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Rail Labor Division



July 13, 2004

Honorable Vernon W. Williams, Secretary
Surface Transportation Board
1925 K Street, NW, Suite 850
Washington, DC 20423

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RE: Finance Docket No. 34502

Dear Mr. Williams:

The Rail Labor Division (RLD) of the Transportation Trades Department, AFL-CIO appreciates this opportunity to comment on the petition of the American Orient Express Railway Company LLC (AOERC) for an order declaring that AOERC is not a common carrier by rail subject to the Surface Transportation Board's (STB) jurisdiction. For reasons more fully explained below, we urge the STB to reject the petition and to find that the AOERC is a common carrier of passengers by rail.

Rail workers represented by the RLD unions¹ have a vested interest in ensuring that rail companies, regardless of how they attempt to characterize themselves, are not misclassified to avoid being subject to the statutory requirements of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, the Railway Labor Act and other rail related laws. While we understand why companies may want to avoid their obligations under these statutes, it must be remembered that rail workers depend on these laws for retirement security, unemployment insurance, and collective bargaining rights. In addition, allowing companies like AOERC to manipulate the law to avoid the STB's jurisdiction would place other rail carriers at a competitive disadvantage and in the case of railroad retirement, jeopardize the solvency of the system.

¹ The following unions are members of the RLD: American Train Dispatchers Association; Brotherhood of Locomotive Engineers and Trainmen, IBT; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; National Conference of Firemen & Oilers, SEIU; Sheet Metal Workers International Association; Transportation • Communications International Union; and Transport Workers Union of America.

As the STB knows, the Railroad Retirement Board (RRB) has already determined that AOERC is a covered employer for purposes of railroad retirement. In response to AOERC's request for reconsideration of that decision, the RRB appointed a Hearing Examiner to review the matter. The Hearing Officer, who filed his report on May 13, 2003, correctly determined that AOERC is a common carrier by railroad, subject to the STB's jurisdiction under part A of subtitle IV of Title 49.

Pursuant to 49 U.S.C. § 10501(b), the STB has exclusive jurisdiction over transportation by rail carriers. An entity is considered a rail carrier if it provides "common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5).

The definition of "common carrier" is not a statutorily defined term, but there is ample case law, thoroughly discussed by the Hearing Examiner, that provides sound guidance in this area. While we will not restate the detailed analysis undertaken by the Hearing Examiner, we agree with the general proposition that 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." Report of Hearing Examiner at 34.

Based on this definition, the Hearing Examiner found, and we agree, that AOERC is a common carrier of passengers rather than a non-regulated private carrier. AOERC owns and operates trains and offers to provide the public with passenger rail transportation. While the train service is only part of the "experience" that AOERC provides, this does not change the fact that part of its service is offering carriage to the public. For these reasons, AOERC is clearly a common carrier for purposes of meeting the first part of the rail carrier definition.

It is also clear that AOERC provides railroad transportation. Unlike the term common carrier, railroad transportation is defined by the statute. In particular, "railroad" includes the "road used by a rail carrier and owned by it or operated under an agreement." 49 U.S.C. § 10102(6)(B). Transportation includes a locomotive, car, or equipment of any kind "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9)(A).

AOERC claims that it is not a railroad because it does not own or operate any of the listed equipment in Section 10102(6) and it does not own or operate any rail lines. We reject this characterization – it is simply not consistent with the law or the realities of AOERC's operation. As found by the Hearing Examiner AOERC, through its advertising and its conduct, holds itself out for hire as ready and willing to transport the public from place to place by rail and, accordingly, represents itself as a common carrier by rail. Unlike a private carrier, AOERC sells the public rail transportation at fixed prices along set routes. Hearing Examiner at 52-53. Direct reservation sales to the public comprised 38% of total reservations in 2001, and 45% are made through travel agents. Hearing Examiner Report, Findings of Fact Nos. 27-28 at 20-21.

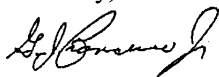
AOERC's negotiates through Amtrak for the use of specific rail lines at specific times. AOERC is responsible for providing equipment that meets the standards of the Federal Railroad Administration (FRA), the American Association of Railroads and Amtrak. Furthermore, AOERC retains control of each train and each passenger during the ride and earns its revenues from selling rail service. Hearing Examiner at 56. AOERC owns or leases rail cars² and contracts directly with passengers to transport them over a route and to a destination chosen by the company. AOERC controls the train, except in case of emergencies, through its on board "hotel manager" and its 39 to 45 on-board staff. Hearing Examiner Findings of Fact Nos. 26 and 27 at 18-19. Its crews must be qualified on FRA and Amtrak safety and operating regulations. Hearing Examiner Report, Findings of Fact No. 12 at 13. Unlike a rail car rental company which earns its revenues by leasing cars to shippers, who pay a railroad for transportation, AOERC earns its revenues from selling trips by rail to the public. Hearing Examiner at 57.

AOERC's claim that it merely provides excursion service and therefore is not a common carrier is totally unsupported. AOERC's trips are interstate, normally lasting several days, covering several states and hundreds of miles. Unlike tourist excursion lines, it does not operate intrastate, over short distances, in a loop starting and ending at the same place. In short, and as found by the Hearing Examiner, "by using these passenger cars to operate over rail road over which it has obtained the right to operate, AOERC meets the definition of a rail carrier under part IV of Title 49." Hearing Examiner Report at 58. We urge the STB to adopt this finding.

Finally, we ask the STB to categorically reject the notion, put forth by AOERC, that the ICC Termination Act of 1995 (P.L. 104-88) completely deprives the STB with jurisdiction over rail passenger service. While some regulatory oversight was curtailed by the Act, Section 10501 clearly states the STB retains jurisdiction of passenger transportation (other than service conducted by local government authority) by rail as part of its general jurisdiction over all rail transportation. While a specific provision of the Act dictates that Amtrak falls under the STB's reach in certain areas, there is nothing in the law that precludes other passenger carriers from being subject to the STB's general jurisdiction pursuant to Section 10501. It is clear that Congress had every intention of ensuring that rail passenger services, including entities like AOERC, would continue to be subject to STB jurisdiction and we thus urge the STB to so find in this case.

Thank you for considering the views of the RLD in this matter.

Sincerely,



George Francisco
Chair

² Indeed, AOERC advertises that these are the same vintage cars, fully-restored, that were used by acknowledged "carriers" during the streamliner era of rail passenger transportation.

Certificate of Service

I certify that one copy of the above comments was mailed, first-class mail, postage prepaid to:
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A handwritten signature in black ink, appearing to read "George Francisco".

George Francisco
Chair