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August 9, 2004

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Office of Proceedings

AUG 10 2004

Part of
Public Record

Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 600
Washington, D.C. 20423-0001

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

Dear Mr. Williams:

The Surface Transportation Board ("STB") has received comments on American Orient Express Railway Company's ("Petitioner's") petition. Please accept and consider this letter as a brief reply to some of those comments. Nothing contained in this letter is intended to modify the Petition or any argument set forth in that document.

John D. Fitzgerald, General Chairman of the United Transportation Union (on the lines of the Burlington Northern and Santa Fe Railroad Company) filed comments on behalf of that Union's General Committee on Adjustment, GO-386 ("UTU/GO-386"). Mr. Fitzgerald is mistaken to say, at pp. 3-4 of his comments, that the STB has never before, during the pendency of a Railroad Retirement Board (RRB) proceeding, agreed to consider whether it had jurisdiction over an entity and that therefore it should not do so here. In fact, the STB has specifically faced the identical situation as is presented by this proceeding and has determined that its decision would be useful and authoritative. See, e.g., H&M International Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34277 (decided November 10, 2003). Just

as in H&M International Transportation, Inc., here, too, the record is clear that both Petitioner and the RRB would consider a decision by the STB on the issue of its own jurisdiction to be both appropriate and useful.

Of particular note in Mr. Fitzgerald's comments is the omission of any statement or analysis with respect to whether the STB has jurisdiction over Petitioner, the only issue raised by the Petition. The UTU/GO-386's only interest in this proceeding is "the viability of the railroad retirement and unemployment programs administered by the RRB." See Mr. Fitzgerald's Comments, p. 3. Thus, the UTU/GO-386 is not concerned with railroad rate structures, unfair competition, public convenience and necessity or any other regulatory issue for which STB jurisdiction exists. Nor does the UTU/GO-386 represent any employee of Petitioner. Thus, the UTU/GO-386 is only interested in increasing contributions to the Railroad Retirement pension fund for the benefit of its members.¹

With all due respect, there is nothing in the ICC Termination Act or any other law that would support a finding of STB jurisdiction over a company created subsequent to its January 1, 1996 solely for the purpose of ensuring contributions to the railroad retirement pension system.² This should therefore be rejected as a basis either for terminating this proceeding as "inappropriate," as suggested by the UTU-GO-386, or for finding that the STB has jurisdiction over Petitioner.

Comments filed by George Francisco, Chair, Rail Labor Division (RLD) of the Transportation Trades Department, AFL-CIO make clear that the RLD's primary concern is also ensuring that Petitioner and its employees be required to pay into the Railroad Retirement system. Among his concerns is to protect "the solvency of the system." As noted above, this is not a proper concern of the STB and may not form the basis for a determination that STB has jurisdiction over Petitioner, a company that is otherwise neither a railroad nor a common carrier by rail.

¹ Because virtually all of Petitioner's employees are part-time seasonal workers and the turnover of Petitioner's Staff is extremely high (see Petition, pp. 5-6), it is unlikely that any of them will ever enjoy the benefits of the Railroad Retirement pension system. This is not of concern to the labor unions that have submitted comments in this proceeding; they only want Petitioner and its employees to contribute a portion of their revenue or earnings, as the case might be, to the Railroad Retirement pension system.

² In 49 U.S.C. 10501(c)(3)(B), Congress did provide that government-operated railroads that were subject to I.C.C. jurisdiction when the I.C.C. Termination Act took effect would be subject to STB jurisdiction for limited purposes. The second sentence of that section makes clear that the purpose was to preserve Railroad Retirement and related benefits for the employees of those railroads but not to expand any such coverage or STB jurisdiction to subsequently created railroads simply by virtue of the enactment of the I.C.C. Termination Act.

Mr. Francisco's comments also purport to provide legal and analytical support for his organization's position that Petitioner should be found to be subject to STB jurisdiction. In fact, however, Mr. Francisco's comments rely virtually exclusively on the decision of the Hearing Examiner appointed by the Railroad Retirement Board (RRB). As noted in the Petition and in the letter submitted to the STB by RRB Management Member Jerome F. Kever, the Hearing Examiner's report to the RRB was advisory only (see also 20 CFR 258.6(d)). The Hearing Examiner's proposed findings and recommendation were never adopted or even acted on by the RRB. They should not be considered an official part of the RRB's or the STB's record. This, indeed, is why Petitioner did not include as part of the record before the STB either the Hearing Examiner's recommendations or Petitioner's Exceptions to the Report of the Hearing Examiner.

If the STB does review those two documents, it will be apparent that the Hearing Examiner's statement of the facts of the case as well as his interpretation of those facts and applicable law are incorrect in a number of critical areas. For instance, as paraphrased by Mr. Francisco, the Hearing Examiner "found" that Petitioner and its "hotel manager" are "in control" of Petitioner's excursion train during excursions. The purpose of this "finding" was obviously to avoid the significance of the fact that Petitioner and its employees perform no railroad functions. Only Amtrak is responsible as the railroad.

The very idea that a "hotel manager" might be in charge of railroad activities (as opposed to the hospitality functions he is actually responsible for) belies logic. Here, the Hearing Examiner's finding also contradicts the record. Uncontradicted sworn testimony established that only Amtrak conductors control the railroad functions of a train (Exhibit D, p. 32-3). This is confirmed by the operating agreement between Petitioner and Amtrak. See Exhibit E, paragraph 3D (Petitioner's cars and employees are under the operational control of Amtrak crews *at all times* and must strictly comply with all instructions from Amtrak crew members); paragraph 3E (Amtrak solely responsible for train movements in the event of trip disruption; and 3H (the movement of Petitioner's cars is subordinate to Amtrak requirements). Indeed, Petitioner does not employ or provide any person on board its consists in a position or with the training necessary to enable Petitioner to operate a train.³ See Exhibit C, paragraph 67 and Exhibit D, pp. 27-34.

³ Both the Hearing Examiner and Mr. Francisco have misconstrued testimony in the record to the effect that the "hotel manager" is "the final word on board" Petitioner's train (Tr. 149-150). In the context of the testimony that preceded this question, which concerned how Petitioner staffs its excursions, this testimony meant that the hotel manager is the senior supervisor of Petitioner's service staff while the excursion is underway. (Tr. 148-49). Indeed, the balance of the 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, repeated by Mr. Francisco, is simply unsupported by the record.

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Another mistake appropriated by Mr. Francisco from the Hearing Examiner's report is the notion that, because it advertises its excursions, Petitioner holds itself out to the public as a common carrier. (Mr. Francisco's letter at page 2). The mere fact of advertising the availability of a service to a focused segment of the population, as Petitioner does, is a far cry from holding oneself out as a common carrier for hire. As explained in depth in the Petition, Petitioner does not provide common carrier service. Its marketing, designed to attract a certain type of vacationer, is not equivalent to holding itself out as a common carrier any more than advertising by a hotel or a restaurant would render such an establishment a common carrier by rail.

It is not the purpose of this letter to reply to every issue raised in the comments filed in connection with this proceeding. The omission of a reply to any objections raised to the declaratory order sought by the Petition or to the form of this proceeding or to the delegation of authority to the Office of Proceedings pursuant to 49 CFR §1011.7(6) should not be taken as and is not intended to be a concession or statement of position of any kind.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Bergen", with a long, sweeping horizontal line extending to the right.

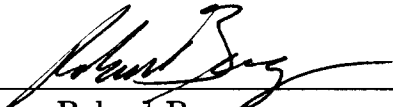
Robert Bergen

RB:mf

I hereby certify I have served a copy of the foregoing by first class mail postage-prepaid upon the following:

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Robert Bergen