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ORIGINAL Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34502

AMERICAN ORIENT EXPRESS RAILWAY COMPANY
PETITION FOR DECLARATORY ORDER

COMMENTS

ENTERED
Office of Proceedings

JUL 13 2004

Part of
Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John D. Fitzgerald

Due Date: July 13, 2004

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SURFACE TRANSPORTATION BOARD

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PETITION FOR DECLARATORY ORDER

COMMENTS

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment, GO-386 (UTU/GO-386), submits these comments in the entitled declaratory order proceeding, instituted June 17, 2004, by the Director, Office of Proceedings (DOP), served June 23, 2004. 69 Fed. Reg. 35130-31. (June 23, 2004).

The petitioner, American Orient Express Railroad Company (AOERC), directly or indirectly owns or leases about 60 rail passenger cars, and employs at least 100 persons over the year, in conducting its rail passenger service. AOERC seeks to escape coverage under the Railroad Retirement Act (RRA), and the Railroad Unemployment Insurance Act (RUIA), administered by the U.S. Railroad Retirement Board (RRB). It asks the Surface Transportation Board (STB) to declare that AOERC is not subject to the STB's jurisdiction (Petition, 2), and concludes with a request that the

^{1/} General Chairman for United Transportation Union, on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver WA 98660.

STB determine that AOERC is not a common carrier by rail subject to STB jurisdiction. (Petition, 43).

Railroad employees represented by UTU/GO-386 have an interest in the status of AOERC, and in rail passenger operations, and have a keen concern for the viability of the railroad retirement and unemployment programs administered by the RRB.

Background

The AOERC petition for declaratory order was filed April 30, 2004, but not placed on the Board's website until shortly before May 20, 2004, when UTU/GO-386 filed its notice of intent to participate.

A hearing examiner for the RRB on May 16, 2003, in an 85-page decision, recommended that AOERC be found an employer "covered" by the RRA and RUIA. AOERC on July 21, 2003, filed exceptions to the hearing examiner's report. AOERC has not filed the complete RRB agency record with the STB. (See: Attachment 1, Letter from UTU/GO-386, filed June 2, 2004). Moreover, the matter is pending and undecided at the RRB. (See: Attachment 2, Letter from RRB Management Member, filed June 8, 2004).

ARGUMENT

OOERC has taken the unprecedented step of seeking to invoke the STB apparently as a vehicle to interfere with an on-going RRB proceeding.

The STB should not entertain the matter. The basis for a declaratory order proceeding is that the STB has discretionary authority to terminate a controversy or remove an uncertainty. 5

U.S.C. §554(e). Here, the controversy is not between private parties, but is between a hearing examiner's recommended report at the RRB,^{2/} and counsel for AOERC. It is highly inappropriate for the STB to jump into this matter, pending before a sister federal agency, particularly in the absence of an open, direct, and written request from the RRB itself. UTU/GO-386 is unaware of any such RRB request that the STB participate in the RRB's proceeding. The impact extends beyond the instant AEORC matter, and might even affect legislative proposals.

1. The STB should revisit its rule permitting the DOP to institute declaratory order proceedings. The acquisition of declaratory order authority by the DOP was highly controversial in 1989, and occurred only after a divided 3-to-2 vote by the former Interstate Commerce Commission (ICC), accompanied by strong separate dissents, which were prophetic. Delegation of Authority-Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). The STB should remove delegation for declaratory orders from the DOP, and should instead direct handling by the agency itself. 49 CFR 1011.7(b)(6). Notice and Comment would be unnecessary for the removal of delegation. The removal of delegation is also warranted by the reduced size of the agency, and the effective elimination of the Office of the Secretary two years ago, such that much of the former flow of paperwork now appears centered with the DOP, rather than through an independent Secretary, reporting directly to the Chairman or the agency.

^{2/} Karl T. Blank, Office of General Counsel, U.S. Railroad Retirement Board.

2. The STB, especially in the absence of the complete RRB agency record, should decline to interfere in the RRB process.

WHEREFOR, the declaratory order proceeding should be discontinued.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

July 13, 2004

Attorney for John D. Fitzgerald

Certificate of service

I hereby certify I have served a copy of the foregoing upon counsel for AEORC, Robert Bergen, Holland & Knight, 195 Broadway, New York, NY 10007, by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

ORIGINAL

LAW OFFICES
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June 2, 2004



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Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: F.D. No. 34502
American Orient Express Company

Dear Mr. Williams:

This letter is responsive to the letter filed May 26, 2004, by V.M. Speakman, Jr., from the U.S. Railroad Retirement Board, wherein it is stated that the petition for declaratory order, filed April 30, 2004, 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.

The petition for declaratory order, filed April 30, 2004, was examined prior to submission of the Notice of Intent to Participate, filed May 20, 2004. The petition on file does not include the exhibits received by the RRB examiner, with perhaps the exception of Exhibit 46.

Very truly yours,

Attorney for John D. Fitzgerald

cc: V.M. Speakman
R. Bergen



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

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JEROME F. KEVER
MANAGEMENT MEMBER

OFFICE OF MANAGEMENT MEMBER

May 27, 2004

Mr. Vernon A. Williams
Secretary to the Board
Surface Transportation Board
1925 K Street, N.W., Suite 840
Washington, DC 20423-0001

Re: Finance Docket No. FD-34502

Dear Mr. Williams:

By letter dated May 21, 2004, the Labor Member of the Railroad Retirement Board (Board) forwarded to you a Report of Hearing Examiner and the Exceptions thereto filed by American Orient Express Railway Company, LLC (AOE) and requested that these documents be included in the record before the Surface Transportation Board (STB) in the above-referenced Finance Docket.

As Management Member of the Board, I believe that it is important to point out that the Hearing Examiner report with respect to AOE has not yet been adopted by the three-member Board. Board regulations provide, moreover, that "The examiner's report shall be advisory only and the Board may, in any case, exercise its right to reject or adopt the examiner's report in whole or in part or adopt such report with modifications." (20 CFR 258.6(d)). Thus, the report forwarded to the STB is not a decision of the Railroad Retirement Board; it may be modified or rejected by a vote of the Board.

Sincerely,


Jerome F. Kever
Management Member

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

Attachment 2
Page 1 of 1



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