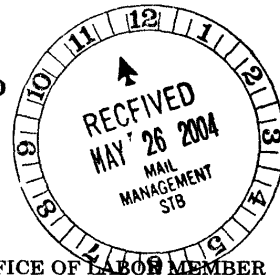




UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

MAY 21 2004



V. M. SPEAKMAN, JR.
LABOR MEMBER

Office of the Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 840
Washington, D. C. 20423-0001

OFFICE OF LABOR MEMBER

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Re: Finance Docket NO. FD-34502

Honorable Sir or Madam:

American Orient Express Railway Company LLC (AOE) has filed a Petition for Declaratory Order before the Surface Transportation Board, as referenced in the above Finance Docket Number.

In its Petition AOE references a Report of Hearing Examiner appointed by the Railroad Retirement Board and has included as Exhibits all evidence presented to the Examiner, including, the statement of facts not in dispute from the Examiner's report as well as the transcript of the hearing conducted by the Examiner. However, it appears the Report and the Exceptions thereto filed by AOE were not part of the Exhibits.

On behalf of the Office of the Labor Member, of the Railroad Retirement Board, I have enclosed eleven copies of the Report of Hearing Examiner, and eleven copies of Exceptions to Report of Hearing Examiner, and respectfully ask that they be included in the record before your agency. **Counsel for AOE has already been provided a copy of these items as part of its proceeding before the Railroad Retirement Board.**

If you have any questions, you may contact Thomas W. Sadler of my staff at (312) 751-4513.

Sincerely,

V. M. Speakman, Jr.
Labor Member

Enclosures

cc: Robert Bergen
Holland & Knight LLP
195 Broadway
New York, New York 10007



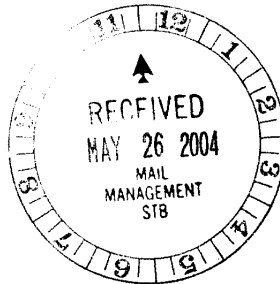
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July 21, 2003



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VIA UPS

Beatrice Ezerski
Secretary to the Board
U.S. Railroad Retirement Board
844 North Rush Street
Chicago, Illinois 60611

ENTERED
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MAY 26 2004

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Re: American Orient Express Railway Company LLC
Our File No.: 077219.00001

Dear Ms. Ezerski:

Enclosed please find five copies of the Exceptions to Report of Hearing Examiner submitted in connection with the application for a redetermination in connection with B.C.D. 01-20.

Best regards.

Sincerely,


Robert Bergen

RB:mf
Enclosure

NYC1 #558111 v1

FINANCE DOCKET NO. FD-34502

UNITED STATES RAILROAD RETIREMENT BOARD

AMERICAN ORIENT EXPRESS :

RAILWAY COMPANY, LLC :

Petitioner :

In the Matter of its Application :
For Reconsideration of :

BOARD COVERAGE DECISION No. 01-20 :

EXCEPTIONS TO REPORT OF HEARING EXAMINER

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PRELIMINARY STATEMENT

This constitutes the exceptions taken by American Orient Express Railway Company LLC ("AOERC") to the Report submitted to the Railroad Retirement Board (the "Board") by Hearing Examiner Karl T. Blank in connection with B.C.D. No. 01-20 (the "Report"). The Report arises from AOERC's request for a redetermination of the Board's coverage decision in B.C.D. No. 01-20.

This also constitutes the exceptions taken by American Orient Express Equipment Company ("Equipment Company") and American Orient Express Rail Services LLC ("Rail Services Company") to the Report. The Board has never made a coverage determination with respect to these companies. Nevertheless, in making a recommendation to the Board with respect to AOERC's request for redetermination, the Hearing Examiner has proposed that the Board make an initial determination that these two companies are also covered employers.

The Board's familiarity with the complete record in this matter, including the Brief in Support of American Orient Express Railway Company LLC's Request for Reconsideration ("AOERC's Brief"), the Report and the record assembled and filed by the Hearing Examiner, is assumed. The exceptions submitted here are made pursuant to 20 CFR § 258.6(a) and supplement but are not intended to supplant AOERC's Brief. Permission was granted to submit these exceptions by July 22, 2003.

SUMMARY

The Board should find that AOERC is not a covered employer under the Railroad Retirement or the Railroad Unemployment Insurance Acts (the "Acts"). AOERC is a land excursion company that uses restored vintage railroad coaches, diners and sleepers as the central feature of the vacation packages it provides. It does not own or operate any locomotives. AOERC does not own, operate or control any railroad track. It does not employ personnel in any of the traditional railroad crafts. AOERC contracts with a common carrier, Amtrak, to provide those railroad-related functions and employees. AOERC provides a seasonal vacation product that is not regulated by the Surface Transportation Board (STB). AOERC does not hold itself out as a common carrier by rail and does not provide a transportation service that can be demanded by the public.

AOERC is a small seasonal business. It has no more than 35 to 45 employees at any one time who are mostly young part-time seasonal workers serving in capacities such as porter, waiter and similar jobs. (Report, p. 19). No railroad crafts are represented in AOERC and no one would work for the company expecting to build a long-term railroad career. All the employees are protected by state worker's compensation and unemployment insurance. Imposition of Railroad Retirement taxes and Railroad Unemployment payments on AOERC is unlikely to benefit a single AOERC employee—it will only add cost to AOERC and deductions from employee paychecks. Notably, the amounts collected under the Acts will be

trivial to the government but will seem like substantial losses from the bottom line to the company and its employees.

In B.C.D. No. 01-20, the Board based its determination that AOERC is a covered employer on a finding that it is a sleeping car company that is a "reincarnation" of a previously existing but long defunct sleeping car company. As argued in AOERC's Brief, however, sleeping car companies are not subject to STB jurisdiction and hence cannot be deemed covered employers.

Following submission of AOERC's Brief, the Board granted a hearing to create a complete record with respect to the application for redetermination. The Hearing Examiner's Report, submitted one year after the conclusion of the hearing, recommends that the Board find that its initial determination was wrong. Rather than as a sleeping car company, the Hearing Examiner has recommended that the Board find that AOERC is subject to the jurisdiction of the STB as a common carrier by rail and, hence, is a covered employer.

The balance of this statement of exceptions will designate, as required by 20 CFR §258.6(a), those findings of fact and conclusions of law recommended by the Hearing Examiner to which objection is taken. In conclusion, we will urge a redetermination by the Board to the effect that AOERC is not a covered employer under any theory, either the Board's initial theory or the Hearing Examiner's proposed new theory. We will also request that the Board decline to make an initial determination that either or both of the Equipment Company and the Rail Services

Company are covered employers. Alternatively, we will urge that, in the event a coverage determination is made, it be applied only prospectively.

I. STATEMENT OF EXCEPTIONS TO FINDINGS OF FACT

Facts Not In Dispute¹

5. In describing the excursion services provided during 1995, 1996 and 1997, first by the joint venture of Trans Texas Rail, Inc. and Reiseburo Mittelthurgau and then by TCS Expeditions, the Report omits the following facts not in dispute.

The above excursion services, provided under the name American Orient Express, were very similar to those provided by AOERC and very different from the service provided between 1989 and 1991 by American European Express (AEE). The American Orient Express as operated from 1995 to 1997 contracted for locomotive service and trackage rights through Amtrak, sold luxury vacations on vintage rail cars rather than transportation to and from a location and did not offer regularly scheduled transportation service. This, of course, is also what AOERC does. In contrast, as determined in Legal Opinion L-90-38 and in C. 1795-90, AEE was a covered employer because it provided sleeping car service. It provided sleeping and dining accommodations in conjunction with regularly scheduled common carrier rail transportation 12 months per year between Washington, D.C. and Chicago.

¹ For consistency of reference, we will adopt the heading titles used by the Hearing Examiner. In addition, references in these exceptions to paragraph numbers will track the paragraph numbers used by the Hearing Examiner in his report.

This Board found AEE to be a covered employer based upon it being a sleeping car carrier, but it never found that TCS Expeditions or its predecessors were covered employers. Consistent application of the law by the Board would dictate that, like TCS Expeditions and its predecessors, AOERC should not be found to be a covered employer because, like those companies did, it provides seasonal tours and excursions unrelated to any common carriage. AOERC does not provide sleeping car carriage incidental to common carriage as did AEE, the basis upon which this Board found it to be a covered employer.

14. On the subject of Amtrak and Amtrak Vacations, the report omits key facts not in dispute. In particular, the Amtrak Vacations are tour packages offered in connection with regularly scheduled trains that are variably priced depending upon the length of the trip each customer chooses to take. Amtrak customers can begin and end their vacations at a variety of departure and destination points and can also disembark anywhere along a route and resume their trips on another scheduled Amtrak train. (Exh. 46, pp. 12-13, paras. 70 to 73). Amtrak is a common carrier by rail, its vacation packages are offered in connection with that railroad's common carriage service and the prices charged are reasonable. (Exh. 3).

This is in sharp contrast to AOERC's service. AOERC excursion passengers may only purchase the entire package offered, there is no variable pricing (except as to the size of on-board sleeping accommodations) and no opportunity to interrupt and then resume an excursion, since there is no regularly scheduled AOERC service. AOERC excursions begin and end only at fixed points and customers must

arrange separate transportation to and from those points. (Tr. 73-74, 79-82).²

Furthermore, unlike Amtrak service, AOERC routes and schedules are not designed to maximize distance traveled in the least amount of time but rather to maximize scenic views and historic and artistic tours without regard to travel efficiency. (Tr. 119-24). They are also expensive. (Exh. 36-L). In short, AOERC's trips are not offered in connection with or ancillary to common carriage by rail; they are offered for their own sake as vacation or excursion experiences and any travel involved is incidental.

Additional Findings of Fact by Hearing Examiner

24. and 25. AOERC takes exception to the Hearing Examiner's Findings of Fact concerning the relationship between Amtrak and AOERC as contained in paragraphs 24 and 25 as follows.

The Hearing Examiner's finding that AOERC "controls the annual itinerary of its trains" (Report, p. 18) is wrong and has no basis in the record. AOERC plans its itineraries two years in advance and the chief consideration from its perspective is "what's selling" (Tr. 119), or what types of excursions are popular with its clientele. Pursuant to contract, AOERC must present the proposed itinerary to Amtrak for its approval. (Exh. 36-H, paras. 1, 3B). Amtrak then negotiates with the owners of the track in the various locations, usually freight railroads, for their

² References to page numbers preceded by "Tr." are to the testimony of Ms. Elizabeth Schellberg ("Ms. Schellberg") contained in the hearing transcript.

approval, which is not always obtained. (Tr. 119-20). AOERC enters into no agreements with the freight railroads that own the tracks.

An actual itinerary therefore results only from Amtrak's negotiations with freight railroads. These include considerations of the precedence of freight traffic, ongoing railroad maintenance and the availability of "parking" for AOERC consists with facilities for servicing the cars. (Tr. 119-20; see also Exh. 36-H, para. 3). AOERC has been denied approval for itineraries it proposed. (Tr. 120).

Amtrak reserves the right in its contract to alter the route, change or omit scheduled stops, cancel trips or alter deadhead moves, even after an itinerary has been approved, marketed and sold. (Exh. 36-H, para. 3C). Amtrak has exercised these rights. (Tr. 151-53). Thus, while AOERC's business needs are central to structuring the itineraries it markets, it has no final "control" over them; it has only the power to decide not to operate an itinerary that Amtrak has arranged or altered.

The Hearing Examiner's findings that AOERC "controls the train during each trip" and that AOERC's hotel manager is "'the final word on board' except in emergencies" (Report, p. 18, para. 25) are also wrong. The contract between AOERC and Amtrak provides that during *any* movement of AOERC's vintage cars

the Equipment and Operator's [AOERC's] crews shall at all times be under the exclusive operational direction of Amtrak (except for provision of on-board passenger services); Operator [AOERC] 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. (Exh. 36-H, para. 3D)

The Amtrak conductor "is entirely responsible for any movement of the train." (Tr. 33). Furthermore, the movement of any AOERC equipment is subordinate to the needs of Amtrak train movements. (Exh. 36-H, para. 3F). And in the event of a cessation of the operation of an AOERC consist due to a disruption, it is Amtrak that arranges for "disposition, en-route setout and pickup of the Equipment with the operating railroad." (Exh. 36-H, para. 3E). Thus, even in the event of a disruption in service, AOERC may not make any arrangement directly with the owner of the railroad. Finally, it is to be noted that AOERC does not employ any person on board its consists with the position or qualifications necessary to control the operation of a railroad train and relies exclusively on Amtrak for those functions. (Tr. 27-34).³

27. and 28. The Hearing Examiner concludes that AOERC markets its service "directly" and "indirectly" to the public at large. (Report, p. 19). Because this conclusion is both misleading and misused, AOERC takes exception to it.

AOERC's marketing and advertising is not designed to reach the public at large and certainly does not promote the availability of common carriage by rail as implied by the Hearing Examiner. First, AOERC carefully plans its marketing and advertising strategies to target only that narrow segment of the populace that is interested in and can afford excursion vacations; it does not seek to attract people in

³ In response to a question from the Hearing Examiner, Ms. Schellberg testified that the AOERC staff position of "hotel manager" is "the final word on board" the train. (Tr. 149-50). In the context of the testimony that preceded this question, which concerned AOERC staffing of its excursions, this testimony meant that, while the excursion is underway, the AOERC hotel manager is the senior AOERC supervisor on board. (Tr. 148-49). Indeed, the balance of Ms. Schellberg's testimony, as well as the record referred to in the text above, makes absolutely clear that Amtrak and its crews are always in control of the train from a railroad operations perspective. The Hearing Examiner's contrary conclusion is simply unsupported by the record.

need of common carriage transportation. (Tr. 86-96). AOERC's media advertisements are placed solely in publications that appeal to prospective well-off vacation travelers and the travel agents that serve them. (Tr. 93-98, 172-80). No advertising is designed with the purpose of attracting common carriage passengers. No brochures or timetables are posted in train stations. Advertisements are not placed in newspapers or magazines of general interest. Even Internet website links are focused on vacation and rail aficionado sites. (Tr. 75-77, 93-98, 170-80). The evidence in the record is indisputable that AOERC provides only a seasonal excursion service and all of its marketing and advertising is designed to support and promote that business. The Board should reject the Hearing Examiner's attempt to interpret the facts to support an argument that AOERC holds itself out generally to the public as offering common carrier transportation by rail.

II. STATEMENT OF EXCEPTIONS TO CONCLUSIONS OF LAW

Beginning at page 24 of the Report, the Hearing Examiner proposes ten conclusions of law followed by a lengthy Discussion and Analysis section that explains the basis for these proposed conclusions. In this statement of exceptions, we will respond to the Hearing Examiner's conclusions of law and the correlating portion of his discussion and analysis simultaneously. To place our exceptions and our analysis of the facts and law in context, however, we begin with an overview.

Overview

AOERC may only be considered a covered employer for purposes of the Acts if it is subject to STB jurisdiction. The Hearing Examiner has recommended to the Board a finding that AOERC is subject to STB jurisdiction on the ground that it provides common carrier railroad transportation. It is AOERC's position that, based upon the undisputed facts, it is not a common carrier by rail and it does not provide railroad transportation as those terms are defined by statute and case law. The Board should find that AOERC is not a covered employer.

The essence of common carriage is the right to deliver a service to the public coupled with an obligation to provide such service indiscriminately to all those who request it. Historically, common carriers provide a public utility, be it in the form of transportation, power or communications, that is regulated by a government entity. In return for either a franchise or other form of monopolistic or exclusive right to provide the utility, the common carrier must accept certain burdens, such as rate regulation, a capped return on investment and the obligation to provide its service without discrimination to all who request and pay for it.

AOERC does not have any of the attributes of a common carrier. It does not provide railroad transportation as that term is defined by statute because it does not own or operate rail trackage or locomotives. While it advertises its excursions to a defined segment of the population, it does not hold itself out as providing common carriage railroad transportation. AOERC provides no service that any member of the public may rely upon or demand. There is no government agency, including the STB, with jurisdiction or authority to require AOERC to continue to

accommodate its customers in vintage dining and sleeping cars and provide them lectures, music, land tours and other entertainment on the ground of public convenience and necessity.

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 but is a covered employer under the Acts by virtue of statute. Similarly, with very limited statutory exceptions, intrastate and regional commuter railroads are also not subject to STB jurisdiction. They, too, are covered employers only by virtue of statute.

In the handful of cases it has considered involving excursion or tourist companies that provide recreational, scenic, historical or educational rail attractions, this Board has not found a single one to be a covered employer with the exception of its initial determination in this case and in the matter involving AEE. AOERC's operations share features with all of the various tourist and excursion railroads that this Board has determined are not covered employers. The Board should not make AOERC the only company in the United States that provides pleasure excursions on historic or vintage rail cars that has been found to be a covered employer.

In addition to a proper application of the law and a consistency of approach to coverage determinations, this Board should also consider the practical effect of a coverage decision in this case. AOERC is a small company that provides limited service to a vintage rail aficionado clientele. No more than 3,000 customers each

year purchase excursions (compared with 23.5 million annual passengers on Amtrak) and they are served by only 35-45 young, seasonal, non-railroad craft employees. Due to the nature of the work and an almost complete annual turnover of staff, it is safe to assume that not a single AOERC employee will ever reap the benefits of a Railroad Retirement pension. A coverage decision, however, will cost each of them the expensive deductions required by the Acts and, in addition, will be a direct financial loss to AOERC that will not be ameliorated by the provision of a benefit to its employees. To the contrary, the fact of the payroll deductions may make it more difficult and certainly more expensive to attract suitable staff. These equitable considerations outweigh the trivial impact that the sums collected would have on the railroad retirement pension system. For all these reasons, the Board should reconsider and reverse its initial determination of coverage in this case.

Exceptions to Examiner's Conclusions of Law 1 through 6

In Proposed Conclusions of Law numbered 1 through 5, the Hearing Examiner recommends that the Board reverse its prior determination that AOERC operates as a sleeping car carrier. He proposes instead a Board conclusion that AOERC operates as a common carrier by rail. The Hearing Examiner's recommendation should be rejected.

Conclusion of Law #1. The Hearing Examiner concludes that the Board erred when it determined that AOERC is subject to STB jurisdiction because it is a sleeping car company. He asserts that "AOERC Railway is correct that it is not a sleeping car company." (Report, p. 27). It was neither conceded nor claimed in

AOERC's Brief that AOERC is a sleeping car company. (AOERC's Brief, p. 20).

However, the sleeping car analogy is useful to demonstrate that AOERC is not a common carrier because, like sleeping car companies (as well as express companies and car rental companies, which the Hearing Examiner discusses at length later in his Discussion and Analysis section), AOERC does not provide common carrier transportation or operate a railroad.

The Hearing Examiner cites Calhoun v. Pullman, 159 F. 387, 389 (6th Cir. 1908), for the proposition that "[t]he railroad is the party with whom the passenger contracts for transportation; the sleeping car company provides additional comforts and conveniences." (Report, p. 31). An AOERC customer, of course, does not pay AOERC or Amtrak to be transported from one place to another. AOERC customers purchase only the sleeping accommodations and other amenities included with them: fine dining, tours of historic sites, entertainment, lectures, panoramic views and the experience of spending time on a vintage railcar. Movement across a landscape is merely one of those amenities, not the sole or even a central purpose for the excursion.⁴ The Hearing Examiner acknowledges that AOERC does not provide incidental sleeping car accommodations for Amtrak passengers.⁵ (Report,

⁴ In contrast, AEE's service was very much like traditional sleeping car carriage: its cars and service were provided in connection with regularly scheduled intercity common carrier rail transportation provided by Amtrak 52 weeks each year. AEE thus held itself out as offering sleeping car carrier service while AOERC does not. Furthermore, since this Board rendered its coverage decision involving AEE, Congress eliminated federal jurisdiction over sleeping car carriers. (AOERC's Brief, pp. 20-25). Thus, whether or not AOERC actually fits the definition of a sleeping car carrier has no direct bearing on the outcome of the Board's decision.

⁵ The Hearing Examiner places great emphasis on the Pullman Company having been the sole sleeping car company. (Report, p. 29). While once true, it stretches logic to insist that every business attribute of the Pullman Company must be included in the definition of a sleeping car carrier. Today, for example, Amtrak offers its own sleeping cars and thus passengers do not need to

p. 33). Under the circumstances, his attempt to distinguish AOERC from traditional sleeping car carriers defeats his argument that AOERC is a common carrier.

Congress and the courts have long recognized that a sleeping car company, while it provides sleeping and dining accommodations for passengers, is not itself a common carrier primarily because it does not provide transportation. Specific statutory language was required to bring sleeping car companies (as well as express companies) under the jurisdiction of the Interstate Commerce Commission (ICC). This history and conclusion requires no further citations to authority as they were understood and accepted by the Board in the AEE coverage decision. B.C.D. 93-68. We continue to assert, as we did in AEORC's Brief (pp. 20-25), that as a consequence of deregulation by Congress and the reality of modern rail transportation, sleeping car and express companies were written out of the law and are no longer subject to STB regulation.

Although he misinterprets the significance of the express company cases,⁶ the Hearing Examiner does demonstrate how AOERC is analogous to an express company, which is not a common carrier according to well-established law. An express company "has no railroad," exercises no control over the actual movement of its cars, and merely ships the goods of its customers. (Report, pp. 55-56). Citing

contract with a separate sleeping car company to obtain sleeping accommodations. This does not mean that Amtrak does not provide sleeping car carriage, as the Hearing Examiner's argument would imply.

⁶ The cases do not, as the Hearing Examiner claims, "illustrate how a common carrier may utilize rail road and yet not be a rail carrier" (Report, p. 55); rather, they illustrate how express companies utilize the railroad but are not common carriers.

Supreme Court decisions in Wells Fargo v. Taylor, 254 U.S. 175 (1920), and United States v. American Railway Express, 265 U.S. 425 (1924), the Hearing Examiner notes that "[t]he natural meaning of 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad." 265 U.S. at 432 (emphasis added). Yet the Hearing Examiner then concludes that, "[r]ather than turn its passengers over to a railroad for 'shipment' in a sense analogous to Express Company [sic], AOERC 'retains control of each train and its passengers [sic] ride during the trip.' (Report, p. 56). As described more fully under AOERC's Exceptions to Additional Findings of Fact 24 and 25 above, this is a complete misstatement of the evidence. AOERC does indeed turn its passengers 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 serve it. The railroad (in AOERC's case, Amtrak) provides "the motive power and the train operatives"; the express company, like AOERC, "uses and pays for [the] railroad transportation." Also like the express company in Wells Fargo, 254 U.S. at 178, AOERC assumes all risk of damage to its property and of injury to its employees, and indemnifies Amtrak from claims involving its equipment and employees. (Exh. 36-H, para. 8).

This emphasis on the separateness of the operator from the car provider is reinforced by the car rental cases, also cited by the Hearing Examiner. (Report,

pp. 56-57). For instance, in Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (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. What makes an entity a common carrier by railroad is the fact that it "operates" the railroad. Id.

Car rental companies did not operate the rails over which their cars traveled, nor did they control the movement of their cars. In United States ex rel. Chicago, New York & Boston Refrigerator Co. v. Interstate Commerce Commission, 265 U.S. 292, 294 (1924), the Court noted that the car rental company "did not own or control any railroad property or facilities, aside from [the] cars," and the refrigerator cars at issue "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). The same can be said of AOERC.

In sum, sleeping car companies and express companies have never been considered common carriers, and were only brought under the jurisdiction of the ICC by virtue of specific language including them in the definition of "rail carrier." With the enactment of the ICCTA, that specific language was deleted from the

relevant statutes. This demonstrates legislative intent to eliminate jurisdiction over sleeping car companies and express companies. (AOERC's Brief, pp. 21-25).

The chief characteristic that AOERC shares with sleeping car carriers, express companies and car rental companies is not, as the Hearing Examiner would have it, a "superficial similarity." (Report, p. 57). The fact that none of them, AOERC included, operates a railroad goes to the very nature of what constitutes common carriage by rail. If an entity does not control the movement or operation of a railroad, it cannot be a rail common carrier.

Conclusion of Law #2. The Hearing Examiner proposes that the Board adopt a conclusion of law defining common carriage that omits a core characteristic: the legal obligation imposed on a common carrier, as a public servant, to provide service. The Hearing Examiner minimizes this critical public utility aspect of common carriage and focuses solely on whether a company holds itself out to the public as providing "passage" to define common carriage. The Board should reject this mistaken conclusion of law.

Based on well-established federal case law, the "real criterion determinative" of 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. 1, 24 (1914). 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 109.⁷

⁷ "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

At first, the Report acknowledges the centrality of the "public nature" of common carriage. (Report, pp. 38-39). Citing from Indianapolis Traction & Terminal Co. v. Lawson, 143 F. 834 (7th Cir. 1906), and Michigan Public Utilities Commission v. Duke, 266 U.S. 570 (1925), the Hearing Examiner notes that "a common carrier is a public utility, operating under a public charter granting special privileges and imposing consequent duties." (Report p. 39). Some of the "special privileges" conferred upon common carriers traditionally have been a franchise or monopoly and an exclusive right to use a road or railway, and 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 users "indifferently." Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207, 212 (1927); N. Pac. Ry., 236 U.S. at 595.

Application of these venerable and incontestable principles would and should result in a determination that AOERC is not a common carrier. Rather than recommending such a determination, however, the Hearing Examiner concludes that "[a]nalyzing a common carrier in terms of public privilege and concomitant public duty has its shortcomings." (Report, p. 39). The report then attempts to refute a long line of conclusive authority to the effect that a common carrier is a public utility. In doing so, the Hearing Examiner relies heavily on Kvalheim v.

be discriminatory in its application to similarly situated users. See N. Pac. Ry. 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).

Horace Mann Life Insurance Co., 219 N.W.2d 533 (Iowa 1974), an Iowa state court opinion concerning the liability of a sight-seeing tour by motor carrier. Our research shows that this is an idiosyncratic case that has not been followed by any significant court outside of Iowa.⁸

A more accurate description of what constitutes a common carrier is provided by the United States Court of Appeals for the Seventh Circuit, an authority that should carry more weight with the Board than an Iowa state court:

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. Indianapolis Traction, 143 F. at 837

AOERC does not meet any of these tests. AOERC has no "franchise," nor does it carry "all alike." 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. (Tr. 81).⁹ Likewise, the accommodations provided by AOERC are not "reasonable"

⁸ Besides Kyalheim, the Hearing Examiner cites from numerous other state court liability cases throughout his Report. For public policy reasons, courts in such 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 (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 this case.

⁹ For instance, in 2001, the least expensive AOERC fare was approximately \$2,600 for an early booking on a Vintage Pullman Car on the Washington, D.C. to New Orleans itinerary. (Exh. 36-L,

in that the dining, viewing and entertainment experiences are far beyond the accommodations expected by an average traveler.

AOERC does not "continuously operate its line." While some itineraries have been offered on a repeat basis, all of them are run only between March 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." (Exh. 36-L, p. 30). And, of course, AOERC does not operate any of the railroad functions involved in hauling its cars.

AOERC sets its rates wholly unregulated by the STB, which has no regulation in place for such a purpose, and plans its schedules based on the availability of Amtrak locomotives and crew and railroad trackage, all as determined by Amtrak and the owner of the track in question. Moreover, AOERC does not have a "right of way over all private means of transportation." In fact, despite the fact that AOERC passengers pay a premium for their experience, other Amtrak train movements and freight needs take priority over AOERC consists.¹⁰ AOERC clearly meets none of the common carrier attributes described in Indianapolis Traction, supra, and numerous other cases. It is not a common carrier.

The public duty of the common carrier brings with it a legal right of the public to demand service. As compared to a private carrier, who "may refuse at

pp. 14). A similar Washington-to-New Orleans fare on common carrier Amtrak, even including deluxe sleeping accommodations, is \$565. (Exh. 3).

¹⁰ Ms. Schellberg described the company's relationship with Amtrak and other railroads as follows: "we are the lowest on the totem pole." (Tr. 150).

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.

A pertinent illustration of this legal right is 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.¹¹ 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.

No service operated by AOERC is intended to meet the transportation needs of the public or its "convenience and necessity." First, the service is neither marketed nor purchased as transportation designed to bring passengers from one

¹¹ 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. (2002), and it exists in its present form following the enactment of the ICC Termination Act of 1995 (ICCTA) at 49 U.S.C. § 10903 (2002). However, a recent search of the STB website, www.stb.dot.gov/publications/whoswho.htm, revealed that under the ICCTA, 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 under Exception to Conclusion of Law #5 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 referred to as Spitulnik and Rennert).

place to another; it is a luxury vacation. AOERC does not provide its excursions for the public convenience and necessity, and there is no population that is dependent upon it for transportation. Second, AOERC reserves the right to cancel trips and refuse passage. In 2000 alone, 13 of the 23 itineraries (21 in the United States and 2 in Canada) offered by AOERC in the United States and Canada were canceled. (Report, p. 12). AOERC could discontinue its 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. As discussed under Conclusion of Law # 5 below, the STB has relinquished jurisdiction over the discontinuance of passenger rail service and so would not be a forum to hear any such complaint. This lack of a public right to demand service or a mechanism for doing so is further confirmation that AOERC is not a common carrier by rail.

In an attempt to bolster his common carriage argument despite the fact that AOERC markets itself and provides service to a relatively tiny and select clientele, the Hearing Examiner indulges in some circular logic. He points out that a common carrier may hold itself out as carrying only a segment of the public and may legitimately refuse passage in isolated instances without affecting its status as a common carrier. (Report, pp. 48-51). He then observes, in effect, that because AOERC also targets a select clientele and refuses passage to some, it too must be a common carrier.

The Hearing Examiner's analysis fails in part because it overlooks the fact that what AOERC offers to its narrow target audience is not common carrier

transportation. As noted repeatedly, AOERC offers pleasure excursions; an argument that it markets these to a limited segment of the population does not transform the services offered into common carrier transportation. The cases relied upon in the Report, none of which involved rail carriers, nevertheless all involved the provision of common carrier transportation, albeit to a defined segment of the public. (Report, pp. 48-51).

A critical factor in each of the cases cited by the Hearing Examiner was that the carriers in question were all operating transportation under the grant of a public franchise or exclusive arrangement. E.g., Terminal Taxicab Co. v. Kutz, 241 U.S. 252 (1916) (taxi company had exclusive agreements with hotel and railroad terminal to carry passengers); Pub. Util. Comm'n v. Johnson Motor Transp., 84 A.2d 142 (Me. 1951) (trucking company licensed as a common carrier over some routes but not others); Circle Express Co. v. Commerce Commission, 86 N.W.2d 888 (Iowa 1957) (trucking company with contract carrier permit found to be a common carrier even though it had applied for a common carrier permit and been denied).

As for Woolsey v. National Transportation Safety Board, 993 F.2d 516 (5th Cir. 1993), which is cited extensively by the Hearing Examiner, that case, like Kvalheim, supra, is idiosyncratic. In addition to the court's emphasis that common carriers by air cannot be analogized to other modes of transportation (which the Hearing Examiner himself acknowledges in footnote 6 to the Report), the dissent in the case points out that the court may be finding Woolsey to be a common carrier as punishment for poor safety practices. 993 F.2d at 528 (DeMoss, J., dissenting).

Likewise, the cases cited by the Hearing Examiner to illustrate instances of legitimate refusal of individual passage by a common carrier all involved disruptive behavior or rule-breaking on the part of the passenger. (Report, p. 51). In contrast, AOERC reserves the right to reject passengers on the basis that they are simply "inappropriate" for the excursions or the accommodations. (Tr. 99-101, 169-70, 174).

Because its target audience is so narrow, AOERC employs a two-pronged marketing approach: As noted in the Hearing Examiner's report (pp. 20-22), AOERC advertises in travel publications that have been shown by market research to reach potential AOERC customers.¹² (Tr. 94-96). The emphasis of its marketing approach, however, and its preferred source of business is travel agents, who, through familiarity with their customers, can pre-screen passengers, steering inappropriate passengers away and directing only those truly interested in this type of unique vacation experience to AOERC. (Tr. 174-76). It is this latter practice that keeps AOERC's rate of actual rejection of passengers so low. Yet AOERC has rejected passengers, both before and after booking, and reserves the right to do so at its sole discretion. (Tr. 69-70). Clearly AOERC is marketing a unique land excursion to a narrow segment of the population and is not offering common carrier transportation.

Conclusion of Law #3. AOERC has not argued in this proceeding that it provides private carriage. It has argued only that it is not a common carrier subject

¹² Significantly, a good deal of AOERC business has been generated as the result of television documentaries that AOERC neither paid for nor commissioned. (Tr. 97-98, 177; Report, p. 20). However, for AOERC to reap the benefits of such free advertising does not mean that AOERC "fostered" such beneficial publicity, as asserted by the Hearing Examiner. (Report, p. 53).

to STB jurisdiction and is, instead, a tourist and scenic railroad excursion provider. The Hearing Examiner, however, has set up an elaborate straw man argument as to why AOERC is not a private carrier so as to knock it down. This is another failed attempt to pin the common carrier label on AOERC.

Relying heavily on state liability cases, the Hearing Examiner isolates the requirements of private carriage as (1) the making of individualized contracts (including individualized negotiations) and (2) a limited number of contracts. (Report, pp. 45-46). He argues that AOERC does not meet these requirements and hence, if it is not a private carrier, it must be a common carrier.

This logic, of course, is faulty. AOERC, as a tourist railroad excursion provider, need not be either a common carrier or a private carrier. It is noteworthy, however, that in fact contrary to the Hearing Examiner's conclusion, AOERC does share some of the significant characteristics of a private carrier.

AOERC offers a number of packages with quoted fares for each itinerary based on the nature of the accommodation requested. As noted in its brochure and in the testimony of Ms. Schellberg, some 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." (Exh. 36-L, p. 28). In addition, AOERC customers can choose optional outside excursions, for which AOERC will make reservations for an additional fee. (Tr. 73). 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. (Tr. 82). AOERC has

also provided charters to organizations such as Suburu and Peter Voll Associates, which are subject to particular negotiations. (Tr. 84-85).

The Report acknowledges that one hallmark of private carriage is a limited number of customers. (Report, p. 48). AOERC's client base is quite small, with no more than 100 passengers per excursion and fewer than 3,000 per year. (Report, p. 24). By comparison, Amtrak served 23.4 million rail passengers during 2002 at a rate of 65,000 each day. See www.amtrak.com, Amtrak Facts. There can be no question as to the limited and individual nature of the excursion service provided by AOERC.

Terminal Taxicab, *supra*, which the Hearing Examiner cites in support of his assertion that a carrier may hold itself out to only a segment of the general public and yet still be a common carrier (Report, p. 48), offers a useful commentary on the distinction between common and private carriers, a perspective that the Hearing Examiner omits from his analysis of the case. 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.¹³ 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

¹³ Incidentally, the common carrier aspect of the taxi service in the Terminal Taxicab case involved an "exclusive" arrangement. This is fully consistent with the chief characteristic of common carriage, which is that, in return for an exclusive franchise or monopoly of some type, the common carrier has a legal obligation to provide service to the public. This clearly distinguishes Terminal Taxicab from the present case.

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 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 provided pursuant to an exclusive arrangement.

Nor is it a scheduled rail carrier under franchise or license with a duty to serve the public convenience and necessity. While it has a number of features characteristic of private carriage, what the Report fails to demonstrate is that it has any of the critical components of a common carrier.

Conclusions of Law #4 and #6. AOERC takes exception to the Hearing Examiner's fourth conclusion of law on the ground that it argues that AOERC is a common carrier by rail by misstating the critical definitions in 49 U.S.C. § 10102.¹⁴

Section 10102(5) states that a "rail carrier" is a person providing common carrier railroad transportation for compensation. "Railroad" is defined as including, inter alia, "the road used by a rail carrier and owned by it or operated under an

¹⁴ As for Conclusion of Law #6, we note that under the Acts a company is a covered employer if it is subject to the jurisdiction of the STB. Coverage based solely on a finding that a company is a common carrier of passengers by rail, as postulated by the Hearing Examiner, would not be legally permissible.

agreement." 49 U.S.C. § 10102(6)(B) (2002) (emphasis added). "Transportation" includes, inter alia, cars "related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9)(A). "Railroad" and "transportation" must be considered in tandem and as serving to define one another. Thus, 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"). The Hearing Examiner's attempt to deconstruct these defined terms and apply each separately in order to make his point should not be accepted.

AOERC does not own or operate by agreement the "road" over which the AOERC consists are pulled by Amtrak locomotives. As discussed under AOERC's exceptions to Additional Findings of Fact by the Hearing Examiner 24 and 25 above, Amtrak controls all aspects of railroad transportation. The Hearing Examiner acknowledges that the statute, supported by case law, requires operation of a railroad. (Report, p. 55). He notes that express car companies were traditionally not considered common carriers because they neither owned nor operated a railroad. (Report, p. 56). But then he concludes, mistakenly, that AOERC is different because it "negotiate[s] through Amtrak" for the use of railroad trackage.

The salient fact is that Amtrak, a common carrier by rail, arranges for the use of track. The track might be owned by freight common carriers, commuter railroads or Amtrak itself. But it is Amtrak that makes the arrangements for the

use of the track and Amtrak that operates the track using its locomotives and crews. AOERC does not negotiate with or enter into any contracts or agreements with the freight railroads that own the tracks. Like the freight railroads in the express company cases, it is Amtrak which, in the words of §10102(6)(B), is the "rail carrier" that owns or operates under an agreement the "road," not AOERC.

The passenger cars owned and staffed by AOERC cannot "move people by rail," as asserted by the Hearing Examiner, unless something moves them.

AOERC's itineraries and routes are subject to change and trips are cancelled, all at the discretion of Amtrak. All railroad movement is dependent upon the availability of the locomotives and rail lines as provided and negotiated for by 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).

Conclusion of Law #5. As part of its deregulation of the nation's railroad industry, in the ICCTA 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 is not subject to STB jurisdiction. It cannot, therefore, be deemed a covered employer under the Acts. The Hearing Examiner's attempts to refute the clear impact of congressional deregulation should be rejected.

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). 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. (2000) (referred to hereafter as RPSA), precisely to preserve some semblance of a once vibrant and extensive passenger rail network. See H.R. Rep. 91-1580, 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, the National Railroad Passenger Corporation, also known as Amtrak, was created by the RPSA 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. H.R. Rep. 91-1580, 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. H.R. Rep. 91-1580, 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. 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 ICCTA was enacted in 1995 and the STB was created, the only intercity passenger rail carrier in the United States was Amtrak. As noted by the Hearing Examiner, except for narrow purposes, the STB has no jurisdiction over Amtrak. Report, p. 62; 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 ICCTA 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 (2000)). See 49 U.S.C. § 24301(a)(1).

Clearly, the enactment of the ICCTA was the culmination of a 25-year effort by Congress, begun with the RPSA in 1970, to deregulate the freight and passenger rail industries.¹⁵ With specific respect to STB's jurisdiction over intercity passenger

¹⁵ Through a selective quotation from Fla. E. Coast Ry. v. City of W. Palm Beach, *supra*, the Hearing Examiner appears to argue that the only purpose of the ICCTA was to restore federal regulatory jurisdiction over railroads that prior law had devolved to the states. (Report, p. 61). A closer reading of the case shows the Court's understanding that, by eliminating the shared federal and state *economic* regulation of rail carriage that pre-dated the ICCTA, Congress intended to both pre-empt such regulation at the state level while reducing its scope at the federal level. Fla. E. Coast Ry., 266 F.3d at 1337-39.

rail, the Conference Report issued in connection with enactment of the ICCTA 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).

Although he acknowledges this statement, the Hearing Examiner argues that, because the definition of transportation set forth in the ICCTA at 49 U.S.C. § 10102(9) includes the phrase "movement of passengers or property," Congress must have intended that the STB have jurisdiction over intercity common carrier passenger transportation. (Report, p. 60). The Hearing Examiner omits a few key steps in his logic to be able to reach this conclusion. Once they are understood, his argument dissolves.

The RPSA, and later the ICCTA, differentiated between intercity passenger rail service and regional or commuter passenger rail service. The latter was left to the control of the states to either operate 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 (2000). To the extent any such commuter railroad was a rail carrier prior to the enactment of the STB, it

could apply to the STB for an order permitting access to 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 in the ICCTA. The inclusion of the word "passenger" in the definition of transportation only serves this limited function. It does not override the clear congressional intent in enacting the ICCTA to relinquish federal regulatory jurisdiction over intercity passenger rail transportation in the United States.

A complete review of the ICCTA 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 Statement of Exceptions, 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.¹⁶

¹⁶ 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

Exception to Conclusion of Law #7

The Board has never held that a purely excursion, scenic or historic rail provider is a covered employer except for the coverage decision affecting American European Express (C. 1795-90) and the initial determination in this proceeding.¹⁷ The Report attempts to explain why the many prior decisions applicable to rail excursion trains should not control here (pp. 63-67), but the effort is unsuccessful. When distilled to their essence, all these non-coverage decisions share the commonality that the trains in question were not common carriers. AOERC should not become the sole exception in the Board's long line of decisions that recognizes the unique non-common carrier characteristics of tourist, excursion and historic trains.

There are certain key factual determinations that are common to the nine Board decisions discussed in AOERC's Brief and in the Report and that also apply to AOERC. In each of them, the trips are described using one or more of the

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.

¹⁷ Without debating the correctness of the Board's decision in the AEE case, it is to be noted that, unlike AOERC, AEE provided sleeping car service 12 months a year in connection with regularly scheduled common carrier Amtrak trains that transported people between major cities. At the time, the ICCTA had not yet been enacted and sleeping car companies were still statutorily subject to ICC jurisdiction. The Board held that AEE was a covered employer by virtue of its status as a sleeping car company and not based on a determination that it was a common carrier. Indeed, the coverage decision specifically noted that, if AEE were to "begin using locomotives under its own control," it would then be considered "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))." (C. 1795-90, n.1). Application of this standard to AOERC, which does not own or operate locomotives or railroad track, would dictate a determination that AOERC is not a common carrier.

following words: historic, excursion, entertainment, educational, amusement, scenic or tourist. All these words apply to AOERC's services. Although not expressly stated in any of the Board's decisions, it is evident that the unifying principle underlying the use of these words is that none of the companies provide common carrier transportation. They are, like AOERC, providing some other experience, and their purpose is not to transport people, in the common carriage sense, from one place to another.

Other facts shared by the excursion cases and by AOERC is the Board's finding that none of the excursions "interchange" with common carrier railroads or "through-ticket" their passengers to common carriers. The fact that some of the companies actually operate on or connect with interstate track was deemed by the Board as not determinative as to coverage. Again, the Board's unstated point has been to emphasize that none of these companies is providing, even indirectly, traditional common carriage by rail—they are providing only amusements, excursions or scenic tours. This, of course, is precisely the case with AOERC. AOERC does not through-ticket or interchange passengers with Amtrak and, even though Amtrak arranges for AOERC's vintage cars to be hauled over common carrier track, there is nothing about AOERC's service that involves the common carriage transportation of people.¹⁸

¹⁸ Most of the coverage decisions referred to here note that the excursion services provided are seasonal or occasional. While this may well be the case universally, the fact is not mentioned in each decision. AOERC's services, of course, are seasonal. This is another factor that demonstrates that its rail service is an excursion or amusement as opposed to regularly scheduled common carriage.

As noted in the Report, four of the Board's coverage decisions involve excursion railroads that operated interstate. AOERC's services also cross state lines. These decisions should be persuasive precedents for a Board determination that AOERC, like the excursion operators in those cases, is not a covered employer.

The Hearing Examiner attempts to distinguish two of the coverage decisions, Minnesota Transportation Museum, B.C.D. 94-14, and Indiana and Ohio Rail Passenger Corp., B.C.D. 97-85, on the ground that those excursion railroads transported passengers in a circuit between two states and that therefore, in the words of the Board, "the use of the [interstate freight] trackage rights is not part of the interstate rail system." B.C.D. 97-85, p. 2. Because the purpose of an AOERC excursion is not to transport its customers from one point to another (indeed, the customers must arrange for common carrier travel to and from the start and end points of an AOERC trip), there is no functional difference between AOERC and the two excursion providers in the above coverage decisions. In effect, AOERC service is identical to the "circuit" conducted by the Indiana and Ohio Rail Passenger Corp., since common carriage transportation is not its purpose and the passengers are not taking the trip to travel between specific start and end points.

All three excursion operators—AOERC, Indiana and Ohio and the Minnesota Transportation Museum—carry passengers on interstate freight track between states for amusement or excursion purposes but not for common carrier transportation purposes. All three are seasonal operations. In none of the cases do the passengers disembark because they have arrived at their interstate destination;

they disembark because the excursion has concluded. In the words of the Board in the Minnesota Transportation Museum decision, "the operation of a tourist railroad does not constitute an operation in interstate commerce since it conducts only excursions of passengers and does not connect with interstate transportation."

B.C.D. 94-14. This is the standard that ought to be applied to AOERC.

The Hearing Examiner's attempts to distinguish the St. Louis Car Company d/b/a Cumbres & Toltec Scenic Railroad, B.C.D. 99-18, and Cumbres & Toltec Scenic Railroad Corp., B.C.D. 99-27, determinations also fail. Each of those decisions involved the same seasonal excursion railroad service, one that has apparently operated for over thirty years, between the States of Colorado and New Mexico. Unlike AOERC, the Cumbres & Toltec railroad operates locomotives and owns its rail trackage. Furthermore, it provides service between towns that would otherwise have no common carrier service.¹⁹ Although the Report stresses that passengers on the Cumbres & Toltec had various travel options that would return them to the origin point of their trips (Report, p. 64), it ignores the Board's finding that some passengers made their own private arrangements after traveling to the termination point or even at a mid-way point in the trip.

Even though the Cumbres & Toltec railroad has many features that a common carrier by rail also has (indeed, a prior operator of the line was apparently a covered employer per Board decision, B.C.D. 99-18), the Board concluded that it is

¹⁹ Under Section 13a of the ICA, one of the considerations in whether the ICC would permit a railroad to discontinue existing common carrier passenger service was whether there was alternative common carrier service available to the affected population. S. Ry. Co., *supra*, 376 U.S. at 96; Spitulnik and Rennert, *supra*, p. 322). In reaching its conclusion that the Cumbres & Toltec Railroad was not a common carrier, the Board avoided a doctrinaire adherence to legal precedent.

no longer a covered employer. The chief factors in its decision were that the Cumbres & Toltec railroad operates an excursion for recreational, scenic, historical and educational purposes rather than for the purpose of providing common carriage; like AOERC, its marketing is directed solely at attracting "railroad enthusiasts and other tourists," B.C.D. 99-18, p. 9; the travel time for a one-way excursion is 7 hours, even though the same route can be traveled in only 90 minutes by car or van; and, although it operates between two states, it does not "interchange" with any other railroad and does not "through-ticket" its passengers to another rail carrier.

There is no substantive or logical basis for distinguishing the Cumbres & Toltec from AOERC; both share all the characteristics that the Board has determined, in Cumbres & Toltec and in all its other rail excursion cases, make a railroad a non-covered excursion or tourist railroad. Indeed, through the ownership of locomotives and track and its complete control of its trains and itinerary along a route with no competing common carriers, the Cumbres & Toltec railroad has more common carrier characteristics than does AOERC.

The Hearing Examiner argues that the shorter distance traveled by the Cumbres & Toltec railroad trip compared with AOERC excursions is the sole significant distinction that warrants a coverage determination with respect to AOERC. (Report, p. 66). The Report does not refer to a single decision of this Board, or to any statute or court case, in support of the idea that interstate common carriage by rail can be defined by the distance traveled. There is no citation to

authority because there is none for this proposition.²⁰ As in all the Board's excursion railroad cases, AOERC operates a seasonal recreational, historic, scenic and educational excursion that does not interchange with rail carriers or through-ticket passengers to a common carrier. It does not transport people to destinations for the sake of travel and does not hold itself out as providing common carriage transportation. Moreover, it does not own or operate locomotives or tracks or employ railroad workers capable of doing so.

Significantly, most AOERC passengers need to get to and from the starting and ending points of their rail journey. (Tr. 81). If AOERC guests were buying transportation, the purpose of the excursion would be to get from the starting point to the end point. The effect of the AOERC itinerary and its benefits are the same as if the train had traveled in a circle, starting and ending at the same point. The AOERC passenger is purchasing the experience, not the transportation. Under all the Board's precedents, AOERC is not a covered employer.

III. PROPOSED INITIAL DETERMINATIONS

In his Conclusions of Law numbered 8, 9 and 10 and accompanying analysis at pages 70 to 75 of the Report, the Hearing Examiner recommends to the Board initial coverage determinations with respect to three companies. Because these

²⁰ Notably, however, the time differences between excursion and common carriage remarked on by the Board in the Cumbres & Toltec case are even more exaggerated when AOERC's excursions are compared with either Amtrak or airline common carrier service. As but one example, a trip between Los Angeles and Seattle takes about 2 hours by airplane, 34 hours by Amtrak and 8 days and 7 nights on an AOERC excursion (Tr. 122-24).

recommendations do not involve an application for a redetermination, we respond to them in this separate section of our Statement of Exceptions.

Conclusion of Law #8. Clarification of certain facts is necessary before commenting on Conclusion of Law #8. The initial coverage decision in this proceeding concluded that AOERC was a covered employer as of January 1, 1995. Having reviewed the evidence submitted, the Hearing Examiner has now recommended to the Board a finding that AOERC was formed and began operations on April 1, 1999. We are in agreement with this fact-finding.

From the March 1998 through October 1998 season, the excursion service was operated by American Orient Express Railway Company, an Oregon corporation. Unfortunately, the Report assigns the shorthand term "AOE Inc." to this company. There had actually been a Washington corporation named AOE Inc. that was part of the TCS Expeditions operation. That company changed its name on November 18, 1997 (Exh. 36F) and thereafter had nothing further to do with the excursions that are the subject of this proceeding.

Thus, in February 2001, when the Board issued the initial coverage determination at issue in this case, there was no entity named AOE Inc. Notwithstanding this fact, in Conclusion of Law #8 (Report, p. 26) and Recommended Decision #1 (Report, p. 1), the Hearing Examiner specifically proposes that AOE Inc. be found to be an employer covered by the Acts. It is assumed that the company that the Hearing Examiner actually intends in these references is the Oregon corporation, American Orient Express Railway Company.

This Board has previously decided that even a company previously deemed a covered employer may not be held to be a covered employer after cessation of operations. See, e.g., B.C.D. 96-77. American Orient Express Railway Company ceased its involvement with the rail excursions at the end of March 1999. Consequently, the Board should reject the Hearing Examiner's invitation to determine now that American Orient Express Railway Company (shortened to AOE Inc. in the Report) was a covered employer.

As conceded by the Hearing Examiner, AOERC did not begin operations until April 1999. (Report, pp. 11, 70). Because AOE Inc. was never and should not now be found to be a covered employer, the Board should also reject the Hearing Examiner's invitation in Conclusion of Law #8 and its accompanying analysis to find that AOERC is the "successor employer" to AOE Inc. Indeed, AOERC should not be found to be the successor of any covered employer.

Neither the RRA nor the RUIA provides that the tax liability of a covered employer is transferred to an entity that receives its assets as the result of an asset transfer. Both the RRA and the RUIA limit the transference of coverage to receivers and trustees. 45 U.S.C. § 231(a)(1)(iii); 45 U.S.C. § 351(a). The Board itself has held that, in the case of asset transfers, it must "separately consider[] whether the new entity falls within the definition of a carrier employer under the RRA and the RUIA" and that "[t]he coverage ruling with respect to the status of a former operator of the rail line does not automatically carry over to the new operator." B.C.D. 99-18.

The fact that AOE Inc. was never a covered employer is also relevant with respect to Equipment Company, which the Hearing Examiner claims began operations in November 1997 and should be found to be a covered employer on the ground that it held title to rail cars used by AOE Inc. As AOE Inc. was never a covered employer, Equipment Company did not therefore provide services to a covered employer as specified under the Acts.

Conclusions of Law #9 and #10. The sole basis for the Hearing Examiner's recommendation that Equipment Company and Rail Services Company should be covered as rail carrier affiliate employers is that they and AOERC are commonly owned by Rail Holdings and that they each perform a service—rail car repairs and ownership, respectively—for AOERC. (Report, pp. 70-75). If the Board agrees that AOERC is not a covered employer, then it must also conclude that Equipment Company and Rail Services Company are not covered employers.

IV. APPLICABLE DATE IN THE EVENT OF COVERAGE

In this section we address, without conceding our view that a coverage determination should not be made in this case, what the applicable date of coverage should be in the event the Board holds that AOERC, Railway Services and Equipment Company are covered employers.²¹

²¹ In the event that the Board finds that AOERC is a covered employer, however, then we would reiterate that there has never been a prior Board determination that either Equipment Company or Rail Services Company was a covered employer. Therefore, whatever decision is reached by the Board should expressly state that it is the initial coverage determination for those two entities. The importance of this initial determination date is that a covered employer is not responsible for contributions earlier than four years before it was required to file a BA-3a compensation report, 45 U.S.C. § 231h, and, in the case of the RUIA, 18 months before its first filing of a Form DC-1, 45 U.S.C. § 358.

The Board has authority under the Acts to determine the extent to which any of its rulings with respect to coverage shall be applied without retroactive effect. L-89-156, p. 3 (citing 26 U.S.C. § 7805(b) and 45 U.S.C. § 358(k)). The Board is not required to impose a coverage determination retroactively to the first date that service as a common carrier began but may make its coverage determination applicable prospectively.

Legal Opinion L-89-156 involved an initial determination by the Board's Deputy General Counsel concluding that the Port of Palm Beach District was a covered employer under the Acts. According to the Legal Opinion, the District had been operating as a common carrier by rail since March 1946, and perhaps earlier than that. In deciding to make the coverage decision in that case prospective only, the Deputy General Counsel considered that the District had not intentionally evaded the Acts but had cooperated with the Board's coverage inquiry. Furthermore, in light of the District's participation in the state retirement system as a government agency, retroactive application of a coverage decision would be an "administrative nightmare" and could have negative impacts on the retirement plans of the district's employees. Thus, coverage was imposed by the Deputy General Counsel effective the first date the District had been notified by the Board that it might be a covered employer.

There is ample reason for the Board, should it decide that a coverage determination is necessary here, to exercise its authority to make that determination applicable prospectively only. Like the Port of Palm Beach District,

AOERC had no reason to suspect that it was a covered employer. AOERC's immediate predecessor company, American Orient Express Company, was not a covered employer. Similarly, when that company took over the excursion operation from TCS Expeditions, neither that company nor the prior owners of the business, Reisboro Mittelthurgau and Nostalgie, had been found by the Board to be covered employers.

In operating its excursion business, AOERC has complied with all applicable state laws with respect to unemployment insurance, worker's compensation, etc., and has paid and deducted from its employees' payrolls all applicable taxes, social security payments, etc. Thus, both AOERC and its employees over the years have acted in good faith and have planned their business and personal incomes with the understanding that they were governed by state and federal statutes regarding taxes, payroll deductions and pension planning that did not involve the Acts. The costs imposed by the Acts on both employers and employees are significantly higher than the taxes and payroll deductions imposed on non-railroad businesses. Therefore, it is inevitable that AOERC's business plan, its costs for services and its compensation to employees would have been different had it known that it had obligations as a covered employer.²²

²² According to the Seventh Circuit Court of Appeals, it is to be expected that the extra cost of taxation under the Acts would be passed on in one fashion or another to the employee. Standard Office Bldg. Corp. v. United States, 819 F.2d 1371, 1373 (7th Cir. 1987). Whether or not the Court's view of "economic theory" would have applied precisely to AOERC and its employees, there can be no doubt that the imposition of higher payroll taxes would have caused some alteration in the AOERC business model and the company's relationship with its employees.

In the Port of Palm Beach case, it appears that the agency's employees had mostly had long tenures. AOERC's employees, of course, tend to have extremely short tenures. For virtually all the employees, the employment is seasonal and practically none of them return after a single season. This circumstance argues in favor of prospective application of any coverage determination.

First of all, no employee excluded from service under the Acts due to a prospective application of coverage will be injured since none will have stayed long enough to have earned a railroad retirement pension. The employees have been covered under social security as well as under state unemployment and worker's compensation arrangements and have taken proper benefit of them. (Report, p. 17; Tr. 39-49). Second, since the employees have been temporary, recovering from them what should have been their payroll deductions under the Acts would be next to impossible and certainly an "administrative nightmare." It would also be administratively difficult to undo past contributions to state unemployment and worker's compensation funds. (Tr. 39-50) As a consequence, the likely result of retroactive coverage will be to burden AOERC with the full expense of taxation, both the employer's and the employee's share. This would be a loss for which the company could not have planned. Thus, a retroactive coverage decision would entail only injury to AOERC without a concomitant benefit to its employees. AOERC has fully cooperated with the Board's investigation in this matter and nothing it has done with respect to coverage or its possible obligations justifies such punishment.

For all these reasons, it is urged that, in the event the Board determines that AOERC, Equipment Company and Railway Services are covered employers, it should make that determination applicable as of February 9, 2001, the date of the Board's initial determination in this case.

CONCLUSION

AOERC is not a covered employer and, in its decision on redetermination, the Railroad Retirement Board should so conclude. AOERC operates a land excursion business offering luxury dining and sleeping accommodations in vintage rail cars and hotels, together with lectures, tours, music and other entertainment. It is not subject to the jurisdiction of the Surface Transportation Board as a common carrier providing railroad transportation. It is not the successor to any other common carrier or company subject to STB jurisdiction.

As for the Equipment Company and the Rail Services Company, inasmuch as they are not under common control or ownership with a covered employer that provides common carriage by rail, there should be no initial determination that they are covered employers.

Dated: July 21, 2003

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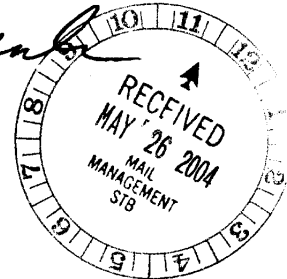
RAILROAD RETIREMENT BOARD

MAY 26 2004

**FOR BOARD CONSIDERATION
AND APPROVAL**Part of
Public Record

May 16, 2003

TO : The Board

FROM : Karl T. Blank *Karl T. Blank*
Hearing ExaminerSUBJECT : American Orient Express LLC
Recommended Board Coverage Decision

Attached for Board consideration is my report and recommended decision on reconsideration regarding the status of American Orient Express LLC and related companies as employers covered by the Railroad Retirement and Railroad Unemployment Insurance Acts. I have provided two copies the report for each Board Member's office. I have also provided each office a copy of the two-volume administrative record, including the transcript of the hearing held at the appellant employer's request. A copy of my report and the final record has also been served today by Federal Express upon counsel for the appellant. Pursuant to section 258.6(a) of the Board's regulations, the appellant may file any exceptions to my report within 30 days.

I would like to acknowledge the invaluable assistance of the Board's Library staff in obtaining and updating legal materials as needed. I also thank Ms. Dadabo and Mr. Bartholow for their support while my report was in preparation; Ms. Cynthia Chatman of the Office of General Counsel for her aid in assembling the final product; Ms. Nancy Russell for proofreading assistance; and Ms. Carroll Slowik and Ms. Ivy King of the Office of General Counsel, and the Board's print shop for producing the copies of the record, especially the color reproductions.

FINANCE DOCKET NO. FD-34502

A

A note of explanation regarding the length of the report, and the length of time to prepare it, is in order.

As presented by the initial coverage decision and appellant's brief to the Board requesting reconsideration, legal questions predominate. Moreover, these questions involve interpretation of law other than the RRA and RUIA. In particular, appellant raised as a threshold argument that the 1995 amendments made to the RRA and RUIA at the time of amendments to Title 49 of the U.S. Code in effect re-aligned the Board's jurisdiction to cover rail carriers to parallel Surface Transportation Board jurisdiction under the new law. Appellant argues this excludes not only "sleeping car companies", but eliminated STB jurisdiction over all passenger service other than extant commuter rail operations. The Board has taken the contrary position that the definition of covered rail carrier employer remained unaffected, thereby including all previous types of rail carriers, including "sleeping car companies" and passenger carriers. Neither issue has ever been presented to a court for review. It is hard to envision the consequences, beyond the narrow issue of "sleeping car company", of a court decision reversing the Board's interpretation of the effect of the 1995 amendments.

Although arguably a decision of covered status under the Acts by the Board is an interpretation of its own statutes which is thus entitled to deference, a court may determine otherwise in view of the tie to another law (the Interstate Commerce Act). Drafting my report to answer the primarily legal issues raised by appellant, and to resolve them to the extent possible as factual conclusions, required a good deal of research. Moreover, the legal sources differed for each issue. Formulation of the definition of sleeping car company required researching the 1906 amendments to the Interstate Commerce Act, Interstate Commerce Commission reports, and late 19th and early 20th century case law. As a common carrier is not defined by statute, the definition of a common carrier of passengers must be established by illustrative court decisions. Since rail carrier case law dealt with the considerations specific to freight carriers, I assembled cases dealing with common carriers under other laws, emphasizing passenger cases where possible. Framing the response to appellant's contention that 1995 amendments to Title 49 ended Surface Transportation Board jurisdiction over passenger transportation meant first reviewing the recent trend toward strictly textual statutory construction. This and other research was unexpectedly time consuming.

Moreover, setting out the factual basis for the common carrier case decisions I have cited, in order to make clear the comparison to appellant's circumstances, has lengthened the report itself. I believe, however, that removing these factual summaries would leave only an abstract legal outline of case names.

In respect to both the length of the report and the time to prepare it, I hope that the attached report and administrative record reflect my effort to provide the Board with the best recommendations possible in this matter, both in terms of this specific appeal and with regard to future cases the Board may encounter.

Attachments

IN RE Reconsideration of
American Orient Express
Railway Company LLC

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)
)
)

United States Railroad Retirement Board
B.C.D. No. 01-20

REPORT OF HEARING EXAMINER

MAY 16, 2003

Karl T. Blank
Office of General Counsel
U.S. Railroad Retirement Board

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

This is the report of the Hearing Examiner, Karl T. Blank to the Railroad Retirement Board, pursuant to section 258.6 of the Board's regulations (20 CFR 258.6), containing the Examiner's findings of fact, conclusions of law, and recommended decision on questions presented by the employer's request for reconsideration of Board Coverage Decision No. 01-20.

RECOMMENDED DECISION

Based on the findings of fact and conclusions of law set forth in this report, I recommend that the members of the Railroad Retirement Board render the following decision on reconsideration with respect to this appeal:

1. American Orient Express Railway Company, Incorporated, (AOE Inc.) was an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts (the Acts) as a common carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code During the period November 14, 1997 through April 1, 1997. AOE Inc. held itself out as a common carrier, operated railroad through an agreement with Amtrak, and provided transportation using passenger rail cars. AOE Inc.

became an employer effective November 14, 1997, the date of closing of the purchase of rail cars and other assets from Reiseburo Mittelthurgau and TCS Expeditions. AOE Inc.'s status as an employer under the Acts terminated with transfer of its passenger operation to American Orient Express Railway LLC on April 1, 1999.

2. American Orient Express Railway LLC (AOE Railway) is an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts as a common carrier by railroad, subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code, because AOE Railway holds itself out as a common carrier, operates rail road through an agreement with Amtrak, and provides transportation using passenger rail cars. AOE Railway became a covered employer effective with its formation and the transfer of operations from AOE Inc. on April 1, 1999.
3. AOE Inc. and AOE Railway are not covered under the Acts as sleeping car companies.
4. AOE Inc. and AOE Railway are not successor employers of American European Express (AEE) for purposes of determining employer contribution rates under section 8 of the Railroad Unemployment Insurance Act.
5. AOE Equipment Company (Equipment Company) is an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. It is under common control with AOE Railway, a rail carrier employer, because both

companies are wholly owned subsidiaries of Oregon Rail Holdings. It performs a service in connection with railroad transportation because its business consists exclusively of obtaining through purchase or lease, and then furnishing to AOE Railway, virtually all rail cars used by AOE Railway. AOE Equipment Company became an employer effective November 14, 1997, the date on which purchase of the initial group of rail cars from Reiseburo Mittelthurgau and TCS Expeditions closed.

6. AOE Rail Services (Rail Services) is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. It is under common control with AOE Railway, a rail carrier employer, because both companies are wholly owned subsidiaries of Oregon Rail Holdings. It performs a service in connection with railroad transportation because its business consists almost entirely of maintaining all passenger rail cars used by AOE Railway. AOE Rail Services became an employer effective August 1, 1999, the date of formation.

SUMMARY OF EXAMINER'S REPORT

The body of this report consists of four segments: Course of Proceedings, Findings of Fact, Conclusions of Law, and Discussion and Analysis.

The first segment, Course of Proceedings, gives the history of the appeal.

The second segment, Findings of Fact, contains 33 numbered paragraphs, each summarizing my finding as to evidence of record concerning an aspect of this appeal.

Paragraphs 1 through 14, under the heading Facts not in Dispute, combine and restate pertinent uncontested facts derived from the Joint Statement of Facts Not In Issue, executed by counsel for appellant and myself.¹ Material organized under sub-headings A and B recount the history of ownership and operation of the group of passenger rail cars between 1989 and 1997 by AEE, Reiseburo Mittelthurgau, Trans Texas Rail, Inc, and TCS Expeditions prior to sale of the cars to AOE Inc.. This evidence is necessary because the initial coverage decision on appeal determined AOE Railway to be an employer effective January 1, 1995. Sub-heading C explains the organization and operation of Oregon Rail Corporation, Oregon Rail Holdings, and subsidiary companies including AOE Railway. Sub-heading D summarizes the evidence submitted by appellant regarding vacation packages offered through Amtrak. The remaining paragraphs 15 through 33, grouped under the heading Additional Findings of Fact by Hearings Officer, are my findings as to facts established by the documentary record and testimony of the witness at the hearing.

The third segment, Conclusions of Law, states the legal standards applied to reach the recommended decision. These standards include definitions of the terms sleeping car company, common and private carrier, rail carrier, exempt tourist excursion railroad, successor employer, and non-carrier affiliate company as a covered employer under the Acts by reason of performing rail car repair or car leasing or loan to the affiliated carrier.

The fourth segment of this report, Discussion and Analysis, sets forth my analysis of the

¹ Findings 1 through 14 consolidate several individually enumerated agreed facts, and omit some details not essential to this decision. However, I specifically affirm my agreement to all the statements made in the Joint Statement appearing as Exhibit 46.

statutes, court cases and prior agency decisions from which I derived the foregoing legal standards, and applies these standards to the facts of this appeal to explain my recommended decision. Part I explains that AOE Railway is not a sleeping car company because, unlike a sleeping car company, AOE Railway sells transportation directly to the public. The operation and legal status of Pullman Company is considered as a basis of comparison.

Part II of the Discussion and Analysis explains why AOE Railway is an employer covered under the Acts as a common carrier of passengers by rail. A review of case law from various venues provides a definition of the term common carrier under the law, and identifies the characteristics of a common carrier in comparison to a private carrier. The rail passenger transportation provided by AOE Railway is distinguished from non-rail carrier businesses which use railroad equipment, such as rail car leasing or railway express companies. Part II also explains that appellant's argument that the 1995 amendments to Title 49 of the U.S. Code ended Surface Transportation Board jurisdiction over interstate passenger service is based on a misreading of an amendment which was limited only to commuter service conducted by local authorities. Part II further distinguishes the scale and method of AOE Railway's passenger operation from prior Board decisions which determined tourist excursion rail lines were not covered rail carrier employers under the Acts. Part II concludes by explaining why AOE Railway is not a successor employer of AEE for purposes of determining employer contributions to be made under the RUIA.

Part III of the Discussion and Analysis section addresses the status under the Acts of

AOE Rail Services and AOE Equipment, two companies which together with AOE Railway are wholly owned subsidiaries of Oregon Rail Holdings, but which were not in evidence at the time of the Board's initial coverage decision. Both companies are under common control with AOE Railway, a rail carrier employer. The rail car repairs which AOE Rail Services performs exclusively for AOE Railway, and rail car purchases or leases which AOE Equipment arranges for AOE Railway each constitute a service in connection with rail transportation as defined by Board regulations and case law.

A table of the authorities follows the text of my report.

COURSE OF ADMINISTRATIVE PROCEEDINGS

In Board Coverage Decision No. 01-20, dated February 9, 2001, the members of the Railroad Retirement Board determined that AOE Railway was a covered sleeping car company employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1995, and was consequently required to file returns of compensation and service of its employees under both Acts, and to pay to the Board contributions assessed under the Railroad Unemployment Insurance Act.

AOE Railway filed a timely request for reconsideration of the initial coverage decision on July 13, 2001, and requested a hearing on its appeal. On February 6, 2002, the Secretary of the Board notified the appellant that Karl T. Blank had been appointed Hearing Examiner to take evidence and testimony in the appeal, and furnished a draft copy of the administrative record, consisting of Exhibits 1 through 41.

By letter dated April 24, 2002, the Hearing Examiner added Exhibits 42 through 45 to the record, and provided appellant with copies of same. Notice of hearing was published in the Federal Register May 13, 2002. See 67 Fed. Reg. 32071. A hearing was held on May 21, 2002, in the headquarters building of the Railroad Retirement Board in Chicago. Mr. Robert Bergen appeared on behalf of appellant, and Ms. Elizabeth A. Schellberg appeared as witness for appellant. Prior to commencing the hearing, the Hearing Examiner and Mr. Bergen executed a previously negotiated Joint Statement of Facts Not In Issue, which was admitted as Exhibit 46. During the course of the hearing, appellant submitted Exhibits 47 through 59. The Board presented no witnesses and introduced no additional documents. On June 12, 2002, the Hearing Examiner furnished appellant a copy of the transcript of the hearing, and closed the administrative record.

FINDINGS OF FACT

FACTS NOT IN DISPUTE

Pursuant to my agreement with counsel for appellant AOE Railway, which was executed May 21, 2002, and which was entered into the administrative record as Exhibit 46, I make the following findings regarding facts which are not in dispute:

A. Regarding American European Express.

1. In 1989, Nostalgie Istanbul Orient Express of Switzerland (Nostalgie) purchased a group of 13 vintage rail cars with the intent of establishing a luxury passenger rail service similar to that conducted by the Nostalgie in Europe. 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. 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.
2. AEE began passenger operation November 15, 1989, offering one-way and round trip fares. AEE employees staffed AEE rail cars. Amtrak employees performed routine running repairs and maintenance of AEE rail cars. Amtrak would not book

AEE travel. AEE did not initially seek approval of the Interstate Commerce Commission for its operation, but 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.

3. In mid-1991, AEE suffered two mishaps. On June 21, 1991, an AEE train collided with a truck on a freight crossing in Indiana, damaging some of the rail cars. On September 12, 1991, an AEE train promoting a projected New York City to Miami train route struck and killed two women trespassing on the tracks. In October 1991, AEE announced operations were suspended. 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.
4. On March 20, 1990, pursuant to regulations of the Board as then in effect, the Deputy General Counsel determined that AEE was a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts as a sleeping car company. In Board Coverage Decision 93-68, (issued October 20, 1993) the Board denied a request by AEE for reconsideration of its status as a covered employer, finding AEE to be a sleeping car company. On August 29, 1996, in Board Coverage Decision 96-77, the Board determined that based on available information, the status of AEE as a covered employer under the Railroad

Retirement and Railroad Unemployment Insurance Acts terminated effective the last day of October 1991.

B. Regarding American Orient Express, Trans Texas Rail, Inc., and Reiseburo Mittelthurgau.

5. Sometime in 1994, Trans Texas Rail, Inc. and Reiseburo Mittelthurgau, a Zurich, Switzerland travel agency, formed a joint venture entitled "American Orient Express" (AOE). Beginning August 1994, AOE began to run weekend excursion trips between San Antonio, Texas and Branson, Missouri, using the former AEE passenger rail cars. In 1995, Space Expeditions, Inc., a Seattle, Washington corporation owned by T.C. Schwartz and doing business as TCS Expeditions (TCS), operated the passenger train for AOE. On September 25, 1995, T.C. Schwartz formed "AOE Incorporated" as a Washington corporation, and registered the trade names "American Orient Express Railway Company" and "AOE Inc." in that state. During 1995, TCS conducted "several" coast to coast trips from Washington, D.C. to Sacramento, California, under the name "American Orient Express". In 1995, TCS offered a nine day transcontinental trip including one night at a hotel at the beginning and end of the trip, meals, excursions and lectures beginning at \$4,990 per person. In 1996, TCS also 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.

On November 14, 1997, TCS and Reiseburo Mittelthurgau entered into an Asset Purchase Agreement with Oregon Rail Corporation (ORC).

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

6. ORC is an Oregon corporation formed April 25, 1997, with Henry Hillman as President and Chief Executive Officer. Pursuant to section 1.1 of the November 1997 agreement (Exhibit 36C), ORC purchased from TCS and Reiseburo all equipment, accounts receivables, tour expenses, toll free telephone number, equipment and real property leases, inventory and supplies relating to the American Orient Express train operation. American Orient Express Railway Company (AOE Inc.), an Oregon corporation, was formed as a wholly owned subsidiary of ORC on October 24, 1997. On April 1, 1999, Oregon Rail Holdings, LLC (Rail Holdings) was formed as an Oregon limited liability company with Mr. Henry Hillman as manager. Rail Holdings in turn controls American Orient Express Railway Company LLC (AOE Railway), an Oregon limited liability company also formed April 1, 1999.
7. In the 1998 brochure, AOE Railway Co. scheduled ten different one way routes in the United States and two in Canada during 1998. (Exhibit 36 I). All but one offered operation in reverse order. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers. Four trips were cancelled by AOE Railway Co. in 1998. AOE Railway Co.

conducted two unadvertised charter trips over two different routes in 1998.

8. In the 1999 brochure, AOE Railway offered seventeen itineraries in the United States and four in Canada. (Exhibit 4). All but one also offered travel in reverse order. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers. Two trips were cancelled by AOE Railway in 1999.
9. In the 2000 brochure, AOE Railway offered 21 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. (Exhibit 5). Thirteen trips were cancelled by AOE Railway in 2000.
10. In the 2001 brochure, AOE Railway offered 15 itineraries in the United States and two in Canada. (Exhibit 36L). All offered travel in reverse order. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers. Two trips were cancelled by AOE Railway in 2001.
11. Rail Holdings and its subsidiaries and related companies, including AOE Railway LLC own no rail line or trackage rights over any of the rail lines on which AOE Railway conducts its trips.
12. Rail Holdings and various wholly owned subsidiaries including AOE Railway entered into an Operating and Maintenance Agreement August 7, 2000, with

Amtrak, to begin January 1, 2001, and to end December 31, 2005. (Exhibit 36H).

Pursuant to this agreement, Amtrak provides locomotives with train and engine crew to pull no more than 17 rail cars of AOE Railway over itineraries specified in an attachment. AOE Railway 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 a Rail Holdings or AOE Railway employee) must inspect the rail cars prior to each departure. AOE Railway has the right to hire its own employees to serve food and beverages, and to provide other services to passengers on its cars. AOE Railway 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. AOE Railway agrees to indemnify Amtrak from any claims, liabilities, damages, or expenses for personal injury (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 agreement. AOE Railway must provide workers' compensation insurance covering its employees, and general liability and property insurance. General liability insurance must include coverage for operations liability,

independent contractors liability, Federal Employers Liability Act, liquor liability and contractual liability, with all railroad exclusions deleted.

13. A fully staffed AOE Railway rail trip currently includes 39 AOE Railway 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. In 2001, AOE Railway hired 105 employees during the year to fill various jobs among the 36 service staff positions which had become vacant. AOE Railway retained 15 service staff employees for the entire year of 2001. Eight of these, including four supervisors, had worked in a previous year.

D. Regarding Amtrak and Amtrak Vacations.

14. The "Amtrak 2001 Travel Planner" (Exhibit 3) describes over twenty vacation packages under license with Globetrotters Vacations, Inc., of Downers Grove, Illinois, doing business as Amtrak Vacations. 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. The Amtrak

passenger contract constitutes the sole contract between Amtrak and the purchaser of a tour. The services other than carriage by Amtrak described by the Amtrak 2001 Travel Planner are provided by independent contractors.

II. ADDITIONAL FINDINGS OF FACT BY HEARING EXAMINER.

Based on the evidence of record, I make the following additional findings of fact:

15. Mr. Henry Hillman is a majority shareholder of ORC, which is in turn a member of Rail Holdings (Tr. 128). ²Rail Holdings is itself a multi-member LLC which acts as a holding company and does payroll and accounting for an number of different entities (Tr. 134). These are grouped into a marine division and a rail division (Tr. 126). The marine division operates stern wheel river boat excursions on the Columbia River.
16. The rail division of Rail Holdings consists of AOE Equipment Company (Equipment Company) (Tr. 127), AOE Rail Expeditions (Tr. 81), AOE Rail Services, LLC (Rail Services) (Tr. 138), and AOE Railway. AOE Rail Expeditions sells airline and Amtrak tickets to, and makes ancillary hotel reservations for, patrons of AOE Railway. (Tr. 81-81).
17. Equipment Company received title to the passenger rail cars purchased from Reiseburo Mittelthurgau in 1997 and functions only to retain ownership of these and other later acquired cars used in the passenger operations. (Tr. 131). As of May

² References in this form are to pages of the transcript of the hearing held May 21, 2002.

2002, a total of 47 cars were available to Equipment Company. (Exhibit 51). The company owned at least 16 cars, leased 16 from Amtrak, and leased 8 from other companies. The total included 4 dining cars, 12 sleeping cars, 13 coach cars, 4 lounge or club cars, and various baggage and crew accommodation cars. Cars leased from Amtrak and refitted by Equipment Company are used exclusively by AOE Railway. (Tr. 182).

18. Rail Services began operations in August 1999 in Englewood, Colorado, (a suburb of Denver) on property leased from General Ironworks. (Tr. 137). In September 2001 Rail Services moved to a facility in Tenio, Washington, leased from CECO (possibly an acronym for Cascade Engine Company) (Tr. 139-40). The history of both facilities prior to lease by Rail Services is unknown, but the Colorado location included an overhead crane used to pick up rail cars to remove the body from wheel trucks. (Tr. 137). Rail Services works only on passenger cars, providing most interior car maintenance of electrical, plumbing and heating/cooling systems. (Tr. 135). Although Rail Services has done some repair work for unrelated entities, this has been "pretty minimal." (Id.) When repair work is underway during the AOE Railway off-season, Rail Services employs about 35 people. (Tr. 139).
19. In the first operating season beginning April 1998, train operations were conducted by AOE Inc. (Tr. 131). AOE Railway assumed operations effective April 1999. (Id.) Six employees were transferred from AOE Inc. to AOE Railway:

five office personnel and one train staff member. (Tr. 132). AOE Inc. was later dissolved. (Id.).

20. Rail Holdings is the sole member of AOE Railway. (Tr. 128). AOE Railway currently has six or seven office employees: four administrative positions, one or two tour managers, two manager positions, and the Vice President of Operations. (Tr. 134). The number has varied by one or two since 1999.(Tr. 135).
21. AOE Railway has never paid contributions under the Railroad Unemployment Insurance Act. AOE Railway pays unemployment insurance contributions in Colorado, where operations offices remain after removal of Rail Services to Washington, in Texas, where the transportation director maintains an office in San Antonio with a part time assistant, and in Oregon, where corporate offices are located. (Exhibit 50, and Tr. 159-160). Unemployment claims have been filed by employees under state systems at the end of the operation season. (Tr. 41).
22. No AOE Railway employee has ever made a claim against the company under the Federal Employers Liability Act. (Tr. 158). AOE Railway maintains an insurance policy for workers compensation coverage with the Crump Insurance Group. (Ex. 50, Tr. 50-51). On average, five or six workers compensation claims have been made by employees each year from 1998 through 2001. (Tr. 157).
23. AOE Railway does not provide package delivery, carry mail or freight, or directly own or lease track in the United States. (Tr. 116). Neither AOE Railway nor an affiliated company owns or leases locomotives in the United States, although it

does lease locomotives in Canada. (Tr. 141). AOE Railway has never made any filing with any state Public Utilities Commission. (Tr. 181).

24. AOE Railway controls the annual itineraries of its trains. All AOE Railway passenger train movements within the United States are made pursuant to contract with Amtrak (Exhibit 36H). The current contract between AOE Railway and Amtrak, which ends December 2005, does not differ from earlier contracts in any respect material to the appeal. (Tr. 158). AOE Railway pays Amtrak a track fee or mileage rate for each trip. (Tr. 117). AOE Railway selects destinations based on a proposed trip schedule furnished to Amtrak two years in advance. (Tr. 118-119). Since most of the track used by AOE Railway belongs to freight trunk line carriers, Amtrak must negotiate for use of particular track at particular times of day and seasons. The ultimate decision on the itineraries offered for a particular year is made by AOE Railway.
25. Under normal circumstances, AOE controls the train during each trip, subject to coordination with freight rail traffic by the Amtrak employees who operate the locomotive. When the train is underway the AOE Railway "hotel manager" is "the final word on board" except in emergencies, when the Amtrak conductor is in control. (Tr. 150, 155). Where necessary, the hotel manager may consult with AOE Railway's transportation director. (Tr. 151). Thus, when a barge damaged a Mississippi River bridge during a trip in 2000, Amtrak provided a list of options and the transportation director ultimately decided what should be done. (Tr. 151-152).

However, when a hurricane prevented taking the scheduled route for a southern states tour, Amtrak notified AOE Railway without discussion that the train would be routed through Chicago and pick up the scheduled route in Texas. (Tr. 153).

26. Each train operated by AOE Railway has from 39 to 45 staff members. Amtrak does not train AOE employees, but AOE Railway has issued an employee manual modeled on the Amtrak manual. (Tr.154). The majority of AOE Railway train staff are employees of the company. Three on-board positions are year-round: hotel manager, assistant hotel manager, and executive chef. (Tr. 30, 33, 34). The porters, dining car waiters and waitresses, laundry porter, night porter, dishwashers, bartender, sous-chefs, assistant chefs, and pursers are full time seasonal employees. (Tr. 30). The on-board employees work a six week on, two week off rotation, necessitating a fourth employee for every three positions. The fourth employee substitutes for one of the three employees who is in the off-week rotation at any one time. (Tr. 148). Due to turnover, AOE Railway hires about 100 individuals over the course of a season to fill the 35 to 40 seasonal on-board positions; in 2001 only 15 stayed for the full season, and five of these returned in 2002. (Tr. 38). The company also contracts on a per-trip basis for three tour leaders each trip, one for each motor coach used in off-train activities, (Tr. 69); and contracts for lecturers and musicians as required. (Tr. 29, 31).
27. AOE Railway markets its service directly to the public at large. It distributes brochures to individuals through the AOE Railway internet website, which is linked

from other internet sites. (Tr. 76, 98). AOE Railway scheduled over \$116,600 for printed media advertising for 2002 directly to consumers. (Exhibit 55). A total of 29 advertisements were to run in 10 consumer magazines (e.g. Midwest Living, Travel America); and 19 ads were to run in 7 regional magazines of the American Auto Club (e.g. AAA Home & Away –Midwest, AAA – Car and Travel – New York). (Id.) AOE Railway employs Cushman Amberg Communications, a public relations firm located in Downers Grove, Illinois, to contact newspaper travel writers and to produce press releases. (Tr.179). An independent film producer, Mr. John Grant, has made at his own expense but with AOE Railway assistance a series of “* * * by Rail” documentaries (e.g. “Rockies by Rail”, “National Parks by Rail”, “Antebellum South by Rail”). (Tr. 97, 177-178). One September 1998 airing of “Rockies by Rail” on the Public Broadcasting System brought 28,000 telephone inquiries, and although more recent broadcasts have brought fewer responses, the series remains “one of our primary sources” of reservations. (Tr. 178). Direct reservation sales to the public comprised 38 percent of total reservations for 2001. (Tr. 171).

28. AOE Railway also markets itself to the public at large indirectly by encouraging travel agents to sell reservations to clients. At the time of the 1997 purchase from TCS Expeditions and Reiseburo Mittelthurgau, the primary sales effort was aimed at contracting with non-profit organizations such as Smithsonian Institution, the Audubon Society, or various college alumni associations, which would then market AOE Railway to their mailing list. (Tr. 90, 92). The number of reservations from non-

profit organizations has declined from 70 or 75 percent in 1997, to 17 percent of the total in 2001. (Tr. 92, 171). By advertising and promotion, AOE Railway has replaced the non-profit organization contracts with travel agents and travel consortiums. In 2001, AOE Railways received 45 percent of its reservations through travel agents. (Tr. 171). Brochures are provided to travel consortiums such as American Auto Club and Virtuoso Vacations.Com for distribution to clients. (Tr. 76). A total of 14 advertisements costing \$23,678 were to run in 3 travel trade magazines (Travel Agent, Travel Weekly, Tour Magazine) in 2001. (Exhibit 55). AOE Railway contractor Cushman Amberg also writes articles for publication in these trade magazines which are intended to solicit business from travel agents. See Exhibit 56: "The Golden Age is Back", Travel Agent, January 2001, and Tr. 99. AOE Railway also contacts travel agents directly. It employs sales representatives in Downers Grove, Illinois, and in Florida, and has a contractor in California, who visit travel agents in their marketing area, show a marketing video, and distribute brochures. (Tr. 76,173). Finally, in order to make them more effective in selling reservations to clients, AOE Railway offers product familiarization trips exclusively for travel agents during train positioning moves, and offers agents steeply discounted last-minute reservations on empty cabin space. (Tr. 173).

29. A prospective passenger who makes a reservation receives a packet of documents which appear in the record as Exhibit 58. (Tr. 104). A pamphlet included in the packet describes the accommodations and meal times. It also

notes smoking restrictions, prohibits private alcohol stock or firearms, and requires earphones for portable listening devices. It states that children under 16 must be accompanied by an adult, and "AOE reserves the right to dismiss passengers from the train if their conduct interferes with the enjoyment of others or endangers the safe operation of the train or its contents." A Health Information Form requests that the passenger list any physical limitations or medical conditions, diet restrictions and current medications. The Form also states that "Due to safety regulations and limitations, wheelchairs cannot be used onboard the train."

30. The reservation packet also includes the "Terms and Conditions of Passage Agreement" (Exhibit 58), which is the "meat of the contract between AOERC and the passenger." (Tr. 108). This document has been a part of the package since 1999, and although based on drafts used by prior management, "these documents are the ones we have produced and they have become more ours, if you will, over time". (Tr. 148). The Agreement defines "passenger" as all persons traveling under the agreement; "carrier" as "Oregon Rail Holdings, LLC, and its subsidiaries"; and "tour" as "any train and or transportation * * * provided by the carrier on which the passenger may be traveling." Article 4 of the Agreement states that the passenger warrants "that he or she is physically and otherwise fit to undertake the scheduled tour", that he or she has appropriate inoculations, "that he or she will at all times comply with the carriers (sic) rules and regulations and orders and directions of the carriers (sic) * * * and that his or her conduct will not impair the safety of the tour or

jeopardize or inconvenience other passengers." Article 12 states that "All passengers, including those who are physically challenged or require wheelchairs or other equipment, are required to advise the carrier, in writing, at or prior to the time a tour is booked, of any physical, emotional or mental condition which may require professional attention during the tour. The carrier requires that the passengers using wheelchairs and needing assistance from other persons to manage these wheelchairs, travel with someone who is able to assist them, both on land and on the tour. Decisions made by the carrier regarding passenger safety will be binding in all instances. * * * "

31. Travel agents and AOE Railway reservation agents are acquainted with policies regarding mental and physical capacity of passengers, and the "main effort is to try and collect that information and discourage people from signing up for the trip before—in the reservation process * * * ." (Tr. 170). However, AOE Railway does not train agents by "telling them who we don't want because really, the focus is making sure they know how wonderful the product is, it's * * * giving them an idea of what the constraints are as well getting them excited about" AOE Railway tours. (Tr. 175). AOE Railway has turned away passengers with reservations in only two known instances (Tr. 170). An elderly passenger arrived at the airport prior to the trip so mentally disoriented that she did not know why she was there, so she was sent home. (Tr. 109). Another elderly passenger traveling with a companion was unable to complete the trip when she became anxious and confused, and disturbed other

passengers. (Tr. 110). AOE Railway states it will not accept families with children under age 8, (Tr. 99, Exhibit 52, page 38)), but there is no information as to the number of reservations declined for this reason. (Tr. 170).

32. Through the 2002 operating season, the passenger capacity of each AOE Railway train was approximately 100 persons, with a total ridership of approximately 3,000 each year. (Tr. 165). Approximately 2,500 of these individuals were passengers within the United States, and the remaining 500 took the Canadian route. (Tr. 169). Beginning with the 2003 season, AOE Railway will operate approximately 10 trips using a second train with a capacity of 100 passengers. (Tr. 166).
33. In the 2002 brochure, AOE Railway LLC offered 7 itineraries in the United States and one in Canada. (Exhibit 52). Six of the seven U.S. itineraries and the Canadian trip offered travel in reverse order. (Exhibit 52, page 32). As in the brochures for past years, a price per person for various types of accommodations followed each itinerary description. Included in the package price were train accommodations, all meals, excursions and group activities, and tour managers.

CONCLUSIONS OF LAW

Based on the statutes, cases and authorities discussed below, I make the following conclusions of law:

1. A sleeping car company sells accommodations to passengers who have separately purchased transportation services from a rail carrier. A sleeping car company does not sell transportation.

2. A common carrier of passengers holds itself out to the public as willing to carry for hire all persons of the portion of the public it serves who may apply for passage, so long as there is room and there is no legal excuse for refusal.
3. A private carrier makes an individual contract in a particular instance for carriage to a certain destination. Private carrier status is evidenced by contracting exclusively with a few customers, making a limited number of contracts in total, and by individual negotiations of terms for each contract.
4. A rail carrier under 49 U.S.C. §10501 is a common carrier which uses rails which it owns or operates by agreement to provide transportation for hire by rail car, or other instrumentality or equipment of any kind related to the movement of passengers or property both by rail.
5. The Surface Transportation Board retains jurisdiction under Subtitle IV of Title 49 over passenger rail service not conducted by a local commuter authority.
6. A common carrier of passengers by rail is a covered rail carrier employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act
7. Under applicable Railroad Retirement Board precedent, to be exempt from coverage as a rail carrier employer under the Acts, a tourist excursion railroad must carry only passengers, and must establish that it is operated as an amusement and not as part of the national system of rail transportation. Evidence supporting a conclusion that a tourist excursion line is not part of the national system of rail transportation includes operating entirely intrastate, operating for only short distances in covered in relatively short time periods, or returning to point of departure.

8. A successor employer for purposes of assessing contributions pursuant to section 8 of the RUIA with respect to a sale or transfer of assets, is one which receives property from an employer.
9. A company which performs substantially all rail car repairs needed by an affiliated rail carrier, and which performs little or no work for other companies, performs a service in connection with railroad transportation within the meaning of section 1(a)(1) of the RRA and section 1(a) of the RUIA.
10. A company which provides substantially all rail cars used by an affiliated rail carrier, and which engages in little or no other business, performs a service in connection with railroad transportation within the meaning of section 1(a)(1) of the RRA and section 1(a) of the RUIA.

DISCUSSION AND ANALYSIS

I. AOE RAILWAY IS NOT A SLEEPING CAR COMPANY

A. A sleeping car company does not provide transportation to the public.

The appellant argues that the Board erroneously determined AOE Railway to be a covered employer on the basis that it is a sleeping car company. Appellant does not concede it may be a sleeping car company under the law (App. Br. 20), ³but contends the Board decision is erroneous as a matter of law because the sleeping car provision no longer exists as a basis for coverage under the Acts administered by the Board following amendment of the Railroad Retirement Act by sections 323 and 324 of Public Law 104-88, the ICC Termination Act of 1995 (109 Stat. 803, at 950). (App. Br. 20-25). The Board, in its decision, stated that the amendment does not affect the coverage provision, citing section 10501(c)(3)(B) of Title 49 of the U. S. Code, as amended by section 201 of the ICC Termination Act. For the reasons set forth below, I find that the effect of the 1995 amendment need not be addressed, because even if it is assumed that the definition of covered employer includes a sleeping car company, AOE Railway is correct that it is not a sleeping car company.

Prior to amendment by P.L. 104-88, section 1(a)(1)(i) of the RRA of 1974 (88 Stat. 1305) provided as follows:

³ References in this fashion are to the Brief of Appellant filed with the Board (Exhibit 37).

(a)(1) The term 'employer' shall include—

(i) any express company, sleeping car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;⁴

The same definition appeared in prior law. Section 1(a) of the Railroad Retirement Act of 1937 (Public No. 162, 75th Congress)(50 Stat. 307) provided that "The term 'employer' means any carrier (as defined in subsection (m) of this section) * * *" while subsection 1(m) provided "The term 'carrier' means an express company, sleeping car company, or carrier by railroad subject to part I of the Interstate Commerce Act." See 50 Stat. 309. Section 1(a) of the Railroad Retirement Act of 1935 (Public No.399, 74th Congress)(49 Stat. 967) contained essentially the same language, as did sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act of 1938 (Public No. 722, 75th Congress)(52 Stat. 1094).

Prior to the railroad retirement legislation of the 1930's, railway labor legislation had also included sleeping car company within the definition of "carrier". See section 1(First) of the Railway Labor Act of 1926, Public No. 257, 69th Congress (44 Stat. 577), and its predecessor, section 300(1) of the Transportation Act of 1920 (Public No. 152, 66th Congress)(41 Stat. 456, 469). None of the foregoing enactments contained further description of the term. Moreover, my research indicates that the term sleeping car company first entered Federal law respecting railroads with the 1906 amendments to the

⁴ Although the Interstate Commerce Act was reorganized and codified in 1978, the language of the Railroad Retirement Act itself continued to refer to the ICA, and resolution of any question regarding the extent of coverage under the RRA ultimately required reference to the RRA itself. Cheney R. Co. v. Railroad Retirement Board, 50 F. 3d 1071, 1075 (D.C. Cir. 1995).

Interstate Commerce Act. See section 1, Public No. 337 (34 Stat. 584). The 1906 amendments were considered at length by both houses of Congress, and the addition of "sleeping car companies" to the jurisdiction of the ICC was discussed. See, e.g., 40 Cong. Rec. H8342-44, June 12, 1906, (statements of Reps. Williams, Prince, Townsend, and De Armond); and 40 Cong. Rec. S9102, June 25, 1906, (statement of Sen. Tillman). However, I was unable to find further description as to which sort of companies would be affected by the amendment.

I believe that the description of the term "sleeping car company" was absent from any of the foregoing legislation simply because the legislators thought it unnecessary. This was because, since absorption of its last competitor in 1900, rail passengers in the United States were served by just one sleeping car company – the Pullman Company. See: Depreciation Charges of Sleeping Car Companies, 215 I.C.C. 597, 598 (1936) ("At the present time the Pullman Company is the only sleeping-car company subject to the act * * * ."); and United States v. Pullman Co., 50 F. Supp. 123, 125 (D. C., E.D. Penn., 1943) ("The Pullman Company is today, and has been since 1900, except for railroads which have performed their own sleeping car service, the only person or company engaged in the business of furnishing sleeping car service to the railroads of the United States.") This absence of competitors throughout the first three-quarters of the Twentieth Century meant that when Congress considered each of the foregoing enactments, the term "sleeping car company" could only mean the Pullman Company as surely as if Pullman had been mentioned by name.

Pullman's pre-eminence also meant that it was largely responsible, through its litigation, for the status of sleeping car companies under common law. See: Pullman Company, 36 I.C.C. Valuation Rep. 845, 854 (1931)(rejecting Pullman's claim, in connection with a proceeding to value the company to determine a rate of return on investment for fare setting purposes, for inclusion of costs for 5,251 suits litigated over a period of 50 years "to establish sleeping car law"). Finally, Pullman's ubiquity meant, as one contemporary court put it, that travel by Pullman was a "matter of common everyday experience". Doherty v. Northern Pacific Railway Co., 115 P. 401, 404 (Montana, 1911). Consequently, to describe Pullman is to define "sleeping car company" under the law when the term was inserted into the ICA, RLA, RUIA, and the RRA as well.⁵

To understand how Pullman Company conducted business, it is helpful to understand why it conducted its business as it did. Pullman evolved in answer to the obstacles to travel in the United States posed by the 19th century multitude of competing railroads. Passengers often found it necessary to disembark from the passenger cars of one railroad and board the cars of another railroad to reach their destination. Transfer might occur in the middle of the night, and might require passengers to collect their luggage and cross town to another railroad station. Moreover, the condition of the passenger accommodations varied from railroad to railroad.

⁵ As Pullman ceased business in 1968 (Love, et al v. Pullman Company, No. C899, 1976 U.S. Dist. LEXIS 16728 (D. Colo. Feb. 10, 1976) no sleeping car company actually existed at the enactment of the Railroad Retirement Act of 1974.

Pullman Company offered a uniform solution to interstate travel on a national scale, similar in some ways to that of present-day Amtrak. (Ex. 45C, Night Trains, at 10). The Pullman Company contracted with the rail carrier to attach Pullman rail cars to the railroad's passenger trains, much as a shipper's proprietary freight cars are included in the consist of a freight train. Lemon v. Pullman Palace Car Co., 52 F. 262, 263 (Cir. Ct. S.D. Miss., 1887). The Pullman passenger remained aboard the Pullman car while it transferred from train to train during the course of the journey. (Ex. 45A, The Story of the Pullman Car, at 136) ("It is possible to travel in a Pullman car without change from Washington D.C. to San Francisco"), and Pullman Co. v. Linke, 203 F. 1017, (D.C., S.D. Oh. 1913) (occupied Pullman sleeping car remained in interstate commerce while disconnected from one train and shunted to a siding to await reconnection to a second train in order to continue its journey).

Pullman's arrangement with the railroads required the rail traveler to purchase two tickets: one ticket from the rail carrier to travel on the train, and a second ticket for a space in Pullman's coach or sleeping car. Calhoun v Pullman Co., 159 F. 387, 389 (6th Cir., 1908) (The railroad is the party with whom the passenger contracts for transportation; the sleeping car company provides additional comforts and conveniences). In other words, the traveler had to first buy the right to be transported on the railroad's train, and then separately buy the right to enter and ride in Pullman's cars. Calhoun v Pullman Palace Car Co. 149 F. 546, (Cir. Ct. W.D. Tenn., 1906) (Purchaser of a Pullman ticket who was ejected from the train by the railroad because he did not also have a ticket over the host railroad

had no cause of action against Pullman.); Lemon v. Pullman Palace Car Co., supra, (where Pullman Company required a passenger to hold a valid railroad ticket for first class in order to be allowed to purchase a sleeping car ticket, a Pullman ticket agent properly refused to sell a sleeping car ticket to a passenger holding a lesser class railroad ticket); Doherty v. Northern Pacific Railway Co., supra, 115 P. at 404 (passenger without a Pullman ticket was properly ejected from a train comprised entirely of Pullman sleeper cars and consequently was prevented from traveling at all, despite his possessing a first class transportation ticket from the railroad.)

The distinction between the purchase of "transportation" versus "accommodation" created a significant legal result: the majority of cases which considered the issue determined that because Pullman did not offer transportation service, it was not a common carrier.

A sleeping car company * * * 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. Linke, supra, 203 F. at 1019. (citations omitted).

This distinction, although not without its critics, see, e.g. Nevin v. Pullman Palace Car Co., 106 Ill. 222, (1883) ("In what respect, then, does this company differ in its relation to the public * * * from an ordinary railway company? * * * Why, then, should not the same principles be held to apply to it that apply to common carriers * * * ?), explains precisely why sleeping car language was inserted into the Interstate Commerce Act and subsequent

railroad legislation. Absent such language, a company furnishing accommodations would not be covered by these statutes because it did not operate as a rail carrier.

B. AOE Railway contracts directly with its passengers to provide transportation.

A comparison between Pullman's operation and the evidence regarding AOE Railway shows AOE Railway is not a sleeping car company. In order to reach the destination, a Pullman passenger had to purchase a transportation ticket from the rail carrier in addition to the accommodation ticket from Pullman. Where the passenger lacked a transportation ticket from the rail carrier, he or she was ejected from the train. Calhoun, supra. In contrast, riders purchase just one ticket from AOE Railway (Exhibit 59) which includes the price of transportation, the price of accommodation on the train, and other benefits, such as side trips by bus and the initial night's hotel stay as well. Further, while AOE Railway contracts with Amtrak to pull its cars, there is no privity between a passenger on an AOE Railway car and Amtrak. See Exhibit 58, "Terms and Conditions of Passage Agreement". Unlike the Pullman passenger, then, the AOE Railway customer purchases his transportation directly from AOE Railway. Accordingly, because AOE Railway is not in the business of furnishing accommodations to passengers of a rail carrier which has contracted with the passenger for transportation, it is not a sleeping car company within the meaning of the RRA and RUIA.

II. **AOE RAILWAY IS AN EMPLOYER UNDER THE RAILROAD
RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS
AS A COMMON CARRIER OF PASSENGERS BY RAIL**

A. **AOE Railway is a common carrier of passengers.**

1. ***A common carrier of passengers holds itself out to the public as willing to carry for hire all persons who may apply for passage, so long as there is room and there is no legal excuse for refusal.***

As AOE Railway is not a sleeping car company, it may be a covered employer under the Acts administered by the Board only if it meets an alternative definition of employer. For the reasons set forth below, I find AOE Railway to be covered under section 1(a)(1)(i) of the RRA and 1(a) of the RUIA as "a carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code."

The jurisdiction of the Surface Transportation Board (STB) over the railroad industry is specified by section 10501 of Title 49, which states in pertinent part as follows:

§10501. General Jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad * * * .

The term "rail carrier used in section 10501 is defined by section 10102, Title 49, as follows:

§10102. Definitions

In this part—

* * * * *

3. 'rail carrier' means a person providing common carrier railroad transportation for compensation * * *;

To be subject to STB jurisdiction, a person must provide both common carrier transportation and railroad transportation. While section 10102 does provide a definition for railroad and transportation, however, it does not define "common carrier".

A number of cases specifically consider whether an operator over a short industrial track is a common carrier by rail. See: United States v. Union Stock Yard & Transit Co., 308 US 213 (1939); Lone Star Steel Co. v. McGee, 380 F. 2d 640, (5th Cir., 1967), at 644; Kieronski v. Wyandotte Terminal Railroad Co. 806 F. 2d 107 (6th Cir., 1986), at 108-109; Association of P&C Dock Longshormen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C. 2d 280 (1992), and Loveless v. Rail Switching Services, 665 N. E. 2d 252, (Oh. App. 1995), at 254-255. However, the primary issue in these intra-state freight terminal cases is whether they operate as part of the national rail system rather than as a merely local and private spur. In comparison, AOE Railway conducts a passenger operation which traverses thousands miles and which routinely crosses numerous state lines. Consequently, the terminal freight railroad cases provide only minimal assistance in analyzing whether AOE Railway is a common carrier.

It has been said in the context of another federal statute "Although the Act itself does not further define common carriage, this term is of an ancient legal vintage." Voyager 1000 v. Civil Aeronautics Board 489 F. 2d 792 (7th Cir. 1973) at 798. That "the Act" mentioned

in the foregoing quote is the Federal Aviation Act (see current 49 U.S.C. §§ 40102(a)(2), 40102(a)(5), and 40102(a)(25)) indicates that along with antiquity, the term "common carrier" has over time acquired a broad legal scope as well, extending to new forms of transportation and into new realms of the law. In the 19th century, stage coach and steamboat companies as well as railroads were determined to be common carriers. The 20th century expanded the term to include automobile taxis, motor trucks, and airplanes. "Common carrier" also embraces pipeline companies, which transport a tangible commodity without vehicles, and telephone companies, which lack vehicles and do not transport physical objects. With the passage of time, the concept also expanded from case law allocating responsibility in private relationships in commerce and personal injury to statutory economic and safety regulation at both the State and Federal levels.

It may be argued that as a railroad is not an airplane or a motor truck, case law covering one may not be applied to the other. But then, a stage coach is not a steamboat, and none of the foregoing are telephone wires or pipelines, yet all have been considered common carriers. It may also be contended that because the objectives of economic regulatory legislation also differ from the objectives of common law rules to determine the standard of care owed to one injured through negligence no analogy may be drawn between the two. Yet a determination of common carrier status has been integral to decisions in both instances. It is true that differences in form of conveyance and in legal purpose lead to some variation between cases and among jurisdictions as to the elements of a common carrier. Compare, e.g., Public Utilities Commission v. Johnson Motor

Transport 84 A. 2d 142(Me., 1951)(considering whether a trucking firm operated over regular routes) and Jackson v. Stancil, 116 S.E. 2d 817, 824, (N.C., 1960)(considering whether air carrier had a regular place of business); Hudson Trans. Lines Inc. v. United States, 562 F. 2d 174, (2d Cir. 1977)(considering former ICC rules governing contract motor carriers providing "specialized service"). Nevertheless, and with due regard to these obvious differences, certain broad principles emerge from case law which define what a "common carrier" is and is not, and courts have used these principles interchangeably from one mode of transport to another. Atlantic Coast Line R. Co. v. Ivey, 5 So. 2d 244 (Fla. 1942) (common carriers by truck owe the same duties to public as railroads); Arrow Aviation v. Moore, 266 F. 2d 488, 490 (8th Cir. 1959)("Whether an air carrier is a common carrier is determined by the same principles as are applied in the case of carriers by other means.")⁶; Association of P&C Dock Longshoremen, *supra*, 8 I.C.C. 2d 280 (rail common carrier decisions under Federal Employer's Liability Act and rail labor and safety law may be used to determine status as rail carrier subject to economic regulation under the Interstate Commerce Act). AOE Railway itself in its brief to the Board cites Doe v. Rockdale School Dist., No. 84, 679 N.E. 2d 771 (Ill. 1997), which

⁶ The abolition of the Civil Aeronautics Board in 1978 did not abolish the common law definition of common carrier developed while that body was in existence. Woolsey v. National Transportation Safety Board, 993 F. 2d 516, (5th Cir. 1993) at 522-523. The Court did reject Woolsey's argument that doctrines evolved in non-aviation carrier cases were applicable to determining common carrier by air. (*Id.*) However, the Court rejected analogy to other modes of transportation because Woolsey sought to restrict the definition and deny that the air carrier offered common carriage under regulatory law. Given that other cases have found the analogy between ground transport and aviation sustainable, I believe Woolsey does not prevent making the reverse analogy from aviation to ground transport, and to support rather than undercut a decision that an entity is a carrier.

concerns the common carrier status of school buses. App. Br. at p, 27. Consequently, a review of decisions by various jurisdictions on the question of the common carrier status which includes not only cases concerning freight railroads, but trucking and airline companies as well, provides a better framework for analysis of the rail passenger operation by AOE Railway than cases which only consider the narrow issue of freight rail transportation alone.

To begin, then, a common carrier is defined in most general terms as one who offers to the public at large to carry for compensation persons or property from place to place. Washington ex rel Stimson Lumber Co. v. Kuykendall, 275 U.S. 207(1927); United States v. Ramsey, 197 F. 144, (8th Cir. 1912). Early cases emphasized the public nature of common carrier activity. In United States v. Louisiana & Pacific Rwy. Co., et al, 234 U.S. 1, (1914), (The Tap Line Cases), the Supreme Court held that a group of railroads operated by logging companies were common carriers. In answer to an argument that most of the traffic on the rail lines derived from the logging companies rather than the public, the Supreme Court noted:

* * * [T]his conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.

* * * Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities * * *. They are engaged in carrying for hire the goods of those who see fit to hire them. They are authorized to exercise the right of eminent domain * * *. They were treated and dealt with as common carriers by connecting systems of other carriers. 234 U.S. at 24, 26.

The Court of Appeals for the 7th Circuit provided a similar definition for a common carrier of passengers for purposes of personal injury liability:

A public, common carrier of passengers is distinguished from private carriers by the franchise 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. Indianapolis Traction & Terminal Co. v. Lawson, 143 F. 834, 837 (Cir. Ct. App. 7th, 1906).

In this view, a common carrier is a public utility, operating under a public charter granting special privileges and imposing consequent duties. Mitchell v. New York Life Insurance Co., 75 F. 2d 107, 110 (7th Cir., 1935)(a common carrier is a public utility operated for the accommodation of the public generally). The Supreme Court pointed to a lack of these characteristics to find a trucking firm was not a common carrier subject to state regulation:

His sole business is * * * limited to the transportation covered by the three contracts [earlier described by the Court]. He had no power of eminent domain or franchise under the state, and has no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public, and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him for service, and has no right to call on him for transportation. Michigan Public Utilities Commission v. Duke, 266 U.S. 570, 576 (1925).

Analyzing a common carrier in terms of public privilege and concomitant public duty has its shortcomings. For example, the state may grant one company the privilege of use of the state's eminent domain power without enfranchising the company as a common carrier, and yet may determine another company to be a common carrier without granting it eminent domain privileges. Compare: Ruddock v. Bloedel Donovan Lumber Mills, 28 F. 2d

684, 687 (9th Cir., 1928). (logging company may obtain condemnation for right of way to access timber); and Dairymen's Co-op. Sales Assoc. v. Pub. Service Commission, 174 A. 826, (opinion adopted by affirming decision, 177 A. 770 (Pa., 1935)) at 829 (Pa. Supr. 1935)(court must consider other factors since motor carriers do not possess right of eminent domain or similar characteristics of railroads and pipelines). Also, lack of a statement of the company's purpose as a common carrier in articles of incorporation may not be determinative where state law allows articles of incorporation to merely state a company is formed to conduct any legal activity. Indeed, a modern entity may choose not to formally incorporate at all, as in the case of limited liability company statutes.

Recognizing such deficiencies, courts have therefore ruled that the public's right to call on a carrier for transportation exists not in exchange for the grant of a public franchise or other formalities, but because the company has held itself out to the public as willing to act as a common carrier. The act of holding out as a common carrier creates the obligation owed to the public to follow through with the promised service.

This view is perhaps best stated by the Iowa Supreme Court in Kvalheim v. Horace Mann Life Insurance Co., 219 N.W. 2d 533, (Iowa, 1974). In finding an operator of cars and buses for sight-seeing tours was a common carrier for purposes of a multiple indemnity provision of an insurance policy, the Court stated:

It is sometimes said that the test [for common carrier] is whether he has a duty to serve all indifferently and is liable for refusal without sufficient reasons for said refusal to act. * * * Conceding * * * a duty rests upon a common carrier, to claim one is not a common carrier because he has persistently disregarded his duty and has arbitrarily chosen whom he would serve, notwithstanding the fact that he has

invited the public to apply, is to make a public duty determinable by the will and pleasure of the individual, and not by principle of law.

The question here, then, is not one of duty, but of liability. * * *

* * * If there was in truth and in fact a holding out to serve all indifferently, then the carrier *must* perform the law-imposed duty to serve all by contracting with them on demand. It is a carrier not because it must perform duties required of the carrier, but because of a legal undertaking.

219 N.W. 2d at 535-36 (quoting Circle Express Co. v. Commerce Commission, 86 N.W. 2d 888 (Ia. 1957)(emphasis in original).

Other cases also reflect the Kvalheim analysis that "holding out", or "undertaking to carry the public" is the critical element differentiating a common carrier. See, e.g. Mitchell, supra, 75 F. 2d at 109 ("A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room and there is no legal excuse for refusal."); Arrow Aviation, supra, 266 F. 2d at 490, ("A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers indiscriminately."); Voyager 1000, supra, 489 F. 2d at 799 (a critical determination is whether the operation holds itself out as ready and willing to transport passengers from place to place, thereby inviting public patronage); Austin Brothers Transfer Company v. Bloom, 147 N.E. 387, 388 (IL. 1925)("A common carrier of passengers has been defined as one who undertakes for hire to carry all persons indifferently who may apply for passage so long as there is room and there is no legal excuse for refusal * * * ."). Based on the rule expressed in these cases, I find the initial question of whether AOE Railway is a common carrier is best analyzed by considering whether it holds itself out as a common carrier.

A company may hold itself out to the public either by advertising itself as a common carrier, or by actually engaging in the business of common carriage for hire. For example, in Arrow Aviation, supra, the Court found ample evidence that defendant held itself out as a common carrier through advertising in the telephone directory that it provided nationwide air taxi service, and further showed it held itself out by conduct to be a common carrier when plaintiff contacted defendant based on the ad, and was accepted for carriage. 266 F. 2d at 490. A travel club in the Voyager 1000 case, supra, held itself out as a common carrier by soliciting membership from the public at large over a period of several years through articles it prepared for publication in newspapers and magazines, by paid advertisements in newspapers, magazines, and by commercial announcements on radio. 489 F. 2d at 795, 801. The sight-seeing tour company in Kvalheim, supra, advertised its services in weekly bulletins, and in brochures distributed to tourist agencies, an air line company, and motels. 219 N.W. 2d, at 536-37. In a case similar to Voyager, the conduct of a trucking firm constituted holding out as a common carrier where the firm claimed to limit transportation to shareholders, but evidence showed it sold stock to anyone wishing to ship with the company. Affiliated Service Corp. v. Public Utilities Commission of Ohio, 186 N.E. 703, 705 (Oh., 1933).

Based on the foregoing authorities, a common carrier is one which holds itself out, through advertisements or by its conduct, as ready and willing to transport the public from place to place for hire.

2. *A private carrier makes an individual contract in a particular instance for carriage to a certain destination.*

AOE Railway argues that by refusing service to certain individuals it does not hold itself out to the public at large, conducting its business instead as a private rather than a common carrier. Appellant's Brief at p. 27. The question of status as a private carrier has often arisen in cases which consider whether an entity is a common carrier. Because the concepts of private and common carrier intertwine, case law from various jurisdictions considering varying modes of transportation is also useful in ascertaining the elements of a private carrier.

In connection with determining the standard of care to which an operator of a crashed airplane would be held, the North Carolina Supreme Court defined a private carrier as follows:

"A private carrier * * * is one who makes an individual contract in a particular instance for the carriage * * * to a certain destination. The private carrier * * * does not hold himself out to the public as ready to accept and carry * * * all who offer. Each act of transportation is a separate and individual act. It is not for the public convenience and necessity, but is a private transaction. The private or contract carrier may refuse * * * to contract for carriage." Jackson v. Stancil, supra, 116 S.E. 2d at 824, quoting State v. Gulf-Atlantic Towing Corp., 110 S.E. 2d 886 (N.C., 1959).

Other jurisdictions have applied essentially the same definition. Rathburn v. Ocean Accident and Guarantee Corp., 132 N.E. 754, 755 (IL., 1921) (auto livery service was not a common carrier under an insurance policy double indemnity clause); Dairymen's Co-op. Sales Assoc. v. Pub. Service Commission, supra, 174 A. at 831 (trucking firms contracting

with an association to haul milk for members are private carriers not subject to Pennsylvania motor carrier regulation).

One indication of private carrier status is limitation of the number of contracts for carriage. Thus, in Michigan Public Utilities Commission v. Duke, 266 U.S. 570 (1925), the Supreme Court held that a trucking firm with three contracts to haul auto bodies from Detroit to Toledo using 75 employees and 47 trucks exclusively for these contracts was a private carrier not subject to the Michigan Public Utilities Commission. In Miles v. Enumclaw Co-Operative Creamery Corp., 121 P. 2d 945 (Wash., 1942) between 98 and 99% of a trucking company's business was hauling milk under one contract with Creamery which specified payment at a rate below that set by state for common carrier cartage. The trucking company obtained a state license as a common carrier during the contract period, but continued hauling for Creamery at the contract rate. Sometime during the contract the trucker refused to do business with another firm who would not give a similar exclusive contract. After the Creamery contract ended, the trucking company ceased the carriage business, but sued Creamery, claiming it should have paid the trucking firm the higher common carrier rate. The Court found that despite the state certificate, the trucker had not acted as if it sought the public's business, and therefore had not held out as a common carrier. 121 P. 2d at 946, 947. Similarly, the Court held in Dairymen's Co-op. Sales Association, supra, that two trucking companies which contracted with the Association were not subject to state regulation as motor carriers. Because the Association's contract required that the truckers haul exclusively for the Association's members, the trucking firms

were not offering to haul for the public in general, but only to the Association. 177 A. at 830. See also Doe v. Rockdale School District No. 84, supra, at 679 N.E. 2d 794-795, (bus company which specifically contracted with school district only to haul students for an agreed period for an agreed compensation, and which neither advertised transportation nor indiscriminately transported members of the public, was a private carrier for purposes of the standard of care owed to an injured student).

Another characteristic of a private carrier are individualized negotiations to conclude each contract as it is made. Three air carrier cases exemplify how a carrier may make a private contract with individual passengers. In Scarborough v. Aeroservice, Inc., 53 N.W. 2d 902 (Neb., 1952), plaintiff enrolled in Aeroservice's airplane mechanics school. At the end of a day's class, plaintiff asked the corporate secretary if he could rent a ride on a company plane. The secretary and plaintiff agreed on a 45 minute flight for \$10. The Court found on these facts that Aeroservice was a private carrier with respect to the duty it owed the plaintiff. The case of Brown v. Pacific Mutual Life Insurance Co. 8 F. 2d 996, (5th Cir., 1925) concerned a similar case. A pilot took passengers for 10 minute rides in his plane, returning to point of departure at a Florida resort. He would not fly with less than 3 passengers, flew without a schedule at such times as he wished, and did not advertise. The pilot was held not a common carrier for purposes of the double indemnity provision of an insurance policy. Defendant in Jackson v. Stancil, supra, operated a business using three planes at a North Carolina airport. His business sold airplanes, sprayed crops, towed advertising banners, and carried passengers for hire. Co-plaintiff Smith, a flying

student of Stancil, "arranged with Stancil for a flight to New York and return for a charge of \$135.00." 116 S.E. 2d at 819. There was no evidence Stancil advertised in the telephone directory, or in the printed and electronic media. Id. at 825. The Court held Stancil was a private carrier "[u]nder the facts and circumstances of this case". 116 S.E.2d at 826.

Individual negotiations also played a role in the Court's decision in Rathburn v. Ocean Accident and Guarantee Corp., supra, which concerned the status of an auto livery service as a common carrier under an insurance policy double indemnity clause. The livery service provided cars to those who called its garage. The car was hired at an agreed sum per hour or an agreed sum per trip, but not when weather "was bad or stormy", and only if the contracting party was "suitable". 132 N.E. 754, 755 (IL. 1921). In Loveless v. Railway Switching Services, supra, the operator of rail freight switching services was a private carrier not liable to an injured employee under the Federal Employer's Liability Act, where it contracted individually with customers, selecting in each case only those operations which met the condition that no common carrier tracks would be used. 665 N.E. 2d 255. By comparison, the lack of negotiations of terms or charges in Circle Express Co. v. Iowa State Commerce Commission, 86 N.W. 2d 888, 892 (Ia. 1957), showed that the trucker did not act as private carrier.

Prior decisions of the Railroad Retirement Board under the Railroad Retirement and Railroad Unemployment Insurance Acts have considered whether a switching operation holds itself out to the public as a common carrier, or acts as a private carrier with respect to a limited number of shippers. Six decisions on this issue are included in the

record as Exhibit 44. Four of these decisions present essentially the same fact pattern: an entity purchases or acquires operating rights over a short rail line which serves one industry, and is held by the Board not to be a rail carrier employer under the Acts because it offers its service to one shipper rather than to the general public. See: B.C.D. 94-29 *Hardin Southern Railroad Company* (Ex. 44A); B.C.D. 94-105.2 *Great Miami & Western Railway* (Ex. 44B); B.C.D. 94-113 *GWl Switching Services, L.P.* (Ex. 44C); B.C.D. 95-39 *Fulton County Railroad, Inc* (Ex. 44D). In a fifth instance, the Board did not make independent findings, relying on the decision of the ICC that the Port authority did not offer itself to the public. B.C.D. 96-59 *Port of Palm Beach District Railroad* (Ex. 44F).

The remaining decision illustrates the general distinction drawn by the Board between private and common rail carriers. In B.C.D. 96-19 *GWl Switching Services, L.P.* (Ex. 44E) the Board reconsidered the status of the same entity determined to be a private carrier in B.C.D. 94-113, above (Ex. 44C). GWl apprised the Board that a trackage rights agreement with the Southern Pacific Railroad (SP) over 5 miles of SP branch and main line allowed access to a second trunk rail carrier, Burlington Northern Railroad (BN). GWl believed access to BN over the SP allowed it to "offer significant opportunities for expanded service by GWl to a variety of customers in the area." In view of the wider sector of the public GWl intended to serve, the Board held "Since GWl does hold itself out as a common carrier to provide rail services, the Board finds that it does fall within the definition of carrier employer * * *."

Consistent with Board precedent regarding intrastate freight lines, the foregoing cases lead me to conclude that a private carrier is one which agrees with a limited number of customers/shippers to transport for them for compensation which is mutually agreed.

3. *A common carrier may hold itself out as ready to carry only a segment of the public and may refuse with a legal excuse to carry an individual in a particular instance.*

The lesser standard of care owed to the public and greater freedom from economic regulation has led many entities to argue their business is so limited as to render them private carriers. However, courts have held that a common carrier may limit its offer to less than the entire public without conducting business as a private carrier.

In Terminal Taxicab Co. v. Kutz, 241 U.S. 252 (1916), a taxi company argued it was not a common carrier subject to the District of Columbia's Public Utilities Commission. Taxicab had contracts with (1) a railroad station owner and (2) several hotels, which gave the taxi company an exclusive right to furnish cabs at those locations. Justice Holmes wrote that the cab company and its vehicles were:

a public utility by ancient usage and understanding (citation omitted), as well as common carriers by the manifest meaning of the act * * * none the less that it only conveys one group of customers in one vehicle. (241 U.S. at 254). We do not perceive that this limitation [in the case of hotel contracts, to serve only hotel guests] removes the public character of the service * * *. No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts. * * * We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. (241 U.S. 255)

Subsequent cases hold that an offer of carriage directed to a limited public suffices to establish the entity as a common carrier. In Public Utilities Commission v. Johnson Motor Transport, 84 A. 2d 142 (Me., 1951), the Court held that a trucking company, licensed as a common carrier over certain routes and as a private motor carrier over others, had exceeded its private carrier license under Maine law because it held itself out as a common carrier over unauthorized routes. The Court noted evidence that the trucker "accepted anybody's freight, that it had rarely, if ever, refused freight, and that the rate charged was the common carrier rate or 'sometimes higher'". 84 A. 2d 147. The trucking firm in Circle Express Co. supra, argued it was a private carrier because it confined its transport to a certain class of commodities of a smaller weight and size, because it had refused shipments which were dirty or poorly wrapped, and because it had refused to do business with a firm which offered few shipments and refused the business of any department stores. 86 N.W. 2d 892. The Court nevertheless found the evidence supported a finding that the trucker was a common rather than a private carrier because it would "transport for hire the goods of all persons indifferently so long as it has room and the goods are of the type it assumes to carry". 86 N.W. 2d 893. See also, Affiliated Service Corporation, supra, 186 N.E. at 704 (common carrier although business limited to hauling motion picture films).

The case of Woolsey v. National Transportation Safety Board, *supra*, concerned an air carrier which specialized in transporting musicians to performances as an alternative to travel by bus. 993 F. 2d at 517. While the National Transportation Safety Board (NTSB) investigated a crash of one of the company's planes flown by an employee, it learned owner Woolsey had piloted other flights without the credentials required if the company operated as a common carrier. The NTSB determined his company was a common carrier, and therefore revoked Woolsey's license. *Id.* at 518. Noting that the firm advertised in a music trade periodical and that there was no evidence it "ever turned away anyone in the music industry who applied to it for air transportation and was willing to pay its fee" (*Id.* at 517), the Fifth Circuit affirmed the NTSB, stating: "What is critical is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public which it serves." 993 F.2d at 524. See also, Voyager 1000, *supra*, at 489 F. 2d 801.

Even where a particular client would otherwise fall within the circle of the public to which the carrier normally offers its services, a common carrier may also refuse carriage on the basis of a "legal excuse". In Ziser v. Colonial Western Airways, Inc., 162 A. 591 (N.J. Sup. Ct. 1932), the air carrier was held to owe passengers killed in a crash the higher standard of care applicable to common carriers. The Court answered Airways' claim that its policies regarding passengers rendered it a private carrier:

The regulations on taking of passengers cited by counsel as removing defendant from the common carrier class seem to us to be merely proper rules for such a

carrier to make and enforce, as e.g., no drunken or noisy person to be taken, no overloading, no flight if weather bad. A set schedule is no essential of common carrying; nor is such a carrier required to when there is no set schedule, to operate with half a load. 162 A. 592.

In the recent case of Ward v. Housatonic Area Regional Transit District, et. al, 154 F. Supp. 2d 339 (D. Conn., 2001), the District Court found a bus operator could exclude a member of the public following a continuing series of altercations. Addressing the plaintiff's argument that the bus operator, as a common carrier, had a duty to transport him, the Court noted Connecticut case law to the effect that a common carrier transports all persons up to its capacity provided no legal excuse existed to refuse, but found no " * * * case law to support the proposition that a plaintiff could bring a claim against a carrier for refusing service. In fact, cases from other states indicated that common carriers are able, by law, to enforce rules and regulations even if that means deprivation of service to individual passengers. (citation omitted). " 154 F. Supp. 2d at 349.

See also, Calhoun v Pullman Palace Car Co. supra, (Purchaser of a Pullman ticket was ejected from the train by the railroad because he did not also have a ticket over the host railroad).

Based on the foregoing authorities, I conclude that a carrier of passengers remains a common carrier if it undertakes for hire to carry all persons of that segment of the public which it serves who may apply for passage, so long as there is room and there is no legal excuse for refusal.

4. *The evidence supports a conclusion that AOE Railway is a common carrier of passengers rather than a private carrier.*

A review of the evidence of record shows that AOE Railway meets each of the foregoing standards for determining it to be a common carrier of passengers.

First, the evidence shows that AOE Railway meets the threshold requirement by making an offer of carriage. It refers to itself as a carrier in the "Terms and Conditions" document, and again on the ticket each passenger receives. (Exhibits 58, 59). At the hearing, the witness acknowledged that these were documents produced by the company to constitute the contract with its passengers. (Tr. 148). If it is granted that the price of that ticket is a multiple of the price of a comparable ticket for passage on Amtrak, it must also be granted that the price does include transportation on the train run by AOE Railway. If it is argued that at the price set by AOE Railway it is selling an "experience", it also cannot be denied that it also sells rides on its train as an integral part of that experience. After all, the distinguishing characteristic of AOE Railway, the very source of its identity, is ownership and operation of its trains. Simply put, AOE Railway offers to provide the public with passenger rail transportation. AOE Railway also offers meals, lectures, bus tours and an initial overnight stay in a hotel before train departure as part of the price paid by the passenger, but the fact that it offers more does not erase the offer of rail transport.

The record also shows that AOE Railway holds itself out to the public as a common rather than a private carrier. AOE Railway solicits passengers by advertisements in

national magazines, by retaining a publicity firm, by distributing brochures directly to the public and to travel agencies, and by employing a sales staff to seek a wider market. (Exhibit 55; Tr. 76, 171, 173, 179). It has also fostered a series of documentaries which initially triggered 28,000 reservation inquiries from the television audience. (Tr. 97, 177-178). Of course, as a result of its market research (Exhibit 54) AOE Railway targets its advertisements at those who would most likely be interested in an expensive vacation on its trains. This is not a limitation of its offer to the public; it is merely good business practice.

The AOE Railway offer of transport, as embodied in its brochures, is also made indifferently to each member of the public it serves. Set routes are depicted, and itineraries are stated. Aside from its promotional activities with travel agents, passengers must pay a fixed price to ride each route. There is no negotiation or other accommodation offered in individual transactions as to destination or price. Each passenger must "take it or leave it."

Conditions and limitations in the offer made by AOE Railway do not so restrict its general nature so as to render AOE Railway a private carrier. The health requirements and restrictions on use of walkers and wheel chairs on board the pre-ADA passenger cars are no more than reasonable precautions, given the nature of the equipment used by AOE Railway, the distance from medical facilities while traveling some remote portions of the itineraries, and the off-train activities. Moreover, the evidence is that AOE Railway has imposed these restrictions in only a handful of situations. Although there is no evidence regarding the number of prospective passengers turned away as a result of AOE

Railway's refusal to carry families with children under 8 years of age, even excluding all these individuals, the AOE Railway offer is still directed to a vast proportion of the public which remains. Accepting the proposition that these limitations are otherwise legally permissible at all, then they are the basis for a legal excuse to refuse carriage in individual cases while retaining AOE Railway's status as a common carrier.

In sum, AOE Railway meets the first element of coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts as a rail carrier because it holds itself out to the public as a common carrier of passengers.

B. AOE Railway provides railroad transportation within the meaning of part IV of Title 49 of the United States Code.

As noted at the outset of section A above, to be subject to STB jurisdiction a common carrier must provide railroad transportation. Unlike the term "common carrier", however, the statute does define railroad transportation. I find that AOE Railway provides railroad transportation within the meaning of part IV of Title 49.

The definition of both "railroad" and "transportation". is set forth by section 10102(5) as follows:

§10102. Definitions

In this part—

(6) 'railroad' includes—

(A) a bridge, car float, lighter, ferry and intermodal equipment used by

or in connection 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;

(7) 'rate' means a rate or charge for transportation;

(8) * * *

(9) 'transportation' includes—

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality 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; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property: * * *

Insofar as relevant here, to be a rail carrier under 10105, the carrier must both use rails which it owns or operates by agreement pursuant to paragraph (6), and provide transportation by the various instrumentalities enumerated by paragraph (9).

The express company⁷ cases illustrate how a common carrier may utilize rail road and yet not be a rail carrier. In U.S. v. American Railway Express Co., 265 U.S. 425 (1924), the Court held that express companies did not fall within the term "carrier by railroad" for purposes of the ICC authority to set rates over "through routes". Justice

⁷ An express company is defined as one in the business of transporting parcels or other moveable property, in the capacity of common carrier, and especially undertaking the safe carriage and speedy delivery of small but valuable packages of goods and money. American Railway Express Co. v. Wright, 91 So. 342 (Miss. 1922).

Brandeis wrote: "An express company has no railroad. It is served by many railroads, as it is served by water lines, by motor trucks, and by horses and wagons." 265 U.S. at 431. "The natural meaning of 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad." 265 U.S. at 432. See also: Wells Fargo v Taylor 254 U.S. 175, 187, 188 (1920)(Express company is not a rail carrier employer for FELA purposes).

While it may be argued that AOE Railway, like American Railway Express, "has no railroad", this overlooks the fact that AOE Railway does negotiate through Amtrak for the use of particular lines of rail to be used by its trains at particular times. (Tr. 118, and Exhibit 36H. Operating and Maintenance Agreement, Section 1). In comparison, there is no suggestion in American Railway Express or in Wells Fargo that the express company's arrangements with rail carriers went beyond shipping the goods of its customers. Rather than turn its passengers over to a railroad for "shipment" in a sense analogous to Express Company, AOE Railway thus retains control of each train and its passengers ride during the trip.⁸ AOE Railway operates the railroad it uses under its agreement with Amtrak within the meaning of 10102(6).

Comparison with the car company cases shows how AOE Railway uses its passenger cars to provide transportation as well. The Supreme Court case of Ellis v. Interstate Commerce Commission, 237 U.S. 434 (1915) concerned a company which

⁸ While section 3D of the Operating Agreement does state Amtrak will control equipment and crew while under way, the witness testified that in practice the AOE Railway "hotel manager" is the final word on board. Tr. 150.

owned refrigerator cars which it leased to railroads on a rate per ton shipped, and for which the railroad then charged shippers by tariff. In holding the company not to be a common carrier by rail, the Court noted: "It has no control over motive power or over the movement of the cars that it furnishes * * * and in short, notwithstanding some arguments to the contrary, is not a common carrier subject to the [Interstate commerce A]ct." (237 U.S. at 444). In the later case cited by AOE Railway (App. Br. 28) U.S. Ex Rel. Chicago, New York, & Boston Refrigerator Company. v. Interstate Commerce Commission, 265 U.S. 292 (1924), a company which owned refrigerator cars which it leased to railroads on a mileage basis claimed eligibility for an operating income guaranty as a rail carrier under the Transportation Act of 1920. The Court, citing Ellis, determined Refrigerator Company was not a rail carrier because its income came not from operating a railway, but from rent paid by railroads which used the cars as instrumentalities of interstate commerce. Id. at 296-97.

Once again, AOE Railway bears some superficial similarity to the car rental companies. AOE Railway uses passenger rail cars in its business; passenger cars which it owns or leases, and which move people by rail. The companies in both Ellis and Refrigerator Company furnished rail cars to the carriers and shippers for a fee. However, the rental companies merely placed cars into the hands of the real carrier, which then provided the transportation service to the shipper. The shipper may have paid the car company for use of the car, but it paid the railroad for transportation. In comparison, AOE Railway earns its revenue not from car rentals but from selling trips by rail to the public.

On the facts of this case, AOE Railway fills cars it owns or leases with individuals who have a direct contract with AOE Railway to transport them over a route and to a destination both designated by AOE Railway. By using these passenger cars to operate over rail road over which it has obtained the right to operate, AOE Railway meets the definition of a rail carrier under part IV of Title 49.

C. **Rail passenger service by AOE Railway is not exempt from Surface Transportation Board jurisdiction.**

AOE Railway argued at the hearing (Tr. 185-189) that regardless of whether it might otherwise be a rail carrier subject to part IV of Title 49, AOE Railway is exempt because part IV only applies to freight rail carriers. I find this argument is based on a faulty interpretation of the law.

AOE Railway argues that the ICC Termination Act of 1995 (P.L. 104-88, 109 Stat. 803) completely deprived the new Surface Transportation Board of jurisdiction over all rail passenger service. AOE Railway rests this interpretation upon the Conference Report on the bill which ultimately became P.L. 104-88. See H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. (1995), reprinted in 1995 U.S.C.C.A.N 850. The section by section analysis in that report of the conference bill compares the bills passed by the House and Senate with the bill proposed by the conferees as follows:

SEC. 10102 Definitions

House Provision

The amended definitions delete several terms rendered redundant in light of the abolition of regulatory jurisdiction over express and sleeping car companies. * * *

Senate Amendment

* * * amends 49 U.S.C. 10102 which defines terms used in rail provisions, to remove terms that are not pertinent, to update and clarify the term "rail carrier", and to remove references to passenger transportation.

Conference Substitute

This provision integrates changes common to both House and Senate provisions to reflect reductions in regulatory jurisdiction. * * * To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of "rail carrier" is limited to persons providing *common carrier* rail transportation.

SEC. 10501 General Jurisdiction

House provision

This provision (Section 10301) replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct preemption of State economic regulation of railroads.

Senate amendment

Section 304 (General Jurisdiction) amends 49 U.S.C 10501, which establishes jurisdiction over rail and pipeline transportation and intermodal rail-water or pipeline-water transportation in several respects. The exclusive nature of the Board's regulatory authority would be clarified. The Board's rail jurisdiction would be limited to freight transportation, because rail passenger transportation today (other than service by Amtrak, which is not regulated under the Interstate Commerce Act) is now purely local or regional in nature and should be regulated (if

at all) at that level. Outdated references to express and sleeping car carriers, which no longer exist, would be removed. References to the regulation of intrastate rail transportation would be updated.

Conference substitute

This provision adopted by the Conference changes the statement of agency jurisdiction to reflect the curtailment of regulatory jurisdiction in areas such as passenger transportation. In light of the exclusive Federal authority over auxiliary tracks and facilities, this subject is integrated into the statement of general jurisdiction. This section also clarifies that, although regulation of passenger transportation is generally eliminated, public transportation authorities that meet the existing criteria for being rail carriers may invoke the terminal area and reciprocal switching access remedies of section 11102 and 11103.

As noted above, 10102(9) continues to define transportation to include a "car, * * * instrumentality or equipment of any kind related to the movement of passengers or property" as well as "services related to that movement" (emphasis supplied). A definition which declares what a term used in a statute means is binding in interpreting that statute. Stenberg v. Carhart, 530 U.S. 914, 942 (2000). Moreover, when used in a statutory definition, the word "includes" is usually a term of enlargement rather than limitation. It conveys the conclusion that other items are includable though not specifically enumerated. Argosy Ltd. v. Hennigan, 404 F. 2d 14, 20 (5th Cir., 1968). If section 10102(9) provides that the STB jurisdiction continues to include transportation provided by passenger cars and services related to movement of passengers, then it conflicts with the references in the House Conference Report to elimination of regulation of passenger transportation. Of course, in such an event the language of the statute must control. Abourezk v. Reagan, 785 F. 2d 1043, 1054-55 n.11 (D.C. Cir. , 1986). In point of fact, however, the legislative history and the enacted statute are in accord.

The recent case of Florida East Coast Railway v. City of West Palm Beach, 266 F.

3d 1324 (11th Cir. 2001), explained purpose of the ICC Termination Act as follows:

"The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing direct economic regulation by the States * * *. The pre-ICCTA statute expressly authorized regulation of certain railroad activities to be undertaken concurrently by the federal and state governments, while still other regulation would be the exclusive province of state law. * * * The ICCTA removed the authority of the States to regulate those railroad activities that had previously been subject to state regulation or to concurrent federal-state regulation, providing instead for federal uniformity in the regulation of rail transport." 266 F. 3d at 1337.

The blanket Federal pre-emption of the former concurrent regulatory authority is found in paragraph 10501(b), which states in pertinent part:

§10501. General Jurisdiction

* * * * *

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers
* * *

(2) [and construction, use and abandonment of side and switching tracks] * * * is exclusive. * * *

The following paragraph 10501(c)(2) then carves out a limited exception allowing the States to regulate commuter operations conducted by local governmental authorities:

(c)(1) [defines mass transit and local governmental authority for purposes of 10501(c)] * * *

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local government authority.

(3)(A) [provides the STB may exercise jurisdiction of local commuter authorities which would have been a rail carrier prior to the ICC Termination Act].

Other than passenger service conducted by a local government authority, therefore, the STB retains jurisdiction under subtitle IV of Title 49 of passenger transportation by rail as part of its general jurisdiction over all rail transportation in the United States.⁹

It may be noted that Amtrak itself is subject to the jurisdiction of the STB under subtitle IV of Title 49 in limited circumstances relating to recording car ownership, taxation of employee compensation, and liability on bills of lading, but is excluded from other provisions. See 49 U.S.C. § 24301(c). There is no doubt that Amtrak would otherwise completely fall within STB jurisdiction as a rail carrier. Cf. Southern Pacific Transportation Co. v. Smith Material, 616 F. 2d 111, 115 (5th Cir., 1980) and Aliotta v. National Railroad Passenger Corp., 315 F. 3d 756, 765, both holding Amtrak to be a common carrier for liability purposes. There is no comparable provision, moreover, excluding one who operates equipment and facilities necessary for intercity passenger transportation under contract with Amtrak. See 49 U.S.C. 24305(a); 24701. Although Congress was unaware at the time of the ICC Termination Act of any intercity passenger operator other than Amtrak, nothing in the Act or elsewhere precludes such an operator from being subject to the jurisdiction of the STB pursuant to section 10501.

Accordingly, I conclude as a matter of law that interstate passenger transportation by rail carrier is subject to the jurisdiction of the STB under Subtitle IV of Title 49.

⁹ In recognition that loss of STB jurisdiction over local commuter authorities under 10501(c)(2) might otherwise be construed as a termination of coverage of these authorities under the Railroad Retirement and Railroad Unemployment Insurance Acts, paragraph 10501(c)(3) explicitly provides that the coverage of employers and employees is unaffected. Ex. 42H *Cumbres & Toltec*, B.C. D. 99-18 at 7-8.

D. **AOE Railway is not an excursion passenger operation exempt from coverage under applicable Railroad Retirement Board precedent.**

The final argument presented by AOE Railway is that aside from whether it may be determined to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts because it is a rail carrier subject to the jurisdiction of the Surface Transportation Board under Subchapter IV of Title 49 of the U.S. Code, AOE Railway is not an employer under relevant Railroad Retirement Board precedent relating to tourist excursion and museum passenger operations. I find these decisions to be distinguishable from the facts in this appeal.

The nine RRB decisions cited by AOE Railway (App. Br. 29-30) appear in the record as Exhibit 42. Five of these concern operations transporting only passengers, and solely within one state. See: L-90-77, *Camp Five Museum Foundation, Inc.* (Ex. 42A); L-91-122, *Scenic Rail Dining, Inc.*, (Ex. 42B); B.C.D. 93-36 *Grand Canyon Railway, Inc.*(42C); B.C.D. 93-62 *AnSCO Investment Company*,(42D); B.C.D. 94-9, *Santa Cruz, Big Trees & Pacific Railway Co.*,(42E). In each case, the Board concluded that since the subject company neither crossed state lines nor interchanged local freight with an interstate rail carrier, the subject company did not engage in interstate commerce. Hence, the company was not a rail carrier employer under the Acts administered by the Board. As all AOE Railway passenger routes cross state lines, the intrastate passenger service rule stated in these five decisions does not apply.

The four remaining RRB decisions cited by AOE Railway do indeed concern passenger trains which crossed state lines. Prima facie, these operations conducted interstate commerce, yet the Board determined they were not rail carrier employers.

Considering this aspect alone, it would appear the Board should determine AOE Railway not to be a rail carrier employer as well.

Again, the decisions may be subdivided into two categories. In B.C.D. 94-14, *Minnesota Transportation Museum*, (Ex. 42F) and in B.C.D. 97-85 *Indiana and Ohio Rail Passenger Corp.* (Ex. 42G), a seasonal passenger train crossed a state line twice as part of a single trip which brought the passengers back to the state of departure. Both entities ran trains over track owned and apparently operated by a freight railroad. In the *Indiana and Ohio* case, the Board explicitly based its decision on the fact that "although the trains operated by the I&O may cross the Indiana and Ohio border during an excursion, since the passengers are transported only in a circuit back to the state of origin the use of the trackage rights is not part of the interstate rail system."

The remaining two decisions, B.C.D. 99-18, *St. Louis Car Company d/b/a Cumbres & Toltec Scenic Railroad* (Ex. 42H) and B.C.D. 99-27, *Cumbres & Toltec Scenic Railroad Corp.* (Ex. 42 I) really concerned the same operation conducted by two successive entities. A seasonal steam passenger train operated over 65 miles of narrow gauge track leased from an unaffiliated company which owned other railroads. The line terminated at Chama in New Mexico and at Antonito in Colorado. Passengers had three trip options. They could board at either terminus, ride to a midway point and return back again by train; or they could make a 7 hour train trip one-way the full length of the line, starting from either Colorado or New Mexico, and then make a 90 minute passenger van return trip back to the boarding point. The time difference between van and train travel times represented the difficult terrain traversed by rail as compared with road, and a stop

at the mid-way point. Noting the isolation of the destinations and that no freight service ran over the line, the Board, citing *Minnesota Transportation Museum*, held that because the operator "did not interchange with any railroad, and did not through ticket any passengers or freight onto any other rail carrier" the Car Company "did not operate a railroad in interstate commerce and thus did not fall within the carrier definition under the RRA and the RUIA" (Ex 42H at 10). Later the Board briefly determined that the entity which assumed operations from Car Company was not an employer on the same basis. (Ex. 42 I).

One element of the tourist line operations which the Board has determined to be exempt from coverage is the relatively short time span and mileage of the transportation provided. Passengers in *Minnesota Transportation Museum* traveled 20 miles in 90 minutes; the trip in *Indiana and Ohio* covered 14 miles in 60 minutes. At four hours, the 76 mile ride in *Camp Five Museum Foundation, Inc.*, lasted somewhat longer, while, as noted above, the trip in *St. Louis Car Company* and *Cumbres & Toltec* could take up to 7 hours, including stopover mid-way. In no case, however, did the ride last more than 8 hours.

Another element, common to the *Minnesota Transportation Museum*, *Indiana and Ohio*, *St. Louis Car Company*, and *Cumbres & Toltec* decisions, is that the passenger while nominally moving interstate actually traveled in a loop back to the state of departure. The incidental nature of crossing the state line is particularly clear in *Minnesota Transportation Museum* and *Indiana and Ohio*, where the circuit consists entirely of the ride on the train. Such a route emphasizes the amusement park element of the ride as compared to transportation in interstate commerce to a destination. *St. Louis Car*

Company and *Cumbres & Toltec* are less clear because the circuit might be completed by a return on the train from mid-point, or a bus ride. Nevertheless, return to point of departure remained part of the total package.

The foregoing Board precedent indicates that to be exempt from coverage as a rail carrier employer under the Acts, a tourist excursion railroad must carry only passengers. In addition, it must establish that it is operated as an amusement and not as part of the national system of rail transportation.¹⁰ Evidence supporting a conclusion that a tourist excursion line is not part of the national system of rail transportation includes operation entirely intrastate, operation for only short distances covered in relatively short time periods, or return to point of departure.

In comparison, the scale of AOE Railway operations (52 scheduled interstate trips in 2002 per Exhibit 52, excluding the entirely Canadian itinerary) differs significantly from any of the cited "tourist excursion line" Board decisions. Most AOE Railway trips begin in one state and terminate in another, although the "Autumn in New England" itinerary departs from and returns to Boston, Massachusetts after traveling through Vermont, New Hampshire, Quebec and Maine. (Ex. 52, 2002 brochure). In all but this New England itinerary, the passenger must find his or her own way back to the point of departure, or homeward. Moreover, in all cases, even including the New England run, the trip runs for several days through several states over hundreds of miles. AOE Railway does not fit the fact profile of any of the foregoing decisions.

¹⁰ In this regard, the tourist excursion line exemption resembles the statutory test for exempt electric interurban passenger lines found in both Acts. See section 1(a)(2)(ii) of the Railroad Retirement Act (45 U.S.C. 231(a)(2)(ii)), and section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. 351(a)).

Because AOE Railway conducts interstate rail passenger service which differs both in scale and in course of operation from prior Board decisions concerning tourist excursion railroads, it is not exempt from coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts.

E. AOE Railway is not a successor employer of American European Express for purposes of the Railroad Unemployment Insurance Act.

AOE Railway argues in its brief to the Board that it is not a "reincarnation" of the defunct AEE. (App. Br. pp. 15-19). The purpose of this argument is to refute any inference that because AEE was determined by the Board to be a covered sleeping car company under the Acts as previous operator of a portion of the fleet of passenger rail cars now operated by AOE Railway, then AOE Railway must be a sleeping car company employer as well. Because I find (*supra*) AOE Railway (and its corporate predecessor AOE Inc.) to be covered employers as rail carriers on the basis of evidence of their own business conduct, any relationship between AEE and AOE Railway is irrelevant to that determination.¹¹

Any business relationship between AOE Railway, AOE Inc. and AEE is relevant to determination of the employer contribution rate pursuant to section 8(a) of the RUIA (45 U.S.C. §358(a)). That section provides in general that the employer's contribution shall take into consideration the benefits paid after December 31, 1989 under the RUIA to employees of that employer. See section 8(a)(15) of the RUIA (45 U.S.C. § 358(a)(15)) and regulations of the Board at 20 CFR 345.302(f). Section 8(a)(19) of the RUIA

¹¹ Although it appears that AEE itself may have been a rail carrier rather than a sleeping car company, the basis for coverage is moot in view of that company's cessation of business.

(45 U.S.C. § 358(a)(19)) further specifies the conditions under which a merger, consolidation, unification or reorganization of an employer affects the employer's contribution rate. In addition, section 345.204 of the regulations (20 CFR 345.204) which implements RUIA section 8(a)(19), provides in pertinent part:

345.204 Sale or transfer of assets.

- (a) In the event property of an employer is sold or transferred to another employer (or to a person that becomes an employer as a result of the sale or transfer) or is partitioned among two or more employers or persons, the individual employer record of such employer shall be prorated among the employer or employers that receive the property (including any person that becomes an employer by reason of such transaction or partition) * * *.
- (b) There shall be no transfer of the employer record where an employer abandons a line of track in accordance with the provisions of the Interstate Commerce Act and the applicable regulations thereunder, and a new entity, found by the Board to be an "employer" * * * is formed to operate or continue service over such line; the Board will assign to such entity a new-employer contribution rate in accordance with section 8(a)(1)(D) of the RUIA and 345.304 of this part.

The evidence of record is that after two accidents in 1991, AEE suspended operations in October of that year, never to resume. (Exhibit 8, p. 61). The fleet of passenger cars which were operated as AEE laid dormant until August 1994, when Reiseburo Mittelthurgau and Trans Texas Rail initiated weekend excursions from San Antonio, Texas to Branson, Missouri. (*Id.*, p.63). The following year, "several" coast to coast trips under the name "American Orient Express" were conducted by T. C. Schwartz, doing business as TCS Expeditions. Mr. Schwartz formed a Washington company in September 1995 named AOE Incorporated, and registered the trade names "American Orient Express Railway Company" and "AOE Inc." as well. After expanding operations again in 1996, TCS Expeditions and Reiseburo Mittelthurgau sold their assets and trade

name registrations to ORC on September 15 and November 14, 1997, respectively. (Exhibits 36B and 36C).

If ORC and AOE Incorporated had purchased the assets of AEE at the time AEE ceased operations, then ORC and AOE Incorporated would have received the assets of an employer and therefore would be responsible for any employer record of RUIA claims as well pursuant to section 345.204(a) of the Board's regulations. Although it is unclear whether Reiseburo Mittelthurgau, the vendor of the rail car assets in 1997, owned any interest in the passenger car fleet prior to 1994, however, the evidence does show that passenger service was actively conducted by AEE rather than by Reiseburo through 1991, and then discontinued altogether for over two years. Moreover, before AOE Incorporated began operation following the 1997 sale of the assets to ORC, the assets of AEE had been operated successively by two additional, evidently unrelated entities (Trans Texas Rail and TCS Expeditions), neither of which has at any time been determined to be an employer under the Railroad Unemployment Insurance Act.¹² On the evidence of record, then, when ORC and AOE Incorporated purchased the passenger rail cars, accounts receivable and rights to the name American Orient Express through the 1997 purchase, they therefore did not acquire the assets of a covered employer.

On these facts, I find that AOE Inc. and AOE Railway are new employers for purposes of establishing an employer record for assessment of contributions under section 8 of the Railroad Unemployment Insurance Act. AOE Incorporated became a

¹² While it appears from the evidence of record that the TCS Expeditions may also have been a rail carrier employer, in view of (1) the lack of a complete record (including any contract with Amtrak), (2) the evidence of record that the TCS exited the railroad business with the sale over five years ago, and (3) the lack of any benefit claims filed with the Board from any employee of these firms, I decline to make any findings regarding the status of either Trans Texas or TCS as a covered employer under the Acts.

covered employer under the Acts effective with the closing of the sale of the rail car assets, November 14, 1997. Because AOE Railway became a covered employer effective with its formation as a limited liability company on April 1, 1999 and assumption of operation formerly conducted by AOE incorporated, AOE Railroad is the successor employer to AOE Incorporated.

III. RAIL SERVICES AND EQUIPMENT COMPANY ARE RAIL CARRIER AFFILIATE EMPLOYERS UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS.

A. Rail Services and Equipment Company are under common control with a rail carrier employer.

At the hearing, the witness for AOE Railway testified that the appellant is one among a group of affiliated companies. (Tr. 127, 131-140). The status of these companies as covered employers under the RRA and RUIA has not previously been considered by the Board. Because the question of the status of these affiliated companies is ancillary to the main question concerning the status of AOE Railway as a rail carrier employer, this report includes my recommendations to the Board regarding the status of these companies as well.

Based on the evidence of record, I find that two of these affiliated companies, the Rail Services and the Equipment Company, although not themselves rail carriers, meet an alternative definition of covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The evidence regarding the remaining affiliated companies is insufficient to determine that these companies are covered employers.¹³

¹³ Included among the companies which are not considered in this report are Oregon Rail Corporation, Oregon Rail Holdings, and the "marine division".

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C.

§ 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad * * *;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351(a) and (b) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3231. Whether a particular company is under common control and performs a service or operates equipment or facilities in connection with rail transportation, because it is the application of a legal standard to particular facts, is a mixed question of law and fact. Atlantic Land Improvement Company v. United States, 790 F. 2d 853, 855, (11th Cir., 1986)(operator of a phosphate loading facility is a covered employer under the Railroad Retirement Tax Act); Standard Office Building Corp. v. United States, 819 F. 2d 1371, 1374, (7th Cir., 1987)(operator of office building not covered under the RRTA).

The legal standard for the term "control" is set forth at section 202.4 of the regulations of the Railroad Retirement Board as the right or power to direct, either directly or indirectly, the policies and business of a company or person. 20 CFR 202.4. The right or power to control may be by any means, method or circumstance, irrespective of stock ownership. Section 202.5 of the Board's regulations further states that a company is under common control with a rail carrier whenever the control of such company is in the same person, persons, or company as that by which the carrier is controlled. 20 CFR 202.5.

Under the Acts administered by the Board and regulations promulgated thereunder, a non-carrier company is under common control with a rail carrier where the principal shareholder of both companies is an individual, (Livingston Rebuild Center Inc. v. Railroad Retirement Board, 970 F. 2d 295, 296 (7th Cir., 1991)), or where the principal shareholder of both companies is a parent corporation (Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358, 363, (10th Cir., 1942)).

The evidence of record is that Equipment Company, Rail Services and AOE Railway are wholly owned by Rail Holdings. (Exhibit 36 H). Although Rail Holdings and its subsidiaries are limited liability companies rather than formally incorporated business, Rail Holdings controls its subsidiaries in the same fashion a corporate parent would, and I can see no basis for treating control of a business organized in this fashion differently. Cf. Universal Carloading & Distributing Co. v. Railroad Retirement Board, 172 F. 2d 22, (D.C. Cir., 1948) at 25-26 (control through revocable trust). Accordingly, as Equipment Company and Rail Services are both controlled by the same entity which controls AOE Railway, I find that they are under common control with a rail carrier employer.

B. Rail Services and Equipment Company perform services in connection with transportation of passengers by rail carrier.

The second step in determining whether a rail carrier affiliate is a covered employer under the Acts is a finding that the affiliate operates any equipment or facility, or performs any service, other than casual service, in connection with the transportation of passengers or property by rail. Regulations of the Board at 20 CFR 202.7 define service or operation in connection with railroad transportation in pertinent part as follows:

The service rendered or the operation of equipment or facilities * * * is in connection with the transportation of passengers or property by railroad * * * if such service or

operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad * * *.

In particular, the status of a carrier affiliate which operates a railroad rolling stock repair shop has previously been answered in the affirmative by three Courts of Appeals. See: Despatch Shops v. Railroad Retirement Board, 153 F. 2d 644, (D.C., Cir., 1946)(freight car shop covered employer under the RUIA); Despatch Shops v. Railroad Retirement Board, 154 F. 2d 417, (2nd Cir., 1946)(freight car shop covered employer under the RRA); and Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir., 1992)(rebuilder of locomotives and other rolling stock a covered employer under RRA and RUIA). The passenger rail car repair and rebuilding performed by Rail Services is indistinguishable from that performed by Despatch Shops and Livingston Rebuild Center. Even if these cases had not been decided, in the case at hand, Rail Services, by repairing and reconditioning the passenger cars used by AOE Railway, clearly performs a service in connection with the rail transportation provided by Railway. Based on the evidence of record, I therefore find Rail Services performs a service in connection with rail transportation.

The question of owning and supplying rail cars has also been addressed by the Seventh Circuit in Itel Corp. v. Railroad Retirement Board. 710 F. 2d 1243 (7th Cir., 1983). The Court held a carrier affiliate which leased rail cars was not a covered employer on grounds that car leasing was not an activity regulated by the Interstate Commerce Commission. 710 F. 2d 1245. The Seventh Circuit subsequently backed away from the Itel rule, replacing it with an inquiry into whether the affiliate is performing a service which could be performed by the carrier. Standard Office Building Corp, supra, at 1379;

Livingston Rebuild Center, supra, at 298. The shift of the legal ground upon which Itel stood means that decision does not control the result here.

The Eleventh Circuit has defined the term "service" as used in the Acts and section 202.7 of the Board's regulations as encompassing the "provision of a steady, dependable supply of an essential item". Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404, 1408, (11th Cir., 1983). In concluding that the provision of concrete crossties to the affiliated rail carrier was a service in connection with rail transportation, the Court further noted "The only other product that is as integral to the operation of a railroad is the rolling stock itself." Id. Later, the District Court faced a company which provided maintenance of way equipment and specialized rolling stock to an affiliated carrier. Carland Inc and Southern Group, Inc. v. United States, 1995 U.S. Dist. LEXIS 2350, (W. D. Mo., Feb. 14, 1995). The Court found that by arranging financing, selecting and purchasing equipment vital to the railroad's operations, the affiliate performed a service under the Railroad Retirement Tax Act. See also, Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351, (8th Cir., 1957)(operator of office building is covered under the RRA); and Adams v. Railroad Retirement Board, 214 F. 2d 534, (9th Cir., 1954)(subsidiary furnishing accounting, purchasing, stenographic and other services to rail carrier parent is covered under the RRA).

The evidence is that Equipment Company owns or leases all passenger rail cars used by AOE Railway. It hardly needs to be said that these cars are essential to the rail transportation of passengers. Furnishing these rail cars must be "reasonably directly related, functionally or economically, to the performance of obligations" which AOE Railway has undertaken as a common carrier by railroad. Accordingly, I find Equipment Company performs a service in connection with the transportation of passengers by rail.

As Rail Services and Equipment Company are under common control with a rail carrier employer, and as they perform service in connection with rail transportation, Rail Services and Equipment Company are covered employers under the Acts administered by the Board. Service to Rail Services would be creditable from date of formation August 1, 1999. Based on evidence that Equipment Company received title to the passenger cars at time of sale by Reiseburo Mittelthurgau in November 1997, service would be creditable to Equipment Company effective November 14, 1997.

CONCLUSION

In Board Coverage Decision No. 01-20, the Board determined that a single entity, American Orient Express Company LLC, was a covered employer under the Acts effective January 1, 1995, because it was a sleeping car company. Based on the more complete evidence obtained in this appeal, that decision was partially incorrect.

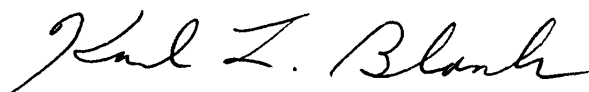
The effective date of coverage was incorrect because the limited liability company which was the subject of B.C.D. 01-20 was preceded by American Orient Express Company, Incorporated. That corporation first acquired the passenger rail cars used for its operation as a result of a sales agreement closed in November 1997, and consequently could be an employer only from the date of sale. The earliest date American Orient Express Company LLC may be a covered employer is the date it assumed operations from the corporation, April 1, 1999.

Also, while BCD 01-20 correctly determined AOE Railway was covered as a carrier, both that company and its corporate predecessor are rail carriers rather than sleeping car companies. These companies meet the definition of rail carrier under part IV of Title 49 of the U.S. Code. They both have held out to the public as common carriers in

accord with the definition of that term. Both have operated, through agreements concluded on their behalf by Amtrak with the owners of the track, a system of rail road depicted in advertising and brochures. Both have transported passengers by rail car. This interstate passenger transportation remains subject to Surface Transportation Board jurisdiction, and is not the sort of limited tourist excursion operation which prior Railroad Retirement Board decisions have exempted from coverage under the Acts. Accordingly, under the law and based on the evidence of record, I recommend that both AOE Incorporated and AOE Railway be determined to be rail carrier employers under the Railroad Retirement and Railroad Unemployment Insurance Acts.

AOE Railway is one of a number of affiliated companies which together are wholly owned subsidiaries of Oregon Rail Holdings LLC. The evidence of record is that two of these, AOE Rail Services and AOE Equipment Company, perform what are virtually exclusive services for AOE Railway. These services are of a nature which case law has found to be service in connection with rail transportation within the meaning of the Acts. If the Board adopts my recommended decision that AOE Railway is a carrier employer, then I recommend that both AOE Rail Services and AOE Equipment Company be determined to be rail carrier affiliate employers under the Railroad Retirement and Railroad Unemployment Insurance Acts as well.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karl T. Blank".

Karl T. Blank
Examiner

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