

AMERICAN ASSOCIATION OF PRIVATE RAILROAD CAR OWNERS, INC.



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July 9, 2004

Re: Finance Docket No. 34502
In the Matter of American Orient Express, Petitioner

Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

Gentlemen:

Attached find the Comments or Statement in Support of the Petition of American Orient Express Railway Company in the above matter.

As allowed by the Board's Notice, these Comments are being submitted by email, and without the necessity of a filing fee.

A copy has been sent to Robert Bergen, attorney for American Orient Express, also by email.

Respectfully submitted,

Paul L. DeVerter II

PLD/skr
Attachment

Cc: Robert Bergen, Esq.
Holland & Knight LLP
195 Broadway
New York, NY 10007

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34502

COMMENTS OR STATEMENT IN SUPPORT OF PETITION FOR DECLARATORY
ORDER

IN THE MATTER OF AMERICAN ORIENT EXPRESS RAILWAY COMPANY,
PETITIONER,

THESE COMMENTS BY AMERICAN ASSOCIATION OF PRIVATE RAILROAD CAR
OWNERS, INC.

American Association of Private Railroad
Car Owners, Inc.
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**COMMENTS OR STATEMENT IN SUPPORT OF PETITION FOR DECLARATORY
ORDER**

**IN THE MATTER OF AMERICAN ORIENT EXPRESS RAILWAY COMPANY,
PETITIONER,**

**THESE COMMENTS BY AMERICAN ASSOCIATION OF PRIVATE RAILROAD CAR
OWNERS, INC.**

This declaratory order proceeding was instituted on behalf of American Orient Express Railway Company LLC ("AOERC") for an order declaring that AOERC is not a common carrier by rail subject to the jurisdiction of the Surface Transportation Board.

These Comments or Statement are being made by the American Association of Private Railroad Car Owners, Inc. ("AAPRCO"), an organization representing its members who are the owners, or harbor a desire to become owners, of privately owned (as opposed to traditional railroad owned) railroad passenger cars. The member owners of cars certified to run on Amtrak approximate 80, with another 90 or so owning cars not yet certified by Amtrak, and 200 associate members.

AAPRCO was apprised of this proceeding by virtue of receiving a copy of the notice by the Surface Transportation Board published in the Federal Register at FR 35130 on June 23, 2004. Noting that AOERC is one of its members, AAPRCO requested further information from AOERC, and these Comments follow after reading the information furnished.

BACKGROUND

The history of privately owned railroad passenger cars goes back to at least 1890. The rich and famous sometimes had their own cars, which were usually modeled after Office cars used by officials of the various railroads. Tariffs were established by the railroads for handling private cars. By the time Amtrak came on the scene, there were probably fewer than 25 such cars still in running order.

But, this has all changed, and now there are several hundred privately owned railroad passenger cars. Most of the owners of cars capable of running on Amtrak are members of AAPRCO, since we are constantly struggling with Amtrak, and the freight carriers, to make it possible to continue to run our cars.

Today there are approximately 150 privately owned passenger cars that have been certified to run on Amtrak trains. There are many more gradually being brought up to the necessary mechanical and electrical standards. These cars are of all types, and our members own and operate sleepers, lounge cars, observation cars both with and without open rear platforms, coaches, dome cars, diners, and at least one baggage car. Nearly all of these cars were previously owned by the various freight railroads, by Amtrak, or VIA (Canada), and were disposed of by these carriers after they no longer met these carriers' needs.

It is estimated that the average Amtrak certified private car runs about 4000 miles per year. Some do not run every year, and one or two may get up to 20,000 miles per year. Most are owned by some form of closely held limited liability company, but perhaps a dozen are owned by historical societies. Most have no permanent staff, and only hire hotel staff when the need arises, or the occasion demands. Some will charter to the public, many will not, and will only

haul their family and friends. Some owners never hire staff, and do all the work themselves. Some have no sleeping quarters, and are only used for day trips.

The large freight railroads generally refuse to haul occupied passenger cars. Usually the cars run by themselves at the rear (hopefully) of Amtrak trains. However, if the opportunity arises, several owners may band together, and run a trip with a business car, lounge car, and sleeper together. A few private cars run in special trains, such as AOERC. And during the AAPRCO convention, for the last several years, the whole train has been made of private cars, except for the Amtrak, VIA, or other common carrier engines and crew. So, there are many and diverse owners, types of private cars, and permutations of running.

But in the history of all of this, privately owned passenger cars had never been considered as common carriers by the Interstate Commerce Commission. The Pullman Company was brought under the jurisdiction of the ICC by special language. But all other private cars that operated during the life of the Pullman Company were never treated as subject to the ICC's jurisdiction. And none have so been treated by the Surface Transportation Board.

THE STATUTE

The Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers, 49 U.S.C. 10501(b). The term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. 10102(5). Although previously much broader in scope, AAPRCO understands that the current wording was restricted as a result of the Interstate Commerce Termination Act of 1995.

THE PETITIONER AND ITS ACTIVITIES

APPRCO's understanding of the factual background in this matter comes primarily from the Joint Statement of Facts Not In Issue brought before the United States Railroad Retirement Board in proceeding B.C.D. No. 01-20, and which are attached to AOERC's Petition as Exhibit C.

According to this agreed Joint Statement, AOERC was formed in October 1997, very shortly after the purchase certain assets (but apparently not the liabilities) from a prior owner. Among those assets were the passenger cars which are now operated by AOERC. In 1998, AOERC began its irregular, and specialized and luxury excursion service and charter service on a variety of routes. (Joint Statement Nos. 37-45.) It appears that AOERC provides a package of hotel services (including meals, excursions and group activities), but that AOERC owns no rail lines, trackage rights, nor locomotives. Instead, AOERC contracts with Amtrak to provide locomotives and engine crews, and otherwise for the transportation of the equipment and occupants, when occupied. This transportation is over lines on which Amtrak has authority to operate, or for which Amtrak contracts with freight railroads on which to operate. (Joint Statement Nos. 58-63.)

It would appear that any service provided by AOERC is subject to cancellation or route modification by Amtrak and also apparently subject to cancellation by AOERC.

RAIL CARRIER

Reviewing the Joint Statement of Facts it would appear that AOERC is not a person providing common carrier railroad transportation for compensation as those terms have been

historically used. A common carrier is an entity that provides regularly scheduled service over a specific route, without discrimination as to pricing, or level of service, to all who apply. The common carrier is another form of regulated public utility, which is required to provide service unless relieved of that liability by whoever regulates the utility. On the other side of the coin, the regulated public utility generally is provided with a monopoly or exclusive franchise over certain routes, a protected fare structure, and traditionally enjoyed the right of eminent domain.

As opposed to a common carrier, a private carrier contracts to provide service over whatever route it chooses, or for which it can make arrangements, at whatever price it can get. It may operate sporadically, without schedule, and with whatever interruptions it may desire. This is clearly not transportation of the sort contemplated by the Statute over a common carrier.

Upon a review of the Joint Statement of Facts, it appears that AOERC does not provide regular transportation, but instead provides irregular service; discriminates in the rates such as the market will bear; has no fixed route; and requires no franchise or certificate of public convenience and necessity. In this regard, it has all the attributes of a private carrier, is no different than a private tank car leasing company, or a private boxcar or refrigerator car company, and thus is not a common carrier.

SLEEPING CAR COMPANY ISSUE

Originally, the Interstate Commerce Act was held by the courts not to include sleeping car companies. However, in 1906, the Interstate Commerce Act was amended to specifically include sleeping car companies under the same terms as were applied to common carriers. In 1995, the Act was again amended to delete all reference to sleeping car companies.

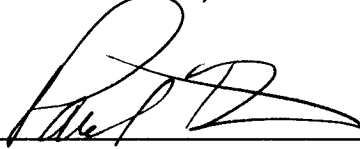
However, to avoid having pensioners removed from the Railroad Retirement Plan, those employees who had been previously covered were still to be covered. AOERC was not formed until after the Act was amended to delete sleeping car companies. Consequently, its employees had never been covered, and it follows are not now covered under the Interstate Commerce Act, nor the Railroad Retirement Plan.

CONCLUSION

AAPRCO has not burdened these Comments with unnecessary citations and statutory language and court decisions. Those seem to be more than adequately covered in the Petition filed by AOERC. AAPRCO believes that the facts set forth in the Joint Statement clearly demonstrate that AOERC is not a common carrier, does not provide transportation of the sort contemplated by 49 USC 10102(5), and therefore is not subject to the exclusive jurisdiction over transportation by rail carriers as may be exercised by the Surface Transportation Board.

Respectfully submitted,

American Association of American Private
Railroad Car Owners, Inc.

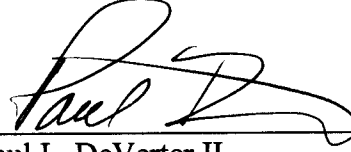
By: 

Paul L. DeVerter II
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July 9, 2004

CERTIFICATE OF SERVICE

These Comments have been served on Petitioner by sending a copy via Email to its Attorney, Robert Bergen, Holland & Knight LLP, 195 Broadway, New York, NY 10007 at Robert.Bergen@hklaw.com on July 9, 2004.

A handwritten signature in black ink, appearing to read "Paul L. DeVerter II", written over a horizontal line.

Paul L. DeVerter II