

EMPLOYER STATUS DETERMINATION

GrandLuxe Railway LLC

This is a determination of the Railroad Retirement Board concerning the status of GrandLuxe Railway LLC (GrandLuxe) 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). The status of GrandLuxe has not previously been considered.

Information regarding GrandLuxe was provided by Mr. John Thompson, Senior Vice President & Chief Financial Officer, and by Yvonne Cook, Director of Finance. Mr. Thompson notified the Secretary to the Board that on May 18, 2006, GrandLuxe purchased "certain assets" of American Orient Express Railway Company, LLC. Mr. Thompson later provided a partial copy of the Asset Purchase Agreement. Section 2.1 of the Agreement states that GrandLuxe purchased "all assets * * * of every kind and type" including "All tangible personal property, vehicles, equipment, machinery * * * furniture, furnishings, appliances, vehicles and other tangible personal property of every description and kind and all replacement parts therefore * * * ". GrandLuxe also purchased all goodwill and the rights to the name "American Orient Express Railway Company". Sections 2.4 and 3.1(b) of the Agreement further provide that GrandLuxe agreed to assume only payment of certain leases, and the "specific Assumed Liabilities as described on Exhibit A", a copy of which was not provided. Section 7.2(i) of the Agreement lists among the obligations of seller AOE Railway that "The Operating and Maintenance Agreement dated effective February 9, 2006 between National Railroad Passenger Corporation and the Sellers * * * shall be in full force and effect and any consent required for the transfer of such agreement to Buyers shall have been obtained." Mr. Thompson advised that GrandLuxe began operations June 5, 2006 with 62 employees. By letter of June 27, 2006, Mr. Robert Bergen, attorney for American Orient Express Railway Company LLC (AOE Railway) confirmed that on May 18, 2006, AOE Railway "sold their operating assets to an unrelated third party" and consequently "AOE Railway no longer operate(s) a rail tour business".

The GrandLuxe internet web site states the company uses restored passenger rail cars to offer nine rail trips in 2007 over three itineraries. The National Parks of the West runs for six nights through Idaho, Utah, Nevada, California, Arizona, and New Mexico. It operates once each month in April, May, June, and August. The Great Northwest & Rockies rail trip runs for six nights through Idaho, Montana, Washington and Oregon. It operates once each month in June, July, and

August. The Rockies, Sierras & Napa trip runs for 6 nights through California, Nevada, Utah and Wyoming. It operates once each month in September and October. The trains include lounge, dining, sleeping and domed observation cars.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

- (i) 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 of the RUIA (45 U.S.C. § 351) contains essentially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

There is no indication that GrandLuxe has made any filing with the Surface Transportation Board which would establish that it is subject to STB jurisdiction for purposes of section 1(a)(1)(i) above. However, the STB has determined AOE Railway to be a passenger rail carrier subject to 49 U.S.C. § 10501. See: American Orient Express Railway Company LLC—Petition for Declaratory Order, Finance Docket No. 34502 (December 27, 2005). Afterward, on April 18, 2006, the majority of the Railroad Retirement Board, Management Member dissenting, determined on reconsideration that AOE Railway was a rail carrier employer under the RRA and RUIA as well. See: B.C.D. 06-15 *American Orient Express Railway LLC*. The majority of the Board found that by using vintage rail passenger cars pulled by Amtrak locomotives over right of way agreements obtained by Amtrak, AOE Railway conducted common carriage of passengers by rail within the meaning of the RRA and RUIA. On April 20, 2007, the United States Court of Appeals for the District of Columbia Circuit, in a consolidated case, affirmed both the decision of the STB and RRB. American Orient Express Railway Company, LLC v. Surface Transportation Board and United States of America, ___ F. 3d ___, Nos. 06-1077, 06-1080, (April 20, 2007).

The evidence of record is that GrandLuxe has purchased the rail passenger cars previously used by AOE Railway, and that AOE Railway has transferred to GrandLuxe the rights under the Operating Agreement with Amtrak to run passenger excursion trains. The STB previously determined that the contract between AOE Railway and Amtrak constituted operation of a railroad by AOE Railway under agreement as defined by 49 U.S.C. § 10102(5). American Orient Express Railway Company LLC—Petition for Declaratory Order, *supra*. By transferring this agreement from AOE Railway to GrandLux, the Board finds that GrandLuxe now operates rail transportation just as AOE Railway did previously.

The evidence further shows that GrandLuxe offers this transportation to the public. Accordingly, the Board finds that GrandLuxe Railway LLC became a rail carrier employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and its corresponding provision of the Railroad Unemployment Insurance Act effective May 18, 2006, the date AOE Railway transferred its assets and operating agreement rights to GrandLuxe.

Original signed by:

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