B.C.D. 01-20

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EMPLOYER STATUS DETERMINATION
American Orient Express Railway Company (AOE)

This is a determination of the Railroad Retirement Board concerning the status of American Orient Express Railway Company (AOE) as an employer under the Railroad Retirement Act (45 U.S.C.§231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

BACKGROUND

In Legal Opinion L-90-38, the Board's Deputy General Counsel found American European Express (AEE) to be a sleeping car company within the definition of "employer" under the RRA and RUIA effective November 15, 1989, the date that it commenced the transportation of passengers in interstate commerce.

In B. C. D. No. 93-68, the Board issued a decision on reconsideration which affirmed the decision of the Board's Deputy General Counsel in Legal Opinion L-90-38 that AEE became a sleeping car company within the definition of "employer" under the RRA and the RUIA effective November 15, 1989. AEE never filed any annual reports of service and compensation with the Board. Information obtained by the Board"s Audit and Compliance Section indicates that AEE ceased operations sometime in 1991 after a train derailment on June 21, 1991, which wiped out nearly half of its eleven car-fleet. There was no evidence that AEE operated after October 25, 1991.

In B. C. D. No. 96-77, the Board found that American European Express, Inc. had ceased to be an employer under the Acts with the close of business on October 31, 1991, the last day of the last month during which evidence indicated that it had operated.

DISCUSSION OF AOE

Recent information obtained from a coverage investigation by the Board's Audit and Compliance Section indicates that AOE is a reincarnation of AEE which is operating with the cars that were rebuilt following AEE's derailment in 1991.

Mr. Michael S. McAfee provided information regarding AOE. According to Mr. McAfee, AOE "in no way contracts for the use of track, we pay for the movement of railcars." According to Mr. McAfee, AOE "do[es] not lease or operate any locomotives in the United States." Mr. McAfee stated that "...movement of passenger cars on freight railroads is performed either by Amtrak or individually in accordance with the

freight railroad's passenger car movement orders and utilizing standard bill of ladings. Movement of our cars in freight service is performed exactly the way any other private car is moved, such as movements for the American Association of Private Rail Car Owners (AAPRCO)."

A thirty-page color brochure describes AOE's service for calendar year 2000 as "Deluxe Rail Journeys on North America's Only Private Luxury Train." The brochure indicates that AOE provides luxury train travel, with club and observation cars, as well as sleeping cars, for a variety of itineraries. For example, the "Millennium Journey" lasts 7 days and 6 nights, going from Washington, D.C. to New Orleans, Louisiana, with stops at Charleston, South Carolina, Savannah, Georgia and St. Augustine, Florida. The "Great Transcontinental Rail Journey" takes 10 days and 9 nights, going from Washington, D.C. and traveling to Los Angeles, California, via Charleston, South Carolina, Savannah, Georgia, New Orleans, Louisiana, San Antonio, Texas, Santa Fe, New Mexico, and Grand Canyon National Park, Arizona. The "Pacific Coast Explorer" goes from Los Angeles, California to Seattle, Washington, with several intermediate stops during the 7 day/6 night itinerary.

Both the RRA and the RUIA define an employer under the Acts to include "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code" (section 1(a)(1)(i) of the RRA and sections 1(a) and 1(b) of the RUIA). The jurisdictional statute referenced in the definition of a carrier employer gives to the Surface Transportation Board jurisdiction over transportation by railroad in the United States between a place in a State and a place in the same or another State as part of the interstate rail network. (49 U.S.C. §10501(a)(1)(A) and §10501(a)(2)(A)). The term "rail carrier" is defined by the statute to mean "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." (49 U.S.C. §10102(5)). "Transportation" is defined to include "a locomotive, car, vehicle . . .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)). Despite having been requested to do so, AOE has not furnished any documentation of authorization by the Surface Transportation Board (STB) for its operations; nor has any such authorization been located. However, the lack of specific STB authorization does not necessarily mean that AOE is not, in fact, subject to STB jurisdiction.

We noted in the beginning of our discussion that the information obtained from the coverage investigation indicates that AOE is a reincarnation of American European Express (AEE) which is operating with cars that were rebuilt following AEE's derailment in 1991. Our decision on reconsideration of the employer status of AEE affirmed the

initial decision that AEE was a "sleeping car company" within the definition of "employer" under the RRA and the RUIA. Prior to January 1, 1996, section 1 of the Railroad Retirement Act defined the term "employer" to include:

> (I) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49.

That definition was amended by the ICC Termination Act of 1995 (section 323, Public Law (P.L.) 104-88) to delete the references to express company and sleeping car company. However, P.L. 104-88 also contained the following provision:

> The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. (49 U.S.C. §10501(c)(3)(B)).

Thus, the fact that the term "sleeping car company" no longer appears in the definition of a carrier employer does not affect the outcome of this case. If AOE would have been covered under the definition of "employer" prior to the amendment of that definition by P.L. 104-88, then it is also covered under the current definition of a carrier employer. The record shows that AOE provides luxury train travel, with club and observation cars, as well as sleeping cars, for itineraries which cross state lines. Despite the fact that AOE's rail cars are not pulled by AOE locomotives, but are instead moved by Amtrak or freight railroad locomotives, AOE falls within the definition of a "sleeping car carrier," since the record demonstrates that it is an entity providing sleeping car transportation for compensation. As such, AOE would clearly have fallen within the definition of a rail carrier employer prior to the amendment of that definition by P.L. 104-88. Since P.L. 104-88 also provided that its enactment would not change coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts, AOE also falls within the definition of a rail carrier employer under the current definition of a rail carrier under section 1(a)(1)(i) of the Railroad Retirement Act and the corresponding provision of the Railroad Unemployment Insurance Act. Cf. B.C.D. No. 93-68, Decision on Reconsideration of the Status of American European Express.

For the reasons discussed above, the Board finds that AOE is a rail carrier employer within the definition of "employer" under the RRA and the RUIA. According to its 1999 brochure, AOE has operated since its 1995 season. The Board therefore finds that

American Orient Express Railway Company (AOE)

American Orient Express Railway Company became an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1995.

Cherry T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever