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ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34502
AMERICAN ORIENT EXPRESS RAILWAY COMPANY
PETITION FOR DECLARATORY ORDER



MOTION TO STRIKE

ENTERED
Office of Proceedings

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Part of
Public Record

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Dated: August 12, 2004

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MOTION TO STRIKE

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment, GO-386 (UTU/GO-386), requests that the Board strike the reply comments, consisting of four pages, filed August 10, 2004, by American Orient Express Railway Company (AOERC).

If the Board concludes that AOERC is entitled to submit reply comments, despite the Board's decision served June 23, 2004,^{2/} and the motion to strike by this commentor, then the Board should grant leave for UTU/GO-386 to submit a reply, and accept for filing UTU/GO-386's reply herein.

1. Motion to Strike. The AOERC reply is contrary to the special procedures established by the Board in its June 23, 2004 decision instituting this declaratory order proceeding. AOERC had submitted voluminous materials on and subsequent to its April 30,

^{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.

^{2/} 69 Fed. Reg. 35130-31. (June 23, 2004).

2004 petition. The Board's decision only called for comments; there was no provision for reply comments.

Moreover, AOERC has not made a request for leave to depart from the June 23, 2004 decision, so as to file a reply, contrary to the Board's rules. 49 CFR 1117.1. Accordingly, AOERC's entire reply should be stricken. 49 CFR 1104.10.

2. Leave to File, and Reply-to-Reply.

(A). Leave to File. In the event the AOERC reply nevertheless is accepted for filing, the Board should grant leave for UTU/GO-386 to respond to AOERC's contentions directed to UTU/GO-386.

(B). Reply-to-Reply. UTU/GO-386 need not respond to AOERC's contentions concerning the standing or interest of railroad employees in this proceeding, for the AOERC argument on this score is frivolous.

AOERC has misstated UTU/GO-386's position concerning lack of any previous request from RRB that this Board participate in the RRB's determination. (AOERC Reply, 8/10/04, 1-2). We know of no such RRB request. The decision by the Director of Proceedings (DOP) in F.D. No. 34277, H&M International Transportation, Inc.--Petition for Declaratory Order (served Nov. 12, 2003) (H&M) is not to the contrary. Moreover, H&M is not "the identical situation" as the instant proceeding.

The DOP, in H&M, declined to institute a declaratory order proceeding. Accordingly, the DOP's discussion for not instituting a proceeding is not Board precedent or a Board ruling on any issue. The DOP is a Board employee, not a person nominated by the President and confirmed by the U.S. Senate.

The action of a Board employee is not final agency action. This is not the first instance where litigants have claimed that the ruling by the agency's Secretary,^{3/} or even a single Commissioner's telegram, is legal or binding on the agency. The Supreme Court has taken a negative view of such former ICC employee action. Minneapolis R.R. v. Peoria Ry., 270 U.S. 580, 585 (1926); Thompson v. Texas Mexican R. Co., 328 U.S. 134, 145-46 (1946). See also: H.J. Baker & Bros., Inc.--Statute of Limitations, 357 I.C.C. 640, 645 (1978); Consolidated Rail Corp.--Declaratory Order--Exemption, 1 I.C.C.2d 895, 897 (1986).

This commentor believes the DOP's language in H&M, although not binding on the agency, and entitled to no weight, nevertheless to have been unfortunate. The public was led to believe that during the lack of a full Board membership during 2003, the single-member Board would not initiate new major actions--such as entry into RRB disputes--until a full Board could be constituted. See: U.S. House, Hearings before Subcommittee on Railroads, Committee on Transportation & Infrastructure, The Surface Transportation Board: Agency Resources and Requirements, 6-7, 11-12 (May 20, 2003).^{4/}

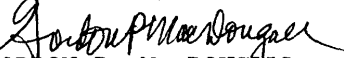
WHEREFORE, The Board should strike the reply comments by AOERC, filed August 10, 2004; if the reply comments are not stricken, the Board should grant leave for UTU/GO-386 to file a

^{3/} The Board's DOP in reality serves as the Secretary. He sits in the Secretary's former office, and appears to perform the major functions of the former Office of the Secretary, which has been abolished.

^{4/} Testimony of Hon. Roger Nober, Board Chairman, in response to questioning.

reply to the AOERC reply, and that the UTU/GO-386 reply be deemed filed.

Respectfully submitted,


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August 12, 2004

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall