

In enacting the ICC Termination Act, Congress eliminated sleeping car companies from the jurisdiction of the newly created STB as well as from coverage under the Railroad Retirement Acts. The phrase "sleeping car company" (or "sleeping car carrier") was deleted by Congress from each of the Interstate Commerce Act (49 U.S.C. former § 10501(a)(1)), the Railway Labor Act (45 U.S.C. former §151, First), the Railroad Retirement Act (45 U.S.C. former §231(a)(1)(i)), the Railroad Unemployment Insurance Act (45 U.S.C. former §351(a)) and the Railroad Retirement Tax Act (26 U.S.C. former § 3231(a)). This across-the-board elimination by Congress of "sleeping car company" from every relevant railroad-related statute in which the phrase had previously appeared can only mean that Congress intended that such companies were not to be subject to the jurisdiction of the STB or to be deemed "covered employers" under the Railroad Retirement Acts. So obvious an expression of legislative will must be given effect. As one court put it, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Lifschultz Fast Freight Corp. v. De Medici, 63 F.3d

¹⁷ The Coverage Decision's conclusion that AOERC is a "reincarnation" of AEE has been shown to be factually and legally erroneous. There is no continuity, either factually or legally, between the ownership or service once operated by AEE and the present service as owned and operated by AOERC. The RRB Hearing Examiner also accepted the conclusion that AOERC and its service is not a successor of AEE under the Railroad Retirement Acts.

621, 628 (7th Cir. 1995). Thus, even if AOERC could properly be characterized as a sleeping car company, the STB would lack jurisdiction over it.

The Coverage Decision reached the legal conclusion that AOERC is subject to STB jurisdiction as a sleeping car carrier by misinterpreting or misapplying 49 U.S.C. § 10501(c)(3)(B) (2004). That section provides:

The Board [STB] has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local government authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

The Coverage Decision concluded that, even though Congress specifically ended all federal jurisdiction over sleeping car companies, AOERC should be deemed a covered employer because it "would have been covered under the definition of 'employer' prior to the amendment of that definition by P.L.104-88."

A key purpose of the ICC Termination Act was to reduce federal regulatory control over the rail industry, and to virtually eliminate regulation of the passenger rail industry (see discussion in section D, below). There was some concern in Congress, however, that covered employers and employees who had already contributed to and expected to be able to receive the benefits of the Railroad

Retirement Acts not be cut off by virtue of deregulation. This concern is what led to the second sentence of the above-quoted section.¹⁸

Representative Bud Shuster, one of the House sponsors of the ICC Termination Act, asserted in the debate leading to its enactment that "nothing in the bill is intended to change in any way the current coverage of the Railway Labor Act and the Railroad Retirement and Unemployment Act" (emphasis added). 141 Cong. Rec. H 12265 (daily ed. Nov. 14, 1995) (statement of Rep. Shuster). He further stated: "We are not touching labor protection as it pertains to the big railroads. The labor protection that is in place stays in place" (emphasis added). Id. at 12260. The point, in other words, was to make certain that employers and employees who were already participants in the benefits programs created by the Railroad Retirement Acts would not be left without those benefits after deregulation. It was surely not the intention of Congress, which purposefully deleted all federal regulatory control over sleeping car companies in every applicable law, to permit such jurisdiction to be asserted under 49 U.S.C. §10501(c)(3)(B) over companies that did not even exist when that statute was passed. Indeed, that very section of the ICC Termination Act emphasizes that its limited purpose was solely to prevent the unintended loss of benefits by already

¹⁸ Given its context and other factors, we believe that the second sentence of 49 U.S.C. § 10501(c)(3)(B) is intended to apply only to covered *governmental* employers and employees. In any event, the sole purpose of the second sentence of that section is to extend coverage under the Railroad Retirement Acts to certain previously covered employers and employees. The sentence clearly does not create STB jurisdiction over any entity. It is therefore unnecessary to present our argument at length as to why AOERC is also excluded from the reach of this section on the grounds that it is not a governmental entity.

covered employees. It has nothing to do with the establishment or extension of the STB's jurisdiction over rail carriers or any other entities.¹⁹

The plain meaning of a statute should be conclusive, except where the terms are ambiguous or the literal application of the statute would be "demonstrably at odds with the intention of its drafters." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). Here, elimination of federal jurisdiction over sleeping car companies was the irrefutable intent of Congress. Nothing in the applicable statutes creates an exception that would warrant the exercise by STB of jurisdiction over AOERC.

2. *AOERC shares characteristics of sleeping car companies, express companies and car rental companies, which are not considered to be common carriers.*

There are analogs between AOERC's service and the service provided by sleeping car companies, as well as by express companies and car rental companies. These are useful to explore briefly because they demonstrate from a different perspective why AOERC does not fall within the STB's jurisdiction. Beginning with

¹⁹ In B.C.D. No. 96-77, in which the Board found that AEE had ceased to operate and was no longer a covered employer, it noted that AEE had "never filed any annual reports of service and compensation with the Board." This can only mean that there are no former AEE employees who were members of and contributors to the Railroad Retirement System. It would not, therefore, serve the legislative purpose of guarding against "contracting" the coverage of the Acts to extend coverage to AOERC since there are no previously covered employees to protect. Furthermore, at the time the ICC Termination Act was enacted in 1995, AEE had ceased to operate as a sleeping car company and AOERC, which was created in 1999, did not yet exist. Since in 1995 there was no "sleeping car company" that was a "covered employer," a holding that under the statute AOERC could nevertheless be deemed a covered employer under the Railroad Retirement Acts would improperly "expand . . . coverage" under the Railroad Retirement Acts to a company that had not previously existed. There is simply no proper way to interpret the statute in this manner.

sleeping car companies, Congress and the courts have long recognized that, while they traditionally provided sleeping and dining accommodations for passengers, they were not themselves common carriers because they did not provide transportation. Thus, in describing sleeping car service, the Sixth Circuit Court of Appeals in Calhoun v. Pullman Co., 159 F. 387, 389 (6th Cir. 1908), noted that passengers contracted with the railroad for transportation and made a separate contract with the sleeping car company for the provision of sleeping accommodations and amenities. Sleeping car companies were subject to Interstate Commerce Commission jurisdiction not as common carriers but only because they were specifically written into the Interstate Commerce Act by Congress. See, e.g., Pullman Co. v. Linke, 203 F. 1017, 1019 (S.D. Ohio 1913).

Like the Pullman cars during the era of sleeping car carriers, the passenger cars owned and staffed by AOERC cannot transport people unless something transports them. All railroad movement of AOERC passenger cars is dependent upon the availability of the locomotives and rail lines as provided and negotiated for by Amtrak. AOERC's itineraries and routes are created and are subject to change or cancellation entirely at the discretion of Amtrak. Because AOERC does not control any aspect of the motive power, signals, switches or other railroad facilities involved in having its rail cars hauled between places, and because it does not employ any person qualified to do so, it is not a provider of "railroad transportation" pursuant to 45 U.S.C. § 10102(6)(B). It therefore has those characteristics of a sleeping car company that would exclude it from being a common carrier (absent a

statutory provision specifically including it) and lacks those characteristics that would place it in that category.

The operations of AOERC are also analogous to those of an express company, which is not a common carrier according to well-established law.²⁰ An express company does not operate a railroad, exercises no control over the actual movement of its cars, and merely ships the goods of its customers. Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187-88 (1920). As stated by the Supreme Court in United States v. American Railway Express Co., 265 U.S. 425, 432 (1924), "[t]he natural meaning of 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad" (emphasis added). In effect, AOERC turns its vintage cars and customers over to Amtrak for "shipment" because it has no control whatsoever over the transportation aspect of the rail journey.

Another similarity between AOERC and express companies is that each has an identity distinct from the common carrier rail operator that serves it. The railroad (in AOERC's case, Amtrak) provides the motive power, the train operations and the track rights; the express company, like AOERC, uses and pays for these railroad transportation necessities. Also, like the express company in Wells Fargo, 254 U.S. at 178, AOERC in its contract with Amtrak assumes all risk of damage to

²⁰ Prior to the enactment of the ICC Termination Act, express companies were subject to federal jurisdiction pursuant to the same statutory provisions under which sleeping car companies were subject to such jurisdiction. 49 U.S.C. § 10501(a)(1) (as originally enacted, Pub. L. No. 95-473, 93 Stat. 1337). When Congress eliminated federal jurisdiction over sleeping car companies in the ICC Termination Act, it simultaneously and just as thoroughly eliminated federal jurisdiction over express companies.

its property and of injury to its employees, and indemnifies Amtrak from claims involving its equipment and employees.

This emphasis on the separateness of the operator from the car provider is reinforced by the principles enunciated in cases involving rail car rentals. For instance, in Edwards v. Pacific Fruit Express Co., 390 U.S. 538, 542-43 (1968), the Court held that a company that provided and serviced insulated railroad cars for transporting perishable foods was not a common carrier by rail. The Court noted that, despite the fact that the car rental company "maintains and takes care of railroad cars" and "controls their eventual destination," these are "activities and facilities which, while used in conjunction with railroads and closely related to railroading, are not yet railroading itself." Id. at 540. The Supreme Court reiterated a core principle by noting that what makes an entity a common carrier by railroad is the fact that it "operates" the railroad. Id.

Car rental companies do not operate the rails over which their cars travel, nor do they control the movement of their cars. In United States ex rel. Chicago, New York & Boston Refrigerator Co. v. ICC, 265 U.S. 292, 294 (1924), the Court held that the Chicago, New York & Boston Refrigerator Car Co. (the "Car Company") was not a common carrier under the Interstate Commerce Act where it owned rail cars which it leased under contract for other railroad companies to pull. Even though the Car Company exercised supervision over the transportation of the rail cars, it did not otherwise control or own any railroad property or facilities. Furthermore, its refrigerator cars "were under the control of the railroad

companies" (although the car rental company was entitled to direct the cars' "distribution" and exercised "a degree of supervision" over the items being shipped in their cars). Id.

The same can be said of AOERC. Comparable to the Car Company in the above-cited case, it negotiates with Amtrak for the provision of the itineraries it wishes to offer its customers. Similarly, too, its staff supervises the hospitality aspects of the tours provided to its customers, the inhabitants of the vintage cars. However, the itineraries and their end points must first be approved by Amtrak and other affected rail carriers. Further, only Amtrak and its railroad personnel control train movements and handle railroad safety matters, including the inspection of the vintage cars.

In Chicago, New York & Boston Refrigerator Co., the Supreme Court held that the Car Company was "not a carrier by railroad, or, indeed, a common carrier at all, within the ordinary acceptance of the words." 265 U.S. at 296. The Court added that if "the Car Company is a carrier by railroad, it would seem to follow that sleeping car companies and express companies are likewise included within the words. Evidently, however, Congress did not think so. " Id. See also Taylor v. New York Cent. Ry. Co., 62 N.E.2d 777, 780 (1945) (holding that the Pullman Company was not a common carrier by railroad under the Interstate Commerce Act).

AOERC shares many of the characteristics that have led courts repeatedly to hold that sleeping car companies, express companies and car rental companies are not common carriers by rail. Like those entities, AOERC lacks all the

characteristics that are uniformly applied by courts to determine whether a provider of railroad-related services is a common carrier by rail. Under any theory, therefore, the Board should conclude that AOERC is not subject to its jurisdiction.

D. The Characteristics that AOERC's Excursion Business Shares With Private Carriage Emphasizes Its Distinction from Common Carriage and Hence the STB's Lack of Jurisdiction

AOERC, as a tourist excursion company, need not be either a common carrier or a private carrier. However, it is instructive to note the many significant characteristics that AOERC shares with private carriers as opposed to common carriers.

The requirements of private carriage include (1) the making of individualized contracts (including individualized negotiations) and (2) a limited number of contracts. AOERC offers a number of packages with quoted fares for each itinerary based on the nature of the accommodation requested, although some individual negotiation can take place. For instance, AOERC offers "early booking" fares and it will accommodate up to three passengers in a Parlor Suite for rates available "on request." In addition, AOERC customers can choose optional outside excursions, for which AOERC will make reservations for an additional fee. AOERC also offers to make separate travel arrangements at the request of its customers before or after the excursion with commercial airlines or Amtrak or at hotels. AOERC has also provided charters to organizations such as Suburu and Peter Voll Associates, which are subject to particular negotiations.

Another hallmark of private carriage is a limited number of customers. AOERC's client base is quite small, with no more than 100 passengers per excursion and fewer than 3,000 per year. By comparison, Amtrak served 24 million rail passengers during 2003 at a rate of 66,000 each day. There can be no question as to the limited and individual nature of the excursion service provided by AOERC.

Terminal Taxicab Co. v. Kutz, 241 U.S. 252 (1916), offers a useful commentary on the distinction between common and private carriers. The Court held that a taxicab company that had exclusive contracts with local hotels and the local railroad terminal was a common carrier and had violated its "public duty" when it arbitrarily refused to carry a guest upon demand.²¹ Later in the opinion, however, the Court noted that there was a separate component of the same taxicab business wherein automobiles were furnished "on orders." With respect to this aspect of its service, the Court noted that the taxicab company "asserts the right to refuse the service" even though it "advertises extensively" and presumably "accepts any seemingly solvent customer."

Still, the bargains are individual, and however much they may tend towards uniformity in price probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the Station and hotels. There is no contract with a third person to serve the public generally. . . .

. . . the Court is of opinion [sic] that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that

²¹ The taxi service in the Terminal Taxicab case that involved common carriage included an "exclusive" arrangement. This is consistent with the chief characteristic of common carriage, which is that, in return for an exclusive franchise or monopoly, the common carrier has a legal obligation to provide service to the public. This clearly distinguishes Terminal Taxicab from AOERC's situation.

an invitation to the public to buy does not necessarily entail an obligation to sell.

241 U.S. at 255-56.

AOERC is not like a taxicab service provided pursuant to an exclusive arrangement. It is not a scheduled rail carrier operating under a franchise or license that carries a concomitant duty to serve the public convenience and necessity. While it has a number of features characteristic of private carriage, it has none of the critical components of a common carrier.

E. The Minimal Jurisdiction Granted to the STB by Congress Over Passenger Rail Does Not Extend to an Operation like AOERC

As part of its deregulation of the nation's railroad industry, in the ICC Termination Act Congress established the STB, gave it limited regulatory authority over freight railroads and minor aspects of Amtrak and commuter railroad services, and otherwise ended all federal regulation of intercity rail. As a consequence, even if there was a basis for concluding that AOERC provides interstate common carriage by rail, it would still not be subject to STB jurisdiction.

By 1970, there was an imminent risk that virtually all intercity passenger rail would cease to operate in the United States. In the previous 50 years, the number of passenger trains in the United States had plummeted from over 20,000 to 500 and those that remained were diminishing quickly. H.R. Rep. No. 91-1580, at 4736 (1970) [hereinafter RPSA House Report]. Congress enacted the Rail Passenger Service Act of 1970, P.L. 91-518, codified in its present form at 49 U.S.C.

§ 24101 et seq. (2004) [hereinafter RPSA], precisely to preserve some semblance of a once vibrant and extensive passenger rail network. See RPSA House Report at 4735. As stated in the House Report, the nation was "faced with the immediate threat of complete curtailment of rail passenger service." Id. at 4736.

The purpose of the RPSA was "to prevent the complete abandonment of intercity rail passenger service and preserve a minimum of such service along specific corridors." Id. at 4735. To do so, Amtrak was created to take over and operate intercity rail passenger service in the United States. 49 U.S.C. § 24101. The RPSA gave private railroads the opportunity to be relieved of their intercity rail common carrier obligations without the need to make a discontinuance application to the ICC pursuant to ICA § 13a. RPSA House Report at 4738; see also Spitulnik and Rennert, pp. 323-24. Instead, they could contract with Amtrak to provide, effective March 1, 1971, the intercity passenger rail service that had been their common carrier obligation. RPSA House Report at 4743-44. The law created an incentive for railroads by establishing a five-year moratorium on discontinuance proceedings. Id. at 4745. The message, in effect, was get out of the passenger business now or be burdened with your common carrier obligation for five more years. Every railroad that was still providing intercity passenger rail at that time took advantage of this offer from Congress, with the exception of the Southern Railway Company. See Spitulnik and Rennert, p. 324. That company eventually succumbed; it ran its last intercity passenger train in 1978. Id.

Thus it was that, when the ICC Termination Act was enacted in 1995 and the STB was created, the only intercity passenger rail carrier in the United States was Amtrak. Except for narrow purposes only tangentially related to common carrier regulation, the STB has no jurisdiction over Amtrak. See 49 U.S.C. §24301(c). In particular, the STB does not regulate the establishment or discontinuance by Amtrak of routes or service or the rates charged by Amtrak for its service. Congress has even provided that Amtrak does not fall within the definition of rail carrier under the ICC Termination Act but, instead, is defined only as a "railroad carrier" under the Federal Railroad Safety Authorization Act of 1994, P.L. 103-440, 108 Stat. 4619 (codified at 49 U.S.C. § 20101 (2004)). See 49 U.S.C. § 24301(a)(1).

Enactment of the ICC Termination Act was the culmination of a 25-year effort by Congress, begun with the RPSA in 1970, to deregulate the freight and passenger rail industries. The court in Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1337-39 (11th Cir. 2001), expressed the view that, by eliminating the shared federal and state economic regulation of rail carriage that had pre-dated the ICC Termination Act, Congress intended to both pre-empt such regulation at the state level while reducing its scope at the federal level. With specific respect to STB's jurisdiction over intercity passenger rail, the Conference Report issued in connection with enactment of the ICC Termination Act specifically stated, among other things, that the purpose of 49 U.S.C. § 10501 was to change "the statement of agency jurisdiction to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation." H.R. Conf. Rep. No. 104-422, at 166-67 (1995).

The point here is not to argue that Congress eliminated all jurisdiction over interstate passenger rail transportation. It is to be acknowledged that the definition of transportation set forth in the ICC Termination Act at 49 U.S.C. § 10102(9) includes the phrase "movement of passengers or property." However, the limited nature and purpose of the jurisdiction over passenger rail left to the STB supports the conclusion that jurisdiction over a service such as that provided by AOERC was not intended by Congress.

The RPSA, and later the ICC Termination Act, differentiated between intercity passenger rail service and regional or commuter passenger rail service. The latter was left to the control of the states to operate either directly or indirectly through a contract with Amtrak or other railroad. See, e.g., Spitulnik and Rennert, pp. 324-36. Intercity rail was to be operated by Amtrak. 49 U.S.C. § 24301. Based on a concern that commuter rail authorities might lack access to critical trackage or terminals in developing or operating their passenger services, Congress granted the STB the limited jurisdiction to adjudicate disputes between such authorities and common carrier railroads over such access. 49 U.S.C. § 11102 (2004). To the extent any such commuter railroad had been a rail carrier prior to the enactment of the STB, it could apply to the STB for an order permitting access to a regulated common carriers terminal facilities or the construction of a switch for access to a line. 49 U.S.C. §§ 10501(c)(3)(B), 11102, 11103; see also Spitulnik and Rennert, pp. 328-29.

This is the only jurisdiction over passenger rail granted to the STB by Congress. The inclusion of the word "passenger" in the ICC Termination Act's definition of transportation only serves this limited function. It does not override the clear congressional intent to relinquish federal regulatory jurisdiction over intercity passenger rail transportation in the United States.

A complete review of the ICC Termination Act and the regulations subsequently adopted by the STB to implement it provides final confirmation that congressional intent was to remove all jurisdiction over intercity passenger rail transportation. While a section-by-section review of the statute would be excessive for purposes of this Petition, it is enough to note that every provision of the statute devoted to rail carriers is concerned exclusively with freight railroads. The statutory provisions address, among other things, standards for the establishment of rates, classifications, cost adjustments, interchange of traffic, services for shippers, demurrage charges, procedures regarding abandonment and discontinuance, railroad accounting and reporting, and many other similar topics. Not a single one of these applies to passenger railroads. Of equal significance, none of the regulations promulgated by the STB concern the regulation of intercity passenger rail.²²

²² In 1997, as part of an effort to eliminate obsolete regulations, the STB deleted 49 C.F.R. § 1136, a regulation designed to regulate fares charged by passenger carriers. In eliminating it, the STB stated that "[e]ven as to rail passenger transportation that might not qualify" as a "local government authority" (over which STB jurisdiction was eliminated pursuant to 49 U.S.C. § 10501(c)(2)), "our regulatory authority is quite limited. The vast bulk, if not all of such transportation, is currently provided by Amtrak." Removal of Obsolete Regulations Concerning Rail Passenger Fare Increases, STB Ex Parte No. 624 (June 18, 1997).

There is no longer a single passenger railroad in the United States that is subject to the jurisdiction of the STB. The only intercity passenger railroad, Amtrak, is not subject to STB's general jurisdiction. Similarly, with very limited statutory exceptions, intrastate and regional commuter railroads are also not subject to STB jurisdiction. It would be truly anomalous as well as unsupportable under the statute for the STB to conclude that AOERC, an excursion company that does not own or operate any locomotive, track or other railroad facility and that does not provide common carrier transportation, is the only "passenger railroad" subject to STB jurisdiction.

CONCLUSION

AOERC provides the equivalent of a cruise on land: leisurely and expensive excursions in luxurious restored vintage rail cars. It has none of the characteristics, provides none of the services and has none of the obligations of a common carrier by rail subject to the jurisdiction of the STB. While it has characteristics reminiscent of sleeping car service, Congress has eliminated sleeping car companies from STB's jurisdiction. Finally, whatever vestigial jurisdiction continues to reside in the STB over interstate passenger rail does not extend to a service such as that provided by AOERC.

Under all the circumstances, it is respectfully requested that the STB commence a declaratory proceeding and issue a determination that AOERC is not a common carrier by rail subject to STB jurisdiction.

Respectfully submitted,



ROBERT BERGEN
MICHAEL J. CAVANAUGH
NANCY K. LUCAS
Holland & Knight LLP
195 Broadway
New York, New York 10007
(212) 513-3200

Attorneys for
American Orient Express Railway
Company LLC

Exhibit A

REQUEST FOR EMPLOYER STATUS

The Audit and Compliance Division of the Bureau of Fiscal Operations will complete Part I and forward request to the Bureau of Law. The Deputy General Counsel will complete Part II, leaving items blank if information is not applicable or available.

Notice No.

01-22

BA No.

6703

Part I

NAME AND ADDRESS OF
COMPANY/ORGANIZATION/ASSOCIATION

AMERICAN ORIENT EXPRESS
% OREGON RAIL HOLDINGS LLC
830 NW 19TH AVENUE
PORTLAND, OR 97209-1402

NAME AND ADDRESS OF CEO/CONTACT OFFICIAL

MS. ELIZABETH A. SCHELLBERG
CORPORATE CONTROLLER

NUMBER AND LOCATION OF EMPLOYEES

DETAIL

COVERED EMPLOYER UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS EFFECTIVE JANUARY 01, 1995.

REFERENCE

00-CO-0056

REQUESTED BY

DATE

Audit & Compliance Division FEBRUARY 05, 2001

Part II

OPINION NO.

B.C.D. 01-20

OPINION DATE

February 9, 2001

PERIODS DURING WHICH SERVICE IS HELD CREDITABLE

EMPLOYER COVERED AS:

Operating Company:

Line Haul Railroad

- ☐ Electric Railroad
- ☐ Switching & Terminal Company
- ☐ Lessor Company
- ☐ Railroad Association
- ☐ Labor Organization
- ☐ Affiliate

X Other: SLEEPING-CAR

FROM

JANUARY 01, 1995

TO

DATE

CORPORATE SUCCESSOR TO

ASSUMES OBLIGATION OF PREDECESSOR

☐ YES

☐ NO

CURRENT EMPLOYER FROM WHICH REPORTS SHALL BE OBTAINED

NOT A COVERED EMPLOYER

EMPLOYER COVERAGE TERMINATED

☐ EMPLOYEES ATTRIBUTED TO ANOTHER ENTITY

DETAILS OF SEGREGATION (IF APPLICABLE)

REMARKS: SEE- EMPLOYER STATUS DETERMINATION FOR FURTHER INFORMATION CONCERNING THIS COMPANY.

APPROVED BY

DATE

Debra Ezyrski FEB 09 2001

FEB 09 2001

EMPLOYER STATUS DETERMINATION
American Orient Express Railway Company (AOE)

This is a determination of the Railroad Retirement Board concerning the status of American Orient Express Railway Company (AOE) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

BACKGROUND

In Legal Opinion L-90-38, the Board's Deputy General Counsel found American European Express (AEE) to be a sleeping car company within the definition of "employer" under the RRA and RUIA effective November 15, 1989, the date that it commenced the transportation of passengers in interstate commerce.

In B. C. D. No. 93-68, the Board issued a decision on reconsideration which affirmed the decision of the Board's Deputy General Counsel in Legal Opinion L-90-38 that AEE became a sleeping car company within the definition of "employer" under the RRA and the RUIA effective November 15, 1989. AEE never filed any annual reports of service and compensation with the Board. Information obtained by the Board's Audit and Compliance Section indicates that AEE ceased operations sometime in 1991 after a train derailment on June 21, 1991, which wiped out nearly half of its eleven car-fleet. There was no evidence that AEE operated after October 25, 1991.

In B. C. D. No. 96-77, the Board found that American European Express, Inc. had ceased to be an employer under the Acts with the close of business on October 31, 1991, the last day of the last month during which evidence indicated that it had operated.

DISCUSSION OF AOE

Recent information obtained from a coverage investigation by the Board's Audit and Compliance Section indicates that AOE is a reincarnation of AEE which is operating with the cars that were rebuilt following AEE's derailment in 1991.

Mr. Michael S. McAfee provided information regarding AOE. According to Mr. McAfee, AOE "in no way contracts for the use of track, we pay for the movement of railcars." According to Mr. McAfee, AOE "do[es] not lease or operate any locomotives in the United States." Mr. McAfee stated that "...movement of passenger cars on freight railroads is performed either by Amtrak or individually in accordance with the

American Orient Express Railway Company (AOE)

freight railroad's passenger car movement orders and utilizing standard bill of lading. Movement of our cars in freight service is performed exactly the way any other private car is moved, such as movements for the American Association of Private Rail Car Owners (AAPRCO)."

A thirty-page color brochure describes AOE's service for calendar year 2000 as "Deluxe Rail Journeys on North America's Only Private Luxury Train." The brochure indicates that AOE provides luxury train travel, with club and observation cars, as well as sleeping cars, for a variety of itineraries. For example, the "Millennium Journey" lasts 7 days and 6 nights, going from Washington, D.C. to New Orleans, Louisiana, with stops at Charleston, South Carolina, Savannah, Georgia and St. Augustine, Florida. The "Great Transcontinental Rail Journey" takes 10 days and 9 nights, going from Washington, D.C. and traveling to Los Angeles, California, via Charleston, South Carolina, Savannah, Georgia, New Orleans, Louisiana, San Antonio, Texas, Santa Fe, New Mexico, and Grand Canyon National Park, Arizona. The "Pacific Coast Explorer" goes from Los Angeles, California to Seattle, Washington, with several intermediate stops during the 7 day/6 night itinerary.

Both the RRA and the RUIA define an employer under the Acts to include "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code" (section 1(a)(1)(i) of the RRA and sections 1(a) and 1(b) of the RUIA). The jurisdictional statute referenced in the definition of a carrier employer gives to the Surface Transportation Board jurisdiction over transportation by railroad in the United States between a place in a State and a place in the same or another State as part of the interstate rail network. (49 U.S.C. §10501(a)(1)(A) and §10501(a)(2)(A)). The term "rail carrier" is defined by the statute to mean "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." (49 U.S.C. §10102(5)). "Transportation" is defined to include "a locomotive, car, vehicle . . . or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." (49 U.S.C. §10102(9)(A)). Despite having been requested to do so, AOE has not furnished any documentation of authorization by the Surface Transportation Board (STB) for its operations; nor has any such authorization been located. However, the lack of specific STB authorization does not necessarily mean that AOE is not, in fact, subject to STB jurisdiction.

We noted in the beginning of our discussion that the information obtained from the coverage investigation indicates that AOE is a reincarnation of American European Express (AEE) which is operating with cars that were rebuilt following AEE's derailment in 1991. Our decision on reconsideration of the employer status of AEE affirmed the

American Orient Express Railway Company (AOE)

initial decision that AEE was a "sleeping car company" within the definition of "employer" under the RRA and the RUIA. Prior to January 1, 1996, section 1 of the Railroad Retirement Act defined the term "employer" to include:

(l) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49.

That definition was amended by the ICC Termination Act of 1995 (section 323, Public Law (P.L.) 104-88) to delete the references to express company and sleeping car company. However, P.L. 104-88 also contained the following provision:

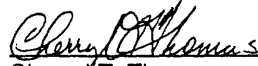
The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. (49 U.S.C. §10501(c)(3)(B)).

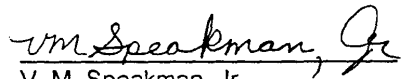
Thus, the fact that the term "sleeping car company" no longer appears in the definition of a carrier employer does not affect the outcome of this case. If AOE would have been covered under the definition of "employer" prior to the amendment of that definition by P.L. 104-88, then it is also covered under the current definition of a carrier employer. The record shows that AOE provides luxury train travel, with club and observation cars, as well as sleeping cars, for itineraries which cross state lines. Despite the fact that AOE's rail cars are not pulled by AOE locomotives, but are instead moved by Amtrak or freight railroad locomotives, AOE falls within the definition of a "sleeping car carrier," since the record demonstrates that it is an entity providing sleeping car transportation for compensation. As such, AOE would clearly have fallen within the definition of a rail carrier employer prior to the amendment of that definition by P.L. 104-88. Since P.L. 104-88 also provided that its enactment would not change coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts, AOE also falls within the definition of a rail carrier employer under the current definition of a rail carrier under section 1(a)(1)(i) of the Railroad Retirement Act and the corresponding provision of the Railroad Unemployment Insurance Act. Cf. B.C.D. No. 93-68, Decision on Reconsideration of the Status of American European Express.

For the reasons discussed above, the Board finds that AOE is a rail carrier employer within the definition of "employer" under the RRA and the RUIA. According to its 1999 brochure, AOE has operated since its 1995 season. The Board therefore finds that

American Orient Express Railway Company (AOE)

American Orient Express Railway Company became an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1995.


Cherry T. Thomas


V. M. Speakman, Jr.

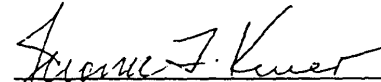

Jerome F. Kever

Exhibit B



REQUEST FOR EMPLOYER STATUS

THE BUREAU OF COMPENSATION AND CERTIFICATION WILL COMPLETE PART I AND FORWARD REQUEST TO THE BUREAU OF LAW. THE DEPUTY GENERAL COUNSEL WILL COMPLETE PART II, LEAVING ITEMS BLANK IF INFORMATION IS NOT APPLICABLE OR AVAILABLE, AND RETURN REQUEST FOR EMPLOYER STATUS TO THE BUREAU OF COMPENSATION AND CERTIFICATION. PART III IS RESERVED FOR DISTRIBUTEES SPECIAL INSTRUCTIONS TO THE BUREAU OF COMPENSATION AND CERTIFICATION.

NOTICE NO.
90-18

BA NO.
6308

PART I

DETAIL

Please advise whether the information developed for American European Express, Inc., is sufficient to render a decision whether this is a covered employer.

NAME AND ADDRESS OF COMPANY/ORGANIZATION/ASSOCIATION

AMERICAN EUROPEAN EXPRESS, INC.
c/o PORTES, SHARP, HERBST, KRAVETS &
FOX, LTD.,
333 WEST WACKER DRIVE, SUITE 500
CHICAGO, IL 60606

NAME AND ADDRESS OF CEO/CONTACT OFFICIAL

ROBERT E. STIGGER, ATTORNEY

NUMBER AND LOCATION OF EMPLOYEES

REFERENCE

REQUESTED BY

Sophia Scott
Sophia Scott, Chief, Accounting and Coverage

DATE

PART II

OPINION NO.

L-90-38

OPINION DATE

March 20, 1990

PERIODS DURING WHICH SERVICE IS HELD CREDITABLE

FROM

November 15, 1989

TO

date

EMPLOYER COVERED AS: (CHECK ONE)

OPERATING
COMPANY

LINE HAUL RAILROAD

X

ELECTRIC RAILWAY

SWITCHING & TERMINAL COMPANY

CORPORATE SUCCESSOR TO

LESSOR COMPANY

CAR LOAN COMPANY

RAILROAD ASSOCIATION

LABOR ORGANIZATION

EMPLOYING UNIT

EXPRESS COMPANY

AFFILIATE

EMPLOYER NOT COVERED

EMPLOYER COVERAGE TERMINATED

DETAILS OF SEGREGATION, IF APPLICABLE

ASSUMES PBLIGATION OF PREDECESSOR

YES

NO

CURRENT EMPLOYER FROM WHICH REPORTS SHALL BE OBTAINED

ITEM IN EMPLOYER STATUS LIST MODIFIED BY THIS RULING

REMARKS

APPROVED BY

Steve
Deputy General Counsel

DATE

03/20/90

PART III

OTHER BUREAUS MAY ENTER ANY INFORMATION OR SPECIAL INSTRUCTIONS WHICH ARE ESSENTIAL TO PROPER INSTRUCTIONS OF THIS EMPLOYER

UNITED STATES GOVERNMENT

Memorandum

RAILROAD RETIREMENT BOARD

L-90-38

MAR 20 1990

TO : Director of Research and Employment Accounts

FROM : Deputy General Counsel

SUBJECT: American European Express, Inc.
Employer Status

This is in reference to a Form G-215 request of January 25, 1990, concerning the employer status of American European Express, Inc. (AEE). AEE has not been held to be an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA).

In a letter dated January 8, 1990, to Mr. George Traynere, former Director of Compensation and Certification, Mr. Robert E. Stigger, of the law firm of Portes, Sharp, Herbst, Kravets & Fox, Ltd., stated that "AEE is a privately owned concern which owns and operates approximately ten private railcars providing a luxury travel experience to AEE's customers." Mr. Stigger stated that Amtrak pulls these cars for AEE in five-car sets, attached to Amtrak's regularly scheduled trains between Chicago, Illinois and Washington, D.C. Mr. Stigger further stated that the operations of Amtrak and AEE are completely separate and that the only relationship between Amtrak and AEE is that Amtrak provides, for a fee, motive power and routine running repairs and maintenance of the railcars. Mr. Stigger indicated that AEE has its own marketing and serving staff and does not provide any services to Amtrak passengers. Amtrak passengers are not permitted to enter AEE's private railcars, and AEE's customers are restricted to AEE's railcars and do not have access to Amtrak's facilities. Mr. Stigger stated that AEE began operations in early November 1989. He also stated that "AEE is not, and is not owned by, a 'railroad company,' 'express company,' or 'sleeping car company,' nor is 50 percent or more of the stock of AEE owned by one or more of such companies." Mr. Stigger also stated that neither AEE nor its stock is owned by another company which is owned by or which itself owns a railroad company. Mr. Stigger stated that none of AEE's directors or principal officers are directors, principal officers, or employees of any railroad company.

By a letter dated October 19, 1989, to Mr. Traynere, Mr. Robert L. Lewis, III, Controller of Amtrak, provided a copy of the Amtrak-AEE Operating and Maintenance Agreement, as amended

Director of Research and Employment Accounts

through October 10, 1989. Under the original agreement, dated August 28, 1989, Amtrak agrees to move a minimum of 3 and a maximum of 5 railcars owned by AEE between Chicago, Illinois and Washington, D.C. on a five-day per week scheduled basis during 12 months of the year, commencing on a mutually agreed-upon date between October 15, 1989, and November 15, 1989, and terminating 5 years thereafter. The agreement provides that the railcars, which shall be occupied only by AEE's passengers and crews, shall be attached to Amtrak's regularly scheduled trains 29 and 30, the Capitol Limited, and that the railcars shall be occupied by no more than 22 passengers per sleeper. The amendment to the agreement, dated October 10, 1989, increased the frequency of the service from 5 to 6 days per week effective November 15, 1989.

According to an article in the Travel section of the Chicago Tribune of Sunday, November 26, 1989, entitled "New Train Passes Its First Test," the first regularly scheduled run of AEE occurred on November 15, 1989. The article referred to AEE as "the country's first luxury train in decades." The article stated that normally AEE will operate with three Pullman sleepers, a club car and a dining car, configured to carry a maximum of 56 passengers and a crew of 13. The article stated further that according to an AEE official, 2 sleepers would not be delivered until December, so the company's two sets of trains were operating with only 2 sleepers apiece. The article stated that the first regularly scheduled trip from Chicago to Washington carried 31 passengers.

A companion article in the Tribune's Travel section, entitled "American-European Express Goes Toe-To-Toe Against the Cost of Flying," indicated that Mr. William L. Sharp, a Chicago attorney who is the partner of AEE's president, Mr. William F. Spann, as well as a director of AEE, "described the train as 'an affordable luxury' for people who don't like airplanes, who want to travel in luxury for a special occasion, who want to 'disappear' for 17 hours or who aren't in a rush."

Both the RRA and the RUIA define an employer under the Acts to include "any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act" (section 1(a)(1)(i) of the RRA and section 1(b) of the RUIA). Despite having been requested to do so, AEE has not furnished any documentation of authorization by the Interstate Commerce Commission (ICC) for its operation; nor have I located any such authorization. However, the lack of any specific ICC authorization does not necessarily mean that AEE is not, in fact, subject to ICC jurisdiction.

Director of Research and Employment Accounts

The Interstate Commerce Act defines the term "sleeping car carrier" as meaning "a person providing sleeping car transportation for compensation." (See 49 U.S.C. § 10102(23).) A "sleeping car carrier" is clearly subject to part I of the Interstate Commerce Act. (See 49 U.S.C. § 10501(a)(1).) In a case involving the attachment of a sleeping car owned by the Pullman Company^{1/}, which had furnished such car to be regularly used by the Baltimore & Ohio Railroad Company for the accommodation and transportation of passengers between the cities of Columbus, Ohio, and Washington, D.C., the United States District Court for the Southern District of Ohio stated that:

"A sleeping car company, it is true, by furnishing sleeping cars under a contract with a railroad company to be used by the traveling public, does not thereby assume or acquire the status of a common carrier of goods or passengers . . . unless declared to be such by some constitutional or statutory provision. It merely furnishes accommodations to the passengers of another company and performs only an auxiliary function in their transportation; but it is nevertheless engaged in a public calling . . . Section 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. L. 584, provides that the term 'common carrier' as used in that act shall include sleeping car companies. By virtue of this statutory provision, the plaintiff's status * * * was in legal contemplation the same as that of an interstate carrier. The car, moreover, was an instrumentality of commerce and was when seized actually employed as such in interstate transportation." Pullman Co. v. Linke, 203 F. 1017, 1019-1020 (S.D. Ohio, 1913) (Citations omitted.).

AEE, like the Pullman Company, is a sleeping car company. Moreover, AEE is clearly engaged in the interstate transportation of passengers. Unlike the arrangement in the decision above, where Pullman simply furnished a sleeping car to the Baltimore & Ohio, AEE contracts directly with its own passengers for the overnight journey between Chicago and Washington, D.C. The fact that AEE may not have sought ICC authorization for its operation is simply irrelevant to a determination as to whether it is subject to ICC jurisdiction.

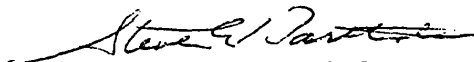
^{1/} The Pullman Company was an employer under the Acts, with service creditable from December 30, 1899 to December 1, 1980. The Pullman Company was formally dissolved on December 2, 1980. (See Legal Opinion L-81-16.)

Director of Research and Employment Accounts

It is also significant that AEE's agreement for obtaining motive power is with Amtrak, which has been expressly made subject to the Interstate Commerce Act by the statute which created it (45 U.S.C. §546(a)). In addition, the Interstate Commerce Act still defines "common carrier" to include a sleeping car company (49 U.S.C. §10102). Given these two additional facts, it would be an anomaly to conclude that AEE is not an employer within the definitions set forth in the RRA and the RUIA simply because it denies that it is a sleeping car company and has apparently chosen not to seek ICC authority for its operations. It is therefore my opinion that AEE is a sleeping car company within the definition of "employer" under the RRA and the RUIA.

Thus, based upon the information summarized above, it is my opinion that American European Express, Inc. became an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act effective November 15, 1989, the date that it commenced the transportation of passengers in interstate commerce.

An appropriate Form G-215 giving effect to the foregoing is attached.


Steven A. Bartholow

Attachment



EMPLOYER STATUS DETERMINATION**American European Express, Inc.**

This is the reconsideration decision of the Railroad Retirement Board concerning the status of American European Express, Inc. (AEE) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA).

PROCEDURAL BACKGROUND

In Legal Opinion L-90-38, the Deputy General Counsel of the Railroad Retirement Board determined that AEE became an employer under the RRA and the RUIA effective November 15, 1989, the date that it commenced the transportation of passengers in interstate commerce, because he found that it is a sleeping car company under section 1(a)(1)(i) of the RRA (45 U.S.C. §231(a)(1)(i)) and section 1(b) of the RUIA (45 U.S.C. §351(b)). The Deputy General Counsel noted in L-90-38 that despite having been requested to do so, AEE had not furnished any documentation of authorization by the Interstate Commerce Commission (ICC) for its operation; nor had he located any such authorization. However, the lack of any specific ICC authorization does not necessarily mean that AEE is not, in fact, subject to ICC jurisdiction.

L-90-38 stated that the Interstate Commerce Act defines the term "sleeping car carrier" as meaning "a person providing sleeping car transportation for compensation." (See 49 U.S.C. § 10102(23).) A "sleeping car carrier" is clearly subject to part I of the Interstate Commerce Act. (See 49 U.S.C. § 10501(a)(1).) L-90-38 cited a case involving the attachment of a sleeping car owned by the Pullman Company, which had furnished such car to be regularly used by the Baltimore & Ohio Railroad Company for the accommodation and transportation of passengers between the cities of Columbus, Ohio, and Washington, D.C., wherein the United States District Court for the Southern District of Ohio stated that:

"A sleeping car company, it is true, by furnishing sleeping cars under a contract with a railroad company to be used by the traveling public, does not thereby assume or acquire the status of a common carrier of goods or passengers . . . unless declared to be such by some constitutional or statutory provision. It merely furnishes accommodations to the passengers of another company and performs only an auxiliary function in their transportation; but it is nevertheless engaged in a public calling . . . Section 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. L. 584, provides that the term 'common carrier' as used in that act shall include sleeping car companies. By virtue of this statutory provision, the plaintiff's status * * * was in legal contemplation the same as that of an interstate carrier. The car, moreover, was an instrumentality of commerce and was when seized actually employed as such in interstate transportation." Pullman Co. v. Linke, 203 F. 1017, 1019-1020 (S.D. Ohio, 1913) (Citations omitted.).

In L-90-38, the Deputy General Counsel found that AEE, like the Pullman Company, is a sleeping car company and, moreover, is engaged in the interstate transportation of passengers. Unlike the arrangement in the decision in Pullman Co. v. Linke, where Pullman simply furnished a sleeping car to the Baltimore & Ohio, AEE contracts directly with its own passengers for the overnight journey between Chicago and Washington, D.C. The Deputy General Counsel concluded that the fact that AEE may not have sought ICC authorization for its operation is not relevant to a determination as to whether it is subject to ICC jurisdiction.

Subsequent to issuance of Legal Opinion L-90-38, AEE filed a timely request for reconsideration of that determination and submitted a written argument in support of that request.

Effective February 5, 1992, the Board's regulations were amended so as to provide that the three-member Board, and not the Deputy General Counsel, makes all initial and reconsideration determinations of employer status. (See 20 CFR §§ 259.1 and 259.3). This decision on reconsideration constitutes the final decision of the agency (20 CFR § 259.6).

Copies of all documents which have been considered in this decision on reconsideration, some of which may have been previously provided to AEE, are attached, together with an Index of the Administrative Record on Reconsideration.

FACTUAL BACKGROUND

Information in the administrative record on reconsideration indicates that AEE entered into an agreement with Amtrak dated August 28, 1989, pursuant to which Amtrak agreed to move a minimum of 3 and a maximum of 5 railcars owned by AEE between Chicago, Illinois and Washington, D.C. on a five-day per week scheduled basis during 12 months of the year, commencing on a mutually agreed-upon date between October 15, 1989, and November 15, 1989, and terminating 5 years thereafter. The agreement provides that the railcars, which shall be occupied only by AEE's passengers and crews, shall be attached to Amtrak's regularly scheduled trains 29 and 30, the Capitol Limited, and that the railcars shall be occupied by no more than 22 passengers per sleeper. An amendment to the agreement, dated October 10, 1989, increased the frequency of the service from 5 to 6 days per week effective November 15, 1989.

According to an article in the Travel section of the Chicago Tribune of Sunday, November 26, 1989, entitled "New Train Passes Its First Test," the first regularly scheduled run of AEE occurred on November 15, 1989. The article referred to AEE as "the country's first luxury train in decades." The article stated that normally AEE will operate with three Pullman sleepers, a club car, and a dining car, configured to carry a maximum of 56 passengers and a crew of 13. The article stated that the first regularly scheduled trip from Chicago to Washington carried 31 passengers.

Information in the administrative record on reconsideration indicates that in May 1990 AEE added a second route between Chicago and New York, with a stop in Philadelphia. According to an article in the Transportation section of the Chicago Tribune of Sunday, December 30, 1990, in late December 1990 AEE began to send its trains over a new route that included a major resort, the Greenbrier at White Sulphur Springs, West Virginia, in the middle of its journey between Chicago and Washington, Philadelphia and New York. The article indicated that the change in routing was intended to increase AEE's average sales to about 60 percent of the train's capacity, from a then-current level of about 50 percent, so that AEE could begin to realize a profit. The article indicated that Greenbrier was selected as a "perfect" spot for a meeting destination so that AEE could attract more group business. That article also stated that:

"In addition to a meeting site to attract groups, Spann [i.e., William F. Spann, AEE's President] said, AEE realized it needed a strong marketing partner and control over the schedule and routing of its own trains, rather than having to depend on Amtrak.

"AEE found the marketing partner and the train operator in the same company, CSX Corp., he said. Besides owning and running freight trains over the new rail line that AEE trains will be using, CSX or its corporate predecessors have owned the 5,000-acre Greenbrier resort since the mid-19th Century.

"CSX will operate the train between Chicago and Washington, but AEE will have to return to letting Amtrak haul the cars between Washington and New York. CSX tracks only run as far north as Philadelphia, and because CSX is only a freight railroad these days, it has no passenger stations of its own in the Northeast."¹

That article also stated that once regular service to the Greenbrier starts in March 1991, a total of four stops a week, two eastbound and two westbound, will be made at the Greenbrier. Passengers going west may board the train at New York, Philadelphia or Washington and ride as far as the Greenbrier, or all the way to Chicago. Going east, accommodations can be made for groups boarding at Indianapolis, in addition to Chicago.

¹ It must also be noted that that same article stated that:

"In another major change, AEE will begin using locomotives under its own control, rather than being hauled behind Amtrak's regularly scheduled trains. That will make the AEE the nation's first privately operated all-sleeping car train since 1967, when the Pennsylvania Railroad quit running the Broadway Limited, AEE officials said."

If this change occurs, it would appear that AEE would then be a common carrier by railroad under section 1(a)(1)(i) of the RRA (45 U.S.C. §231(a)(1)(i)) and section 1(b) of the RUIA (45 U.S.C. §351(b)).

APPLICABLE STATUTES AND REGULATIONS

Section 1(a)(1)(i) of the RRA (45 U.S.C. §231(a)(1)(i)) provides that the term "employer" under the Act includes:

(i) any express company, sleeping-car company, and carrier by railroad, subject to Part I of the Interstate Commerce Act.

Section 1(b) of the RUIA (45 U.S.C. §351(b)) contains the same definition. The term "sleeping-car company" was also included in the definition of "employer" contained in the Railroad Retirement Act of 1937, the predecessor of the present Railroad Retirement Act of 1974.

The term "sleeping-car companies" was added to the definition of the term "common carrier" in the Interstate Commerce Act by the Hepburn Act, approved June 29, 1906 (34 Stat. 584). An amendment to the Interstate Commerce Act in 1978 changed the term to "sleeping-car carrier." However, the 1978 amendment (P.L. 95-473) was a codification of the Interstate Commerce Act, and the legislative history of that amendment expressly provides that no substantive change was intended by a mere change of terminology:

Substantive change not intended. Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged. H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 3009, 3018.

DISCUSSION

The argument submitted in support of AEE's request for reconsideration states essentially that because AEE's operations differ from the operations which were conducted by the Pullman Company and AEE's business and contractual relationships with Amtrak "are vastly different" from the Pullman Company's relationships with the various railroads with which it contracted, AEE is not a sleeping car company. This argument is grounded on AEE's assertion that at the time that the Interstate Commerce Act was amended in 1906 to include the term "sleeping-car companies," the Pullman Company was the sole manufacturer and servicer of sleeping cars. For the reasons explained below, the Board does not find this argument persuasive.

First of all, the term "sleeping-car company" is a generic term. Neither the RRA nor the RUIA define the term, apparently because Congress considered it to be self-explanatory. The Interstate Commerce Act defines "sleeping car carrier" as "a person providing sleeping car transportation for compensation" (49 U.S.C. §10102(23)). Webster's has defined "sleeping-car" as follows:

"a railway car furnished with berths, compartments, etc. in which passengers may sleep." Webster's Dictionary of the English Language Unabridged, Deluxe Ed. 1977, p. 1706.

The term "company" is defined as:

"6. a number of persons united for the same purpose, either in private partnership or as a business concern." Id. at 368.

Thus, a sleeping-car company is a business involving railway cars in which people may sleep.

In order to determine whether a sleeping-car company is one which would be subject to the Interstate Commerce Act, a determination must be made as to whether the company holds itself out to the public as engaging in the business of providing sleeping-car transportation for compensation. The Interstate Commerce Commission has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. State of Washington ex rel. Stimson Lumber Company v. Kuykendall, 275 U.S. 207, 72 L.Ed. 241, 48 S. Ct. 41 (1927); Ensco, Inc. v. Weicker Transfer and Storage Co., 689 F. 2d 921, 925 (10th Cir. 1982); Lone Star Steel Company v. McGee, 380 F. 2d 640, 643 (5th Cir. 1967), cert. denied 389 U.S. 977, 19 L.Ed. 2d 471, 88 S. Ct. 480 (1967). It is the right of the public to demand service that is the real criterion which is determinative of its character as a common carrier. United States v. Stephen Brothers Line, 384 F.2d. 118, 122-123 (5th Cir. 1967). "The distinctive characteristic of a common carrier is that it undertakes to carry for all people indifferently." Ciaccio v. New Orleans Public Belt Railroad, 285 F. Supp. 373, 375(D.C. La. 1968).

In contrast, a private carrier is one who without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Demetrios v. Edwards, 416 F. 2d. 958, 959 (7th Cir. 1969). Private carriers thus undertake not to carry for all persons indiscriminately, but rather transport only for those with whom they see fit to individually contract. Id., at 959; Florida Power & Light Company v. Federal Energy Regulatory Commission, 660 F.2d 668, 674 (5th Cir. 1981), cert. denied, Ft. Pierce Utilities Authority v. Federal Energy Regulatory Commission, 459 U.S. 1156, 103 S.Ct. 800, 74 L.Ed. 2d 1003 (1983). See also The Tap Line Cases, 234 U.S. 1, 58 L.Ed. 1185, 1194 (1913).

As can be seen from the discussion above, it is not the nature of the contracts pursuant to which a company provides sleeping-car transportation which determines whether it is a sleeping-car company subject to the Interstate Commerce Act, but instead the determining factor is whether such company holds itself out to the general public as a provider of sleeping-car transportation. It is clear from the administrative record on reconsideration that AEE holds itself out to the general public as a provider of sleeping-car transportation between Chicago and Washington and Chicago and New York.

In specific response to AEE's argument that because the Pullman Company was allegedly the only sleeping-car company in existence at the time that the term "sleeping-car companies" was added to the Interstate Commerce Act in 1906 and that therefore the term was intended to cover only Pullman or a company conducting operations in the same manner as Pullman, it must be pointed out that the term enacted was not only generic, but was also plural. Thus, although there may have been only one company which would fall subject to ICC regulation immediately upon enactment of the 1906 amendment (see United States v. Pullman Co., 50 F. Supp. 123, 125 (E.D.Pa. 1943)), Congress made it clear by its use of the plural generic term that it intended to include any such company which might begin to provide sleeping-car transportation to the general public. This intention was again manifested in the enactment of the definition of "employer" in the RRA, which includes "any" sleeping-car company within the definition of an "employer."

It should also be noted that the term "sleeping-car company" remains in some form in the RRA, the RUIA, and the Interstate Commerce Act, despite the fact that the Pullman Company was dissolved on December 2, 1980. (See Articles of Dissolution in the enclosed administrative record on reconsideration.) All three of these Acts have been amended since December 1980, and Congress plainly could have removed the term from any or all of them if, as AEE apparently contends, the term only applied to the Pullman Company or an identical operation.

The argument in support of AEE's request for reconsideration states (at page 12) that AEE owns and operates approximately ten rail cars which travel in interstate commerce in each direction between Chicago, Illinois and Washington, D.C. and Chicago, Illinois and New York, New York. The argument states that AEE has a contract with Amtrak whereby Amtrak agrees to pull those cars for AEE in five car sets attached to Amtrak's regularly scheduled trains and that each set of rail cars consists of one dining car, one parlor/lounge car and three sleeping cars. The argument states that AEE's ticketing is completely separate from that of Amtrak and that AEE maintains its own ticketing offices and agents. A passenger purchases only an AEE ticket; no Amtrak ticket is required for travel on AEE's cars. The argument then proceeds to argue that because AEE does not have an integrated relationship with Amtrak, AEE is not a "Pullman-type company" and is therefore not subject to the RRA and the RUIA.

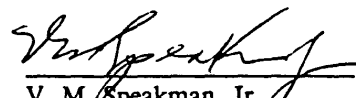
However, the very facts recounted in the argument presented by AEE to show how AEE's operations differ from those formerly conducted by the Pullman Company also demonstrate that AEE operates a sleeping car business expressly designed to transport the public in interstate commerce. AEE sells its own tickets and thus contracts directly with those persons wishing to use AEE's sleeping car service between Chicago and Washington or New York. AEE handles all the revenue brought in through its sale of its transportation services. AEE exercises sole control over the services provided on its rail cars and provides all on-board services to its own passengers, who would come under the control of Amtrak only during emergency operations and for safety purposes (page 13 of argument in support of request for reconsideration). Moreover, through its contract with Amtrak, AEE has acquired the use of tracks, locomotive power, and on-route maintenance. AEE is, in the Board's opinion, operating a sleeping car company within interstate commerce.

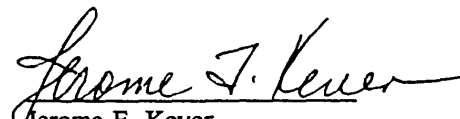
It is therefore the opinion of the Board upon reconsideration that American European Express, Inc. is a sleeping car company within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)(i)) and section 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §351(b)).

CONCLUSION

For the reasons discussed herein, the opinion expressed in Legal Opinion L-90-38, that American European Express, Inc. has been an employer covered by the Railroad Retirement Act and the Railroad Unemployment Insurance Act since November 15, 1989, is hereby affirmed.


Glen L. Bower


V. M. Speakman, Jr.


Jerome F. Kever

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REQUEST FOR EMPLOYER STATUS

The Audit and Compliance Division of the Bureau of Fiscal Operations will complete Part I and forward request to the Bureau of Law. The Deputy General Counsel will complete Part II, leaving items blank if information is not applicable or available.

Notice No.

96-81

BA No.

6308

Part I

NAME AND ADDRESS OF COMPANY/ORGANIZATION/ASSOCIATION

AMERICAN EUROPEAN EXPRESS, INC.

NO KNOWN ADDRESS

NAME AND ADDRESS OF CEO/CONTACT OFFICIAL

NUMBER AND LOCATION OF EMPLOYEES

DETAIL

COVERAGE TERMINATED UNDER THE JURISDICTION OF THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS EFFECTIVE OCTOBER 31, 1991.

REFERENCE

REQUESTED BY

DATE

Audit & Compliance Division AUGUST 27, 1996

Part II

OPINION NO.
B.C.D. 96-77

OPINION DATE
August 26, 1996

PERIODS DURING WHICH SERVICE IS HELD CREDITABLE

FROM

TO

NOVEMBER 15, 1989

OCTOBER 31, 1991

EMPLOYER COVERED AS:

Operating Company:

- ☐ Line Haul Railroad
- ☐ Electric Railroad
- ☐ Switching & Terminal Company
- ☐ Lessor Company
- ☐ Railroad Association
- ☐ Labor Organization
- ☐ Affiliate
- ☐ Other: _____

CORPORATE SUCCESSOR TO

ASSUMES OBLIGATION OF PREDECESSOR

☐ YES
☐ NO

CURRENT EMPLOYER FROM WHICH REPORTS SHALL BE OBTAINED

☐ NOT A COVERED EMPLOYER

☒ EMPLOYER COVERAGE TERMINATED

☐ EMPLOYEES ATTRIBUTED TO ANOTHER ENTITY

DETAILS OF SEGREGATION (IF APPLICABLE)

REMARKS:

APPROVED BY

Deatrice E. Huski

DATE
AUG 29 1996

EMPLOYER STATUS DETERMINATION
American European Express, Inc.

This is the determination of the Railroad Retirement Board concerning the status of American European Express, Inc. (BA No. 6308) (AEE) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

In B.C.D. No. 93-68, the Board issued a decision on reconsideration which affirmed the decision of the Board's Deputy General Counsel in Legal Opinion L-90-38 that AEE became a sleeping car company within the definition of "employer" under the RRA and the RUIA effective November 15, 1989. AEE never filed any annual reports of service and compensation with the Board. Information obtained by the Board's Division of Audit and Compliance indicates that AEE ceased operations sometime in 1991 after a train derailment on June 21, 1991, which wiped out nearly half of its eleven-car fleet. Specifically, the latest information available is a news article dated October 25, 1991, issued by The Associated Press. That article indicated that AEE had changed the name of its train to the Greenbrier Express when it expanded its service to stop at Indianapolis; Greenbrier Resort in White Sulphur Springs, West Virginia; Baltimore; Wilmington, Delaware; Philadelphia and New York. The article stated that during the previous week, the Greenbrier Express canceled its twice weekly service between New York and Chicago and shelved plans for a New York-Miami service scheduled to begin November 19, 1991. The article also stated that sales had plummeted after the derailment on June 21, 1991. There is no evidence that AEE has operated after the date of the article.

Based on the information available, the Board finds that American European Express, Inc. ceased to be an employer under the RRA and the RUIA effective with the close of business on October 31, 1991, the last day of the last month during which evidence indicates that it operated.


Glen L. Bower


V. M. Speakman, Jr.

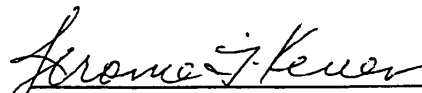

Jerome F. Kever

Exhibit C



IN RE Reconsideration of	)	
	)	United States
American Orient Express	)	Railroad Retirement Board
Railway Company LLC	)	B.C.D. No. 01-20
	)	

JOINT STATEMENT OF FACTS NOT IN ISSUE

The American Orient Express Railway Company LLC, by and through its attorneys, Holland & Knight LLP, and the Hearing Examiner for the Railroad Retirement Board, Karl T. Blank, hereby jointly agree that for purposes of the proceeding before the Examiner in this matter, the following facts are not in dispute:

- I. Regarding American European Express.
 1. In 1989, Nostalgie Istanbul Orient Express of Switzerland (Nostalgie) purchased 13 vintage rail cars with the idea of establishing a luxury passenger rail service modeled on that conducted by Nostalgie in Europe; Nostalgie refurbished ten of these cars.
 2. Nostalgie, as majority shareholder, formed American European Express (AEE), a Delaware corporation with a principal office at 333 West Wacker Drive, Chicago, Illinois, to conduct this service.
 3. On August 28, 1989, AEE entered into an operating and maintenance agreement with the National Railroad Passenger Corporation (Amtrak) whereby Amtrak agreed to allow up to five AEE passenger cars to be coupled to Amtrak's Capitol Limited, a regularly scheduled passenger train operating between Chicago and Washington D.C.

4. AEE began regular weekday passenger operation November 15, 1989, offering one-way and round trip fares.
5. AEE employees staffed AEE rail cars.
6. Amtrak employees performed routine running repairs and maintenance of AEE rail cars.
7. Amtrak would not book AEE travel.
8. AEE did not seek approval of the Interstate Commerce Commission for its operations in 1989.
9. On March 20, 1990, pursuant to regulations of the Board as then in effect, the Deputy General Counsel determined in Legal Opinion L-90-38 that AEE was a covered employer under the Railroad Retirement and Railroad Unemployment Acts (the "Acts") as a sleeping car company.
10. The AEE service was suspended in November, 1990.
11. In March, 1991, AEE began operating a new service, which it named the "Greenbrier Limited," to provide passenger service between Chicago and New York City through Washington D.C. and Philadelphia, with a stop at the Greenbrier resort in White Sulphur Springs, West Virginia.
12. In a notice dated June 11, 1991, the Interstate Commerce Commission granted AEE an exemption to operate as a class III rail carrier of passengers. American European Express, Inc. - Operation Exemption - Between Chicago IL and New York NY; ICC Finance Docket No. 31892, 56 Fed. Reg. 27775, June 17, 1991.

13. CSX Transportation, a rail carrier which owned the Greenbrier resort, provided train operation services for AEE between Chicago and Washington over trackage rights controlled by that company.
14. Amtrak continued to provide train operation service for AEE between Washington and New York City to allow access to passenger facilities in Philadelphia and New York.
15. Passengers traveling west to the Greenbrier resort or Chicago could board at New York City, Philadelphia, or Washington.
16. Passengers traveling east from Chicago to the Greenbrier could board at Chicago, Indianapolis or Cincinnati.
17. The one-way and round-trip fares varied depending upon destination and accommodations but were higher than the fares charged by Amtrak for its passenger services along comparable routes.
18. On June 21, 1991, an AEE train collided with a truck on a grade crossing in Indiana, destroying nearly half of what was by then its eleven-car fleet.
19. On September 12, 1991, an AEE train for news media to preview a projected new AEE operation from New York City to Miami struck and killed two women trespassing on the tracks.
20. In October 1991, AEE announced that its operations were suspended.
21. On August 27, 1993, AEE filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois, case No. 93B 0018249.

22. On October 20, 1993, in Board Coverage Decision 93-68, the Board denied a request by AEE for reconsideration of its status as a covered employer, finding AEE to be a sleeping car company. The facts that AEE had ceased operations and had filed for bankruptcy were not mentioned in the Board's decision on reconsideration.
23. On August 29, 1996, in Board Coverage Decision 96-77, the Board determined that, based on available information that AEE had ceased operations, the status of AEE as a covered employer under the Acts terminated effective the last day of October 1991.
24. AEE never filed any annual reports of service and compensation with the Board for any of the period that it was a covered employer.

II. Regarding American Orient Express, Trans Texas Rail, Inc., TCS Expeditions, and Reiseburo Mittelthurgau.

25. The eleven vintage cars that had been used by AEE sat mostly unused in a CSX rail yard for nearly the entire three years after October, 1991.
26. This fleet eventually came to be owned by a Swiss company named Reiseburo Mittelthurgau ("Mittlethurgau").
27. Sometime in 1994, Mittelthurgau formed a joint venture with Trans Texas Rail, Inc. which they called American Orient Express (AOE).
28. Beginning August 1994, AOE used the passenger rail cars previously used by AEE, and which by then had been repaired and remodeled, to operate the

"Branson Limited." This service consisted of nine weekend excursions between San Antonio, Texas and Branson, Missouri and three excursions from San Antonio to New Orleans.

29. AOE added additional cars and marketed rail excursions in 1994 and 1995 in the Nieman-Marcus department store Christmas catalogues.
30. In 1995, Space Expeditions, Inc., a Seattle, Washington, corporation owned by T.C. Schwartz and doing business as TCS Expeditions (TCS), operated the excursions for AOE.
31. On September 20, 1995, T.C. Schwartz formed "AOE Inc." as a Washington corporation, and registered the trade names "American Orient Express Railway Company" and "AOE Railway Company" in that state.
32. During the first half of 1996, a joint venture of TCS and Trans Texas Rail Corp. operated five transcontinental trips as American Orient Express.
33. In 1997, TCS took over the American Orient Express operations by itself and expanded the number and variety of excursions.
34. During 1996 and 1997, the excursions offered by American Orient Express involved transcontinental and regional trips which included all or most of the following features: hotel stays at the beginning and end of the trip, meals, lectures and off-train excursions; prices varied depending on the excursion and the accommodations.

35. In 1996, for instance, TCS offered a ten-day Denver to Santa Fe tour of Western national parks, a five-day trip from Los Angeles to Santa Fe, and a nine-day round trip from Los Angeles to Aspen, Colorado and Santa Fe.
36. During the period that Mittlethurgau or its immediate predecessor owned the vintage cars and had them operated as the American Orient Express, there was no determination by the Railroad Retirement Board that Mittlethurgau, TCS, American Orient Express or any other person or company associated with the ownership of the cars or the operation of the service was a covered employer under the Acts.

III. Regarding American Orient Express, Oregon Rail Corporation, American Orient Express Railway Company, Oregon Rail Holdings LLC, and American Orient Express Railway Company LLC.

37. On September 15, 1997, Oregon Rail Corporation ("ORC") entered into an Asset Purchase Agreement with AOE, Inc., T.C. Swartz and Space Expeditions, Inc.
38. ORC is an Oregon corporation formed on April 25, 1997 with Henry L. Hillman, Jr. as its President.
39. Pursuant to section 1.1 of the September 1997 agreement, ORC purchased from AOE, Inc. and Space Expeditions, among other things, all equipment, accounts receivables, tour expenses, toll free telephone number, equipment and real property leases, inventory, the rights to trademark and trade names including American Orient Express and AOE, the right to exercise an option to purchase certain "train assets" and supplies relating to the American Orient Express train operation.

40. By separate agreement dated November 14, 1997, ORC purchased from American Orient Express Equipment Company, a Delaware corporation, twelve vintage rail cars.
41. American Orient Express Railway Company (AOE Railway Co.), an Oregon corporation, was formed as a wholly owned subsidiary of ORC on October 24, 1997.
42. The cars purchased from American Orient Express Equipment Company were used for AOE Railway Co.'s inaugural 1998 season.
43. AOE Railway Co. scheduled eight different one-way routes in the United States, two of which also traveled entirely or partially in Canada during 1998. All but one offered operation in reverse order, meaning a customer could purchase an excursion and begin the itinerary at either end of the trip. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers. Air fare or other transportation to and from the beginning and end points of the trip was not included or provided.
44. During the 1998 season, TCS Expeditions acted as AOE Railway Co.'s agent for air travel and also separately sold insurance for trip cancellation, emergency medical evacuation, baggage, accident and sickness. The 1998 brochure showed the street address and e-mail address of TCS Expeditions as the point of contact for customers.

45. Four scheduled trips were cancelled by AOE Railway Co. in 1998, while two unadvertised charter trips over two different routes were conducted that year.
46. On April 1, 1999, Oregon Rail Holdings, LLC (ORH) was formed as an Oregon limited liability company, Mr. Henry L. Hillman, Jr., manager.
47. ORH controls American Orient Express Railway Company LLC (AOE Railway LLC), an Oregon limited liability company also formed April 1, 1999.
48. On or about April 1, 1999, the assets of ORC subsidiary AOE Railway Co. were transferred to AOE Railway LLC.
49. In 1999, AOE Railway LLC offered seventeen itineraries in the United States and four in Canada. In all but one case, the itineraries operated in reverse order, allowing customers to purchase a tour beginning at either terminal point. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers.
50. AOE Rail Expeditions, a subsidiary of ORC, was the agent during the 1999 season for arranging air fare for customers, and for trip cancellation, emergency medical, baggage, accident and sickness insurance. The address for American Orient Express was shown in the 1999 brochure as 5100 Main Street, Downers Grove, Illinois.
51. Two trips were cancelled by AOE Railway LLC in 1999.
52. In 2000, AOE Railway LLC offered 19 itineraries in the United States and two in Canada. All but two also offered travel in reverse order. Included in

the package price were train accommodations, all meals, excursions and group activities, and tour managers.

53. The 2000 brochure states that American Orient Express offered trip cancellation, emergency medical, baggage, accident and sickness insurance, and offered assistance in reserving flights. The address for American Orient Express was shown in the 2000 brochure as 5100 Main Street, Downers Grove, Illinois.
54. Thirteen trips were cancelled by AOE Railway LLC in 2000.
55. In 2001, AOE Railway LLC offered 15 itineraries in the United States and two in Canada. All offered travel in reverse order. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers.
56. The 2001 brochure stated that American Orient Express offered trip cancellation, emergency medical, baggage, accident and sickness insurance, and offered assistance in reserving flights. The address for American Orient Express was shown in the 2001 brochure as 5100 Main Street, Downers Grove, Illinois.
57. Two trips were cancelled by AOE Railway LLC in 2001.
58. In the United States, ORH and subsidiaries and related companies including AOE Railway LLC, own no rail line and have no trackage rights over any of the rail lines on which AOE Railway LLC conducts trips using the vintage rail passenger cars.

59. In the United States, ORH and subsidiaries and related companies including AOE Railway LLC, own or control no railroad locomotive used by AOE Railway LLC to conduct trips using the vintage rail passenger cars.
60. ORH and various wholly owned subsidiaries including AOE Railway LLC entered into entered into an Operating and Maintenance Agreement August 7, 2000, with Amtrak, to begin January 1, 2001 and end December 31, 2005.
61. Under the Operating Agreement, Amtrak agreed to provide locomotives and train and engine crews to pull no more than 17 rail cars of AOE Railway LLC over itineraries specified in an attachment.
62. Under the Operating Agreement, AOE Railway LLC is responsible for providing equipment in good working order which meets all mechanical and engineering standards of the Federal Railroad Administration, the American Association of Railroads, and Amtrak. Amtrak or an agent (other than an ORH/AOE Railway LLC employee) must inspect the rail cars prior to each departure.
63. Under the Operating Agreement, AOE Railway LLC must supply its own provisions and its own employees to serve food and beverages, and to provide other services to passengers on its cars. AOE Railway LLC crews must be qualified on Federal Railroad Administration and Amtrak safety and basic operating regulations and must meet applicable Federal and State requirements for restaurant and service lounge operations.

64. Under the Operating Agreement, AOE Railway LLC agrees to indemnify Amtrak from any claims, liabilities, damages, or expenses for personal injury to persons (other than to Amtrak employees); for loss, damage or destruction of property (other than Amtrak property); and for claims, liabilities, damages, or expenses for Amtrak labor cost claims, including labor protection benefits, alleged scope rule violations, and disciplinary actions incurred in conjunction with the Operating Agreement, except in the case of gross negligence or willful misconduct by Amtrak.
65. Under the Operating Agreement, AOE Railway LLC must provide workers' compensation insurance covering its employees, and general liability and property insurance. General liability insurance must include operations liability, independent contractors liability, Federal Employers Liability Act, liquor liability and contractual liability coverage, with all railroad exclusions deleted.
66. Under the Operating Agreement, AOE Railway LLC is obligated to pay Amtrak at pre-set dollar amounts per train mile traveled, with lower rates for dead-head miles and reduced rates for train miles traveled above certain distances.
67. A fully staffed AOE Railway LLC rail trip currently requires approximately 39 AOE employees, including three equipment maintenance personnel and 36 service staff positions. The service staff includes chefs, assistant chefs,

dishwashers, bartenders, waiters, waitresses, housekeepers, launderers, and pursers. An additional three tour leaders may be independent contractors.

68. In 2001, AOE Railway LLC hired 105 employees during the year to fill various jobs among the 36 service staff positions which had become vacant.
69. AOE Railway LLC retained 15 service staff employees for the entire year of 2001. Eight of these, including four supervisors, had worked in a previous year.

IV. Regarding Amtrak and Amtrak Vacations.

70. The "Amtrak 2001 Travel Planner" published by Amtrak describes Amtrak's inter-city passenger rail service throughout the United States, which includes approximately 27 corridors. Service on these corridors is regularly scheduled at published fares. Passengers typically may embark and disembark at any stop along a rail corridor and pay a fare that varies depending upon an individual's origin and destination as well upon the accommodations chosen.
71. The "Amtrak 2001 Travel Planner" also describes over twenty vacation packages under license with Globetrotters Vacations, Inc., of Downers Grove, Illinois, doing business as Amtrak Vacations.
72. Amtrak Vacations tour packages offer hotel accommodations and sightseeing tours at various destinations for a fixed price above the cost of rail fare from the passenger's departure city. Depending on the departure city and destination, the passenger may have more than one train to select for transportation to the destination. For example, the Niagara Falls tour may

begin from the east via Amtrak's Maple Leaf from New York City, or from Amtrak's Lake Shore Limited departing from Chicago.

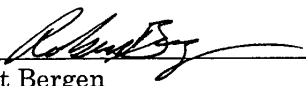
73. All Amtrak Vacations tour packages may be purchased with a variety of departure and destination points. Each is priced accordingly. In addition, because the rail transportation services provided by Amtrak are on board regularly scheduled trains, Amtrak Vacations customers are free to schedule the length of their vacations as they choose by simply paying any additional hotel charges.
74. Amtrak Vacations offers a Trip Protection Option which covers certain cancellation penalties and unused hotel and car rental fees.
75. The Amtrak Vacations passenger contract constitutes the sole contract between Amtrak and the purchaser of a tour.
76. The services other than carriage by Amtrak described by the Amtrak 2001 Travel Planner are provided by independent contractors.

V. Exclusions and limitations.

77. This joint statement does not address activities conducted by companies, ventures, partnerships, or other business entities owned or controlled by ORH or Henry L. Hillman, Jr. other than the entities identified in this document.
78. This joint statement does not address activities by ORH, AOE Railway LLC, or AOE Railway Company other than as set forth above.

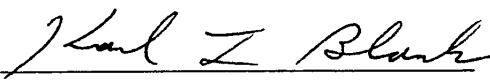
79. This joint statement does not limit AOE Railway LLC or the Hearing Examiner from introducing, during the time the record in this proceeding remains open, evidence on matters not within the scope of this agreement.
80. This joint statement does not compromise the power of the Board to reject or to adopt the Hearing Examiner's report in whole or in part or to adopt the report with modifications.

For American Orient Express
Railway Company LLC


Robert Bergen
Holland & Knight LLP

Dated: May 21, 2002

For Railroad Retirement Board


Karl T. Blank
Hearing Examiner

Dated: MAY 21, 2002

Exhibit D

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BEFORE THE
UNITED STATES RAILROAD RETIREMENT BOARD

IN RE:) Board Coverage
AMERICAN ORIENT EXPRESS) Decision 01-20
RAILWAY COMPANY, LLC,)
Appellant.)

ORIGINAL

STENOGRAPHIC REPORT OF PROCEEDINGS

had in the above-entitled matter held at 844 North
Rush Street, 8th Floor Board Room, Chicago,
Illinois, on May 21, 2002, commencing at 9 o'clock
a.m., MR. KARL BLANK, Hearing Examiner.

APPEARANCES:

HOLLAND & KNIGHT, LLP
BY: MR. ROBERT BERGEN
195 Broadway
New York, New York 10007-3189
(212) 513-3200
Representing the Appellant,
AOE Railway.

Reported By: Anna M. Morales, CSR, RMR
License No.: 084-002854

1 over Amtrack. And the Surface Transportation
2 Board was also given by Congress in 1995 some
3 minimal jurisdiction over commuter rail, in
4 particular, with respect to switching and terminal
5 activities.

6 And the Act, as I think is clear to all
7 of us, kept covered under the Railroad Retirement
8 Act and the related Acts employees of railroads
9 who had previously been covered but as to whom
10 jurisdiction by the Surface Transportation Board
11 had been eliminated. And the purpose for that was
12 to ensure their continued coverage so that people
13 who had invested, if you will, in the retirement
14 system or the unemployment system would not be cut
15 off by virtue of the deregulation of the passenger
16 transportation by Congress.

17 So our primary point in this entire
18 proceeding has been and continues to be that the
19 Surface Transportation Board has no jurisdiction
20 over a company such as AOERC -- which, if you
21 don't mind, that's how I would like to refer to it
22 today, and we understand that in referring to it
23 that way we are referring to the American Orient
24 Expressway Railroad Company, LLC.

1 HEARING EXAMINER BLANK: All right.

2 MR. BERGEN: -- that the Surface Transportation
3 Board has no jurisdiction over AOERC; that it has
4 no jurisdiction over any company like it that
5 provides the kind of service it provides; and
6 that, therefore, it is not a covered employer;
7 that, in fact, the company didn't even exist of
8 course at the time the ICC Termination Act was
9 passed. But we'll get to that as a factual
10 matter.

11 Beyond that, because of some of the
12 earlier decisions, primarily because of the
13 termination by the Board that there's coverage
14 here, and because of the basis of that termination
15 which is that the Board concluded that some prior
16 covered employer had some relationship to AOERC,
17 we're going to -- we'll put facts in the record
18 through the testimony of Ms. Elizabeth
19 Schellberg, and the purpose of the testimony will
20 be to show, among other things, that AOERC is not
21 in any way a successor to or reincarnation of or
22 any kind of continuation of any prior company that
23 was a covered employer under the Acts; that, in
24 particular, it's not a reincarnation or

1 continuation of American European Express which
2 had been found by the Board in 1991, I believe, to
3 be covered employer. I don't remember the exact
4 date.

5 HEARING EXAMINER BLANK: Yes.

6 MR. BERGEN: It's in the record.

7 HEARING EXAMINER BLANK: Yes.

8 MR. BERGEN: The covered decision in that case
9 is in the record.

10 Our testimony -- the purpose of the
11 testimony will also be to show that AOERC is a
12 tourist railroad that provides excursions and
13 trips, but it does not provide transportation in
14 the sense of common carriage. It's not a railroad
15 as defined under the Acts, under the ICC
16 Termination Act, I should say. It is not a
17 railroad. It is not a common carrier. It is an
18 excursion company. And so that it's not -- it's
19 not covered under any way that you look at it.

20 The testimony will also show that it's
21 not a sleeping car company, assuming there were
22 still -- another point we're going to make is that
23 even if the Board were to disagree that AOERC is
24 not subject to the jurisdiction of the Surface

1 Transportation Board, one of the points that it
2 made in its coverage determination was in addition
3 to this idea of reincarnation of American European
4 Express was the idea that AOERC is a sleeping car
5 carrier, and that -- notwithstanding the clear
6 language in the ICC Termination Act that somehow
7 the law reaches back and captures sleeping car
8 companies as covered employers.

9 I think the facts will show that AOERC is
10 not a sleeping car carrier, number one; and I
11 think the law is clear, as we made clear in our
12 brief, that the law does not reach back; that
13 while the law sought to protect people who --
14 employees in particular of previously covered
15 employers after the relinquishing of the
16 jurisdiction by the federal government, it did not
17 mean to say that if you might have been covered
18 prior to the Termination Act that we can still
19 reach back and capture you as a covered employer,
20 otherwise, the law would make no sense if that
21 were the case. But, in any event, that was our
22 legal argument.

23 We'll show -- I think the facts will show
24 that you -- I think one of the documents,

1 Mr. Blank, the most recent document, I guess it
2 was 45.

3 HEARING EXAMINER BLANK: Yes, it was the last
4 one.

5 MR. BERGEN: -- was a history or a little
6 description of what sleeping car companies were
7 like. There are also many cases that describe
8 what sleeping car companies were like.

9 I think the history of those cases, if
10 you look back at them and if you look back at the
11 history of the Interstate Commerce Act, you'll see
12 that when the Interstate Commerce Act was first
13 passed two centuries ago, not really 200 years
14 ago, but a couple of centuries back, it did not
15 cover sleeping car carriers. I think the Board
16 recognized that in the AEE decision.

17 That subsequently, I believe it was in
18 1906, Congress decided to include sleeping car
19 carriers or sleeping car companies as covered
20 employers in order to regulate them; but as is
21 clear from that article, as is clear from some of
22 the cases, in those days, sleeping car carriers
23 were actually very like common carriers in the
24 sense that they accepted all commerce. Any

1 passenger who wanted to buy passage on a sleeping
2 car could do so. They were -- it was common
3 carriage. If you could buy a ticket, you are
4 entitled to a berth.

5 AOERC is not a sleeping car company in
6 that sense, in the sense of being anything like a
7 common carrier. It is not open to everyone. It's
8 not open to the general public to buy a ticket.

9 We believe that, and we believe the facts
10 will show that all the contracts entered into with
11 customers of AOERC are private contracts, private
12 carriage.

13 So that really concludes my opening
14 statement. But just to emphasize finally that the
15 essential point for us is that we're not a company
16 covered by the Surface Transportation Board or the
17 jurisdiction, and we're not a covered employer.
18 All these other things are just alternative
19 arguments in light of the -- in light of the
20 record in the case.

21 So let me turn to Ms. Schellberg and our
22 testimony.

23 HEARING EXAMINER BLANK: All right. At this
24 point then, I will swear Ms. Schellberg in. Would

1 you please raise your right hand?

2 (Witness sworn.)

3 HEARING EXAMINER BLANK: Thank you. You may
4 proceed.

5 ELIZABETH A. SCHELLBERG,
6 called as a witness herein, having been first duly
7 sworn, was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. BERGEN:

10 Q. For the record, would you please state
11 your full name?

12 A. Elizabeth Schellberg.

13 Q. And what is your -- you're employed by
14 AOERC as already described here?

15 A. I am actually an employee of Oregon Rail
16 Holdings which is the parent company of AOERC.

17 Q. But are you familiar with AOERC and its
18 operations?

19 A. Yes, I am.

20 Q. When were you first employed by the
21 company?

22 A. I started working for the company on a
23 contract basis in February of 1998 and then became
24 a full-time employee on April 1, 1998.

1 Q. What's your position with the company?

2 A. My current position is corporate
3 controller. So I handle all of the financial
4 transactions for AOERC as well as consolidating
5 information from our other subsidiaries.

6 (Whereupon, Mr. Perbohner
7 enters.)

8 THE WITNESS: My original position with the
9 company was to help set up a lot of infrastructure
10 in terms of registrations in various states for
11 different licenses and permission to do business
12 in all of the jurisdictions that we travel
13 through.

14 BY MR. BERGEN:

15 Q. And are you -- I think you had told me
16 previously, are you a CPA certified public
17 accountant?

18 A. I'm a certified public accountant and
19 have, oh, 20 years of experience in private
20 industry as corporate controller positions.

21 Q. Well, how did you get to this job? What
22 was your job immediately before this?

23 A. Most of my private industry experience has
24 been in the power industry, working for

1 subsidiaries of utilities, developing and
2 operating independent power energy, electricity
3 plants, both domestically and internationally.

4 And I was in the process of closing one
5 of those companies down when I met the chief
6 financial officer of Oregon Rail Corp, and that
7 led to my position with the company.

8 MR. BERGEN: Mr. Blank, let me interrupt for a
9 minute. Do you mind identifying the other people
10 in the room for the record? Is that okay?

11 HEARING EXAMINER BLANK: Certainly. Mr. Rob
12 Perbohrner of the Management Member's office. And
13 Rachel -- I'm sorry?

14 MS. SCHULMAN: Schulman.

15 HEARING EXAMINER BLANK: Schulman of the Chair,
16 Office of the Board.

17 MR. BERGEN: Nice to meet you.

18 HEARING EXAMINER BLANK: They are not
19 participating in any way in the hearing.

20 MR. BERGEN: Okay.

21 BY MR. BERGEN:

22 Q. Do you remember receiving the termination
23 from the Railroad Retirement Board dated February
24 5, 2001, finding that AOERC is a covered employer?

1 A. Yes, I do.

2 Q. That was addressed to you?

3 A. Yes, it was, I believe.

4 Q. So you are aware of the purpose of the
5 hearing here obviously?

6 A. Correct.

7 Q. Who is Scott Taylor?

8 A. Scott Taylor is the secretary of the
9 various LLCs, and he's the Vice President of
10 Finance for Oregon Rail Holdings and is my
11 immediate boss.

12 Q. And we -- a certification prepared by
13 Mr. Taylor and signed by Mr. Taylor was previously
14 introduced in the record here?

15 A. I got my copy.

16 MR. HEARING EXAMINER BLANK: Did you mention
17 that, Mr. Blank, by the way?

18 HEARING EXAMINER BLANK: Yes. It's Exhibit 36
19 of the record.

20 BY MR. BERGEN:

21 Q. Right. Have you seen Mr. Taylor's
22 certification?

23 A. Yes, I have.

24 Q. And are you familiar with all the facts

1 that he stated in that certification?

2 A. I am familiar.

3 I would have to say that I would have to
4 take the same exception that he does in his
5 statement in that some of the things that are
6 contained in the exhibit are things that I do not
7 know directly, but feel very confident in the
8 accuracy of the statements in terms of having
9 gathered that information from knowledgeable
10 people that would have reason to know those facts.

11 Q. People in the company?

12 A. Yes.

13 Q. So you can confirm that from your
14 experience that the facts stated in this
15 certification are correct?

16 A. Yes.

17 Q. Are you also familiar with the exhibits --

18 A. Yes, I am.

19 Q. -- are attached that to the
20 certification?

21 And what about the history of AOERC? Are
22 you familiar with that? Can you tell us just
23 briefly?

24 A. Some of it predates my involvement with

1 the company, but Michael McAfee and Henry Hillman
2 started discussions with TCS which --

3 Q. TCS I believe is referred to in these
4 documents.

5 A. Okay -- in 1997, I believe, and the Oregon
6 Rail Corp was incorporated in April of 1997
7 anticipating the purchase of the assets of TCS and
8 Reiseburo Mittelthurgau. I believe AOERC, Inc.,
9 as distinguished from the LLC was incorporated in
10 October, just prior to the closing of the deal,
11 and the actual asset purchase was closed on
12 November 14th of 1997.

13 Q. And one of the attachments actually to one
14 of the exhibits to Mr. Taylor's certification, a
15 few of the exhibits actually include -- one of
16 them is the asset purchase agreement.

17 Does this document, the asset purchase
18 agreement, begin to describe the asset purchase
19 you just referred to that was closed in November
20 of '97?

21 A. Yes.

22 Q. Do you recall, even without referring to
23 this -- if not, I suppose you can refer to it to
24 refresh your memory -- who sold the assets and

1 what the assets generally were?

2 A. Well, there was actually two transactions.
3 One was for the operation, the assets of the
4 operating company which was TCS Space Expeditions.
5 T. C. Schwartz, AOE, Inc., were the names,
6 corporate names that were used; and, from them, we
7 bought the contracts for the following season,
8 1998 season, collateral materials, accounts
9 receivable, prepayments for trips and various
10 contracts and assets that they had relative to
11 operating the equipment.

12 The second agreement, which I believe is
13 Exhibit C, was the agreement with Mittelthurgau
14 itself for the purchase of the rail cars.

15 Q. And how many rail cars were there?

16 A. I believe that there were 12 included in
17 that agreement.

18 Q. There's an Exhibit A attached to Exhibit C
19 of the Taylor certification. Does that --

20 A. Yes. Those were the 12 cars that were
21 purchased in November of '97.

22 Q. Now to your knowledge, in the course of
23 this transaction, did AOERC or AOERC Corp in any
24 of the purchaser side of this transaction acquire

1 any stock of the seller or any sellers?

2 A. No. It was an asset purchase. There was
3 no stock involved.

4 Q. Now I have -- in the record you've seen
5 mention of American European Express. Did any
6 interests, obligations, contracts, shares from
7 American European Express, was any of that
8 purchased during this transaction?

9 A. No.

10 Q. To your knowledge, was anything from AEE
11 in terms of corporate ownership, obligations
12 contract ever purchased by AOERC?

13 A. No.

14 Q. Well, in the course of your having worked
15 for AOERC and for Rail Holdings for these number
16 of years, aside from the coverage decisions
17 referring to American European Express, has any
18 obligation of AEE, American European Express, come
19 across your desk?

20 A. No.

21 Q. Are, to your knowledge, any former owners
22 or directors of American European Express members,
23 directors, shareholders of any of the companies
24 involved in AOERC?

1 A. No. They are not.

2 Q. Now the Schwartz Mittelthurgau group that
3 the assets were purchased from, did you ever --
4 as part of this purchase, did you get their books
5 and records with respect to employees?

6 A. No. As part of the agreement, we received
7 a list of employees and a history of their salary,
8 how much they had earned in the previous year,
9 1996, and year-to-date in 1997, their benefits
10 packages, any bonuses, that kind of thing, so that
11 we could assess which of these employees we wanted
12 to bring over and into our new operation. But
13 there was no -- we did not get complete payroll
14 records or any --

15 Q. Social Security records?

16 A. No.

17 Q. Tax withholding?

18 A. No, nothing that had to do with the
19 detailed records of their operation at all.

20 Q. Any records that they were making,
21 Railroad Retirement Board payments, like Railroad
22 Retirement, Railroad Unemployment Insurance
23 payments?

24 A. No, we didn't.

1 Q. Railroad retirement tax payments?
2 A. No.
3 Q. I am just going to refer you to a section
4 -- just for a second, back to the Taylor
5 certification, there's a section 7.9 -- I'm sorry.
6 That's my mistake. It's 7.9 of Exhibit B which is
7 the asset purchase agreement.

8 In that paragraph is entitled Compliance
9 with Codes, Regulations, Licenses. Do you see
10 that?

11 A. Correct. Yes, I do.

12 Q. I'm going to read to you the second
13 sentence, just for the sake of the record.

14 Seller and Space as to the operation of
15 the Business have procured from all government
16 agencies and authorities having jurisdiction over
17 their activities and from BMI and ASCAP all
18 licenses, permits, certifications or other
19 authorizations necessary for the conduct of their
20 activities and employees in the same or good
21 standing with all taxes and license,
22 certification, permit and examination fees and
23 other charges that may be levied on their
24 activities having been paid in full when due.

1 To your knowledge, in light of that
2 sentence, as part of the asset purchase, did the
3 company ever receive any indication that it was
4 subject to Surface Transportation Board
5 jurisdiction?
6 A. No.
7 Q. Or that it had an exemption to operate by
8 the Surface Transportation Board?
9 A. No.
10 Q. Okay. When did the AOERC service
11 excursion service begin?
12 A. We -- like I say, the deal closed in
13 November of '97 which was the end of the '97
14 season. All tours for the '97 had been operated
15 and were finished. And so we took possession of
16 the equipment and immediately put it into our dry
17 dock season to refurbish and repair anything that
18 needed to be done to the cars.
19 And our first trip for the '98 season
20 began in mid March of 1998.
21 Q. What does dry dock mean in this context?
22 A. For us, dry dock means that the cars are
23 taken into the shop. They are inspected and their
24 mechanical underpinnings are all inspected and

1 repaired as needed. Any interior work is done in
2 terms of recarpeting, reupholstery, repairs to the
3 air conditioning system, to the plumbing systems,
4 electrical systems, et cetera.

5 Q. I'm going to refer you to Exhibit I of the
6 Scott Taylor certification. Can you just tell us,
7 just for the record, state what that is?

8 A. This is the 1998 brochure that was
9 produced by TCS in -- prior to our purchase of the
10 company. So they -- I don't have a specific date
11 for when it was printed, but generally in the
12 industry, brochures are printed somewhere in the
13 neighborhood of a year before the actual trips
14 begin. So my guess is that they had this printed
15 in March or April of 1997.

16 Q. On this exhibit on what appears to be the
17 next to the last page beginning at the bottom of
18 the first column on the left, there's an
19 indication -- and this comes up as well, Mr.
20 Blank, in our joint statement, I believe, the
21 facts -- it mentioned that TCS Expeditions will be
22 handling certain things such as trip
23 cancellations, insurance, et cetera.

24 Could you explain why that was if they

1 weren't in the picture any longer?

2 A. Well, one of the agreements that we made
3 when we purchased the assets was, in a contract
4 with TCS, to continue in a transition status, to
5 take reservations for the 1998 season and 1999
6 season, for that matter, to take payments and to
7 send out final documents, preliminary and final
8 documents to the passengers as they received
9 funds. So we paid them \$100,000 for that
10 transition period which lasted most of 1998.

11 MR. BERGEN: Mr. Blank, I don't know how you
12 want to do the introduction of exhibits. I can do
13 them pretty formally.

14 HEARING EXAMINER BLANK: If you want to name
15 what they are and then we'll -- I will identify
16 them as an exhibit number.

17 BY MR. BERGEN:

18 Q. Liz, I am going to show you this document.
19 It's entitled Transition Agreement. Is that the
20 agreement you were just referring to?

21 A. That is.

22 HEARING EXAMINER BLANK: Okay. This is a
23 document entitled Transition Agreement. The first
24 paragraph states, This is an agreement made by and

1 between Space Expeditions, a Washington
2 corporation, et cetera.

3 I will enter that in the record as
4 Exhibit 47.

5 (Whereupon, Exhibit No. 47 was
6 received into evidence.)

7 HEARING EXAMINER BLANK: You may proceed.

8 BY MR. BERGEN:

9 Q. Why did you feel it was necessary -- why
10 did the company feel it was necessary to keep TCS
11 available to handle these customer issues?

12 A. Well, first of all, the brochure that was
13 out in the marketplace had their name and address
14 on it, and so they obviously were going to be
15 involved from the fact that potential customers
16 had their name and address.

17 But from the standpoint of having a
18 smooth transition from their previous year's
19 operation and our new operation, they had the
20 infrastructure set up and the documents prepared
21 for this purpose. We were in the process of
22 setting up a company to do sales and marketing in
23 Downers Grove here in Illinois, and it would have
24 been very difficult for us to have serviced the

1 1998 passengers while we were building our sales
2 marketing effort for the future.

3 Q. Thank you. I thought we did discuss the
4 next current staffing of the company. Maybe you
5 can give us an idea. I don't know if there's a
6 typical expedition, but on a trip that customers
7 might purchase, what is the staffing?

8 A. On board, we generally have, depending on
9 the number of passengers that we have on a
10 particular trip, we'll have somewhere between
11 39 and 45 people on board that are either as
12 employees or subcontractors to facilitate trips.

13 That breaks down into a number of
14 categories. Our tour leaders, who are the people
15 that work with the passengers when we're off the
16 train, are generally subcontractors, and they
17 generally work for us on a trip-by-trip basis.
18 They will -- we have some tour leaders that like
19 our Antebellum South itinerary and they will work
20 with us when we are in the south in the
21 springtime.

22 So we have some tour leaders that have
23 some particular geographic knowledge and
24 specialties, and some that work for other

1 companies, so they fit us into their schedule as
2 their other work permits.

3 HEARING EXAMINER BLANK: Let me just interrupt
4 you. I mean these types of people that like are
5 tour leaders, are they -- when you say they have
6 like a preference for a particular kind of
7 itinerary, what's typically their background?
8 Are these railroad workers? What kinds of people
9 are these generally?

10 THE WITNESS: No, these are people that are in
11 the travel industry. So they are people that
12 generally arrange and accompany passengers on
13 extended vacation tours.

14 So I'm sure Talick (phonetic) and a
15 number of the other vacation tourist industry
16 companies are aware they would work when they
17 weren't working for us.

18 BY MR. BERGEN:

19 Q. What are their responsibilities on the
20 tour?

21 A. Their responsibilities are to make sure
22 that the passengers get from the train to the
23 buses; that we don't leave any passengers behind
24 when we go and visit Yellowstone or any of the

1 places that we visit.

2 They make sure that there's -- any of the
3 passenger needs are seen to. Lunches and that
4 kind of thing are handed out, and generally are
5 there to answer any questions about our itinerary
6 and what's up next and that kind of thing.

7 Q. So who else is on a train as far as staff,
8 as far as crew?

9 A. The other subcontracted labor that we have
10 on the train are the musicians, and we always have
11 at least one musician on board for the trip, and
12 they are responsible for playing the piano in one
13 of our lounge cars at dinner time and in the
14 evening.

15 Some of our trips are themed. We have a
16 jazz theme on some of our Antebellum South trips.
17 On those trips, we actually have a quartet that
18 will come on board for the entire trip for
19 entertaining the passengers in the evening.

20 In terms of our on-board employees, we
21 have several departments. The porters are
22 responsible for the general hospitality in like a
23 hotel room. So they are responsible for cleaning
24 the rooms. They make the beds up in the morning.

1 They put the beds down and have -- do the
2 turn-down service in the evening. They schedule
3 showers. They arrange for -- if people want to
4 have a wake-up call or have beverages brought to
5 their rooms, they take care of all those needs.
6 So they really are, you know, the personal
7 attendants to the passengers for their sleeping
8 quarters.

9 We have the dining staff, of course, and
10 that's really broken down between the wait staff,
11 who are responsible for serving the meals, and the
12 galley crew. And the galley consists of an
13 executive chef, a sous-chef, and several assistant
14 chefs and dishwasher galley.

15 And we have the bar, the club cars and we
16 have two club cars and an observation car on the
17 train, and there is a bar in each of those cars.
18 So we have a bartender who's available from mid
19 morning until about 10 o'clock at night to serve
20 passengers beverages, alcoholic beverages. It
21 costs money, but any other beverage or food
22 service in the club cars is complimentary.

23 Then we have a laundry porter and night
24 porter. And then the pursers who are the

1 bookkeepers and concierge for the train. So they
2 are the people that buy souvenirs -- you know,
3 sell the souvenirs and take messages and are
4 basically the communication hub of the train.

5 Q. On the side of the independent contractor,
6 I've seen in some of the brochures that there are
7 lecturers as well?

8 A. Yes.

9 Q. Are there?

10 A. We have -- that is one of the enhancements
11 that we've actually made to the trips since we've
12 been running them in 1998 and beyond.

13 We always have a lecturer of some kind on
14 board. These, again, will be people who either
15 are specialists in railroad history or in
16 particular areas of the country where we are
17 running our trips. They generally will give three
18 or four lectures during the course of a trip and
19 usually will repeat that lecture, you know, twice
20 each time.

21 So while the passengers are -- when we
22 have days where people are on the train for most
23 of the day, we arrange for those lectures to have
24 several sessions so people can listen to the

1 history if they want.

2 Q. What kind of qualifications do these types
3 of people have usually?

4 A. They usually are often -- they're
5 academics people that are in -- come from the
6 college level that have specific historical or
7 natural history backgrounds. Often they're
8 authors or people with, you know, credible
9 credentials. And we screen them pretty carefully
10 because some of them are more interesting than
11 others obviously.

12 And at the end of each trip, we always
13 have a comment card for people to tell us how they
14 like different features of the trip, and the
15 lecturers are always ones that usually get
16 extensive comments. So we use that to screen and
17 determine who we want to have on in the next
18 season.

19 Q. You haven't mentioned having a qualified
20 railroad engineer or railroad brakeman or railroad
21 signalman or any of those type of positions on the
22 crew. Do you have such positions?

23 A. No, we don't. We run our trips with
24 Amtrack responsible for hauling the train. They

1 provide the locomotive engineers and a conductor
2 on each of the trips.

3 And the conductor is the person who is
4 entirely responsible for any movement of the
5 train. So if we need to have the train moved or
6 anything like that, then we have to go to the
7 conductor, and he's the one who -- or she is the
8 one who does that for us.

9 Q. I am going to show you another document
10 entitled the American Orient Express On Board Pay
11 Scale. I just ask that you identify it and
12 explain what it is.

13 A. Okay.

14 HEARING EXAMINER BLANK: I will enter this into
15 the record as Exhibit 48.

16 (Whereupon, Exhibit No. 48 was
17 received into evidence.)

18 THE WITNESS: This is a list of the positions.
19 Our human resources department uses this as the
20 basis for hiring employees, and I will just
21 describe that process for you.

22 We generally do our recruiting while the
23 train is in its dry dock season, and we will go to
24 various cities that we pass through and do job

1 fairs. We recruit from the hospitality industry
2 for our wait staff and porters and bartenders. We
3 recruit from various culinary institutes for our
4 galley crew.

5 There's a couple of positions on this
6 list that I had neglected to mention which are the
7 management positions. The hotel manager and
8 assistant hotel manager and the executive chef are
9 salaried employees. We generally have them
10 year-round employees. All of the rest of the
11 positions for on-board staff are seasonal
12 full-time positions.

13 Q. What's the season?

14 A. The season is from -- the trips generally
15 are starting mid February. So we hire around the
16 1st of February and trips go through mid November,
17 and we release the seasonal workers within two or
18 three days of the end of our season. So they
19 usually are done by November 15th.

20 Q. What is -- there's a column entitled
21 Position which I think is self -- you have
22 explained that.

23 What is this column that says First Year
24 Rate?

1 A. That is the daily rate that we pay those
2 positions if they are brand new employees for us.

3 Q. So when lead purser says 115, that person
4 gets \$115 a day?

5 A. Correct.

6 Q. While on board?

7 A. Correct.

8 Q. And so they are not paid when they're not
9 on board?

10 A. No. And we use a rotation schedule of six
11 weeks on and two weeks off. So people will work
12 six weeks straight, and then they'll be off for
13 two weeks.

14 Q. There's a column that says Tip Pool, and
15 in some places it says no, some places it says
16 yes, and then some places it says 50. Could you
17 explain that?

18 A. I'm not sure about the 50, but various
19 positions are eligible for the tip pool.

20 And employees get two types of tips; what
21 we call hand tips, which are cash that a passenger
22 will hand them directly during the course of the
23 trip. And then at the end of the trip, we make a
24 recommendation to the passengers for general

1 gratuities for the staff, and the passengers will
2 pay for that upon the termination of the trip, and
3 that is the tip pool.

4 So all of that money is put into a pot.
5 You take all the people that have yes by their
6 names for being in the tip pool. The number of
7 employees times the number of days divides the tip
8 pool up into shares; and then depending how many
9 days a particular employee works for that trip,
10 they'll get that many days' worth of tips. And
11 that goes through our payroll system so that it
12 gets properly taxed and reported.

13 Q. In the next two columns, one says after
14 200 days, and the other one says after 400 days.
15 Would you explain what those are?

16 A. After someone has worked for 200 days
17 which means they have worked for most of a season
18 or the equivalent of most of a season, we have a
19 scheduled increase for them assuming that they are
20 an employee in good standing; and then after 400
21 days they get another scheduled increase. And we
22 have some employees who work for us for a full
23 season. Some work for us for multiple seasons,
24 but are turnover rate is really pretty high.

1 The other column here --

2 Q. Meaning what? Which one are you referring
3 to?

4 A. The bonus column.

5 Q. Yes.

6 A. For all of our on-board employees, we
7 write a contract with them that will give them
8 certain number of dollars per day if they stay
9 with us for their contract period. And it depends
10 on the position, what the dollar amount and how
11 long the contract is, but it's an effort to reduce
12 our turnover rate so we're not always training
13 employees.

14 Q. But you mentioned the turnover rate. What
15 is it approximately?

16 A. Well, I think that we put into -- in
17 Scott Taylor's record, there is an exact number
18 for last season. Generally, it's about 300
19 percent. So we'll -- the 35 to 40 on-board hotel
20 positions, we'll have to hire about 100 employees
21 in order to fill those positions for the full
22 season.

23 Q. Let me refer you to Paragraph 25 of
24 Scott Taylor's certification. Is that what you

1 were referring to?

2 A. Correct. So for the 2001 season, we ended
3 up hiring 105 people for 36 positions that we had
4 last year.

5 Typically our employees are in their
6 early 20s for the line positions. Our hotel
7 manager, executive chef, et cetera, are generally
8 -- the management on board are generally older
9 people.

10 But the porters and the wait staff are
11 generally in their early to mid 20s. Our average
12 age on board runs right around 28 or 29 when you
13 average all the employees together.

14 They -- some employees, like I said, stay
15 for an entire season. Last year I believe we had
16 15 people that were with us for the whole season.
17 Of the staff that we ended the year with last
18 year, we brought about 15 of those back for this
19 year, not all the same as the 15 that were there
20 for the full season; and of those 15, I think
21 we're down to 5 --

22 Q. Who have remained?

23 A. -- who are still with us for this season.

24 Q. It's not typical for people to stay many

1 years in one of these positions?

2 A. No, except for the management and the
3 people that are full-time permanent staff in our
4 offices.

5 Q. So you would say that people don't take
6 this job as a porter with AOERC in order to
7 retire?

8 A. No.

9 Q. In paying the staff, you're responsible,
10 you're involved, aren't you, in the compensation?

11 A. Yes.

12 Q. Does AOERC deduct for Social Security and
13 Medicare?

14 A. Yes.

15 Q. Do you also pay the employer's share to
16 the government of those taxes?

17 A. Correct.

18 Q. What about unemployment insurance? Is
19 the company obligated to pay unemployment
20 insurance anywhere?

21 A. Yes. We -- AOERC is registered for
22 payroll taxes in the States of Texas, Colorado,
23 and Oregon currently; and we pay all state
24 withholding and state unemployment taxes that are

1 due to each of those states.

2 Q. And this has been for all employees?

3 A. For all employees since the beginning --
4 since November of 1997, I believe, is when we
5 first had employees.

6 Now in 1997 and 1998 and part of 1999, we
7 were registered in quite a few more states because
8 the controller at the time had registered payroll
9 for any state where we had an employee as
10 resident. So there's quite a number of states
11 that we have paid unemployment taxes to in
12 addition to the three that we're currently paying.

13 Q. But since then you have cut back on that?

14 A. Yes.

15 MR. BERGEN: Mr. Blank, I am going to introduce
16 a document which is actually multi pages but
17 because of what it is it makes sense to just keep
18 it all as one document, I believe, unless you
19 prefer to do it differently and just --

20 HEARING EXAMINER BLANK: As you wish.

21 MR. BERGEN: It's double-sided, just so you
22 know. I will give it to you in this folder. It
23 would be a lot easier.

24 HEARING EXAMINER BLANK: All right. Thank you.

(Whereupon, Exhibit No. 49 was
received into evidence.)

BY MR. BERGEN:

Q. Could you please, Ms. Schellberg, just explain what this multi-page document is? I am going to count the pages I guess just for the heck of it.

A. Can I talk while you're counting?

These are our tax filing summaries from ADP. We have used ADP as our tax and payroll service since we started having payroll in 1997. The reports that are in this packet actually start from fourth quarter of '99 through 2001, and it has quarterly reports for each quarter between fourth quarter '99 and fourth quarter of 2001.

The quarterly reports are certainly in existence for November of '97 through third quarter of '99. I just was not able to find the box from our dead storage in order to make copies for that.

Q. But, basically, aside from the numbers that might be different, the general format of the report would be the same?

A. Correct.

1 HEARING EXAMINER BLANK: Excuse me, is this
2 entirely then quarterly statements? Is that what
3 this consists of?

4 THE WITNESS: Correct.

5 HEARING EXAMINER BLANK: All right.

6 THE WITNESS: And it is -- quarterly payroll
7 tax it would include.

8 MR. BERGEN: Why don't we go through one?

9 HEARING EXAMINER BLANK: I want to be able to
10 identify -- I will identify it as Exhibit 49
11 quarterly statements prepared by ADP. I'm sorry.

12 MR. BERGEN: I count 40 pages by the way,
13 double-sided, which would I guess add up to
14 80 total sides.

15 BY MR. BERGEN:

16 Q. It might be just easier just for the
17 record to go through one. The very top one I
18 have.

19 I had clipped it in sections, and the
20 very top one is four pages, and the statement date
21 on the front is January 22, 2000. On the first
22 page, it says, federal information. Could you
23 just explain briefly what that means, what that
24 document refers to?

1 A. The first page of this quarterly report is
2 the fourth quarter of 1999, 941 payroll
3 information. Form 941 is the federal payroll tax
4 quarterly report number.

5 And this report shows what federal income
6 tax was withheld, what employee FICA was withheld,
7 the employer FICA matching, and the total amount
8 of liability and deposits for that quarter. It
9 also, in the last column, shows the Federal
10 Unemployment Tax Liability.

11 Q. And then when you turn that page over on
12 the back of that page, it continues to say federal
13 information. What is that page?

14 A. Okay. The 941 report requires two
15 different pieces of information. One is what your
16 deposits are which is summarized on the front
17 page. This back -- the second page has what the
18 liability is by periods. So that way the
19 government can tell when the liability was
20 incurred and match to it when the deposits were
21 made to make sure that they were made in a timely
22 manner.

23 Q. And this is basically shown on a monthly
24 basis?

1 A. Yes.

2 Q. And would this be -- would you say that
3 this is an accurate statement of both the total
4 wages and tips, et cetera --

5 A. Yes.

6 Q. -- that the company paid and the taxes it
7 paid as shown in this document?

8 A. That is correct.

9 Q. And the next page of these four pages
10 which also says fourth quarter 1999 at the top, it
11 says, CO localities, city and county of Denver.
12 Could you explain that page?

13 A. One of the locales that we are registered
14 for payroll taxes is in Colorado, and the city and
15 county of Denver have local income -- not income
16 taxes, but local taxes that are payable. And so
17 this is a summary of the taxable wages to the city
18 and county of Denver and the applicable tax that
19 was paid for us.

20 Q. What kind of tax is that, do you know?

21 A. It is a -- it's got kind of a funny name.
22 It is a -- it's a payroll tax, but it's -- I can't
23 remember the name of it. It's just a per person
24 tax, and I believe it's like \$4 per person per

1 month or something in that range.

2 Q. Let's turn to the page over which says
3 State of Colorado at the top.

4 A. Okay. The State of Colorado, this would
5 be the state income tax and the state unemployment
6 tax for our employees who were working in the
7 State of Colorado.

8 We have an operations office in Denver,
9 Colorado, so we have a staff of between seven and
10 ten people -- over the course of the years, it's
11 varied -- who are permanent full-time positions in
12 Denver, and they are responsible for managing the
13 tour and hotel operations for the train.

14 Q. So where it says, Employer SUI, that would
15 stand for state unemployment insurance?

16 A. Correct.

17 Q. So these are state unemployment insurance
18 taxes that were paid by AOERC?

19 A. Correct.

20 Q. And the next page says, State of Illinois
21 at the top?

22 A. Correct.

23 Q. And please explain that one.

24 A. Apparently we had -- oh, I remember. We

1 had one employee in 1999 who was working in our
2 Chicago office who was one of our transportation
3 managers, and his responsibility was to work with
4 Amtrack to arrange our routes and deal with any
5 problems relative to the Amtrack contract for us.
6 And he was working in our office here in Illinois.
7 So in 1999, we did -- AOERC was registered in
8 Illinois.

9 Q. And did you pay state unemployment tax for
10 him?

11 A. Correct. As you can see, the income tax
12 and unemployment tax was paid for that one
13 individual.

14 Q. And if you turn that page over, it says,
15 State of Oregon. Would you explain that one?

16 A. Yes, we have -- most of our hotel on-board
17 employees we register in the State of Oregon. In
18 1999 -- they had been in Denver for most of the
19 year, but we switched that to Oregon. So we had a
20 few employees in 1999, but the bulk of the
21 employees in 2000 and following have been
22 registered in Oregon. And we paid the state
23 income tax and state unemployment tax for those
24 people in the State of Oregon.

1 Q. The next page also says, Oregon, Workers'
2 Compensation Assessment?

3 A. Yes. The State of Oregon has a WCA rate,
4 workers' compensation, and it is an additional
5 fund in addition to standard workers' comp, that
6 you pay a certain number of cents per day worked I
7 believe. It might be hours worked. States vary
8 on this, but it's just an additional amount that
9 we pay --

10 Q. And --

11 A. -- to a state fund.

12 Q. I'm sorry. And this indicates that you
13 did pay that?

14 A. Correct.

15 Q. And then finally turning that page, State
16 of Texas?

17 A. We also have a very small office in
18 San Antonio, Texas, where we have had one to three
19 employees over time. And that is another one of
20 our transportation people who work with Amtrack,
21 and this report indicates unemployment tax that
22 was paid for those people for this quarter.

23 Q. Without going through the other 36 pages
24 of this exhibit, would it be fair to say that

1 these documents produced by ADP are accurate
2 indications of the unemployment and other taxes
3 that AOERC has paid on behalf of its employees
4 over the years?

5 A. Yes.

6 Q. Mr. Blank, you marked this one, right?

7 HEARING EXAMINER BLANK: Yes. It's Exhibit 49.

8 BY MR. BERGEN:

9 Q. In terms of all these unemployment
10 benefits that the company has had to pay as tax,
11 has the company ever received -- or any of its
12 employees, I should say, have any of its employees
13 made claims for unemployment insurance?

14 A. Yes, they have. And we have the
15 information about who has filed for claims.

16 At this point, just for confidentiality
17 purposes, I haven't made copies of that, but
18 generally when our season ends, some of our
19 employees will file for unemployment until they
20 find other jobs.

21 Actually it has not been a very large
22 number because a lot of people go from the train
23 into seasonal Christmas season jobs, and so we
24 haven't had a lot of unemployment claims; but we

1 do have a record of all the claims that have been
2 paid.

3 Q. And they do get paid, the claims?

4 A. Yes, as appropriate. You know, we have
5 some employees who are terminated for cause and we
6 follow up on those as is appropriate.

7 Q. What do you -- I mean, this might be a
8 somewhat difficult question, but if it were held
9 that AOERC was required to make railroad
10 unemployment insurance payments, would it be
11 possible for AOERC to go back to the states where
12 it has made state unemployment tax payments and
13 seek refunds, do you know?

14 A. I have never tried to do that, but I am
15 assuming that it would be possible. It would be
16 very cumbersome and it would be difficult because
17 you'd have to deal with all of the employees who
18 might have made claims or might make claims
19 against our account over the years, and it would
20 just -- it would be a cumbersome task to do it.
21 It certainly would be possible, but impractical.

22 Q. How are your employees covered for
23 workers' compensation?

24 A. We have always maintained our workers'

1 comp coverage with a reputable carrier through our
2 insurance broker. We are currently covered for
3 workers' comp insurance through Zurich Insurance
4 Company, and we estimate our payrolls for a given
5 year and pay a premium based on that amount.
6 We've got the current binder for this year's
7 policy.

8 Q. I have just handed you a document. What
9 is that?

10 A. This is our current binder and policy for
11 our current year which goes from December 1st
12 through November 30th. So this policy went into
13 effect -- and, actually, there was -- part of this
14 shows a policy period from November 14th to the
15 1st, but then there's an addition.

16 MR. BERGEN: We would like to introduce that,
17 Mr. Blank.

18 HEARING EXAMINER BLANK: All right. This is an
19 insurance binder. The first page indicates it's a
20 cover sheet from Crump Group, Crump Insurance
21 Services Northwest, Incorporated. I will add that
22 to the record as Exhibit 50. Thank you.

23 (Whereupon, Exhibit No. 50 was
24 received into evidence.)

1 BY MR. BERGEN:

2 Q. Thank you. Ms. Schellberg, this says that
3 the insured, this Oregon Rail Holdings, does this
4 also cover AOERC?

5 A. Correct. This covers our workers' comp in
6 all of our rail-related ventures.

7 Q. And even though this is for the current
8 year, has the company maintained policies
9 comparable to this one since its inception?

10 A. Yes, it has.

11 Q. Have there been any claims by any AOERC
12 employees for workers' compensation benefits?

13 A. Yes, there have.

14 Q. And when they were -- when justified, have
15 been paid?

16 A. Yes.

17 Q. I think we ought to -- I would like to
18 talk a little bit about the train itself. I am
19 going to show you a document.

20 Mr. Blank, I am going to give you a copy
21 and ask that it be introduced as an exhibit.

22 THE WITNESS: I got one here.

23 MR. BERGEN: It says at the top left, Oregon
24 Rail Holdings, Rolling Stock Inventory, 24 April,

1 '02.

2 HEARING EXAMINER BLANK: That would be
3 Exhibit 51.

4 (Whereupon, Exhibit No. 51 was
5 received into evidence.)

6 BY MR. BERGEN:

7 Q. Ms. Schellberg, what is this document,
8 please?

9 A. This is a listing of all of the cars or
10 rolling stock that we have or have rights to.

11 Q. And I notice that there's some color added
12 to this. Some of the boxes are shaded in blue.
13 Some are just plain white. A few are in yellow
14 and there's a pink one.

15 What's the significance of the colors?

16 A. What I was trying to do is show what cars
17 were subject of the purchase agreement from
18 Mittelthurgau. The yellow cars and -- the yellow
19 lines and the pink line are the 12 cars that we
20 purchased from Reiseburo Mittelthurgau.

21 The ones in yellow are the ones which
22 were part -- were mentioned in the article,
23 Cruising, as cars that were refurbished and
24 coincidentally used in the AEE set. But those are

1 the ones, the 12 cars that we purchased in the
2 original agreement.

3 The ones in blue are ones that were
4 either Amtrack-leased or cars that we leased from
5 Rail Ventures. Some of these cars had been a
6 regular part of the consist in 1996 and 1997, and
7 some had been in and out of the consist for those
8 years. But we -- when we purchased the 12 cars,
9 we also negotiated leases for those cars as well.

10 Q. So the very first entry, Car 2233, which
11 for the record, by the way, is indicated in blue,
12 when it says Amtrack lease, what does that mean?

13 A. That is a car that had been leased from
14 Amtrack by TCS, and when we bought the assets, we
15 re-negotiated that lease with Amtrack and began
16 using that car. That car is now on a lease
17 purchase option, and I believe we may actually own
18 that at this point, but I'm not sure.

19 Q. What is -- the next column says -- just a
20 number of them say AOE I, and then there are a few
21 that have AOE II. Could you explain that?

22 A. AOE I is the consist that we are currently
23 using. You'll notice on the next column, it says
24 location is on the road. And so those are the

1 cars that are currently part of our set that is in
2 operation.

3 The ones that are listed as AOE II are
4 the cars that are slated to be part of our second
5 consist, and we are hoping that this consist will
6 be ready for September trips this year. Some of
7 the cars from the original purchase will be part
8 of that second consist and some we're building.

9 Q. When you began operations in 1998, can you
10 identify from this list which cars were in the
11 active consist?

12 A. All the cars in yellow, the San Antonio
13 car which is in pink, the Pacific Star in blue,
14 the San Francisco in blue, and the Grand Canyon in
15 blue were all part of the consist. I don't know
16 whether the Portland was in the consist in '98 or
17 not.

18 Q. And the Monterrey?

19 A. The Monterrey was not.

20 Q. Was not?

21 THE COURT: Excuse me. If I might just
22 mention, in the event that this doesn't come out
23 in color in copies, when you're indicating
24 something, identify it. In yellow, the column

1 that shows it was acquired, in all those instances
2 it shows "original purchase"?
3 THE WITNESS: Correct.
4 HEARING EXAMINER BLANK: For these, the ones
5 that are identified in yellow?
6 MR. BERGEN: Except for the pink one which also
7 says "original purchase", but it says not AEE.
8 HEARING EXAMINER BLANK: Right, an additional
9 item besides the words "original purchase" is in
10 that column.
11 MR. BERGEN: Perhaps we can identify which ones
12 are in blue as well now.
13 HEARING EXAMINER BLANK: Okay.
14 THE WITNESS: That probably won't come out.
15 The four or five that are in blue are Car
16 Number 2233, Car Number 800050, 800668, 800218,
17 800246.
18 MR. BERGEN: Thanks for clarifying that,
19 Mr. Blank.
20 HEARING EXAMINER BLANK: Certainly.
21 BY MR. BERGEN:
22 Q. And in the final column, you've explained
23 that "on the road" means it's in use. "Shop"
24 means what?

1 A. We have a shop in Tenino, Washington,
2 which our original shop was in Englewood,
3 Colorado, and last year, we moved the shop to just
4 outside of Olympia, Washington. So those cars are
5 all at our shop location there.

6 Q. On the second page, there are a few that
7 are referred to as "available". What does that
8 mean?

9 A. We had a letter lease with Amtrack that
10 identified coaches, cars that we might lease; and
11 these are cars, I believe, that were on that list
12 that we have not taken and I do not believe we are
13 going to take, but I believe that we -- I believe
14 that we have a right to take them if we wanted to.

15 Q. Can you give some general description of
16 what these cars look like? Maybe we ought to
17 just start with the ones that are actually on the
18 road in the consist now.

19 A. Okay.

20 Q. Perhaps begin with a sleeper? If there's
21 a document that's already in the record that you
22 would like to refer to . . .

23 A. Well, let me start with the outside of the
24 train because that's what is most noticeable and

1 striking about the set.

2 All of our cars are smooth-sided cars and
3 they're painted in matching colors. So the bottom
4 is a royal blue and the top part is a cream color
5 and then there's a gold stripe down the middle.
6 And then they all have the car names printed on
7 the outside and the American Orient Express logo
8 on them as well.

9 On the inside, the sleeper cars are --
10 have a variety of different room configurations.
11 The cars have a room classification which we refer
12 to as Vintage Pullman. Those are two-bed
13 compartments with a water closet and a sink,
14 lavatory arrangement. The bunks, there's two
15 bunks, an upper and a lower bunk that are made up
16 for the night, and then during the day, they push
17 back into the wall and become a couch seat.

18 There is a single-room category that we
19 have a few of, and that is similar, only it has
20 just a single berth. It is a lower berth, and it
21 also has a water closet and a sink in the cabin.

22 Then we have the presidential suites
23 which have two beds, both of them on the floor
24 level. They aren't any bunks there. The

1 presidential suites all have their own shower and
2 water closet and sink and are a little bit roomier
3 than -- well, than the Vintage Pullmans.

4 We have two other categories, a parlor
5 suite and a deluxe category, and those have a
6 combination of two bunks and another lower bed for
7 the parlor suite, and then two lower berths.
8 They're just a little bit differently configured
9 than the presidential suite. So we have them
10 priced slightly differently.

11 And then we just added two new cars to
12 the consist this spring, and they have --

13 Q. Which ones are they, by the way?

14 A. The Denver and the Savannah, and those are
15 cars which Colorado Rail Car just finished
16 refurbishing for us, and those have two single
17 berths that are an L-shape on the lower level. So
18 those --

19 Q. What are the fittings like in these
20 sleeper cars?

21 A. The sleeper cars are all done in mahogany
22 wood panels. There is wool carpeting throughout,
23 and they're upholstered. They aren't all the same
24 so each room has its own character.

1 This year in anticipation -- well,
2 actually, last year anticipating the development
3 of the second set, we had a design company come in
4 and look at all of the cars and a pallet or
5 scheme, as it were, for each of the cars. So as
6 reupholstery and that kind of thing becomes
7 necessary, we have a plan for which rooms will get
8 what kind of fabric and appointments.

9 Q. Is the general approach to be, you know,
10 basic hotel, luxury hotel, first class? I mean,
11 how would you characterize it, if you could?

12 A. Well, we sell our product as a luxury
13 product, and we make every effort to make the cars
14 be as aesthetically appealing and as comfortable
15 as possible.

16 They are railroad cars, so the rooms are
17 small, but within the confines of the railroad car
18 dimensions, we do everything we can to make them
19 spectacular. We have a lot of inlaid wood. We
20 have brass fixtures, art work, et cetera, in the
21 sleepers as well as in the club cars and diners.

22 Q. Why don't you describe the club cars and
23 diners a little bit?

24 A. The club cars and the diners are really

1 the nicest part of the train. The club cars are
2 -- have a baby grand piano. They have overstuffed
3 chairs. There's an ebony bar with brass fittings.

4 We have live plants. We always have a
5 huge bouquet of flowers on the piano, and often
6 have champagne, cocktails or high tea in the club
7 cars. It is basically -- those are basically the
8 meeting areas of the train.

9 This year we've added a dome car to the
10 set, and it replaces one of the club cars. And so
11 it's a full dome. And the upstairs has some
12 cafe-like tables so that there's a bench seat with
13 a table in between.

14 The bench seats are done in leather; and
15 then on either end are seating for people to view
16 the scenic -- scenery as the train travels. That
17 car -- actually, the upstairs can hold somewhere
18 around 80 people, so we can actually get most of
19 our passengers in that area now which is good
20 because then lecturers can maximize their impact
21 with passengers.

22 Q. That reminds me, how many passengers
23 typically are on one excursion?

24 A. We've limited the number of people to

1 about somewhere around 100. If every berth was
2 filled, I think that we could have 109 perhaps.

3 But we've found that logistics gets
4 difficult when we have every bed filled in terms
5 of -- if there's any air conditioning problems or
6 if we have a passenger that has a particular
7 problem, we need to have the ability to move
8 people around in the cabins. So we generally do
9 not sell more than 100 to 103 passengers per trip.

10 It also depends on what our combination
11 of passengers are because sometimes we'll have
12 someone who will pay for a Vintage Pullman but be
13 in by themselves in that room. So what could be
14 two people is just one. And so it varies
15 slightly.

16 Our trips in the early season are not
17 always fully subscribed. We often will have 80 to
18 95 people on those trips. But our peak season is
19 generally sold out.

20 Q. And has AOERC modified the cars or
21 improved the cars or refurbished the cars or
22 changed the fleet since the service has began
23 service or since it acquired the cars?

24 A. We have done a lot of work on the cars

1 cosmetically. If you look at them, they look very
2 similar certainly on the outside as to what they
3 looked like when we purchased them.

4 But we have invested a lot of money in
5 upgrading the various aspects of the internal
6 train. This past year, for instance, we replaced
7 several of the kitchen equipment pieces and
8 upgraded those. We've upgraded the upholstery and
9 the carpet, the window treatments, the PA system,
10 and we're always working on plumbing, electrical,
11 and HVAC systems for the car.

12 And, like I said, we have made a real
13 effort as we are anticipating the second set to
14 coordinate all of the decor so that it is
15 complementary but also unique.

16 MR. BERGEN: Mr. Blank, can I suggest that
17 maybe we give the witness and the stenographer a
18 break for a few minutes?

19 HEARING EXAMINER BLANK: I was thinking that.
20 Let's recess for ten minutes. We'll be back at,
21 we'll say, 10 to 11.

22 (Recess taken at 10:36 a.m.)

23 (on the record at 10:48 a.m.)

24 HEARING EXAMINER BLANK: It's now 10 minutes to

1 11. We're back on the record.

2 MR. BERGEN: Thank you, Mr. Blank.

3 BY MR. BERGEN:

4 Q. We were in the midst of having
5 Ms. Schellberg describe the train set, and we had
6 gone through some of the cars, and I think maybe
7 you can describe the dining cars and any others
8 that we have omitted?

9 A. The dining cars -- we use two diners in
10 our set, and they together seat approximately
11 88 passengers at a time; and even when the train
12 is full, this is adequate seating for us to have
13 an open diner, open dining period, so people are
14 not given a specific time to come and eat dinner
15 as they are on cruise ships. But it's a very
16 similar experience.

17 The tables are set up in fours and twos,
18 and people often, you know, just join someone
19 who's already sitting in order to accommodate the
20 people.

21 We always pride ourselves on the quality
22 of the food on board. We work with some historic
23 railroad recipes that have been used on all of the
24 famous trains of yore and as well as regional

1 cuisine. So our executive chef is always looking
2 at where we are and trying to tailor the menu to
3 the region to enhance the passengers' experience.

4 Our dinners typically have a
5 hors d'oeuvre, soup or salad, a choice of entrees
6 which is usually some sort of fish, some sort of
7 beef and/or some sort of chicken or poultry or
8 pork or lamb kind of entree, and then a choice of
9 desserts. We offer wine with our dinners as part
10 of the trip package.

11 Lunches are similar but a lighter fare.
12 And then breakfast. We have a choice of a
13 continental breakfast that's usually served in the
14 observation car and one of the lounge cars, and
15 then a full breakfast that's served in the dining
16 room car.

17 It's a wonderful experience eating on the
18 train. You can sit -- you can easily sit there
19 for two and a half hours and eat and watch the
20 scenery go by.

21 And then the final car that I really
22 haven't described or talked about is our
23 observation car which is the round ended car that
24 is the last car on the consist, and that's the

1 New York, and it has a bar in it as well and
2 overstuffed chairs, tables for people to play
3 games on. And then in the very back session, it's
4 just a lovely place to watch the scenery when
5 trains are traveling.

6 So those are basically -- the passenger
7 cars. In addition to the passenger cars that I
8 have described, we also have two crew sleepers
9 that house the crew; and then the San Francisco
10 car is -- has some passenger rooms and the crew
11 lounge in it as well.

12 And, finally, the San Antonio or -- we
13 always have a car that's a baggage laundry car
14 where we do the laundry and store excess supplies.

15 MR. BERGEN: I am going to introduce the 2002
16 American Orient Express brochure because the
17 record up until now has the brochure of 2001.

18 HEARING EXAMINER BLANK: That's right. That
19 will be Exhibit 52, American Orient Express 2002
20 brochure.

21 (Whereupon, Exhibit No. 52 was
22 received into evidence.)

23 BY MR. BERGEN:

24 Q. Could you please read the tag line on the

1 front page here?

2 A. Deluxe Rail Vacations on America's Premier
3 Private Train, 2002.

4 Q. Thank you. One thing we haven't done yet,
5 and maybe can you do that, Ms. Schellberg, is
6 describe the actual service, the tour experience
7 that passengers get and maybe, as you do that, you
8 can refer to this brochure.

9 A. When a passenger buys a tour -- we have a
10 number of different itineraries in different parts
11 of the country, but generally we try and make our
12 tours seven -- eight-day, seven-night experience
13 because we found that that's what sells the best.

14 Most of our trips are listed as eight
15 days and seven nights. The first night is always
16 a hotel stay in the city of origin, and we use
17 that night to get all the passengers together in
18 one room. We feed them dinner. We introduce the
19 hotel manager, the chef, the tour leaders, the
20 lecturer, and give them some hints about train
21 travel and what it's like, teach people how to get
22 by each other in the hallways because they're very
23 narrow.

24 We talk about the functioning of the

1 toilets, talk about safety regulations, talk about
2 different facets of the trip. Like some of our
3 trips go to higher altitudes, so we make sure that
4 they are all aware again of any problems like
5 that. So if we have people with breathing
6 problems, we make sure that they have their own
7 oxygen as well as the oxygen we have on board in
8 case of emergencies, this kind of thing.

9 And we went to this first hotel night in
10 order to make sure that we had everybody in one
11 room to have -- get that safety and health
12 information and make sure that people got there in
13 time.

14 We had problems with passengers arranging
15 to get to the city of origination by airlines or
16 train or bus or however, and they would -- they
17 would get delayed because their common carrier got
18 delayed at the airports or whatever, and they
19 missed the train departure and we couldn't really
20 hold the train up. So we occasionally would have
21 passengers chasing the train to our next stop to
22 join the tour.

23 The first hotel night is a standard now
24 with all of our trips. Generally we will --

1 Q. What kind of hotels are they usually?

2 A. The best that we can find in the city. We
3 use very high-end hotels in all of the cities that
4 we travel. In some cities, we're able to get much
5 nicer accommodation than others. Salt Lake City,
6 for instance, doesn't have the same kind of
7 opulence that you can get in New Orleans or LA or
8 some other places, but we find the best venue that
9 we can.

10 Then generally the next day, we will take
11 the passengers on a tour of the city. So
12 depending on what the city is, we have selected
13 places to take them. And sometimes we actually
14 give them lunch while they're on the tour, and
15 sometimes they eat their first meal on the train
16 as lunch on that second day.

17 And the way we schedule the trips, a trip
18 will end on the train for one set of passengers
19 when the next set is at the hotel that night. So
20 we are actively turning the train in terms of
21 cleaning and doing any maintenance between
22 essentially noon on the last day of the trip and
23 noon the next day which is really day two of the
24 next trip.

1 And then from there, it depends which
2 itinerary we're on. The brochure pretty much lays
3 out the general list of things that we do.

4 I'm looking at the Antebellum South trip
5 starting at Washington, D.C., for instance, and --

6 Q. What page are you on?

7 A. I am on Page 18, 19 of the 2002 brochure.
8 On day two, after their city tour, they get on the
9 train and have lunch and go to Richmond, Virginia,
10 and have a museum tour in Richmond.

11 Q. Would there be a leader of that tour?

12 A. The tour leaders -- and, generally, we
13 have three tour leaders on each trip because, when
14 we take the passengers off, generally we need
15 three motor coaches to take them to the various
16 venues off the train. So there's one tour leader
17 for each motor coach.

18 Q. And AOERC has hired the motor coach and
19 made all those arrangements as part of the tour?

20 A. Correct. Correct. And all -- all of the
21 things that I am describing are included in the
22 package that the passenger buys. And I will make
23 a note if there's ever anything, as I am talking,
24 that is extra.

1 But on day 3 of this Antebellum South
2 trip, they will actually spend more time in
3 Richmond, Virginia, going to Monticello and
4 various venues in Richmond. Then they usually
5 dine on board and they travel during the night
6 from Richmond to Charleston.

7 On day 4, they get off the train in
8 Charleston and tour the historic district and the
9 magnolia plantation and some of the Civil War
10 sites in Charleston. Again, they get back on
11 board and have dinner and travel during the night
12 to Savannah.

13 And the next day in Savannah, they do the
14 -- what's the novel? Midnight -- used to be in
15 the --

16 Q. Something about the garden?

17 A. The Garden of Good and Evil, something
18 like that.

19 Q. Midnight in the Garden of Evil?

20 A. Right, Midnight in the Garden of Good and
21 Evil, and they actually go to some of the sites
22 that are in that novel.

23 And in Savannah, one of things that we've
24 arranged is a progressive lunch. And so they are

1 actually going to private homes in Savannah, some
2 of the historic mansions, and the people that live
3 there have allowed us to entertain our passengers
4 in their homes. And so that's kind of unique
5 feature. Plus they have women all dressed up in
6 the big Civil War gowns as the tour leaders on the
7 motor coaches as well.

8 From Savannah, they spend most of the day
9 en route on day 5 going across the south toward
10 Jackson, Mississippi. And so that's sort of their
11 long train day where they really have the chance
12 to enjoy the train travel for most of the day.
13 And they'll serve an afternoon tea and have
14 lectures while they're on board.

15 Day seven on this particular itinerary,
16 we take them to Vicksburg and some of the Civil
17 War sites around Vicksburg, Military Park and just
18 some of the sites in that city.

19 And then the final day, they end up in
20 New Orleans. And, generally, the last day of the
21 trip, we serve breakfast and pull into the station
22 and then the passengers are on their own. We help
23 them get to the airport if they're flying home.
24 We also can make arrangements for post hotel

1 nights, if they would like us to, but that is
2 separate from the package and would be something
3 that they would initiate and pay for separately.

4 Q. The Page 19 in this brochure that we're
5 looking at the lower right-hand corner has tour
6 prices, both early booking and retail prices.

7 Is that an accurate statement of the
8 prices of the tour per person?

9 A. Yes. And the early booking is six months
10 in advance and generally on all of our trips is a
11 \$300 per person discount if they make their
12 reservations three -- six months in advance.

13 Q. And just for the record, what's the least
14 expensive retail and the most expensive retail
15 price there?

16 A. The least expensive, if you do early
17 booking in a Vintage Pullman, you would pay 2590
18 -- \$2,590. If you paid full price for a
19 presidential suite, you would pay \$4,999 for the
20 trip.

21 One of the things that I will point out
22 here is in this brochure, you'll see activities
23 offered in that box in the lower right-hand corner
24 there, and you see a little golfer in there.

1 One of the things that we are attempting
2 to do with all of our tours by way of attracting a
3 more diverse and perhaps a younger population onto
4 the train is to offer some optional tours that
5 might be a little more physically active than our
6 standard tour; and, in this particular one, there
7 are some golf opportunities.

8 If people would like to do those along
9 the way, those activities offered are additional
10 costs. So they're optional tours, and they can
11 either sign up for them ahead of time or they can
12 sign up for them onboard. And whether or not we
13 can accommodate them sometimes -- depending on the
14 activities depends on if we have enough people
15 subscribed to do that optional activity.

16 I will note that usually an optional
17 activity means that they miss a scheduled activity
18 and they don't get any kind of discount for not
19 participating in the regular activity.

20 Q. Could you describe this as a -- the AOERC
21 service that you just described, could you say
22 that this is a regularly scheduled transportation
23 service?

24 A. No.

1 Q. I mean, if some one gets off at, you
2 mentioned Charleston, can they wait for the next
3 AOERC train to come along and take them the rest
4 of the way?

5 A. No. And even if they could, it would be a
6 long wait.

7 Q. I am going to show you another document.
8 This is entitled AOE 2002 schedule. And I would
9 ask you to --

10 HEARING EXAMINER BLANK: We'll enter that as
11 Exhibit 53.

12 (Whereupon, Exhibit No. 53 was
13 received into evidence.)

14 BY MR. BERGEN:

15 Q. Ms. Schellberg, I'll ask you what this is?

16 A. This is a revised schedule as of April 22,
17 2002, and the second page has a revision date of
18 March 22, 2002. And this has a revision of what
19 trips we are running this year that differs from
20 what is in the catalogue.

21 Of course, this catalogue was published
22 in the spring of 19 -- 2001, and we were
23 anticipating that our second consist was going to
24 be ready by early May this year and, in fact,

1 knock on wood, it will be ready in September. And
2 so we have had to re-arrange our schedule pretty
3 dramatically, reducing the number of trips this
4 year from what it was in the brochure.

5 Q. And what happens to customers who might
6 have wanted to purchase those?

7 A. When we changed the schedule, we did have
8 a certain number of individuals and some groups
9 that were scheduled on trips that had to be
10 cancelled. And we -- for the groups, we were able
11 to accommodate them on other departures. And the
12 passengers, we did the best we can -- could to
13 move them on to other similar trips or dates.
14 Some of those people, we were able to accommodate.
15 Others, we weren't, and had to refund their
16 deposits.

17 Q. How is this brochure -- referring back to
18 the brochure for 2002 -- how does the company use
19 that brochure? How do you distribute it?
20 What's the purpose of it?

21 A. We produce this approximately a year in
22 advance. We distribute it in several different
23 ways.

24 We have relationships with travel

1 consortiums, Virtuoso Vacations.Com and several
2 other AAA organizations. And we will distribute
3 quantities of the brochures to those organizations
4 who then use them in their various offices and
5 effort promotion to their customers.

6 We also work with individual travel
7 agents around the country, particularly in
8 California, Florida and the Midwest where we have
9 sales reps, and they will provide the brochures to
10 those travel agents for use with their individual
11 customers.

12 And then, finally, people can request
13 brochures through our web site. And so there's a
14 request form that people can fill out if they
15 visit our web site and we'll mail a brochure to
16 individuals upon request.

17 We also --

18 Q. If I go to Penn Station, New York, or
19 Union Station in Washington, I'm not going to find
20 these in the Take One folder --

21 A. No.

22 Q. -- or Take One stand?

23 You don't put them out in public train
24 stations?

1 A. No. When we send them out, we send them
2 out next day delivery through the postal service
3 generally because we want people requesting our
4 brochures to know that we are interested in them
5 as customers.

6 So it's -- we spend a lot of money
7 getting the brochures to people, into people's
8 hands. As controller, sometimes I take exception
9 to that, but . . .

10 Q. I just want to take you back for a moment
11 to Mr. Taylor's certification. On Paragraph 20,
12 there are two sentences and I will read them into
13 the record. It says -- this was Mr. Taylor's
14 certification -- "Since the 1998 tour year,
15 several different itineraries have had trip
16 cancellations primarily due to insufficient sales.
17 Four trips were cancelled during the 1998 season;
18 two in 1999; thirteen in 2000, and two in 2001."

19 Are those accurate statements?

20 A. Those are correct.

21 Q. Why so many cancellations in 2000?

22 A. We, like many other tourist and hotel
23 operations, thought that the millennium was going
24 to be a great opportunity to sell product. And so

1 we scheduled a trip that bridged the new year.
2 And originally it was a transcontinental trip from
3 LA to Washington, D.C., and later we cut that down
4 to a New Orleans-Washington, D.C. trip.

5 Our subscription to the trip was
6 mediocre, I would say, at best. We probably had
7 enough people to run it; but the fact of the
8 matter is it was that it cut our maintenance
9 season by more than half. So we were going to
10 have to put an extraordinary effort into getting
11 the train ready.

12 And we had also added a tour called the
13 Orange Blossom Express or Orange Blossom Explorer
14 which was a Miami to New Orleans trip that would
15 fill in the time from the millennium trip until
16 our normal season start in early March. The
17 Orange Blossom trips didn't sell well at all, and
18 so we had three or four of eight trips that were
19 essentially empty, and we could not justify
20 bringing the train out of our maintenance season
21 that early, hiring a crew, and then not having any
22 revenue for two months until our regular season
23 ended.

24 So primarily, it was a lack of sales that

1 caused those.

2 We also had two late season trips in 2000
3 that cancelled. Someone somewhat brilliantly
4 scheduled a trip that ended on Thanksgiving day,
5 and that didn't sell well. Just for the obvious
6 reasons. And so we ended up cancelling two trips
7 at the end of the season.

8 But that's why we had so many
9 cancellations in that particular year.

10 I have not added up the number of trips
11 that we've changed from our catalogue this year
12 because -- because that's basically due to
13 equipment availability, not for sales issues.

14 Q. On Pages 18 and 19 of the 2002 brochure,
15 you were -- you took us through the Antebellum
16 South tour, what that might be like.

17 Could someone buy for less than the tour
18 price a trip, say, from Charleston to Savannah or
19 from Savannah to Vicksburg and not take the entire
20 trip?

21 A. If someone wants to get on the train
22 during a trip, they have to pay the full passage.

23 It's theoretically possible that someone
24 could get on the train at some point other than

1 the beginning and get off the train at some point
2 other than the end; but we -- I don't recall.
3 Although I wouldn't have personal knowledge of
4 anybody asking that question, but the price would
5 be the same regardless of where they got on or
6 off. We do --

7 Q. You don't market this as, you know, trips
8 from point to point?

9 A. No, no.

10 Q. Or price it that way either?

11 A. No. In fact, some of our shortest trips
12 in terms of mileage are more expensive than
13 shorter trips. And basically our pricing has to
14 do with a combination, a number of days that we're
15 on the road and the off-train features that are
16 included in the package.

17 When we are doing our trips to the parks,
18 for instance, we take the passengers off the train
19 and put them in a lodge in the parks overnight.
20 And so that trip tends to be more expensive even
21 though it's the same seven days as the Antebellum
22 trip is.

23 So the number of miles really that a trip
24 entails is really one of the lesser factors in how

1 we price the trip.

2 Q. Do you have some general familiarity with
3 Amtrack's service, intercity service?

4 A. General familiarity with it.

5 Q. To your knowledge, are the price of your
6 trips comparable at all to Amtrack travel?

7 A. They're about a thousand percent higher
8 than -- I would have to make some specific
9 comparisons, but our trips are not comparable to
10 Amtrack.

11 Q. Are Amtrack trains, to your knowledge,
12 appointed anything like your trains?

13 A. None of the Amtrack trains I have ever
14 ridden looked anything like our trains.

15 Q. And you mentioned that getting to the
16 starting point of an AOERC tour and getting home
17 from the end point is not one of the services you
18 provide?

19 A. It's not part of the package.

20 Our rail expedition -- AOE Rail
21 Expeditions is our sales and marketing company,
22 and they are the ones who actually do the
23 marketing for us and they're the people that take
24 the reservations.

1 That company has an ARC membership, which
2 is Airline Reporting Corporation, which allows us
3 to sell tickets on common carriers, primarily
4 airlines, but we can sell an Amtrack ticket as
5 well; and it also allows us to make hotel
6 reservations and, you know, various associated
7 reservations much as any travel agent would be
8 able to do.

9 When someone calls to make a reservation
10 for the trip, in addition to buying the package,
11 some of them may want to spend a couple extra days
12 in Washington, D.C., for instance, if that's where
13 their trip starts to New Orleans or whatever the
14 city of origination. And so we'll try to make
15 reservations in the same hotel that we stay in as
16 part of the tour for an additional cost.

17 If they want us to, we can arrange air
18 fare for them. It's not included in the package
19 price, but we can make that arrangement for them.
20 And, in that sense, we are acting more as a travel
21 agent than -- for the person putting that package
22 together.

23 Q. Let me turn to Exhibit L of the
24 Scott Taylor certification which is the 2001

1 brochure. On Page 29, there's -- on Page 29, it's
2 entitled Frequently Asked Questions.

3 Could you please just read for the record
4 the first question and answer, at least the first
5 sentence of the answer.

6 A. The question is "How long has American
7 Orient Express been in business?" Answer, "The
8 2001 season will be our seventh year of
9 operation."

10 Q. Could you explain that, given that you
11 have previously testified that AOERC began
12 operations in 1998?

13 A. Well, the question as it's phrased is the
14 American Orient Express and, in fact, the American
15 Orient Express name has been used since the 1995
16 season that was operated by TCS and TransTexas. I
17 believe it was a joint venture in '95. And so if
18 you count back, I believe that's the basis for
19 that statement.

20 Q. And the reason for that statement you
21 think?

22 A. Well, when you're selling a vintage
23 historic product, you are always wanting to give
24 people a sense of history of the product as well

1 as that the product is historical; and it is, as I
2 would say, a marketing puffing ploy; that it is a
3 truthful statement from the standpoint that that
4 name and essentially that equipment has been
5 operating in a similar manner for that period of
6 time.

7 It is not accurate in terms of how long
8 our corporation has been in business, but it is
9 intended as a sales and marketing statement and
10 not as a technical statement of fact.

11 Q. We've gone over some examples of
12 cancellations of trips. At least we went through
13 the changes in the 2002 schedule. Are there also
14 ever any unadvertised additional trips?

15 A. We've had a number of different trips over
16 the years. Most -- well, several of them happened
17 in '98 which was our first year of operation. We
18 had inherited the schedule that was arranged by TC
19 in 1997. Four of the nine Canadian trips that
20 were in that schedule were cancelled, so while --
21 during the period of time that we would have been
22 using the train in Canada, if those trips had been
23 fully subscribed.

24 We did do a couple of non-scheduled

1 trips, and one of them was with Subaru. They used
2 our cars essentially. We provided all the onboard
3 services, but they arranged for all of the
4 extra-curricular activities; and that trip went
5 from Portland to Whitefish, Montana and back. It
6 was essentially a sales promotional trip for some
7 new models that they had coming out.

8 We also have done a number of "family
9 trips". We did a trip for the NRP, the National
10 Railroad Passenger Association. I'm not sure. I
11 wouldn't swear that that's the right name of that
12 organization, but it was an annual meeting for
13 railroad companies that have passenger service.
14 And so they met on the train and actually had
15 their meeting. I believe that trip went from LA
16 to Albuquerque. I'm not sure about where that
17 was.

18 And then we've had various charters that
19 -- we ran a charter from Denver to San Francisco
20 for Peter Voll and Associates. That wasn't one
21 that we had advertised in the catalogue.

22 Generally, that's not our business. We
23 don't do that on a regular basis or planned basis
24 because we make more money running our own trips.

1 But, occasionally, people do contact us and ask
2 about that.

3 Q. Why don't we talk just for a few minutes
4 about what the typical AOERC clientele or customer
5 is like. Is there a typical customer?

6 A. Yes. Generally our customers are retired.
7 They tend to be -- I sometimes tell people that 65
8 is young on our train, but as time has gone on,
9 we've had attracted some younger people.

10 But it's generally people who are fairly
11 well off, although we do get some fair number of
12 middle-class people who are taking the trip of a
13 lifetime, have saved up all their money to take a
14 trip with us.

15 But, generally, they're senior citizens,
16 and they are often well-traveled, have taken a lot
17 of other trips and our product is an alternative
18 to going on another cruise in the Caribbean; gives
19 them a more intimate setting than the large cruise
20 ship and is generally aimed at educational and
21 more sightseeing rather than relaxation type of an
22 experience.

23 Q. So you don't get the college kids coming
24 home from school?

1 A. No.

2 Q. Like I get on the Northeast car with
3 Amtrack?

4 I'm showing you another document that we
5 would like to put in the record, Mr. Blank. It's
6 entitled American Orient Express Virtuoso Scoring,
7 November 7, 2000.

8 (Whereupon, Exhibit No. 54 was
9 received into evidence.)

10 HEARING EXAMINER BLANK: I will enter this as
11 Exhibit 54.

12 BY MR. BERGEN:

13 Q. What is this document, Ms. Schellberg?

14 A. This is a study that we did in conjunction
15 with Virtuoso which is one of our consortium
16 partners. And they took our mailing list and the
17 demographics that we have associated with that and
18 compared it to their multi-million name mailing
19 list and scored it according to different segments
20 as they have them listed.

21 It's a -- their segments are interesting.
22 They -- for instance, the top segment, which was
23 the highest correlation of our list to their list,
24 was the second honeymooners, and the average age

1 is 60 to 70. Their average trip length was 11
2 days, and they spent an average of \$6,200 on their
3 trip

4 BY MR. BERGEN:

5 Q. Per person?

6 A. Per person.

7 Q. Let me refer you to the back page of this
8 document. Beginning on what says Page 5, it says
9 here -- obviously there's a faxed page -- there's
10 something called a Brief Review, Families and
11 Segments. What is that section of the document?

12 A. That is the explanation of the various
13 segments so it gives you a little clearer
14 explanation of who's included in that particular
15 segment.

16 Q. This description is created by Virtuoso?

17 A. Correct.

18 Q. And then you said they compared your list
19 of customers to their lists and then they
20 categorized them.

21 And what about the -- going back to the
22 first couple of pages, Page Number 2 through Page
23 Number 4, are these -- is this listed in any kind
24 of order? Because I see it goes from Segment 6 to

1 Segment 14 to Segment 12. What is the order of
2 this?

3 A. I believe that this is from the most
4 prevalent to the least, in terms of correlating
5 with their list. So most -- more of our names
6 were in the Segment 6 category which is the first
7 one listed than in Segment 8 which is Platinum
8 Girls which is the last one.

9 Q. This basically categorizes in the order of
10 the number of your customers that fit into that
11 segment?

12 A. Correct.

13 Q. Who your clientele is basically?

14 A. Correct. And the way we collect
15 information for marketing purposes, when we send
16 out preliminary documents, we ask the passengers
17 to fill out information about where they heard
18 about our trip, what magazines they read, and
19 various statistics in terms of age and marital
20 status that they fit into, and that's the first
21 source of our segmentation.

22 Our reservation agents will collect as
23 much of that information as they can as they're
24 making the reservation as well. And at the end of

1 the trip, we have had quite a long questionnaire
2 that we ask people to fill out; and,
3 unfortunately, I don't have a copy of that but
4 would be happy to provide that to you at a later
5 date if it seems appropriate.

6 We give away a trip to somebody who has
7 filled out the questionnaire each year. So we --
8 in order to entice people to give us the
9 information, we give them a carrot of a free trip.

10 Q. Would you say the characteristics of your
11 customers have changed since you began service in
12 '98?

13 A. Overall we're still serving the same
14 passenger segment. We are working very hard to
15 expand that somewhat by offering some optional
16 tours as I mentioned earlier.

17 What has changed is the source of our
18 passengers. When we purchased the assets in late
19 '97, the primary sales effort was aimed at
20 non-profit organizations. So organizations like
21 the Smithsonian, the Audubon Society, various
22 alumni associations from Stanford, Harvard, those
23 kinds of institutions, would sign a contract with
24 us and then market the program to their mailing

1 list.

2 And that was the vast majority of the
3 reservations when we purchased the trip and the
4 assets in 1997.

5 Q. Let me direct your attention for a moment
6 to Exhibit B of Scott Taylor's certification. I'm
7 sorry -- yes, Exhibit B. And then Exhibit B
8 itself has its own Exhibit B. It's a little
9 confusing, which is entitled Schedule of Equipment
10 Leases and Other Contracts, Commitments and
11 Liabilities.

12 And beginning in the second half of that
13 first page, it says, Sales Contracts and
14 Commitments. Would you say that this is
15 consistent with your testimony just now about the
16 types of organizations that you would do business
17 with at that time?

18 A. Correct. On this list are a number of
19 different types of contracts, but the majority of
20 them, alumni tour agreements, University of
21 Michigan Alumni Association, Harvard Alumni
22 Association, California Alumni Association, UCLA
23 Alumni Association, et cetera, are all non-profit
24 groups who had contracts to sell our program

1 through their associations.

2 Q. And this is a list of -- referring again
3 to this Exhibit B of Exhibit B of the Taylor
4 certification, this identifies the contracts that
5 were signed over to you as part -- to AOERC as
6 part of the sale of the assets?

7 A. Correct.

8 Q. Thanks.

9 A. Of course, it was AOERC Corporation at
10 that point.

11 Q. At that point, correct. But you were
12 saying that the thrust of the company's marketing
13 has changed since then?

14 A. Correct. The vast majority -- and I
15 hesitate to put a percentage on it, but I would
16 guess that it was 70 to 75 percent was non-profit
17 organizations when we purchased the assets.

18 Nonprofit organizations now make up less
19 than 15 percent of our bookings. We have
20 developed a network of travel agents, as I stated
21 earlier, and are working with a number of
22 consortiums which are -- travel agents are able to
23 join Virtuoso, for instance, and be part of their
24 group in terms of having products that are

1 screened and sold through that consortium; and, as
2 part of that, they get a better commission rate.

3 And also since we've become a preferred
4 supplier for them, we offer some incentives. For
5 instance, AAA of California, Southern California,
6 I believe, is one of the agency groups that we
7 work with, and any passenger that books through
8 AAA of Southern California will get a \$25 onboard
9 credit, and they'll find that on their pillow when
10 they check on to the train. And they can use that
11 for buying souvenirs or beverages on the train.

12 (Whereupon, Exhibit No. 55 was
13 received into evidence.)

14 MR. BERGEN: Let me show you another document
15 entitled American Orient Express 2002 Advertising
16 Schedule. And I would ask Mr. Blank that this be
17 admitted.

18 HEARING EXAMINER BLANK: Exhibit 55.

19 BY MR. BERGEN:

20 Q. Ms. Schellberg, what is this document,
21 please?

22 A. This is a draft of our plan for 2002 print
23 advertisements, and it's very, very close to the
24 final version; but what's on this schedule is the

1 dates and times of print ads that we were
2 proposing to place for this year, for 2002. It
3 was prepared in November of last year.

4 Q. And in the column on the front -- on the
5 top left, it says, "Consumer Magazine". What does
6 that list the names beneath that?

7 A. The magazines that are listed in that top
8 section under Consumer Magazines are all display
9 or types of ads that went into magazines that
10 would be read directly by our passengers.

11 Q. But that's -- that lists the name of the
12 actual magazines?

13 A. Yes.

14 Q. And then the next box below that is
15 Consortia Publications. What does that refer to?

16 A. Those would be advertisements that go into
17 magazines that are published by the various
18 consortiums that we are members of; and, for this
19 particular year, all of those are AAA magazines.
20 Those magazines would go to both the travel agents
21 and to their clientele.

22 So it has sort of a dual effect in terms
23 of getting to both agents and to end users.

24 Q. And what's the next category called Trade

1 Publications?

2 A. Trade publications are the travel agent
3 magazines that we advertise in, and there's three
4 magazines, Travel Agent, Travel Weekly and Group
5 Tour Magazine that we regularly place ads in; and
6 these are ads that are aimed specifically at
7 travel agents, not likely to be seen by individual
8 travelers.

9 Q. In the first group, back up to Consumer
10 Magazine, how did you -- how were these particular
11 magazines as opposed to other magazines selected?
12 Why have you chosen these? Why haven't you
13 chosen, for example, general circulation news
14 magazines like NewsWeek or something?

15 A. Well, one of the things that we are always
16 very interested in collecting from people who call
17 us is the source of information, how they heard
18 about us. And so we keep statistics on where
19 people have seen us. So if they have seen us in a
20 Sunset Magazine, we tally that up so we know which
21 ads that we've placed last year, for instance,
22 have been most effective for us.

23 We also keep track of, you know, what
24 magazines our passengers read and analyze how

1 successful various ads are. So if we got
2 published an ad in a New Yorker Magazine, for
3 instance, and we did not get a lot of response
4 from that ad, that particular advertisement, then
5 we may decide in another year to shift those funds
6 to advertising in a different magazine.

7 So it shifts -- that particular segment
8 shifts from year to year depending on what our
9 experience is.

10 Q. And these magazines, what's your basic
11 target as a marketing strategy?

12 A. Our basic target are people that are
13 traveling, people that are usually in 40 and older
14 age categories, and generally people who are
15 middle to -- middle class or higher.

16 Q. But is this traveling for the sake of
17 getting from place to place or some other kinds of
18 travel?

19 A. No. These are vacation and leisure
20 travelers.

21 Q. One of the ways besides advertising, like,
22 you know, what we've been just through, this
23 discussion of print advertising, what other ways
24 does AOERC market its product?

1 A. One of the most successful things that we
2 have are PBS features that have featured our
3 train.

4 A person by the name of John Grant has
5 made several segments on the train. One is called
6 Rockies by Rail. Another one is called National
7 Parks by Rail. And he made one on our Antebellum
8 South by Rail. And then last year, he made a new
9 one that was for the Food Channel -- Food Channel,
10 I believe, that featured Dining by Rail, and that
11 one was featured on our Pacific Coast Explorer
12 trip.

13 And they showed a lot of our recommended
14 features on the tour, but really focused on the
15 dining both on the train and off the train on
16 that.

17 And Public Broadcasting has bought the
18 rights to the trips by rail segment and aired
19 those on a fairly regular basis over the last
20 three years. And we always get a tremendous
21 response from those programs airing, even though
22 there's nothing on the program per se other than
23 the name of the train that leads them to us.

24 So that's one of our most successful

1 public relations types of publicity.

2 We have a PR firm that regularly recruits
3 and organizes travel writers to take trips on the
4 train. So we have a steady stream usually of
5 articles that show up in Sunday travel sections
6 that feature the train.

7 And then, finally, of course, our web
8 site is linked to a lot of travel sites, and
9 particularly rail sites. So if someone is
10 interested in railroading, it's a short trip to
11 get to our web site that describes the train in
12 our activities.

13 (Whereupon, Exhibit No. 56 was
14 received into evidence.)

15 MR. BERGEN: I am going to show you another
16 document entitled the gold -- it's an article
17 entitled Golden Age is Back. I would ask that
18 that be admitted.

19 HEARING EXAMINER BLANK: I will enter this as
20 Exhibit 56.

21 BY MR. BERGEN:

22 Q. Ms. Schellberg, what is this?

23 A. This is an article that was published in
24 Travel Agents Magazine, and it has kind of a dual

1 feature from our perspective in terms of
2 introducing people to our product, talking a lot
3 about the train. But it also is talking a lot
4 about our shift towards using travel agents for
5 selling the product from the non-profit
6 organization.

7 So we're kind of giving them the spiel of
8 being able to earn healthier commissions from
9 selling our product than they get from some of the
10 other vacation and cruise opportunities out there.

11 Q. So this is an indirect marketing to the
12 travel agents themselves?

13 A. Correct.

14 Q. Just to stay on the market for another
15 moment or two, is the AOERC service, the tour,
16 available to everyone? Anyone who wants to buy a
17 ticket can just get on board?

18 A. No. We have certain restrictions that we
19 impose on our customers. One is an age limit
20 which we screen at the reservation point. We'll
21 not allow children under the age of 8 to
22 participate in our trips. And between the ages of
23 8 and 16, we have a discounted fare program as
24 long as they're traveling with an adult. Any

1 child 16 or under needs to be with an adult pretty
2 much at all times when they're on board, and that
3 is primarily for safety reasons.

4 And because the nature of our off train
5 --

6 Q. Which is for safety reasons?

7 A. Not allowing children under the age of 8
8 on board. We don't have the facilities to either
9 entertain them or to supervise them appropriately.
10 So age is certainly one criteria in terms of
11 children.

12 The other criteria that we deal with on a
13 pretty regular basis is, given the age of our
14 passengers, mobility and mental acuity, if you
15 will. And because the train is grandfathered for
16 ADA purposes, we are not wheelchair accessible.

17 Q. That's the American with Disabilities Act,
18 correct?

19 A. Correct. Our passage ways in sleeper cars
20 are 23 inches wide. Doors into the cabins are
21 18 inches wide and do not accommodate any normal
22 wheelchair and are not friendly to walkers.

23 We actually do not allow people to use
24 walkers while they're on board because they make

1 it impossible for people to get around them and
2 are very hard on the mahogany woodwork.

3 So we -- when we collect information from
4 the passengers, we are always asking them about
5 mobility problems. And if they have mobility
6 problems, we discourage them from participating in
7 the trip. And if the mobility problems are such
8 that they are able to move around a moving train
9 adequately, we encourage and/or require them to
10 travel with a companion who is physically capable
11 of helping them if need be.

12 Q. I wanted to discuss with you a little bit
13 how customers are notified of the rules.

14 I am going to show you this other
15 document that I ask to be introduced. It's
16 entitled American Orient Express Confirmation.

17 (Whereupon, Exhibit No. 57 was
18 received into evidence.)

19 HEARING EXAMINER BLANK: I will enter as
20 Exhibit 57.

21 BY MR. BERGEN:

22 Q. Ms. Schellberg, what is this document,
23 please?

24 A. This is the first document that a

1 passenger will receive after they have made their
2 initial reservation, and --

3 Q. Is this an actual one by the way?

4 A. This is an actual copy of a confirmation.
5 We've whited out the passenger's name for privacy
6 reasons; but this is an actual trip on one of our
7 Pacific Coast Explorer excursions that is --
8 actually, this trip just ended last week. So this
9 was --

10 Q. So this is the actual itinerary?

11 A. Yes. For a trip that started May 7th and
12 ended on May 14th of 2002.

13 Q. And why is this called the confirmation?

14 A. This is what we send out to a passenger
15 who has made -- who has called us up and made a
16 reservation.

17 There's two different scenarios: Certain
18 passengers will pay their deposit of \$500 deposit
19 per person with a credit card when they make their
20 reservation, and, in that case, this would just be
21 a confirmation of that deposit.

22 Some people will prefer to pay by check
23 and so they would get this piece of paper so that
24 they would know what they need to do in order to

1 reserve -- make their reservation, hold their
2 reservation.

3 Q. Okay.

4 A. And basically this document let's them
5 know what kind of information will be coming in
6 their preliminary documents. It gives them a
7 summary of what they've purchased, and a summary
8 of the features of the trip and a -- the total
9 price for what they have.

10 Q. So that's the price that someone paid
11 here? This is obviously confirmation for two
12 people?

13 A. Right. And they paid \$5,220 per person
14 for this excursion.

15 And then finally it has the refund and
16 cancellation policy.

17 Q. On the cover -- on the front page, the
18 first page, the second full paragraph that begins,
19 "We ask that", "We ask that the personal health
20 and immigration and information form be returned."

21 So they have -- a customer would get
22 these additional forms they have to fill out?

23 A. Correct.

24

1 (Whereupon, Exhibit No. 58 was
2 received into evidence.)

3 BY MR. BERGEN:

4 Q. I am going to hand you a blue booklet,
5 8-and-a-half-by-11 in size. It contains a number
6 of documents. On the cover it says, American
7 Orient Express.

8 HEARING EXAMINER BLANK: All right. I will
9 enter this with its contents as Exhibit 58, if
10 that's what you would like me to do.

11 MR. BERGEN: Yes, please.

12 HEARING EXAMINER BLANK: All right. Let's see.
13 The contents are a little pamphlet, Comprehensive
14 Travel Protection, a confirmation sheet similar to
15 what we were just discussing as Exhibit 57.

16 MR. BERGEN: Since we put that in separately,
17 we don't have to have that in the packet there.

18 HEARING EXAMINER BLANK: All right. I will
19 exclude that.

20 THE WITNESS: This is the same.

21 HEARING EXAMINER BLANK: And a form entitled
22 Personal Information Form, American Orient Express
23 Rail Expeditions. Another form, Health
24 Information Form. A printed sheet entitled Terms

1 and Conditions of Passage Agreement. And it looks
2 like four pages stapled together, Getting on
3 Track, AOE, 2002, Recommended Reading List.

4 And then the other side of the folder
5 here, we have a pamphlet that looks like --
6 entitled American Orient Express Passenger Guide;
7 and, finally, a sheet with a diagram of a cut away
8 of the passenger car entitled New in 2002, Deluxe
9 Suite.

10 And then at the bottom, it shows a line
11 of vista dome cars. I believe that's everything

12 MR. BERGEN: Yes. Thank you. If we could just
13 point out that many of these documents are
14 actually printed on both sides.

15 HEARING EXAMINER BLANK: All right.

16 BY MR. BERGEN:

17 Q. Ms. Lissberg -- Ms. Schellberg?

18 A. That's a new one. I never got Lissberg
19 before.

20 Q. Why don't we go through a couple of these
21 rather quickly.

22 The Health Information Form. And on the
23 back of the Health Information Form or the front,
24 whichever side, one side says Health Information

1 Form, the other side says Personal Information
2 Form. What is the purpose of having a customer
3 fill out a personal information form?

4 A. Basically what we're trying to get on the
5 Personal Information Form is emergency
6 information, preferences for their hotel stay, how
7 they like their name on their name badge, and any
8 information about special occasions.

9 Many people are on an anniversary trip or
10 a second honeymoon or a graduation present --
11 well, not very many graduation presents, but
12 birthdays, that kind of thing. And so if they let
13 us know that they have got a special occasion,
14 then usually we'll, you know, put something in
15 their cabin, a bottle of wine or flowers or
16 something to acknowledge that.

17 Q. What about the Health Information Form?

18 A. The Health Information Form is the primary
19 place where we are able to assess medical
20 conditions that might impair someone's ability to
21 participate in the program.

22 It also makes us aware of any particular
23 problems someone might have. I already mentioned
24 oxygen for some of our high altitude trips.

1 Dietary requirements. Mobility issues. Those
2 kinds of things. And we hope that people are
3 honest when they fill these out because it's the
4 primary place where we are able to intervene and
5 let people know if we don't think this trip would
6 be appropriate for them.

7 Q. Speaking of this -- speaking of dietary,
8 by the way, are you able -- is AOERC able to
9 accommodate people who have religious dietary
10 restrictions such as kosher or Hallel?

11 A. I know that we have provided kosher meals.
12 I'm not sure whether we are able to meet
13 everyone's dietary restrictions, but we certainly
14 routinely do diabetic, low-fat, low-salt diets and
15 vegetarian diets more for health reasons, I think,
16 than religious restrictions.

17 Q. This multi-page document called Getting On
18 Track, AOE 2002 Recommended Reading List, just
19 briefly what is that about?

20 A. Many of our passengers are interested in
21 the educational component of our trip. Many of
22 them are buying their tickets a year or more in
23 advance, and this is one way of kind of giving
24 them something to whet their whistle, if you will,

1 and prepare for the trip.

2 So it makes recommendations that are
3 appropriate to the particular trip that they are
4 going on. For instance, if they are going on one
5 of our Civil War theme trips and on the Antebellum
6 route, they can read Civil War history that's
7 pertinent to the places that we actually stop.

8 There's recommendations for Lewis and
9 Clark readings on our Northwest and Glacier trip
10 because a lot of places that we go there
11 correspond to some of the places that Lewis and
12 Clark went and that sort of thing.

13 So it is simply a reading list to help
14 people enhance their experience of our product.

15 Q. Another document in here is Terms and
16 Conditions of Passage Agreement.

17 A. Yes, the fine print.

18 Q. That's the fine print?

19 A. Yes. These are generally the -- this is
20 the meat of the contract between AOERC and the
21 passenger.

22 It has definitions. It has our
23 warranties and our rights as a provider. It
24 talks about luggage and risks relative to losing

1 baggage; risks relative to the use of
2 subcontractors when we're off the train.

3 It talks about our right to exclude
4 passengers if need be. Security health
5 considerations. It states the jurisdiction for
6 any claims or suits that might be filed relative
7 to the passage; and, finally, states that this
8 contract is what is binding, assuming that they
9 use their ticket.

10 So this is something they get in their
11 preliminary package before they have made their
12 final payments. So it's something I hope that
13 they read.

14 Q. You mentioned excluding passengers and the
15 asserted right to exclude passengers. Has that
16 ever happened?

17 A. Yes. Unfortunately, we have had occasions
18 to either reject passengers at the beginning of
19 the trip or to send passengers home who have been
20 unable to complete the trip.

21 And one example, the most recent example
22 was a woman showed up at the New Orleans airport
23 on one of our Antebellum South trips, and she had
24 no idea why she was in New Orleans. The airport

1 people looked through her purse and found an AOE
2 ticket and got her to our hotel at which point we
3 had someone sit with her to make sure that she
4 didn't wander off while we contacted her
5 relatives.

6 And it turned out it was a niece who had
7 bought the trip for this woman who was her aunt,
8 and the travel agent who made the booking had had
9 this woman do other trips but, apparently, she had
10 lost some of her mental abilities in the meantime
11 and she was -- she was just unable to safely
12 travel even with a companion. So we sent her
13 home.

14 Another situation last year happened in
15 Canada where we had a woman who was traveling with
16 a companion because they were aware that she had
17 some memory problems, and she was unable to
18 complete the trip because she got very anxious and
19 confused and was disrupting other passengers.

20 So we -- in that case, they were
21 agreeable to leaving the trip partway through.
22 But we would have sent them home even if they
23 hadn't been agreeable because it was a safety and
24 disruption problem.

1 Q. And then there's this document, the
2 Passenger Guide. I was going to ask you to
3 describe this document called the Passenger Guide.

4 A. Oh, the Passenger Guide. I'm sorry, I
5 thought you said the passenger died. Not
6 recently. That's the Murder on the Orient
7 Express.

8 The Passenger Guide, we give our
9 passengers this information in the preliminary
10 documents. There's a very similar document in the
11 final documents, and then we go over this
12 information again at our first meeting with them
13 at the hotel.

14 And, basically, this is trying to give
15 them a heads up on the nature of train travel.
16 One of our constant problems with people on the
17 train is they bring too much luggage, and we have
18 very limited storage and closet space in the
19 rooms. So we try to give them an idea of what
20 they should pack, you know, what kinds of luggage
21 is available, and just everything from what kind
22 of electrical outlets we have and how to
23 appropriately dress; security issues in terms of
24 people bringing valuables onto the train.

1 Our cabins do not lock from the outside,
2 so if people have valuables, they need to either
3 leave them at home or keep them in a safe -- in
4 the safe in the purser's office.

5 But that kind of information is all
6 detailed, and also they have a layout of all the
7 cars so people can see.

8 Q. And this -- is this -- are these fairly
9 good sketches? I mean, you described some of
10 these cars earlier in your testimony.

11 A. Yes, yes. These are, more or less, to
12 scale and show the different cabin configurations.
13 Small but somewhat accurately.

14 There is a variety in terms of layouts of
15 the number of the rooms just because the cars come
16 from different places and have been refurbished at
17 different times.

18 Q. What's -- there's this single sheet,
19 American Orient Express, New in 2002, Deluxe Suite
20 and Vista Dome Cars?

21 A. The Deluxe Suite is, as I mentioned
22 earlier, the two new passenger sleeper cars that
23 we added to the set. That shows the layout of
24 those cabins which I think will be very popular

1 because they don't have the upper bunk.

2 And the Vista Dome Car was -- is a
3 cut-away of the dome car that we had originally
4 planned to put into the set. We in fact are not
5 using the vista domes but rather full domes that
6 we acquired from Amtrack last year and have
7 refurbished. So that is -- we have a dome, a
8 better dome than that one.

9 Q. I was going to introduce the ticket book,
10 but I think I'm going to save that. There's too
11 much.

12 A. Basically the information in the ticket
13 package is -- are luggage tags and just boarding
14 pass and the Passenger Information Guide. It has
15 a lot of the same information that we just went
16 over that's in the preliminary documents.

17 HEARING EXAMINER BLANK: Why don't we admit it
18 and, if you don't want to discuss it, that would
19 be fine.

20 MR. BERGEN: I have one that we -- we have one
21 where we also had to delete the name of the actual
22 passenger. I think we succeeded.

23 HEARING EXAMINER BLANK: I would certainly take
24 care of that anyway.

1 MR. BERGEN: Okay.

2 (Whereupon, Exhibit No. 59 was
3 received into evidence.)

4 THE WITNESS: And these are the final document
5 package that someone would get after they have
6 paid their full fare.

7 HEARING EXAMINER BLANK: This would be
8 Exhibit 59. It's a packet of one, two, three,
9 four five pamphlet items entitled Final Trip
10 Schedule, Airport Transfer Options. Look like
11 this is a duplicate.

12 MR. BERGEN: This is for two passengers.

13 HEARING EXAMINER BLANK: Okay. Another
14 Passenger Information Guide, small, about 8-by-5
15 or 8-by-3 pamphlet. A series of what looks like
16 luggage tags.

17 THE WITNESS: Correct.

18 HEARING EXAMINER BLANK: These would be plastic
19 items, ID cards.

20 THE WITNESS: Those are also luggage tags.

21 HEARING EXAMINER BLANK: Okay.

22 THE WITNESS: There's two types of two luggage
23 tags. Those, the plastic ones, are permanent
24 luggage tags that would have someone's name and

1 address on them. Then there are cardboard
2 colored-coated tags that coordinate the
3 passenger's luggage with a particular car. So
4 when they collect the passenger's luggage prior to
5 boarding, that tells them what cabin to deliver
6 the baggage to.

7 HEARING EXAMINER BLANK: All right. And then
8 we have American Orient Express Voucher.

9 THE WITNESS: That's a document that would
10 check people into the hotel room for the first
11 night hotel.

12 HEARING EXAMINER BLANK: It indicates hotel,
13 Westin Seattle Hotel. And a date. A boarding
14 ticket -- both of these items are, again, like the
15 3-by-5 size -- 3-by-8. This is entitled Boarding
16 Ticket and it shows the train, American Orient
17 Express, the type of cabin, a booking number and a
18 date that says date ticket issued.

19 Is there anything else on that that you
20 --

21 THE WITNESS: No.

22 MR. BERGEN: The back of it. On the back of
23 it, there is again a summary of the Terms and
24 Conditions which are in an abbreviated form, terms

1 of the passage.

2 HEARING EXAMINER BLANK: All right. All these
3 items will be part of Exhibit 59. I will list
4 them in the index when I revise them.

5 MR. BERGEN: Thank you, Mr. Blank.

6 BY MR. BERGEN:

7 Q. Ms. Schellberg, you have really described
8 for us pretty well the services provided in the
9 trains, the train cars.

10 Does AOERC provide any other kinds of
11 services than its excursions such as package
12 delivery?

13 A. No.

14 Q. Deliver any mail?

15 A. No.

16 Q. Carry mail or freight?

17 A. No.

18 Q. Does AOERC have any locomotives?

19 A. No.

20 Q. Does AOERC own or lease any track in the
21 United States that it uses?

22 A. No.

23 Q. And how are the consists of cars pulled?

24 A. We have a contract with Amtrack that we

1 pay a track fee or a mileage rate for each of our
2 trips; and if we are -- have a positioning move,
3 we have two different rates depending on whether
4 we move the consist as a whole or whether we move
5 just individual cars. For some reason --

6 Q. For the sake of the record and those who
7 may not be railroaders, what is a positioning
8 move?

9 A. A positioning move is when we move cars,
10 for instance, from our shop to the first city
11 where we start our trip at the beginning of the
12 season. So we had to move the cars from our shop
13 in Tenino to Los Angeles at the beginning of the
14 year this year.

15 When we take the train into Canada, we
16 have a positioning move between Seattle and
17 Vancouver, British Columbia. And those movements
18 are made without passengers. The crew is on
19 board, but the train moves as a unit and at a
20 lesser rate than our normal rate.

21 Q. Who handles all the switching,
22 dispatching, coupling and decoupling of cars and
23 all those related services?

24 A. Amtrack handles all of that, and the

1 conductor on the Amtrack crew is the one
2 responsible for deciding when and where the train
3 moves.

4 Q. Are all the excursions operated over
5 trackage that Amtrack owns?

6 A. I doubt that Amtrack owns very much of the
7 track rights. Most of the track that we are on
8 belongs to freight railroads. I would say the
9 most track is either BNSF or Union Pacific. I'm
10 not sure which.

11 Q. Is BNSF short for Burlington, Northern,
12 Santa Fe?

13 A. Yes, correct.

14 Q. Who makes arrangements to use their track
15 then if it's not Amtrack track?

16 A. Amtrack is responsible for arranging all
17 of the -- negotiating the schedules with all of
18 the freight railroad.

19 Q. How does that work when you plan
20 itineraries and excursions?

21 A. Our planning process is basically two
22 years in advance. So we have already -- are
23 looking at our 2004 season. Our 2003 season is
24 pretty much already in the book.

1 And the process that we go through is our
2 sales and marketing people get together with the
3 tour and operations people and our transportation
4 department and we sit down and look at what's
5 selling and decide how much iterations, say, that
6 we want to do with our Antebellum South trip
7 versus how many Canadian trips versus, you know,
8 the various trips we have, and try and schedule
9 those in a way that minimizes our positioning
10 moves because positioning moves are expensive.
11 They cost money and we don't make any money.

12 Once we have determined what we would
13 like to do, we present that to Amtrack and Amtrack
14 will go to the freight railroads and negotiate
15 that schedule for us.

16 On a number of different occasions, the
17 freights have come back and said, No, you can't be
18 on that piece of track at this particular time or,
19 No, you can't be on that track at all, and that's
20 been particularly true of our Rockies and
21 Yellowstone trip which is a trip that goes from
22 Denver to Salt Lake, and it's had various features
23 involved in it, but basically it's a trip that
24 goes through the Colorado Rockies and is

1 spectacular in terms of track miles, but the
2 Moffitt Tunnel is very congested with freight
3 traffic.

4 And they have -- Union Pacific has some
5 scheduled maintenance on that track and last year
6 was the last year that they would allow us to take
7 that trip. So that is a trip that is off our
8 schedules. It's a very popular trip, but we can't
9 run it because of constriction on access to the
10 track.

11 For new trips, for instance, this year,
12 we have a trip -- a new trip for us in New
13 England, and we have only just recently finalized
14 that particular trip. And the pieces that go in
15 to finalizing a trip is a fitting it into the
16 schedules of traffic on the particular freight
17 railroads that we're on, figuring out where we're
18 going to park and where we're going to service the
19 train.

20 And once all of those things are
21 completed, then our tour department will go in and
22 say, Okay, we have eight hours in this location.
23 We'll take a motor coach tour to this place and
24 see these different museums or natural wonders or

1 whatever in a particular area.

2 And then once they have their piece done,
3 then all the other people get into motion in terms
4 of arranging supplies for food and services for
5 septic and that, if we're not in Amtrack stations.

6 If we are stopping in Amtrack stations,
7 then Amtrack, as part of the track fee, provides
8 septic, water, and garbage train washing services
9 to us. But if we are in a non-Amtrack station,
10 then we have to arrange all of those ourselves.

11 Q. What are rare track miles?

12 A. Rare track miles are -- again, you may
13 actually know as much about this as I do -- but
14 they are areas where passenger trains haven't
15 traveled in a long time or rarely go in those
16 areas.

17 And another way in which that term is
18 used, at least around our company, is for areas
19 where passenger trains may travel but they don't
20 travel during daylight hours.

21 For instance, the Amtrack service between
22 LA and Seattle --

23 MR. BERGEN: I think we have the Amtrack
24 brochure --

1 HEARING EXAMINER BLANK: Yes, we do.

2 MR. BERGEN: -- as part of the record, don't

3 we?

4 HEARING EXAMINER BLANK: It's Exhibit 3, I

5 believe, yes.

6 THE WITNESS: That's the travel plan.

7 There's --

8 HEARING EXAMINER BLANK: We have another one.

9 Exhibit 2 is the timetable.

10 MR. BERGEN: The timetable.

11 THE WITNESS: And we schedule -- you know, if

12 you were just comparing our trip in terms of the

13 track miles between LA and Seattle, the Coast Star

14 Light on Page 54 has the Amtrack --

15 BY MR. BERGEN:

16 Q. Referring to Exhibit 2.

17 A. -- has the Amtrack schedule between

18 Seattle and LA. And around Mount Shasta --

19 Dunsmuir, California, is listed there. If you

20 take Amtrack, you will be going around

21 Mount Shasta which is beautiful. The track's just

22 -- the mountains are just right there for you.

23 You see that at 12:20 a.m. So you're going by --

24 Q. On Amtrack?

1 A. On Amtrack. If you're going in the other
2 direction, if you're northbound, you'll get there
3 at 5:04 a.m. so if you're doing it in the summer,
4 you might get a sunrise over Mount Shasta. But,
5 generally, you are going through the most
6 attractive part of the trip, scenery wise, in the
7 middle of the night.

8 Q. What about AOERC?

9 A. On our Pacific Coast Explorer trip, we
10 have scheduled our times so that we go through the
11 Feather River Canyon which is considered, I think,
12 rare track miles during daylight hours.

13 And so that's, you know, one of the main
14 features of that trip is an afternoon going
15 through the mountains in Northern California. And
16 it's very spectacular, assuming that we don't get
17 delayed.

18 But that is one of the differences
19 between, you know, the way we schedule our trip
20 and the common carrier, Amtrack, the kinds of
21 timetable they have their trip scheduled for when
22 it's convenient for people to travel.

23 Q. How long is the Amtrack trip? How long
24 does it take and how long would yours take

1 approximately?

2 A. If you would leave -- you could leave
3 Los Angeles at 9 o'clock in the morning -- no,
4 10 o'clock in the morning and arrived in Seattle
5 at 8:25 p.m., I believe, the next day. So it
6 takes about 18 hours. Maybe. Not quite that. 10
7 to -- yes, 18 hours. No. 24 plus -- 24 hours
8 plus.

9 Q. Plus 10?

10 A. So 34 hours it would take -- I'm an
11 accountant. I don't add numbers up unless I have
12 a calculator -- to take that trip.

13 On our trip, it's an eight-day --
14 seven-day, seven-night excursion.

15 Q. And have you ever done that by plane?

16 A. Yes.

17 Q. And how long is that about?

18 A. It's about -- Seattle to LA is about a
19 two-hour flight.

20 MR. BERGEN: I have no more questions.

21 HEARING EXAMINER BLANK: All right. Let's go
22 off the record for a minute.

23 (Discussion off the record.)

24 THE COURT: Let the record show that we're

1 going to recess for an hour approximately. It's
2 25 after 12 now. We'll reconvene at approximately
3 1:30.

4 (Recess taken at 12:23 p.m.)

5 (On the record at 1:32 p.m.)

6 HEARING EXAMINER BLANK: This is the second
7 half of the American Orient Express hearing. It's
8 approximately 1:35, May 21st.

9 Mr. Bergen has just finished the direct
10 examination of the witness, Ms. Schellberg, and
11 now I will ask some questions of her on behalf of
12 the Board.

13 EXAMINATION

14 BY HEARING OFFICER BLANK:

15 Q. As I mentioned in the statement of the
16 issues, sort of the tagged-in issue is whether the
17 company is covered under any other condition or
18 criteria under the Acts. I think I will just get
19 that out of the way first.

20 Obviously AOE is not a labor
21 organization, is not an association run by rail
22 carriers; is that correct?

23 A. That's correct.

24 Q. Another basis for coverage under the Acts,

1 both Acts is whether a company performs a service
2 in connection with rail transportation and is
3 under common control with a rail carrier.

4 I know that Mr. Hillman has a number of
5 businesses. Just as sort of a blanket question to
6 start off, does Mr. Hillman own or control rail
7 carrier in the accepted sense of the term?

8 A. Not to my knowledge.

9 Q. American Orient Express Railway Company is
10 owned by American -- or rather Oregon Rail
11 Holdings; is that correct?

12 A. That's correct.

13 Q. What is the business of Oregon Rail
14 Holdings?

15 A. Oregon Rail Holdings is the holding
16 company for a number of different entities. We
17 have a marine division that includes sternwheeler
18 boat that -- a ship that goes on seven-day cruises
19 on the Columbia River.

20 That operation is building a second boat
21 that will be also a sternwheeler that goes to
22 Alaska and the Inside Passage in the summer and
23 will be on the Columbia River in the off-season
24 shoulder seasons.

1 And then on the rail side, we have our
2 marketing sales organization and our rail services
3 company.
4 Q. Now the Rail Services Company, would that
5 include AOE?
6 A. No. No. It is a separate LLC.
7 Q. And what would that do? .
8 A. That does maintenance on rail cars,
9 primarily our own. We have done some work on
10 other people's cars, but it's mechanical and
11 interiors for the trains.
12 Q. Is there any other company besides that
13 that's in the rail group as you call it?
14 A. We have a company called -- on both the
15 marine and the rail side, we have a company called
16 -- that's an equipment company for each of those
17 sides of the company that actually holds the title
18 to the rail cars themselves. So that is its own
19 separate company. It's not -- it doesn't have any
20 operations other than to hold the cars.
21 Q. That includes the rail cars that are used?
22 A. Correct.
23 Q. By AOE?
24 A. Right.

1 Q. Is American Orient Express Railway Company
2 a manager-managed LLC or is it --

3 A. It's a single-member LLC, if I understand
4 your question correct.

5 Q. Okay.

6 A. And ORH, LLC, is the sole member.

7 Q. And Oregon Rail Holdings, LLC, is that
8 owned solely by Mr. Hillman?

9 A. No. It has -- Oregon Rail Corp is one of
10 the members, and Mr. Hillman is the majority
11 shareholder of Oregon Rail Corp.

12 And then there's a number of other
13 members that are all affiliated with the Hillman
14 Company. There's several trusts and entities that
15 were created by the Hillman Company for the
16 investment opportunity in ORH.

17 I could not tell you the legal names of
18 all of those entities without referring to them,
19 but I certainly could provide an ownership list,
20 if you needed that.

21 Q. Yes, why don't we just make a note to
22 forward that after the hearing is over.

23 A. Okay.

24 Q. So I have a list.

1 MR. BERGEN: Let's be clear, what would you
2 like? Forward what?

3 HEARING EXAMINER BLANK: The companies that are
4 related to Oregon Rail Holdings. And
5 Ms. Schellberg just testified, I believe, that
6 Oregon Rail Holdings is owned in part by Oregon
7 Rail Corporation which has various other
8 subsidiaries and so forth. Just to identify what
9 companies are involved in the constellation here.

10 THE WITNESS: Okay. I think actually a lot of
11 that is already in some of the exhibits that you
12 had. I noticed that you had a number -- you
13 pulled D & Bs on I think most of the companies. I
14 don't know that you had any of the marine.

15 HEARING EXAMINER BLANK: No, we didn't have
16 anything as far as I know that related to that.
17 Not that that's a particularly item of interest to
18 us anyway.

19 THE WITNESS: Right.

20 MR. BERGEN: I think Ms. Schellberg is
21 referring to --

22 HEARING EXAMINER BLANK: Well, we have
23 Exhibits 22, Dun & Bradstreet.

24 MR. BERGEN: That's it.

1 HEARING EXAMINER BLANK: Exhibit 24, a
2 comprehensive report on Oregon Rail Corporation.

3 THE WITNESS: It's not a problem. We have it.
4 BY HEARING EXAMINER BLANK:

5 Q. Speaking of the other documents, it is
6 mentioned in our agreed facts that Mr. Hillman and
7 the related companies, Oregon Rail Corporation, so
8 forth, own no rail carrier in the United States.
9 Is there a reason why that was specified?

10 MR. BERGEN: I don't think it says it doesn't
11 own a rail carrier.

12 HEARING EXAMINER BLANK: Let's see.

13 THE WITNESS: Toward the end, I think.

14 HEARING EXAMINER BLANK: Right. Item 58 says
15 ORH and subsidiaries --

16 MR. BERGEN: They own no rail line or trackage
17 rights.

18 HEARING EXAMINER BLANK: Right, trackage
19 rights.

20 THE WITNESS: That could be anywhere in the
21 world. We do not own any rail line or trackage
22 rights anywhere.

23 BY HEARING EXAMINER BLANK:

24 Q. So basically the only rail-related

1 operations are the repair facility and American
2 Orient Express?

3 A. Correct.

4 Q. And there's a third company that basically
5 just owns the title of the cars?

6 A. Correct.

7 Q. At the time of the purchase transfer
8 between TCS and I guess it's Reiseburo
9 Mittelthurgau, Oregon Rail Corporation made the
10 purchase, the title of the cars went straight to
11 AOE Railway Company, a corporation, at the time?

12 A. The title I believe went directly into AOE
13 Equipment Company which is the subsidiary that is
14 strictly for owning the titles.

15 Q. And it stayed there?

16 A. And it has stayed there.

17 Q. The operation, American Orient Express,
18 the travel business was conducted at first by the
19 Railway Company, and then in April of '99, the LLC
20 took it over?

21 A. Correct.

22 Q. What happened to the Railway Company?
23 Does that still exist?

24 A. No. No, that's no longer in existence.

1 It was primarily a change in tax entity that was
2 required by the investors. So the sub -- it was a
3 sub S corporation to start out with, and it was
4 dissolved once the assets were transferred into
5 the LLC.

6 Q. Now Oregon Rail Corporation still exists?

7 A. Oregon Rail, yes. That's correct.

8 Q. Did the AOE Railway Company have its own
9 employees that were then transferred to --

10 A. The LLC.

11 Q. -- the LLC?

12 A. Correct.

13 Q. So, at that point, there was no employees
14 of the Railway Company?

15 A. Right. And it was dissolved.

16 Q. I believe you testified that at the time
17 that Mr. Hillman's companies took over operation,
18 there were some employees of the previous
19 operation, American Orient Express, TCS
20 Expeditions and so forth that were taken on in the
21 new operation; is that correct?

22 A. Yes.

23 Q. How many people involved were there?

24 A. I believe there were six.

1 Q. What sort of work did they do?

2 A. They were all management people. One was
3 our transportation director. One is now -- was
4 the tour director who's now our VP of operations.
5 One was maintenance guy. One was the manager of
6 the whole operation. And two were the hotel --
7 onboard hotel manager and office hotel manager.

8 Q. And all these people, some of them are
9 still with the company?

10 A. Two.

11 Q. And which ones are they?

12 A. That would be Kathy Eastman, who's our VP
13 of Operations, and Neil Wright, who's our Director
14 of Transportation.

15 Q. Neither of these positions are actually on
16 the train?

17 A. No.

18 Of the six that came over, only one of
19 those positions was an onboard position.

20 Q. And how long did that individual stay on
21 then?

22 A. He left us toward the end of the season
23 last year.

24 Q. Meaning 2001?

1 A. 2001.

2 Q. Among the various companies in this
3 operation, you said there's a rail division, a
4 marine division.

5 Does AOE Railway, LLC, employ its own
6 administrative employees for payroll, personnel,
7 that sort of thing?

8 A. The payroll and the accounting functions
9 are done by Oregon Rail Holdings, but they do have
10 their own administrative staffs in terms of their
11 specific areas of responsibility.

12 Q. How many administrative employees then
13 does AOE Railway, LLC, have?

14 A. They have -- they have four administrative
15 positions, two manager positions, the VP of
16 operations; and I think there's one or two other
17 tour managers who help with the tours, arrange
18 hotels and the tour venues, and those are all
19 full-time permanent positions in either San
20 Antonio or Denver.

21 Q. So this is approximately six or seven
22 people?

23 A. Yes.

24 Q. Has this number stayed constant?

1 A. It has varied one or two up and down, but
2 it's been pretty constant throughout.

3 Q. Now you mentioned that Oregon Rail
4 Corporation actually had some administrative
5 functions for AOE, LLC; is that correct?

6 A. Correct.

7 Q. And there's also the car repair company?

8 A. Correct. The repair company bills the
9 AOERC for maintenance on a per mile basis. So for
10 each trip run, you know, there's an interchange of
11 accounting functions there.

12 Q. The repair company you said also does some
13 work for other --

14 A. It's been pretty minimal, but we have
15 worked on several other people's cars; and the
16 long-term plan is that we would be able to do more
17 than our own work in our maintenance facility.
18 Right now we don't have facilities big enough to
19 do very much work other than our own.

20 Q. When you say maintenance, are you
21 referring more to the mechanical functioning of
22 the car, the wheel trucks and that sort of thing,
23 less like tightening the screws on a chair inside?

24 A. Well, we do both. I mean --

1 Q. The facility does both?

2 A. The facility does both. I mean, we don't
3 -- we can't -- don't have facilities to paint the
4 cars. So there's a lot of things that we end up
5 contracting out.

6 We don't -- we send all our wheels to
7 Amtrack to be turned and that kind of thing, and
8 we use a lot of subcontractors for some of the
9 major items; but we do do most all of the
10 interior, HVAC, electrical, plumbing work
11 ourselves.

12 Q. So, again, it's mostly the passenger car
13 element that you're working on --

14 A. Correct.

15 Q. -- rather than the rail car?

16 A. You know, we've got people welding and
17 that kind of stuff, but it is really aimed more at
18 the rail car, the passenger side of it.

19 Q. Did the other small amount of business
20 that you've done, has that been passenger cars,
21 too, or freight?

22 A. No. It's all passengers. We've never
23 worked on any freight.

24 Q. Now the repair facility at one time was in

1 suburban Denver; is that correct?

2 A. Englewood.

3 Q. On a property owned by General Ironworks?

4 A. Correct. That property was sold to
5 another, Barton -- well, I'm not sure what the
6 legal names were, but the property changed hands
7 while we were in it. So I don't believe that
8 General Ironworks was the owner when we left.

9 And that property was condemned for the
10 Denver -- or the Colorado Rail Transit Authority.

11 Q. So you were leasing the property; is that
12 it?

13 A. Correct.

14 Q. What was General Ironworks, do you know?

15 A. I have no idea.

16 Q. Has that facility essentially -- was it
17 designed to do rail car repairs?

18 A. It certainly worked for rail cars. It had
19 an overhead crane that was good for picking up the
20 cars and taking them off the trucks.

21 But I believe that the Transit Authority
22 was razing the whole facility and starting from
23 the ground up. So I know there was rail to the
24 site and there was rail on the site, but I don't

1 know what Barton did.

2 And it just -- you know, for what we were
3 doing, it worked for our purposes.

4 Q. How long did -- I will say AOE Railway,
5 whatever, Mr. Hillman's operations, how long did
6 they use this facility?

7 A. AOE Rail Services, LLC, is the company
8 that was in that facility, and they were there I
9 believe from mid, maybe, August or September time
10 frame 1999 until August, September of 2001.

11 Q. Before that time, how did you maintain the
12 cars?

13 A. The first season that we -- the first dry
14 dock season that we owned the cars, remember, it
15 closed in November of '97, and the train was taken
16 to a yard in San Antonio, I believe, for the
17 maintenance in that season, and that was all
18 subcontracted because we did not have facility at
19 that point.

20 Q. You don't recall what yard or what company
21 was doing that?

22 A. I could find out, but I don't know that.

23 Q. How many employees does AOE Rail Services
24 have then?

1 A. It varies depending on whether the train
2 is in dry dock. When we're in dry dock, it has
3 30 employees, 30 to 35 employees. And when the
4 train is out on the road, it usually drops down to
5 less than 20.

6 We have a few more this year because we
7 are working on cars for the second set, but that's
8 the range.

9 Q. Do you -- elsewhere in the agreement of
10 facts, we state that there was a good deal of
11 turnover in AOE, LLC's employees. Is there a
12 turnover in the Rail Services Company, too?

13 A. We have a core of leads that stay -- have
14 stayed with us, but we didn't bring -- I think we
15 may have had one guy that moved from Colorado to
16 Washington to work with us, and he had only been
17 employed for a year; but, other than that, we
18 haven't had anybody that stayed with us throughout
19 in the Rail Services, and we just hired a new crop
20 of people when we moved the facility.

21 Q. The new facility is in Centralia,
22 Washington?

23 A. Near Centralia. It's actually in Tenino.
24 Actually it's in Western Junction, but it's

1 between Centralia and Olympia.

2 Q. Did Railway Services or Oregon Rail
3 Corporation purchase this property or is this
4 another lease?

5 A. It's another lease.

6 Q. Who's the lessor in this case?

7 A. City of Tacoma, I believe.

8 Q. And what was this facility being used for
9 before you folks took it?

10 A. CECO (phonetic) which stands for -- I'd
11 have to think about that for a moment. It will
12 come to me. It is an operation that was doing
13 maintenance on locomotives. And I heard a rumor
14 -- I'm not sure whether it's true or not -- that
15 they are in bankruptcy or having trouble, but they
16 were not using the facility at the time that we
17 took it over.

18 It might be Cascade Engine Company. We
19 just always called it CECO. It was some engine
20 repair operation.

21 Q. It's a stand-alone company doing some sort
22 of --

23 A. I don't have any knowledge one way or the
24 other than that.

1 Q. All right. Sure. Our agreed statement
2 also says that the United States Oregon Rail
3 Holdings and subsidiaries and related companies
4 own or control no railroad locomotive used to
5 conduct trips by the AOE. You own no -- these
6 companies own no railroad locomotive at all?

7 A. No. We sometimes lease a locomotive for
8 use when we're in Canada because Canadian National
9 is unable to provide all the head-end power that
10 we need up there.

11 But that's the only -- it's the only time
12 we're involved in engine leasing, and that's just
13 for the time that we're in Canada.

14 Q. Does the Canadian Rail -- is it
15 Canadian National --

16 A. Canadian National is who pulls us in
17 Canada.

18 Q. They provide their own locomotives and
19 train crew and so on, similar to the Amtrack
20 arrangement in United States?

21 A. Correct, although Via Rail does the
22 maintenance when we're in the station for us;
23 whereas, Amtrack does all of that for us when
24 we're in the U.S.

1 Q. We have a series of letters in the record,
2 Exhibits 12, 13, 14, 16, between Mr. Fleming of
3 this agency and Mr. Michael McAfee --

4 A. McAfee.

5 Q. -- of Oregon Rail Corporation. He was
6 responding to questions about AOE operations.

7 What was mister -- is he still with the
8 company, first of all?

9 A. No, he's -- well, he's still on our Board
10 of Directors, but he and -- his position was the
11 chief financial officer and secretary of the
12 entities. He left the company in -- as an
13 employee in mid 2000, I believe, and Scott Taylor
14 came in as his replacement.

15 Q. So he was -- I'm sorry, did you say
16 secretary?

17 A. He was secretary of the various sub S
18 corporations and then manager of the LLCs when the
19 format changed. And then he was the chief
20 financial officer, I believe was his title. I
21 don't think he was a vice president.

22 Q. So he was -- he wore several hats of the
23 same position in different companies?

24 A. Correct.

1 Q. So he was a manager at one time of Oregon
2 Rail Holdings?

3 A. Correct.

4 Q. Regarding the brochures, Mr. Bergen and I
5 had a little conversation with this over the phone
6 at one point.

7 Just to make this absolutely clear, the
8 brochures indicate that an itinerary is available
9 in the reverse?

10 A. Correct.

11 Q. Could you describe what that means?

12 A. We design our schedules so that we
13 maximize our track miles, i. e., we don't want to
14 have positioning moves if we don't absolutely have
15 to.

16 And so if we -- in the springtime when
17 we're running the Antebellum trips, we'll run back
18 and forth between Washington, D.C., and New
19 Orleans with separate trips. But each of the
20 brochures will have -- has a page that gives you
21 the reverse -- the order of events, if you're
22 going in the opposite direction from what's on the
23 regular pages, and that's in the 2002 brochure.
24 That's Page 32. So they are most often exactly

1 the same trips but just going in the opposite
2 direction in terms of order.

3 Sometimes, because of timing in the
4 schedule, they'll be slightly different track
5 miles and slightly different amounts of time that
6 we'll spend at a particular venue. But they are
7 separate trips.

8 I mean, I don't know that we've ever had
9 anybody buy a "round trip" the way you would for
10 an air fare or that kind of thing.

11 Q. I understand. Well, we've spoken a lot
12 about the Antebellum South trip. Just for
13 consistency sake, in the 2002 brochure,
14 Exhibit 52, there's a list of various tour dates
15 on Page 19. The first one is March 1st to 8th.
16 The second one is March 15th to March 22nd.

17 Does that indicate then that it would be
18 going in one direction on March 1st to 8th and
19 then turn around and go back on the 15th to the
20 22nd?

21 A. No. If you look at that, the
22 Washington, D. C. Direction --

23 Q. I see.

24 A. -- has all the dates, if you were going

1 in that direction; and then the New Orleans to
2 Washington, D.C., has the opposite direction.

3 So March 1st to 8th is going south to
4 New Orleans, and then March 8th to the 15th, they
5 went back northerly to Washington, D.C.

6 Q. I see. I haven't had a chance to look at
7 this.

8 A. I number mine back and forth so that I can
9 keep them straight.

10 Q. And the lag time between the reverse
11 travel is about a day or so apparently?

12 A. Well, we schedule in shop days because,
13 you know, of course we keep track of how many
14 miles are on each of the cars and they have to
15 have wheel work done at regular intervals.

16 So we schedule in shop days. And if you
17 look at the schedule, you will be able to see when
18 those are; but, generally, we try and have the
19 first day of a trip be the same as the ending day
20 of the prior trip.

21 So, for instance, the one that we were
22 just talking about, Trip 1 of the Antebellum South
23 starts on March 1st and ended on the 8th. Trip
24 Number 2 started on the 8th at the hotel and they

1 actually board the train on the 9th so that we
2 have about a 24-hour period to clean and do any
3 maintenance work on the train.

4 Q. Right near the end of your testimony
5 earlier, we received two packets, Exhibits 58 and
6 59. One is I guess an initial packet, and another
7 one is the final packet.

8 Has the content of this material changed
9 over time?

10 A. I have -- I don't believe that I ever saw
11 the equivalent materials that they were sending
12 out in 1998 when TCS was doing that for us.

13 The content of these, once we started
14 doing it ourselves, has evolved somewhat; but,
15 basically, the look of the folders and the titles
16 of the pieces that are there have remained pretty
17 much the same.

18 We've always had a Personal Information
19 Sheet and a medical -- the medical one, the HIF
20 and PIF as they're affectionately called. The
21 Travel Insurance, Terms and Conditions, the pieces
22 as they are in here have always been part of the
23 package. There have been some changes in wording
24 and that kind of thing over time, but essentially

1 they are pretty much the same.

2 Q. Were these -- you just said you don't know
3 what TCS was doing; is that correct?

4 A. Correct.

5 Q. So since --

6 A. Since '99.

7 Q. Since '99?

8 A. They have been pretty much -- they have
9 looked like this, if not been essentially similar.

10 Q. Were these materials then drafted at the
11 request of Oregon Rail Corporation or whatever
12 controlling . . .

13 A. Wow . . .

14 Q. Your organization produced these
15 documents, as far as you know?

16 A. Yes.

17 Q. They weren't carried over from --

18 A. I'm sure that they would have looked at
19 what TCS did and used them as guidelines as to
20 what they liked and what they didn't like and what
21 was useful and what wasn't as useful and modified
22 them.

23 The transition period between -- when TCS
24 was doing this function for us was really when our

1 -- the people that we had hired to do, provide
2 this function were setting up their
3 infrastructure.

4 So I really can't tell you what TCS's
5 documents looked like, but these are the ones that
6 we have produced and they have become more ours,
7 if you will, over time, but -- does that clear it
8 up?

9 Q. Yes. I understand that you don't know
10 what TCS did, so . . .

11 A. Right.

12 Q. You testified that there's something like
13 39 to 45 people on board including the contractor,
14 lecturers and so forth.

15 How many employees does AOE have at one
16 time during the season?

17 A. Our onboard employees are on a six-week
18 on, two-week off rotation. So, generally, if we
19 are in a fully staffed mode, that for every three
20 positions on board, there is a fourth person who
21 is the relief person. So we rotate the people
22 through all of the positions.

23 So our full staff is probably around 60,
24 when you include the full-time permanent people in

1 the offices as well as the onboard people and the
2 relief positions.

3 Now for the onboard positions, when they
4 aren't on board, they aren't receiving any
5 remuneration. So they're on our payroll. They're
6 active employees, but when they're on rotation,
7 they aren't paid.

8 So, at any one time, our onboard staff is
9 -- our paid onboard staff is pretty consistent in
10 terms of that number range.

11 Q. Now I believe you were describing the
12 structure of the supervision among the number of
13 people that AOE staffs the trains with. We might
14 even have an exhibit that lists them.

15 A. Yes. I don't know which number it was,
16 but --

17 MR. BERGEN: Is this the document with the
18 salaries?

19 THE WITNESS: The pay scale, yes.

20 MR. BERGEN: Yes, I have it. That was No. 48.

21 HEARING EXAMINER BLANK: Okay. Here we go.

22 BY HEARING EXAMINER BLANK:

23 Q. Now the hotel manager is essentially the
24 individual in charge of the train?

1 A. Correct. He's the final word on board.

2 Q. However, you also said that Amtrack
3 supplies the engine crew?

4 A. Correct.

5 Q. How many individuals again does Amtrack
6 supply on a trip?

7 A. I am not sure how many people they have in
8 the cab, but whoever they put in the cab, plus a
9 conductor who travels with the train.

10 Q. The point of contact between Amtrack and
11 AOE is the hotel manager then and the conductor?

12 A. Primarily.

13 Q. Would the conductor communicate to the
14 hotel manager? Does it have to go back to the
15 company headquarters, back and forth?

16 A. Oh, no, they communicate.

17 And the nature of, you know, moving the
18 train is such that -- you know, a lot of times the
19 passengers like to know why they're sitting on a
20 siding; and, of course, because we are the lowest
21 on the totem pole, if there's anything ahead of
22 us, freight or anything, we'll get pulled over to
23 a siding while it's cleared up or it gets by us,
24 one way or the other.

1 And so a lot of times, the tour leaders
2 or the hotel manager will be talking to the
3 conductor just to find out what's happening so
4 that they can inform the passengers. So some of
5 it is just informational situations.

6 And then when decisions need to be made
7 about what to do in a unique situation, the
8 conductor will discuss that with the hotel
9 manager, and sometimes our transportation director
10 will get involved in that, particularly if there
11 is, you know, something catastrophic.

12 Like the year before last, a barge ran
13 into the bridge, the rail bridge over the
14 Mississippi River, and we were on the east side of
15 that bridge on our way to New Orleans, and we had
16 to make a decision pretty quick because the rail
17 traffic was piling up, you know, by the minute
18 essentially of where to take the train; and
19 Amtrack essentially made a recommendation to us,
20 you know, and then gave us a choice of what we
21 could do.

22 But essentially we ended up doing what
23 they recommended and took the train back up to
24 Savannah and ended up chartering a plane to get

1 our next bunch of passengers from New Orleans to
2 the train in Savannah.

3 Q. In a case like that, Amtrack offers you
4 options essentially, this is what we can do?

5 A. If they're available. And because -- you
6 know, we are their largest private customer, and
7 they want us to be as successful as we can, so if
8 there are options, they will let us know what they
9 are.

10 Most of the time it is just a matter of
11 delays and informing us of what the delays are and
12 what the delays -- expected delay is so that we
13 can arrange with our tour operators in the next
14 city for a late arrival or to re-arrange how we're
15 going to do tours.

16 MR. BERGEN: Maybe you want to just mention the
17 example of the hurricane that happened during the
18 transcontinental.

19 THE WITNESS: Yes. That was another kind of
20 catastrophic one and one where we didn't have a
21 lot of options.

22 We had a transcontinental trip, and I'm
23 thinking that it was in 1999, and we were
24 scheduled to leave Washington, D.C., to go along

1 our southerly route. And I believe it was,
2 Hurricane Hugo was headed for the Mississippi
3 Delta and was due to arrive when our train would
4 have been crossing that area.

5 And they would not allow us to go on our
6 normal route; instead, routed us through Chicago,
7 and we didn't pick up our normal route until
8 somewhere in Texas. I want to say San Antonio.
9 I'm not real sure.

10 But it was -- so essentially our
11 passengers got a lot of train time. But we were
12 totally -- they actually were almost captive on
13 the train; and, in that situation, Amtrack said,
14 you know, this is what you're going to do, and
15 that's what we did. It was -- those are the
16 interesting trips.

17 And in that situation, we did not -- I
18 don't believe that we refunded anybody's passage
19 because of the change in the trip. That's one of
20 the conditions -- one of the things in our Terms
21 and Conditions is that we have the right to change
22 the route and features, you know, as necessary;
23 and, in that case, clearly it was beyond our
24 control.

1 BY HEARING EXAMINER BLANK:

2 Q. The operating agreement at Item 5 says
3 that Amtrack may provide training.

4 Has it done any training for AOE
5 personnel?

6 A. We -- I do not believe that Amtrack has
7 ever done any formal training.

8 I would not be surprised if sometimes the
9 Amtrack conductor works with the crew in terms of
10 any safety situations that they might observe that
11 they feel need correction.

12 Our safety manual that we use on board is
13 put together by our transportation staff, but it
14 is reviewed by and approved by Amtrack and the
15 Canadian National as well because we have to
16 conform to both those agencies in terms off our
17 safety procedures.

18 Q. The safety procedures are in line with
19 what Amtrak would --

20 A. Correct.

21 Q. -- impose on its own employees?

22 A. Correct. We actually modeled ours after
23 Amtrack's. Maybe not quite as voluminous,
24 but . . .

1 Q. Do you conduct training then on your own
2 of your employees?

3 A. Oh, absolutely. We -- at the beginning of
4 the season, we bring employees on two weeks in
5 advance, partly to, you know, do the final
6 cleaning and get the train ready for passengers,
7 but we do CPR training.

8 We do, depending on the position. We
9 have positions, specific training for the wait
10 staff, for the porters; and safety training, drug
11 screening, all of those kinds of things is part of
12 our routine with new employees.

13 Q. This would encompass the safety manual?

14 A. Correct. But just to clarify, that
15 position -- in the case of an emergency, all of
16 our employees are under the rule of the conductor,
17 the Amtrack personnel.

18 So that is part of their training is to
19 follow whatever directions we get from the Amtrack
20 personnel. And in an emergency situation, were
21 there to be cause to evacuate the train or
22 anything like that, our employees would be under
23 the control and direction of Amtrack conductor.

24 Q. You indicated that there's been some

1 unemployment claims against AOE in the state
2 systems; is that correct?

3 A. Correct.

4 Q. And there has been some claims, a claim at
5 least for workers' comp --

6 A. Yes.

7 Q. -- covered?

8 How many do you recall?

9 A. Oh, I think -- these are the workers' comp
10 claims, so these are not all individual claims.
11 They are multiple pages for some of them, but, you
12 know, this -- well, I don't know how comprehensive
13 this is. It goes back to '98. So this may be the
14 sum total of our workers' comp claims.

15 Q. Now is that one of the documents I have in
16 the record?

17 A. No. We have --

18 MR. BERGEN: We didn't introduce this because
19 it has personal information of the employees.

20 HEARING EXAMINER BLANK: Okay.

21 MR. BERGEN: I mean, we have no problem showing
22 it to you. I'm not sure about putting it in the
23 record.

24 HEARING EXAMINER BLANK: Yes. My just looking

1 at it wouldn't really help matters any, I don't
2 think.

3 MR. BERGEN: Okay.

4 BY HEARING EXAMINER BLANK:

5 Q. We can get around that actually.

6 The documents, you've testified they
7 exist?

8 A. Correct.

9 Q. Can you give me an estimate of how many
10 claims there are in that?

11 A. I would say that there -- how many years
12 have we got? '98, '99, 2000, 2001. I would say
13 that we probably have maybe five or six per year
14 maximum, and they have ranged from -- we had one
15 person who had a back injury.

16 We had -- probably the most serious
17 accident that we had was one of our galley people
18 was pretty severely burned when there was an
19 accident. The train hit a car that violated the
20 intersection and the train had to stop very
21 quickly, and the guy spilled some boiling
22 something or other and burnt himself. That was
23 probably the most serious of the accident.

24 Most of them are minor cuts and strains.

1 Q. Has any of these individuals who are
2 injured raised a claim under the Federal Employees
3 Employers Liability Act which covers railroad --

4 A. No.

5 Q. -- companies?

6 We have -- the Amtrack agreement in the
7 record is dated August of 2000. There was one in
8 existence prior to that?

9 A. Yes.

10 Q. Did it differ in any material way from the
11 one that's currently in the record?

12 A. It was cheaper.

13 No. I'm sorry.

14 Q. The major provision?

15 A. The major provisions have all been pretty
16 consistent through the years. We -- it is my
17 belief.

18 I would have to double check the
19 documents, but I believe in '98, '99, they were
20 one-year contracts; and, in 2000, we were able to
21 get a multi-year agreement with them.

22 And that probably -- that and the price
23 are the two things that are the primary changes
24 from the original agreement.

1 Q. You mentioned that you pay the
2 unemployment insurance contributions in Texas,
3 Colorado, Oregon. How did you choose those
4 states?

5 A. That is where we have our offices.

6 Our onboard employees were primarily
7 reported in Colorado up through the middle of '99,
8 and then when we moved the accounting office to
9 Oregon. We consolidated some of the states.

10 The controller prior to me had registered
11 us in every state where we had an employee who was
12 a resident. So, for instance, the train never
13 went to Maryland, but we had an employee --
14 Maryland, one of the northeastern states, but we
15 had an employee who was a resident there, and so
16 he registered us for payroll in that state.

17 I believe that's legal, but it's also
18 legal to have them in the state of your
19 headquarters when you have traveling employees.
20 And so when we moved the accounting function to
21 our Portland office, we elected to report all the
22 onboard employees in the State of Oregon for
23 unemployment purposes.

24 States generally have reciprocal

1 agreements so that if someone who is a Montana
2 resident applies for unemployment and their
3 unemployment has been paid in the state of Oregon,
4 Montana and Oregon work that out with each other.

5 Q. Do you still have offices in those three
6 states, Texas, Oregon --

7 A. Yes.

8 Q. -- Colorado?

9 A. And Colorado.

10 Q. Now the repair shop was in Colorado and
11 moved. What's left in Colorado now?

12 A. Just the operations officers, about six or
13 seven employees. I'm not sure what the latest
14 count is.

15 Q. And there's also an administrative office
16 in Oregon?

17 A. Yes, the corporate headquarters.

18 Q. And what is located in Texas then?

19 A. Our transportation director is in Texas,
20 and he has one assistant, a part-time person who
21 helps him in his office.

22 Q. So there's permanent offices in all three
23 of these locations?

24 A. Correct.

1 Q. Where is the one in Texas?

2 A. San Antonio.

3 Q. And Antonio.

4 One of the exhibits in the record is an
5 interview with Mr. Hillman at Exhibit 21 on
6 September 27, '98, in the Minneapolis Star
7 Tribune. He told that reporter that the trains
8 had approximately 104-passenger capacity. In
9 1998, he said they ran 75 to 100 percent capacity.

10 I believe you also testified that it's
11 approximately 100?

12 A. Right.

13 I believe that we had one trip where we
14 had 110 passengers, and it really gummed up the
15 works for our dining capacity. With 100 people
16 shifting in and out of the diners on a pretty even
17 flow, and when you add another 10 people to that,
18 it made it difficult for people to find a seat for
19 dinner, so . . .

20 Q. Now also -- the number of trips that
21 appear in the brochures is not the ultimate number
22 of trips that actually occur during a year, you
23 said?

24 A. Correct.

1 Q. Mr. Hillman in the 1998 article indicated
2 that they had a 3500 person capacity for 35
3 proposed trips for 1999.

4 MR. BERGEN: Could you tell me which article it
5 is because 21 -- I'm sorry to interrupt -- but
6 Exhibit No. 21 has a number of articles in it.

7 HEARING EXAMINER BLANK: It's Minneapolis Star
8 tribune, article September 27, 1998. Let's see.

9 MR. BERGEN: Okay. September 27, '98.

10 HEARING EXAMINER BLANK: It's like the third
11 and fourth one in.

12 MR. BERGEN: Right. We have it.

13 BY HEARING EXAMINER BLANK:

14 Q. Well, I am just using that as a point of
15 reference, really. If there was a 3500-person
16 capacity at 35 proposed trips, about how many
17 people would you actually have carried in '98?

18 A. Off the top of my head, I don't have the
19 actual passenger count. We do certainly keep
20 those statistics.

21 In '98, I would guess that our passenger
22 count was somewhere around -- between 3000 and
23 3200. I couldn't give you an exact number,
24 although I could provide that if you would like me

1 to.

2 Q. I think your testimony is close enough.

3 Is that -- you basically retained --

4 A. I'm sorry. I'm just thinking about the
5 '98 season.

6 The 35 trips that we planned included 4
7 Canadian trips that were cancelled. So that would
8 have been 400 people out of that 3500 that did not
9 travel with us. So it probably was around 3000.
10 I'm guessing.

11 MR. BERGEN: I can just ask, are you assuming
12 that all the remaining trips were pretty fully
13 booked?

14 THE WITNESS: Well, that would be the other
15 100 people. If you took 400 off of the 3500, that
16 would get you down to 31, and I am -- I don't know
17 the actual capacity of the other trips that ran,
18 off the top of my head, but my recollection is
19 that those trips were running between 85 and 100
20 percent full.

21 So that would be, you know, 15, maybe as
22 many as 20 people off on some trips and more than
23 full trips -- more than 100 on some trips. So I'm
24 guessing that the number was around 3000 for '98.

1 BY HEARING EXAMINER BLANK:

2 Q. Well, AOE has added a couple of cars here
3 and there over the years. Would the capacity now
4 be more like 4000 or 3700, not including the AOE
5 II?

6 A. Right. Not including the AOE II, our
7 capacity really has changed primarily by the
8 number of trips that we've run as opposed to our
9 capacity.

10 We have changed out the cars and used
11 them in different combinations as time has gone
12 on, but our capacity -- from the accounting
13 standpoint, just talking in loose terms, if we had
14 100 people on a trip, I consider that a fully
15 subscribed trip even though there may be a bunk
16 berth or two available. So our expansion in our
17 revenues and capacity have largely been because
18 we've added additional trips.

19 In the early years -- '98, '99, our
20 season started in March and we now start our
21 season mid February. In the early years, we were
22 ending our season generally by the end of October
23 and now we are generally running through the end
24 -- not through the end, through the middle of

1 November.

2 So we've added three to four trips to the
3 length of our season, and that has increased our
4 capacity.

5 Q. You did state that late and early trips
6 are not as fully booked as the ones --

7 A. Correct.

8 Q. So what's the capacity for the 2002 year,
9 assuming you don't bring in the AOE II?

10 A. Well, I have actually not done a --

11 MR. BERGEN: We have Exhibit 53.

12 THE WITNESS: Right. There's 33 scheduled
13 trips on our revised schedule,

14 BY HEARING EXAMINER BLANK:

15 Q. This is per Exhibit 53?

16 A. Per Exhibit 53.

17 Q. Yes.

18 A. And I would guess -- so if all of those
19 trips were fully subscribed, I would say that we
20 would have 3300 passengers, and I'm guessing that
21 our passenger count will be around 3100 for the
22 AOE I consist.

23 Q. So it's -- would you say then, just as a
24 basis of comparison, it's pretty much stayed the

1 same since '98 given -- even though you've offered
2 perhaps more trips, you would seem to still be in
3 the 3000 --

4 A. Well, the difference on this schedule from
5 prior schedules is this -- this train, AEO I
6 consist will be doing one, two, three, four, five,
7 six, seven, eight of our longer trips.

8 And the transcontinental trips and the
9 transCanadian trips, those are eleven- to
10 twelve-day trips. So, in fact, in a normal year,
11 you would have two or three less of those.

12 So the number of passengers that we are
13 carrying on this consist with this schedule is
14 less, but our revenues will be higher because
15 there's a higher percentage of longer trips. See
16 what I'm saying.

17 Q. Yes. And this doesn't reflect use of
18 AOE II or it does?

19 A. Schedule A is AOE I only. AOE II,
20 Schedule A, the second page reflects the trips
21 that are scheduled for the second consist.

22 Q. I see.

23 A. So there will be ten trips on the second
24 consist.

1 Q. And things look like it will occur so far?

2 A. Yes.

3 MR. BERGEN: Mr. Blank, do you mind if I ask a
4 question or two since we have this schedule out?

5 HEARING EXAMINER BLANK: Sure. Go ahead.

6 FURTHER DIRECT EXAMINATION

7 BY MR. BERGEN:

8 Q. Just a question. What is a
9 familiarization trip? Is that a paid customer
10 trip?

11 A. No. That is -- what you are looking at is
12 about halfway down the page. It's called
13 familiarization going from July 10th to July 12th,
14 and Salt Lake City to Seattle.

15 That is -- when we had to redo our
16 schedule, we ended up in Salt Lake City and the
17 train needs to be in Vancouver. And so we are
18 going to use that positioning move to carry some
19 travel agents and the VIPs. We'll invite railroad
20 people and various people that we want to schmooze
21 on that the trip.

22 Amtrack allows us to do that at our
23 positioning move rate as long as we aren't
24 charging anything more than essentially food for

1 the trip.

2 Q. When you added the number of trips up this
3 year --

4 A. I did not include that.

5 Q. -- you did not include that?

6 A. I did not include that.

7 Q. And the five transCanada, you did include
8 those?

9 A. Yes.

10 Q. They were entirely in Canada?

11 A. They are entirely in Canada. They go to
12 Vancouver to Montreal.

13 MR. BERGEN: Thank you, Mr. Blank.

14 FURTHER EXAMINATION

15 BY HEARING EXAMINER BLANK:

16 Q. So if we remove the -- you were including
17 the Canadian trips?

18 A. Correct.

19 Q. If we took those out, that's one, two --

20 A. Five trips.

21 Q. Five trips. Approximately 500 capacity?

22 A. Correct.

23 And the Canadian trips are almost always
24 sold out. So I'm fairly certain that that would

1 be 500 out if all you're counting is the U.S.

2 trips.

3 Q. Now we mentioned -- you mentioned in your
4 testimony earlier, and I guess you also mentioned
5 it again a few minutes ago, regarding cancelled
6 trips.

7 By that, you mean, one voyage or whatever
8 from New Orleans to whatever, one Point A to
9 Point B at the end, rather than a whole itinerary?

10 A. Right, correct.

11 Q. You mentioned --

12 A. Excuse me. I just had one thought, that
13 we did cancel the entire itinerary for the Orange
14 Blossom trips in 2000 when we had all the huge
15 number of trips cancelled, and we never ran any of
16 the iterations of that trip. But that's the only
17 time that that has ever happened. And we have not
18 tried to sell that itinerary again, at least at
19 this point.

20 Q. You were also testifying earlier that AOE
21 has rejected customers who don't meet -- about how
22 many times per year would that sort of thing
23 happen?

24 A. It is our hope that it would never happen.

1 I can't tell you about children because those
2 situations are always handled at the reservation
3 point. So people don't get past even making a
4 reservation if they are wanting to bring children
5 younger than eight.

6 With the elderly passengers who are
7 unable to make the trip, hopefully also, those are
8 selected out before they ever get to the point of
9 getting on the train.

10 To my recollection, the two instances
11 that I talked about this morning are the only
12 times when we had to actually send someone home,
13 when it's been that extreme. But we've had
14 several situations where it was just a difficult
15 situation that we were able to manage by assigning
16 people to individuals that had difficulty.

17 But, again, our main effort is to try and
18 collect that information and discourage people
19 from signing up for the trip before -- in the
20 reservation process rather than to have them get
21 to the train and be uncomfortable or unhappy
22 themselves and make our other passengers
23 uncomfortable and unhappy as well.

24 Q. You also mentioned that a good deal of

1 your reservations come through travel agents in
2 recent years; is that correct?

3 A. Correct.

4 Q. One of the other articles in exhibit --
5 that big Exhibit 21 is an article out of Travel
6 Agent. Let's see. It's written by Mr. David
7 Codswell. Let me see if I can find where it is.

8 It's entitled On The Right Track,
9 April 26, 1999. It's the first one. And he
10 indicated in his article that in April of '99, 35
11 to 40 percent of the AOE's business came through
12 travel agents.

13 Does this sound accurate to you?

14 A. Yes. I don't know the specific
15 percentage, but that seems reasonable. At that
16 point we had, you know, begun the effort to build
17 our travel agent pipeline from a marketing
18 perspective in '98. So that wouldn't surprise me
19 that that was accurate. But I don't know the
20 specific percentage.

21 Q. Forgive me if I've asked -- if you said
22 this before and I missed making a note of it.

23 Did you give an estimate of what your --
24 how much of your business comes through travel

1 agents now, 2001, 2002?

2 A. No, but I asked our marketing guy that
3 very question. And if I can find my scribbled
4 notes from that conversation. I can't find my
5 notes on that.

6 It's my recollection that our non-profit
7 business was about 13 percent. Travel agent
8 business was 38 percent is what's sticking in my
9 head. And the balance are direct customers.

10 Let me see if I can find that.

11 45 percent -- I'm sorry. I got the
12 numbers mixed up. 17 percent from the nonprofit;
13 45 percent from travel agents; and 38 percent
14 direct was what he told me for our 2001 season.

15 Q. Good. Thank you.

16 When the travel agents are generating the
17 contacts, reservations and whatever, do they have
18 any instructions from you or other than the
19 material that you've given us today that are just
20 the general criteria given to the public?

21 A. We work with travel agents on pretty much
22 three different levels.

23 We have sales reps. We have a contracted
24 sales rep in Florida, an employee in California,

1 an employee in the Midwest region here in our
2 Downers Grove office; and their responsibility is
3 to cultivate the travel agent community. So they
4 go around and talk to the travel agents on a
5 personal level. They put together presentations
6 where they bring them together and talk about the
7 product, show them videos.

8 We have a marketing video that's about
9 seven minutes in length that is taken -- excerpts
10 taken from John Grant's Rockies By Rail, National
11 Parks By Rail and Antebellum South By Rail.
12 They've kind of spliced pieces of those three
13 together to do a marketing piece.

14 And then really the third thing that we
15 do is to offer familiar trips, either particular
16 trips that we use positioning moves for or, if
17 travel agents make a reservation like close to the
18 travel date, we will give them a pretty steeply
19 discounted rate if we have cabin availability.

20 So we often will have shoulder season
21 passengers that are travel agents traveling to
22 experience the product.

23 And those are the three primary ways we
24 have of educating the travel agent.

1 It's an pretty important part of our
2 marketing philosophy because our train is a unique
3 product. And the vacation cruise industry -- it
4 is unlike cruises, particularly in terms of the
5 accommodation and some of the physical aspects of
6 travel, and it's similar to cruises in terms of a
7 lot of amenities and the pace of the trip.

8 But we are particularly sensitive to the
9 travel agent as being the ones who can help us
10 screen people that are inappropriate for our trips
11 as well as identify the people that are prime
12 targets for us.

13 So we put a lot of effort into helping us
14 understand what our product is and what its strong
15 points are as well as the cautionary points
16 relative to their customers. It doesn't do either
17 of us any good for a passenger to come on to our
18 train thinking that luxury means a big room with a
19 king-sized bed and walk-in closet only to find
20 that they're in a room that, you know,
21 approximates the size of their walk-in closet at
22 home, if you know what I mean.

23 Q. So the idea to inform the agents on the
24 physical constrictions of the train, does that

1 also include these criteria like no children under
2 eight, this sort of thing?

3 A. Correct. And I don't mean to say that we
4 are -- that our training is telling them who we
5 don't want because, really, the focus is making
6 sure that they know how wonderful the product is;
7 but it's, you know, giving them an idea of what
8 the constraints are as well as getting them
9 excited about this as an alternative to what their
10 customers have been doing on cruise ships or at
11 resort areas.

12 Q. Would they have like a set of screening
13 questions or something that they would ask of
14 someone who called your office and made a direct
15 reservation?

16 A. Let me answer the question a little bit
17 differently than you posed it.

18 It is our hope, and it's our reason for
19 working through travel agents, is the assumption
20 that the travel agent has a personal relationship
21 with their customers. People that are buying our
22 type of product are generally not walking in off
23 the street to a travel agent that they don't know.
24 They often are working with a travel agent who's

1 planned their vacations for them over a course of
2 many years.

3 So our marketing avenue through travel
4 agents is that once a travel agent knows the
5 restrictions that they would be able to aim
6 customers of theirs that are appropriate to our
7 product.

8 For example, the woman that we had to
9 send home this year from New Orleans had in fact
10 traveled with the agents that signed her up were
11 actually on the trip that she was on, and they had
12 arranged travel for her in the past. But she had
13 gone downhill in the time since they had done
14 their last trip, and clearly our trip was
15 inappropriate for her.

16 But, in that case, it was actually very
17 good because they were able to see -- they there
18 experiencing the product and they were there
19 seeing how we handled a situation that was clearly
20 not workable for either this woman or for us as an
21 operator.

22 Q. Now individuals that contact AOE directly,
23 Exhibit 55 is your summary of various forums for
24 advertising.

1 Is this where you would generate your
2 outside non-agent assisted inquiries essentially
3 through advertising like this?

4 A. Some of it comes through our print media.

5 I would say that, by far and away, our
6 most effective producer of individuals who contact
7 us directly are the PBS specials on our train.
8 And the Food Channel just had one on in the last
9 couple of weeks for the trip that they filmed last
10 season. And it just generates quite a number of
11 calls.

12 The first time that our -- that Rockies
13 By Rail was aired internationally -- not
14 internationally -- nationally was in September of
15 '98. So it was toward the end of the season, the
16 first season we were operating the train, and we
17 got 28,000 calls as a result of the airing of that
18 PBS special. It was just astonishing.

19 But that -- and that was -- PBS does not
20 put a tag line on it for us. So that was people
21 who saw it and called Amtrack, called PBS, called,
22 you know, just started typing on the web looking
23 for us that, finally, you know, they were able to
24 find us independently.

1 And we haven't had that kind of response,
2 you know, in more recent airings because enough
3 people now have seen the program that it doesn't
4 generate quite that enthusiastic of a response.
5 But that's -- that is one of our primary sources.

6 And word of mouth is also a huge part of
7 our program. We have lots and lots and lots of
8 passengers who take the trip and, you know, come
9 home and tell all their friends about it and, you
10 know, come on additional trips because we run so
11 many different itineraries. We have a lot of
12 passengers who will come back and take a different
13 tour route with us at a different time.

14 Q. Now By Rail Video Series, that's not paid
15 advertising by AOE?

16 A. No. It is not.

17 Q. This is just a documentary that this
18 individual -- or a series of documentaries that he
19 made in connection with your operation?

20 A. Correct. In fact, we did not pay him to
21 make the documentaries either. We did provide
22 space -- well, the original two were made before
23 we had purchased the assets.

24 But the Antebellum one and the food one

1 have been made since we've owned the equipment.
2 And we provided them with space and cooperated in
3 terms of their camera crews and that kind of
4 thing.

5 But he does that all on his own and then
6 sells the program to PBS.

7 Q. In the record, there's references to
8 Cushman Amberg Communications. Is that like an ad
9 agency that --

10 A. It's a public relations firm. So they're
11 not doing any of our ad placement. They are the
12 ones who are working with travel writers and
13 arranging for targeted travel writers. Like the
14 New York Times Sunday Travel Section has sent a
15 writer to travel on the train and write an
16 article. So they are working on that.

17 They work on press releases. For
18 instance, helping us with the inauguration of the
19 second set would be the kind of thing that they
20 would work on, the public relations as opposed to
21 advertising.

22 Q. Is there -- are they oriented towards
23 seeking out like reporters that do articles on AOE
24 and that sort of thing?

1 A. Yes.

2 Q. Is that it?

3 A. Yes.

4 Q. Publicist type activity?

5 A. Correct. Free advertising.

6 Q. Well, you pay them?

7 A. Well, we pay Cushman Amberg. We do not
8 pay the travel writers. And often we don't know
9 if there's writers on the train. Sometimes they
10 make themselves known and sometimes they travel
11 incognito, if you will.

12 Q. I believe you also said in your testimony
13 this morning that at one time AOE was making
14 filings as a foreign corporation doing business in
15 the states that it passed through. You don't do
16 that anymore?

17 A. Oh, no, yes, we do.

18 Q. You do?

19 A. Yes, we do.

20 And primarily that has to do with liquor
21 licensing. Each of the states are totally
22 idiosyncratic as to their requirements for liquor
23 licenses.

24 Some states don't even want to know about

1 us, quote, unquote; have given us letters from
2 exemptions. Some states require that we get a
3 license but do not require us to report. Some
4 states we have to do monthly reporting even though
5 we are only in the state for two days maybe during
6 a season.

7 So it varies all over; but a lot of --
8 most of our foreign filings as foreign
9 corporations in states has to do with our liquor
10 licensing.

11 Q. Have you ever had to do any filings with
12 the public utility commission of a state?

13 A. No.

14 Q. I am almost finished here.

15 Exhibit 51 was your list of the various
16 cars. Some of these are identified as acquired
17 through an Amtrack lease. The Denver, the
18 Savannah, the ADA coach, near the center of the
19 first page. These are -- these are under an
20 exclusive lease between you and Amtrack; is that
21 it?

22 A. Those are leased -- that's a lease
23 purchase, and so it's a three-year lease with a
24 bargain purchase at the end of the three-year

1 lease.

2 Q. So during that period, you have the use of
3 the car and not Amtrack?

4 A. Correct. Oh, yes. And those four cars in
5 particular are cars that we are refurbishing to
6 our own specifications. So they are essentially
7 new -- a new layout of the car that are going into
8 the existing consist, and the other two are going
9 into the AOE II consist.

10 Q. A couple of these that are leased are
11 leased from something called Rail Venture. Could
12 you tell me what that is, what that means?

13 A. Rail Ventures is the company that owns the
14 cars. Rail Ventures is I believe owned --
15 although I do not know the ownership structure in
16 its entirety -- by a gentleman named John
17 Kirkwood, and John Kirkwood is one of our board
18 members and is an investor who is a rail fan. He
19 owns a number of rail cars and has a number of
20 private cars that he uses for his own purposes
21 and/or leases to us or Montana Rockies, which was
22 a company that we owned briefly up in Montana.

23 Q. Yes, I recall seeing that in the record at
24 some point. That was also a passenger operation?

1 A. Yes, it was, although they had some
2 onboard sleeping capacity on some trips, but their
3 operation was mostly day -- it was a two-day trip
4 with an overnight stay in Missoula between
5 Sandpoint, Idaho, and Livingston, Montana. Not
6 very good destination terminal points, you know,
7 in terms of our customer profile.

8 Q. Was this owned also by Mr. Hillman?

9 A. We purchased it in November of 1998 and
10 sold it in December of 2000.

11 Q. So you operated that independently of AOE?

12 A. Correct.

13 Q. And now you don't have it?

14 A. Correct.

15 HEARING EXAMINER BLANK: Thank you,
16 Ms. Schellberg. I have no further questions.

17 Mr. Bergen, do you have anything to
18 follow up on?

19 MR. BERGEN: No, thank you.

20 HEARING EXAMINER BLANK: Any further statement
21 before I close the hearing?

22

23

24

1 CLOSING STATEMENT

2 BY MR. BERGEN:

3 I guess much of a statement I would make
4 would be sort of repetitive, but let me -- I do
5 want to reiterate our central point, that the
6 Surface Transportation Board doesn't have
7 jurisdiction over rail passenger transportation
8 any longer with the exceptions I mentioned at the
9 opening.

10 And so we're very firm in our belief that
11 there's simply no jurisdiction regardless of --
12 regardless of what the Board thinks American
13 Orient Express delivers as a service, it's clearly
14 only a passenger service. It doesn't deliver
15 freight of any kind; and, as a result, it's not
16 subject to the jurisdiction of the Surface
17 Transportation Board and, therefore, it can't be a
18 covered employer by law.

19 Summarizing -- let me give you something
20 by the way, if you don't mind. I just copied a
21 couple pieces of legislative history of the
22 ICC Termination Act, just to make it easier.

23 HEARING EXAMINER BLANK: All right.

24 MR. BERGEN: When the ICC Termination Act was

1 enacted by Congress, there was -- obviously there
2 was the House report and the Senate report because
3 they each voted different bills out of committee;
4 and then there was eventually a Conference
5 Committee which agreed on the final bill that went
6 to Congress and that was enacted.

7 I've copied a few pages of the Conference
8 Report, and you'll see that the pages aren't all
9 obviously sequential because I didn't think you
10 needed hundreds of pages.

11 But I have the cover page which is
12 ICC Termination Act of 1995, Conference Report,
13 and it begins with the Table of Contents of the
14 statute, then it jumps to Page 165 which is what I
15 brought which is the joint explanatory statement
16 of the Committee of Conference. And it's a
17 section -- then it goes on to a section-by-section
18 analysis of HR-2539 which became the bill of the
19 ICC Termination Act.

20 And the way this works, for each section
21 of the statute that was being enacted, there's a
22 comment that was -- that came out of the House
23 Committee report, a comment that came out of the
24 Senate, and then what the Conference Amendment

1 report was, which is the conference as I
2 understand it, understanding of what they had
3 agreed to.

4 And so, for example, on Section 101,
5 Abolition, meaning abolition or referring to the
6 abolition of the Interstate Commerce Commission,
7 the Conference Amendment language says, "The
8 Conference terminates the ICC and transfers
9 remaining functions to a new Surface
10 Transportation Board of the Secretary effective
11 January 1, '96." I am not going to read all of
12 this, but I wanted to read a couple different--
13 what I thought were some important points.

14 Referring to Section 10102 of the Act,
15 which is the ICC Termination Act which is entitled
16 Definitions --

17 THE COURT: Excuse me, could you identify the
18 pages that you are reading this off of?

19 MR. BERGEN: I'm sorry. Why don't I give this
20 to you as well. I brought you copies.

21 HEARING EXAMINER BLANK: I really don't need to
22 enter this into the record since it's a public
23 document.

24 MR. BERGEN: I just brought it for your

1 benefit.

2 I am reading on Page 166 now. The
3 Section on Definitions in 10102. The House -- I'm
4 going to read all three, if you don't mind,
5 because the House provision -- this is how the
6 House interpreted its own bill I suppose:

7 "The amended Definitions deletes several
8 terms rendered redundant in light of the abolition
9 of regulatory jurisdiction over express and
10 sleeping car companies." I think it's clear from
11 that language that the House expected that they
12 were actually abolishing jurisdiction over
13 sleeping car companies.

14 "Unlike the former 10102, the
15 Definitions are confined entirely to terms
16 relevant to railroad provisions."

17 The Senate language on the same section
18 says, "Section 303, Definitions, amends 49 USC
19 10102 which defines terms used in rail provisions
20 to remove terms that are not pertinent, to update
21 and clarify the term "rail carrier" and to remove
22 references to passenger transportation."

23 And then the Conference substitute says,
24 "This provision integrates changes common to both

1 House and Senate provisions to reflect reductions
2 in regulatory jurisdiction. To reflect the
3 reorganization of all rail provisions into a
4 separate part, non-rail definitions have been
5 deleted to clarify that only providers of rail
6 transportation for compensation or within the
7 scope of the statute. The definition of rail
8 carrier is limited to persons providing common
9 carrier rail transportation."

10 I'm just looking at this next page. I
11 don't want to read this whole page obviously. The
12 next page, Section 167, refers to the General
13 Jurisdiction Statute, Section 10501, which creates
14 the jurisdiction of the Surface Transportation
15 Board.

16 In the Senate amendment language -- I'm
17 not going to read all of it, but the second
18 sentence begins, "The exclusive nature of the
19 Board's regulatory authority would be clarified.
20 The Board's rail jurisdiction would be limited to
21 freight transportation because rail passenger
22 transportation today, other than service by
23 Amtrack which is not regulated under the
24 Interstate Commerce Act, is now purely local or

1 regional in nature and should be regulated, if at
2 all, at that level. Outdated references to
3 express and sleeping car carriers, which no longer
4 exist, would be removed."

5 I guess my point is pretty clear that I
6 think that Congress believed -- I think the
7 statute is pretty clear, but I think this is the
8 Conference report and the Senate and House reports
9 that make pretty clear that they thought that the
10 federal government was getting out of the business
11 of regulating passenger transportation with the
12 exceptions that are not -- that are not relevant
13 to this case.

14 I think that going on from that, and just
15 touching a little bit upon Ms. Schellberg's
16 testimony and some of the prior decisions of even
17 the Railroad Retirement Board, I think we received
18 from you this package, which we appreciate, of
19 some of the relevant decisions, or at least the
20 ones that we think, have been cited here. So I
21 don't think I have to go too much in depth into
22 them because, obviously, you've seen them
23 yourselves, but I would point out that there are
24 other examples of excursion and tourist railroads

1 that the Board has concluded.

2 As far as I can tell, without exception,
3 it has concluded that they are not covered
4 employers regardless of whether or not they
5 operate between more than two states or even
6 between two states.

7 It would be, I think -- I mean, as far as
8 we can tell from having done the research, and I
9 haven't seen anything to the contrary, there is no
10 case in which a railroad like this has been found
11 to be a covered employer. There's nothing about
12 this one, this particular railroad that makes it
13 -- this particular service that makes it unique
14 and that would justify even under the law or the
15 facts this Board concluding that for some reason
16 this one railroad, which provides an excursion
17 service similar to some of the others, perhaps a
18 little bit more refined, a little more exclusive,
19 would be a covered railroad.

20 I think the evidence that's now in the
21 record beyond the question of -- beyond the issues
22 I've just addressed makes it clear that this is
23 not a common carrier. And I think the statute is
24 very clear that if the Surface Transportation

1 Board regulates anything, it only regulates a
2 common carrier by rail.

3 The statute, Section 10102, 49 USC,
4 Section 10102, Subdivision 5, "Rail carrier means
5 a person providing common carrier railroad
6 transportation for compensation" -- I won't read
7 the exceptions because it has to do with street
8 railroads.

9 And this is covered in our brief. It
10 defines what a railroad is. And I won't repeat
11 what's in our brief.

12 This company, there's no facts that show
13 that it meets any of the definitions of railroad.
14 It doesn't own or operate any kind of the
15 facilities or equipment that's listed here as
16 being a railroad.

17 The fact that it may provide
18 transportation under some broad definition of
19 transportation is irrelevant to the question of
20 rail carrier under the statute. The statute
21 doesn't define rail carrier by whether it provides
22 transportation only. It has to be -- it has to
23 provide transportation -- it has to be railroad
24 transportation for compensation. AOERC does not

1 provide railroad transportation for compensation.

2 And, finally, it's not a common carrier.

3 I think that's been made abundantly clear in the
4 record. Not everyone can buy a ticket. It's not
5 a service designed for everyone to buy a ticket.
6 There are people who are excluded. There are
7 entire categories of people who are excluded.

8 And, furthermore, it doesn't -- it's not
9 really a service that provides transportation from
10 point to point. It's an excursion service. It's
11 a very high-end vacation. From beginning to end,
12 it is more about the experience of being on
13 vintage cars; the experience of having refined
14 service, both in terms of food and accommodations;
15 the experience of seeing historic sites, seeing
16 vistas that aren't commonly seen that you won't
17 see traveling by bus on the interstate, even -- as
18 we saw, even necessarily by traveling by Amtrack
19 because Amtrack provides a common carrier service
20 which is designed to get you from Point A to
21 Point B in the fastest, most inexpensive manner
22 possible, which this is clearly not.

23 So I think -- you know, it is hard for us
24 to see any justification for this Board to do

1 anything but reverse its decision from before and
2 find that this is not a covered carrier.

3 The other thing I wanted to discuss,
4 Mr. Blank, is we have raised other issues in the
5 case which we believe should be irrelevant, but,
6 in any event, go to the question of when the
7 service began, when coverage begin, and whether or
8 not in the event of a decision by the Board, which
9 we don't see as justified, whether or not the
10 decision of the Board ought to be prospective or
11 retrospective.

12 Whether that's a subject that we need to
13 discuss now or whether it's been made clear enough
14 or whether we ought to provide some follow-up
15 later on -- I mean, I guess this question is just
16 going to, what is the next stage of the hearing?

17 I also have some sort of just mechanical
18 questions. Are you going to provide a new Table
19 of Contents printed out? We know what the
20 exhibits are, et cetera.

21 But, you know, with all that, that's
22 really the end of my presentation.

23 HEARING EXAMINER BLANK: Well, thank you.

24 As to what the following steps are, we

1 really don't have anything else to be submitted
2 into the record at this stage. We've talked about
3 a corporate structure. I don't think that's
4 necessary at this point.

5 So with the conclusion of the hearing
6 today, I would close the record. If you wish --
7 you've already submitted the brief in connection
8 with the reconsideration request initially back in
9 November. If you wish, you could submit a
10 supplemental brief or you would also have a period
11 of 30 days to respond to my report to the Board.
12 In essence, a brief to the Board Members
13 themselves countering any contrary recommendations
14 that I might make.

15 MR. BERGEN: Can I also argue in favor of the
16 recommendations that you're going to make?

17 HEARING EXAMINER BLANK: You certainly may.

18 I'm merely saying that you, although if
19 you would like, I could allow you a period of time
20 now to give me like a supplemental brief.

21 An alternative would be to just respond
22 to any points that you feel necessary in my
23 written report to the Board. So depending -- I
24 won't ask you to make a decision now, if you

1 prefer to think about it.

2 MR. BERGEN: I would. Thank you.

3 HEARING EXAMINER BLANK: Depending upon your
4 decision then, that would -- if you're not going
5 to submit anything further, then it would go to me
6 to write my recommendations to the Board which you
7 would then receive along with the transcript and
8 so forth. And any response you wanted to make
9 would be addressed to the Board itself at that
10 point.

11 And then, as I believe I outlined in my
12 earlier letter to you, then the Board would
13 consider my report, adopt all of it, part of it,
14 none of it, as it chose, and you would then
15 receive the final decision of the agency.

16 Well, so, at this stage then, if you
17 would like, I can give you ten days to decide
18 whether you would like to submit a report, an
19 additional brief or not. You can just notify me
20 at that point --

21 MR. BERGEN: Okay.

22 HEARING EXAMINER BLANK: -- if you do.

23 MR. BERGEN: Certainly if there are any
24 particular issues, whether factually or legal that

1 you feel would be helpful to have some additional
2 argument or research on, we could address that.

3 Other than that, I will be glad to let
4 you know within ten days whether we feel we need
5 to do anything.

6 HEARING EXAMINER BLANK: All right. How long
7 do you think you need to prepare a brief if you
8 decided to submit one?

9 MR. BERGEN: I think the brief we submitted is
10 pretty thorough.

11 HEARING EXAMINER BLANK: Another 20 days?

12 MR. BERGEN: Yes. It wouldn't take long. It
13 wouldn't be that much more that I have to say.

14 HEARING EXAMINER BLANK: Well, then, at this --
15 I will leave it at that stage. You can notify me
16 within ten days of today whether you intend to
17 submit any supplemental brief prior to my
18 preparing a report.

19 If you advise me that you are, we'll set
20 a date for which that supplemental brief would be
21 due. Otherwise, I will just close the record and
22 I will notify you with a copy of the transcript
23 when I get it. And then I will issue my decision
24 or recommendation as soon as I can.

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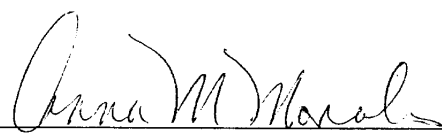
With that, let me state that the record
is -- the hearing is concluded at approximately
3:30 p.m.

(Which were all the proceedings
had in the above cause this
date and time.)

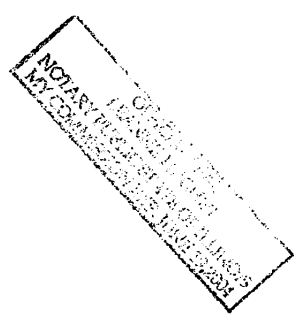
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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

ANNA M. MORALES, being first duly sworn,
on oath says that she is a court reporter doing
business in the City of Chicago; and that she
reported in shorthand the proceedings of said
hearing, and that the foregoing is a true and
correct transcript of her shorthand notes so taken
as aforesaid, and contains the proceedings given
at said hearing.


Certified Shorthand Reporter

SUBSCRIBED AND SWORN TO
before me this 10 day
of June 2002.



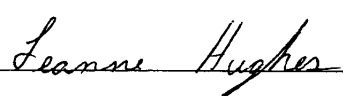

Notary Public

Exhibit E



OPERATING AND MAINTENANCE AGREEMENT

BETWEEN

NATIONAL RAILROAD PASSENGER CORPORATION, OREGON RAIL HOLDINGS LLC, AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC, MONTANA ROCKIES RAIL TOURS LLC, AOE EQUIPMENT LLC, AOE RAIL SERVICES LLC, AND AOE RAIL EXPEDITIONS LLC.

THIS OPERATING AND MAINTENANCE AGREEMENT (the "Agreement"), dated as of the 7th day of August, 2000, is entered into by and between Oregon Rail Holdings LLC and wholly owned subsidiaries American Orient Express Railway Company LLC, Montana Rockies Rail Tours LLC, AOE Equipment LLC, AOE Rail Services LLC, and AOE Rail Expeditions LLC, state of Oregon organizations all having offices at 830 NW 19th Avenue, Portland, Oregon 97209, (collectively, "Operator") and the National Railroad Passenger Corporation ("Amtrak"), a District of Columbia corporation having its principal offices at 60 Massachusetts Avenue, N.E., Washington, D.C. 20002.

WHEREAS, Amtrak is engaged in the business of providing national intercity passenger rail transportation; and

WHEREAS, Operator wishes to operate multiple frequency passenger train service throughout the country using Amtrak locomotives and train and engine crews; and

WHEREAS, Amtrak is willing to operate multiple frequency passenger train service and to provide Amtrak locomotives, train and engine crews, and other agreed-upon services, all under the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. Scope of Agreement.

During the term of this Agreement, Amtrak agrees to operate multiple frequencies of passenger train service for Operator in accordance with the itineraries set forth in Attachment A, attached hereto and incorporated herein, as scheduled and approved for each trip (individually, a "Trip"; collectively, the "Service"). The schedule and itinerary for each Trip shall be submitted for Amtrak approval at least 120 days in advance (such schedule, after approved, being hereafter referred to as "Approved Schedule"), and each Approved Schedule shall be incorporated within Attachment A as part of this Agreement. Amtrak shall provide motive power and train and engine crews for each Trip,

which may consist of up to sixteen (16) cars under the care, custody, and/or control of Operator, as set forth in Attachment A, or such substitute cars as Amtrak approves (such cars are collectively referred to as "Equipment"). The parties agree that, upon the request of Operator and the approval of Amtrak, a seventeenth car may be added to a train consist. Under no circumstances can the train be operated with more than seventeen cars.

2. Term of Agreement.

This Agreement shall commence on January 1, 2001 and shall continue in full force and effect through December 31, 2005, unless terminated earlier pursuant to this Agreement. This Agreement may be extended with the mutual agreement of the parties; however, Amtrak reserves the right to change any term or condition hereof, including any price, for any such extension of this Agreement.

3. Trip and Deadhead Operations.

- A. Operator is responsible for making the Equipment available and operationally reliable in sufficient time to permit an on-time departure of the scheduled Trip or deadhead move as set forth in the Approved Schedule of that Trip. Amtrak is under no obligation to move the Equipment, either as a Trip or as a deadhead move, unless the Equipment is in good working order and meets all Federal Railroad Administration ("FRA"), American Association of Railroads, and Amtrak's mechanical and engineering standards. Amtrak has no obligation to provide substitute equipment in the case of Operator's inability to furnish its designated Equipment.
- B. Trip Schedules provided in advance by Operator are subject to Amtrak approval. If Operator requests a new Trip Schedule incorporating route segments not previously utilized, Operator agrees to compensate Amtrak for qualification costs incurred for Amtrak train and engine crews in preparing the route segment for service. Amtrak will provide Operator, in advance, an estimate of all qualification costs for preparing the new route segment for service which costs shall not exceed \$20,000 for any given route.
- C. Amtrak agrees to use its reasonable efforts to fulfill the Approved Schedule for each Trip; however, Amtrak does not guarantee the published schedule and reserves the right to change the route and to change or omit any scheduled stops for a Trip or cancel any Trip or any deadhead move at any point if operationally or mechanically appropriate, in Amtrak's sole opinion. Amtrak agrees to notify Operator of such changes as soon as reasonably practicable. In

the event that operating or mechanical constraints or conditions prohibit a departure from any station at the scheduled time, Amtrak will depart as soon as reasonably practicable thereafter.

- D. Operator agrees that while the Equipment is being moved by Amtrak for each Trip and deadhead movement, the Equipment and Operator's crews shall at all times be under the exclusive operational direction of Amtrak (except for provision of on-board passenger services); Operator shall be responsible for ensuring that all of Amtrak's instructions relating thereto shall be strictly complied with by Operator, Operator's crews, and all passengers and invitees on board. Amtrak shall not be obligated to comply with any operational request from Operator or any crew member, passenger or invitee, except as otherwise provided in this Agreement. Amtrak reserves the unrestricted right of access to the Equipment by Amtrak operating crews or supervision regarding safety and compliance with regulations concerning train operations.
- E. In the event of disruptions en-route which cause Amtrak to cease train operation on any Trip or deadhead move, Amtrak will take reasonable steps to coordinate arrangements for disposition, en-route setout, and pickup of the Equipment with the operating railroad. In such event, Amtrak shall not be responsible for Operator's Equipment, property, crews, passengers, baggage, or personal effects. If Amtrak agrees to do so, Amtrak will take reasonable steps to handle Operator's passengers and crews around a disruption. Associated expenses incurred by Amtrak hereunder shall be reimbursed by Operator in accordance with Section 7 hereof.
- F. Operator agrees that other Amtrak train movements take priority over train movements contemplated by this agreement.

4. On Board Passenger Services.

Operator shall hire and provide its own employees to provide food, beverages, and other passenger services for the Service. Operator will provision the Equipment for each Trip with foodstuffs, beverages, and restaurant supplies off Amtrak property, provided, however, Amtrak shall provide potable water, wet ice, sewage disposal (where normally performed) and trash pickup at designated Amtrak service stops for all Trips. For potable water, wet ice, sewage disposal and trash pickup at non-Amtrak service stops designated by Operator, Amtrak will arrange these services per Operator request, with the understanding that Operator will assume the cost and complete liability (irrespective of any negligence or misconduct of Amtrak, except for gross negligence or willful misconduct) for those services. Incremental charges associated with station service handling by Amtrak of Operator's passengers, if Amtrak agrees to do so, shall be reimbursed by Operator in accordance with Section 7 hereof. Operator

shall obtain liquor licenses, food service licenses and all other necessary or desirable licenses in States in which Operator intends to serve or sell alcoholic beverages and food and to obtain any other license where necessary or desirable for its operations and shall comply with all applicable laws, rules, and regulations relating to all services contemplated by this Agreement, including, without limitation, the service of food and beverages. Operator shall also obtain all licenses associated with the use of recorded or live music or entertainment of any other medium on all Trips. Amtrak may request evidence of the existence of any such licenses at its discretion.

5. Operator Personnel Training.

All Operator crews must be Amtrak-qualified on FRA and Amtrak safety and basic operating regulations. All applicable Operator crews and personnel must meet applicable Federal and State requirements for restaurant and service lounge operations. Amtrak will provide safety and operating training and food and beverage service training to Operator's crews at the request of and at the expense of Operator; provided, however, that Amtrak will not provide any other training or function which Operator is required to provide under this Agreement, and Amtrak does not assume any liability therefor.

6. Maintenance of Equipment.

- A. Operator agrees to make the Equipment available for final inspection by Amtrak mechanical personnel at a reasonable length of time prior to the first scheduled trip of the season.
- B. Amtrak or its authorized agent will inspect the Equipment prior to the scheduled departure of each Trip and deadhead move. No equipment shall be used on a Trip without Amtrak's approval. The authorized agent cannot be an employee of Operator.
- C. Operator agrees to compensate Amtrak, its operating carriers, or station and terminal companies for any and all costs associated with the provision of authorized repairs and scheduled and unscheduled maintenance of the Equipment. Amtrak agrees to charge Operator an internal Amtrak labor rate of \$50.00 per hour, plus any applicable overtime in the proportion required in the appropriate agreement between Amtrak and its labor unions (by way of example, time and a half or double time).

7. Fees and Method of Payment.

- A. For each Trip scheduled to be operated by Amtrak, Operator shall pay Amtrak the corresponding rate per train mile based upon the following mileage-based schedule:

For calendar year 2001:

1-60,000 miles:	\$36.00/train mile for each mile 1-60,000
60,001-110,000 miles:	\$35.00/train mile for each mile 60,001-110,000
110,001 and above miles: above	\$34.00/train mile for each mile 110,001 and above

For calendar year 2002:

1-60,000 miles:	\$37.00/train mile for each mile 1-60,000
60,001-110,000 miles:	\$36.00/train mile for each mile 60,001-110,000
110,001 and above miles: above	\$35.00/train mile for each mile 110,001 and above

For calendar year 2003:

1-60,000 miles:	\$38.00/train mile for each mile 1-60,000
60,001-110,000 miles:	\$37.00/train mile for each mile 60,001-110,000
110,001 and above miles: above	\$36.00/train mile for each mile 110,001 and above

For calendar year 2004:

1-60,000 miles:	\$39.00/train mile for each mile 1-60,000
60,001-110,000 miles:	\$38.00/train mile for each mile 60,001-110,000
110,001 and above miles: above	\$37.00/train mile for each mile 110,001 and above

For calendar year 2005:

1-60,000 miles:	\$40.00/train mile for each mile 1-60,000
60,001-110,000 miles:	\$39.00/train mile for each mile 60,001-110,000
110,001 and above miles: above	\$38.00/train mile for each mile 110,001 and above

This amount is inclusive of:

1. Motive power
2. Train and Engine crews
3. Initial terminal mechanical inspections

4. Enroute mechanical inspections (at Amtrak designated service points)
5. Onboard support services (at Amtrak designated service points):
 - (a) Potable Water
 - (b) Wet ice
 - (c) Sewage disposal
 - (d) Trash Pickup

The above rate is exclusive of any additional costs set forth in this Agreement, including but not limited to extraordinary operating railroad charges which may be imposed by the operating railroads. Extraordinary operating railroad charges include, but are not limited to, parking and terminal fees on non-Amtrak owned track, switching charges and rail access surcharges on operating railroads.

- B. With the advance approval of Amtrak, Operator may add a seventeenth car to the train consist. Operator agrees to pay Amtrak a rate of \$0.40 per car mile when the car is operated in the consist.
- C. When train operates over an operating railroad, Amtrak agrees to compensate the railroad under the following schedule:

1. Rail access fee:

For calendar year 2001:	\$10.50 per train mile
For calendar year 2002:	\$11.00 per train mile
For calendar year 2003:	\$11.50 per train mile
For calendar year 2004:	\$12.00 per train mile
For calendar year 2005:	\$12.50 per train mile

2. Train and engine crews (if provided by Railroad):

\$7.00 per train mile

Fees charged in excess of this amount will be the responsibility of Operator. Amtrak agrees to consider processing charges from these railroads and invoice Operator for the balance due, if requested by Operator, and Amtrak finds it appropriate at its sole discretion to do so.

- D. With the advance approval of Amtrak, Operator will be allowed a maximum of eight train movements per calendar year to position empty trains for subsequent revenue movements. During these movements, the train may be occupied by on board crew only. Operator shall pay Amtrak the corresponding rate per train

mile based upon the following mileage-based schedule:

For calendar year 2001:	\$27.00 per train mile
For calendar year 2002:	\$28.00 per train mile
For calendar year 2003:	\$29.00 per train mile
For calendar year 2004:	\$30.00 per train mile
For calendar year 2005:	\$31.00 per train mile

- E. For the deadhead movement of the Equipment on Amtrak regularly scheduled trains, Operator shall pay Amtrak the applicable private car tariff rate. All deadhead moves on regularly scheduled trains must be approved in advance by the applicable Amtrak Product Line and Business Unit. If such moves are not approved, Amtrak will attempt in good faith to provide alternate means of Equipment movement, at the cost of and subject to the approval of Operator. Availability of 480 volt Head End Power and specific position in train are not guaranteed by Amtrak.
- F. For parking of the Equipment on Amtrak owned or leased property, Operator shall pay Amtrak the applicable private car tariff rate after the first 48 hours. Operator is responsible for any and all costs and liability associated with parking or all other services at a non-Amtrak owned or leased property. This does not apply to Equipment awaiting repair work at Amtrak maintenance facilities, or to Equipment awaiting building or breaking apart of Operator's train at beginning or end of calendar year season.
- F. Operator agrees to pay Amtrak for all sums due hereunder in lawful U.S. currency. No later than two (2) weeks prior to departure of the first Trip, Operator shall pay Amtrak by wire transfer for Trip movements and deadhead movements associated therewith for the first Trip. Operator will continue to pay by wire transfer two (2) weeks in advance for each Trip throughout the term of this Agreement. Amtrak reserves the right to hold departure of a scheduled Trip until payment or proof of payment is received. For all other costs and charges hereunder due from Operator to Amtrak, Operator shall pay Amtrak within thirty (30) days of receipt of an invoice. Invoices not paid within 30 days will accrue late charges at an annual rate of ten (10) percent, commencing thirty (30) days after the invoice date, and ending when payment is received by Amtrak.

In special circumstances, Operator may incur expenses on Amtrak's behalf with Amtrak's prior written approval. Operator may offset such expenses against payments to Amtrak, provided Operator receives prior written approval to do so from Amtrak's Product Line Director, Charter Services, and submits documentation of such approval with its remittances. Otherwise, Operator may invoice Amtrak for expenses incurred on Amtrak's behalf, and Amtrak will

reimburse Operator within thirty (30) days of receipt of invoice.

- G. Operator is not entitled to a refund or credit for any Trip, deadhead move, or portion thereof that 1) Operator cancels with less than three (3) business days' written notice, 2) Amtrak is unable to move the Equipment or operate the Trip or deadhead move for any reason described in Sections 3.A., 5, or 6.A. hereof, or 3) due to violation of any provision of this Agreement by Operator. Operator shall be entitled to a refund or credit for any unused train mile fees, less expenses described in Section 3, for any Trip, deadhead move or uncompleted portion of a Trip, where cancellation is due to causes described in Sections 3.B. and 3.D. hereof. In addition to all other remedies, Amtrak may cancel movement of the Equipment and any Trip without refund upon notice to Operator for any default in payment under this Agreement. Any such cancellation shall not waive Amtrak right to any payment due hereunder.

- H. Payments should be sent to:

Amtrak Intercity
Finance Department
210 South Canal Street
Suite 560
Chicago, IL 60606

8. Indemnity, Liability and Property Damage Insurance.

- A. Operator agrees to defend, indemnify, and save harmless Amtrak, its operating carriers, stations and terminal companies, and their respective officers, employees, agents or servants, successors, assigns, and subsidiaries (the "Indemnified Parties"), from any and all claims, liabilities (including liabilities assumed pursuant to indemnity contract), damages, or expenses of any kind, including attorneys' fees, for: 1) injury to, or death of any person(s) whatsoever (except for employees of Amtrak) and 2) loss, damage, or destruction to any property, including loss of use (except Amtrak property but not excepting Amtrak property leased to Operator), which arises out of and is caused directly or indirectly by the use, occupancy, parking, storage, handling, or movement of the Equipment, or by the provision of any service in connection with any Trip, and which is not caused by the gross negligence or willful misconduct of Amtrak. Operator hereby releases and waives any claim against the Indemnified Parties for any loss, damage, or destruction of Operator Equipment, or other property owned by or in the care, custody or control of Operator which is not caused by the gross negligence or willful misconduct of Amtrak.
- B. Operator agrees to defend, indemnify and save harmless the Indemnified Parties from any kind and all claims, liabilities, damages, or expenses of any

kind, for any and all Amtrak and/or third party labor cost claims, whether or not actual labor claimed was provided, including, without limitation, labor protection benefits, alleged scope rule violations, and disciplinary actions, incurred in conjunction with this Agreement.

- C. The indemnification obligations under this Section are limited to the first Ten Million Dollars (\$10,000,000) per occurrence; however, they are not limited by the existence of any insurance policy or by limitation on the amount or type of damages, compensation, or benefits payable by or for Operator under Workers' Compensation Acts, Disability Benefit Acts, or other Employee Benefits Acts, and shall survive termination of this Agreement for any reason. Amtrak will give Operator prompt written notice of any lawsuit or written claims which are reasonably likely to give rise to a claim for indemnification under this Agreement. Amtrak will, upon reasonable request of Operator, provide to Operator such information that is in its possession relating thereto. Amtrak will not settle any such matter without the prior written consent of Operator.
- D. Operator shall procure and maintain, at its own cost and expense, during the entire period of performance under this Agreement, the types of insurance specified below. Operator shall submit a certificate of insurance giving evidence of the required coverages prior to the commencement of the movement of the Equipment and on an annual basis thereafter. In no way shall any movement be performed until the required certificate of insurance has been furnished. All insurance shall be procured from insurers acceptable to Amtrak. The insurance shall provide for thirty (30) days' prior written notice to be given to Amtrak in the event coverage is substantially changed, canceled, or not renewed. If the insurance provided is not in compliance with the requirements listed below, Amtrak maintains the right to cease movement of the Equipment until proper evidence is provided.

Workers' Compensation Insurance

A policy complying with the requirements of the statutes of the jurisdictions in which the movement of the Equipment will be performed, covering all employees of Operator. Employer's Liability coverage, with limits of liability of not less than One Million Dollars (\$1,000,000) each accident or illness, shall be included. The deductible shall not exceed TenThousand Dollars (\$10,000).

General Liability Insurance

A policy issued to and covering liability imposed upon Operator with respect to all movement and operations to be performed and all obligations assumed by Operator under the terms of this Agreement. Products and Completed

Operations Liability, Independent Contractors Liability, Federal Employers' Liability Act, Liquor Liability, and Contractual Liability coverages are to be included, and all railroad exclusions are to be deleted.

Amtrak and its operating railroads shall be named as named insureds with respect to operations to be performed; and the policy shall contain a waiver of subrogation against Amtrak, its operating railroads, their employees, and agents.

Coverage under this policy, or policies, shall have limits of liability of not less than Ten Million Dollars (\$10,000,000) per occurrence, combined single limit for bodily injury (including disease or death), personal injury, and property damage (including loss of use) liability. The deductible shall not exceed Ten Thousand Dollars (\$10,000).

Property Insurance

A policy issued to and covering any property or Equipment owned by, leased to, or used by or otherwise in the control, custody, or possession of Operator, against all risk of physical damage usually covered in a railroad property insurance policy. For purposes of property insurance, any equipment under lease to Operator from Amtrak shall be considered Operator's property, while the locomotives provided under this Agreement shall be considered Amtrak's property. Operator's property insurance shall carry limits sufficient to cover the scheduled value of all Operator property used for activities conducted by or for the account of the Operator pursuant to this Agreement. The deductible shall not exceed Ten Thousand Dollars (\$10,000).

9. Force Majeure.

Amtrak shall not be liable for any failure to perform or for any delay or cancellation in connection with any Trip or the movement of the Equipment if such failure, delay, or cancellation is due or in any manner caused by the laws, regulations, acts, demands, orders, or interpositions of any federal, state, or local government agency having jurisdiction thereof; Acts of God, public enemy, labor troubles of any nature (including strikes and lockouts), track outages, accidents, fire, floods, earthquake, weather, epidemics, quarantine restrictions, war, riots, rebellion, insurrection or terrorism, or any other cause similar to the foregoing or beyond the parties' control.

10. Use of Operator Equipment.

Operator agrees to:

- A. Operate and maintain its Equipment and services in a dignified and tasteful manner, in the judgment of Amtrak, in keeping with both Amtrak's and the restaurant/hospitality industry's standards for quality and service.
- B. Be responsible for the hiring, training, certifying, and dismissing of Operator staff.
- C. Pay for all food, beverage, music, merchandise and any other product or service to be used by Operator in association with services to be performed on any Trip.
- D. Procure from all government agencies and authorities having jurisdiction over the activities of the Operator and from all other licensors, including without limitation BMI and ASCAP, licenses, permits, certifications, or other authorizations necessary for the conduct of its activities and employees, and shall maintain the same in good standing, paying all taxes, license, certification, permit, and examination fees and other charges which may be levied on its activities.
- E. Promptly observe and execute the provisions of any and all present and future government laws, rules, regulations, and other demands pertaining to its activities or occupancy and to all Amtrak rules and regulations.

11. Termination.

- A. Amtrak may immediately terminate this Agreement upon notice to Operator for (i) denial of operating authority to move the Operator's Equipment by any Federal, State or local agency, or (ii) Operator insolvency, petition in bankruptcy or reorganization, or (or (iii) Operator's failure to keep, perform or observe any other promise, covenant or agreement set forth in this Agreement and such failure continues for a period of thirty (30) days. Amtrak may also immediately terminate this Agreement if Operator fails to pay any amount due hereunder and such failure continues for a period of fifteen (15) days after delivery of written notice of the failure by Amtrak to Operator.
- B. Amtrak may immediately suspend this Agreement upon notice to Operator if i) any type of strike or other labor activity is directed against Operator's train operation, or ii) Amtrak experiences labor work claim(s), work stoppage, slowdown or lockout, or any other labor activity associated with any Trip or the movement of the Equipment that would, in the sole opinion of Amtrak, adversely affect Amtrak's transportation and maintenance activities, including without limitation those provided hereunder or adversely affecting Amtrak's labor relations with its own employees. Amtrak shall notify Operator when Amtrak determines, in its sole opinion, when it is appropriate to reinstate said

Agreement.

- C. No waiver by Amtrak of any default on the part of Operator in performance of any of the terms, covenants, or conditions hereof to be performed, kept, or observed by Operator shall be or be construed to be a waiver by Amtrak of any other subsequent default in performance of any of the terms, covenants, and conditions.

12. Assignment and Sublease.

Operator shall not assign, sell, convey, transfer, mortgage, or pledge or otherwise encumber this Agreement or sublet the Equipment for operation under this Agreement without the prior written consent of Amtrak.

13. Governing Law.

This Agreement shall be governed by and construed in accordance with the laws of the District of Columbia, without regard to conflicts or choice of law provisions.

14. Notices.

All notices, including but not limited to requests, notifications, and reports, given or required to be given to or by any party shall be in writing, and all such notices either delivered by hand, sent by certified mail (return receipt requested), or sent by a nationally recognized overnight delivery service addressed as follows:

If to Amtrak:	Product Line Director: Charter Services Amtrak Intercity 210 South Canal Street Suite 342 Chicago, IL 60606
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If to Operator:	Chief Executive Officer Oregon Rail Holdings LLC 830 NW 19th Avenue Portland, OR 97209
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Notices shall be deemed to have been received on the date delivered to the recipient regardless of any other date indicated thereon. Either party may change the representative and/or address to which notification shall be given hereunder by notice in writing to the other party hereto.

15. Miscellaneous.

- A. This Agreement constitutes the sole and entire agreement between the parties hereto and supersedes all previous oral or written understandings, agreements, commitments, or representations concerning the subject matter of this Agreement. Except as otherwise provided in this Agreement, no change or modification in this Agreement shall be of any force or effect unless reduced to writing, dated, and executed by both parties hereto.
- B. If any provision of this Agreement is held to be unlawful, invalid, or unenforceable, it shall be deemed to be deleted herefrom without prejudice to the lawfulness, validity, and enforceability of the remaining provisions.
- C. Each party hereto shall be deemed to be an independent contractor.
- D. The headings and captions used herein are inserted for convenience of reference only and shall not affect the meaning of any provision.
- E. Notwithstanding any termination or expiration of this Agreement, all rights and obligations including, without limitation, those pertaining to warranties and indemnification, hereunder which by their nature continue beyond termination or expiration of this Agreement shall survive until each such right and/or obligation expires or terminates in accordance with its respective term.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the day and year first above written.

NATIONAL RAILROAD PASSENGER CORPORATION

By: William G. Ladd
(Signature)
WILLIAM G. LADD
(Name)
DIRECTOR
(Title)

OREGON RAIL HOLDINGS LLC

AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC
MONTANA ROCKIES RAIL TOURS LLC
AOE RAIL SERVICES LLC
AOE RAIL EXPEDITIONS LLC
AOE EQUIPMENT LLC

By: Henry L. Williams
(Signature)
Henry L. Williams
(Name)
President
(Title)