U.S. Railroad Retirement Board
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Legal Opinion L-2006-13
June 21, 2006

TO : The Board

FROM : Steven A. Bartholow
General Counsel

SUBJECT : American Orient Express Railway, Inc.
American Orient Express Railway LLC
AOE Rail Services
AOE Equipment Company
Contributions under the Railroad Unemployment Insurance Act -
Non-retroactive Assessment

This is to advise the Board regarding the request by American Orient Express Railway LLC for a ruling by the Board limiting the retroactivity of liability of that company, its predecessor, and corporate affiliates, for contributions due under section 8 of the Railroad Unemployment Insurance Act prior to April 30, 2006. For the reasons set forth below, I recommend that the Board waive contributions with respect to compensation paid to employees prior to April 18, 2006. A draft Board Order is attached.

I. Summary of Evidence of Record and Prior Board Proceedings

The record concerning these companies is extensive, and proceedings have continued over several years. For purposes of considering whether to limit retroactive contributions, however, the history of the companies' operations and the Board's proceedings may be summarized as follows.

American Orient Express Railway Company, (AOE Inc.) was incorporated as a wholly-owned subsidiary of Oregon Rail Corporation ORC) on October 24, 1997. On November 14, 1997, ORC purchased 13 vintage rail passenger cars. These cars had previously been used by American European Express (AEE) to conduct interstate passenger service as a class III rail carrier from November 15, 1989 to October 1991, when AEE ceased operations. AEE itself never had any relationship with ORC. The vendor of the cars at the time of sale to ORC was a joint venture between TCS Expeditions, a Washington corporation, and Reiseburo Mittelthurgau, a travel agency located in Zurich, Switzerland. Title to the cars was transferred at sale to another wholly-owned ORC subsidiary, AOE Equipment Company.

Beginning April 1998, AOE Inc. used the passenger cars to operate seasonal passenger excursions to various areas of the United States and Canada. On April 1, 1999, AOE Inc. transferred operation of the passenger excursions to American Orient Express Railway LLC (AOE Railway). AOE Railway is a limited liability company wholly owned by Oregon Rail Holdings LLC, which was also formed by ORC on April 1, 1999. In August 1999, AOE Rail Services began operations as a maintenance facility almost exclusively for the repair or renovation of passenger cars used by AOE Railway. AOE Rail Services is also a wholly-owned subsidiary of Oregon Rail Holdings.

The Board opened a coverage investigation on February 19, 1999, which ultimately resulted on February 9, 2001, in a unanimous determination by the Board that AOE Inc. was a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Board Coverage Decision 01-20, American Orient Express Railway, Inc. Based on available information, the Board determined coverage began January 1, 1995. AOE Railway filed a request for reconsideration of the initial determination on July 13, 2001, and also

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requested a hearing before the Board. The Board appointed a Hearing Examiner to take testimony and receive documentary evidence on February 6, 2002. A hearing was held May 21, 2002.

The Examiner made his report to the Board May 16, 2003. Based on the additional evidence adduced at the hearing, the Examiner recommended the Board find AOE Inc. to be a covered rail carrier employer from November 14, 1997, the date the passenger cars were purchased from AEE. He further recommended AOE Railway be determined to be an employer from April 1, 1999, when it assumed operations from AOE Inc. Finally, he recommended that AOE Equipment and AOE Rail Services be determined to be covered employers by reason of being under common control and performing services in connection with rail transportation effective November 14, 1997 and August 1, 1999, respectively.

Before the Board issued its decision, however, AOE Railway filed a petition with the Surface Transportation Board for a declaratory order finding it not to be a rail carrier subject to STB jurisdiction. On January 14, 2004, the Board agreed to stay its decision, awaiting the result of the STB review. On December 27, 2005, the STB issued a decision finding AOE Railway to be a rail carrier subject to STB jurisdiction under part A of subtitle IV of Title 49 of the U. S. Code. By letter of April 18, 2006, the Board notified AOE Railway that it had determined on reconsideration that AOE Inc., AOE Railway, AOE Equipment, and AOE Rail Services were covered employers under the RRA and RUIA from the dates recommended by the Hearing Examiner. See B.C.D. 06-15, American Orient Express Railway, Inc., decision on reconsideration.

II. The Request to Limit Retroactive Liability for RUIA Contributions

By letter dated May 15, 2006, counsel for AOE Railway has requested that the Board waive collection of contributions prior to April 30, 2006 from AOE Railway, AOE Rail
Services, and AOE Equipment. In support of this request, the letter notes that AOE Railway has maintained offices in Texas, Colorado, and Oregon, and has paid unemployment insurance taxes under the laws of those states. AOE Rail Services presently operates in the state of Washington, and has paid unemployment insurance taxes to that state. In past years, both companies also maintained workers' compensation policies. Employees of both companies have received unemployment insurance payments from the state systems, and have received benefits under the workers' compensation policies. AOE Equipment has never had any employees, and consequently never paid any unemployment insurance taxes or workers' compensation insurance premiums.

Counsel for AOE Railway argues that in light of past compliance with state unemployment and workers' compensation laws, retroactive application of liability for coverage under the RUIA would not further the beneficial purpose of the statute, and may subject the companies to duplicate contributions under both systems. Counsel further contends that retroactive application of the RUIA would throw past benefit payments to the employees under the state systems into question.

III. Analysis

Section 8(a)(1)(A) of the RUIA requires employers covered by the Act to pay a contribution equal to a percentage of compensation paid to each employee, limited by a maximum monthly compensation base determined each year. Unlike taxes funding the Railroad Retirement Act, which are collected by the Internal Revenue Service under the Railroad Retirement Tax Act (26 U.S.C. §§ 3201-3241), employers pay these contributions directly to the Railroad Retirement Board. See RUIA section 8(i). The Board's authority with respect to contributions is set forth by section 8(k) of the RUIA as follows:

> (k) All provisions of law, including penalties, applicable with respect to any tax imposed by the provisions of the Railroad Retirement Tax Act, insofar as applicable and not inconsistent with the

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> provisions of this Act, shall be applicable with respect to the contributions required by this Act: Provided, That all authority and functions conferred by or pursuant to such provisions upon any officer or employee of the United States, except authority to institute criminal proceedings, shall, with respect to such contributions, be vested in and exercised by the Board or such officers and employees of the Board as it may designate therefor. * * *

With regard to retroactivity of rulings under the Internal Revenue Code of 1986 (the Code) by the Secretary of the Treasury or the Commissioner of Internal Revenue, section 7805(b)(8) of the Code, as amended in 1996, states:

> (b)(8) The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

Published revenue procedure under the Code states that a ruling applies retroactively unless it includes a specific statement indicating under the authority of section 7805(b) the extent to which it is to be applied without retroactive effect. See Rev. Proc. 89-14, 1989 –1 Cum. Bul. 814, 815.

The Railroad Retirement Board has determined in a series of decisions dating to the early years of administration of the RUIA that under the authority of Code section 7805(b)(8) and its predecessor provisions, the Board may in appropriate circumstances limit retroactivity of liability for contributions under the RUIA. See, e.g., Board Order 42-177, Ogden Union Stockyards Company and Idaho Stockyards Company, approving the recommendation of the General Counsel in Legal Opinion L-42-219 to apply former section 3791(b) of the Internal Revenue Code of 1926; and Board Order 59-119, Richmond Union Stockyards Company, applying section 7805(b) of the Internal Revenue Code of 1954. The 1996 amendment to 7805, though adding paragraphs (b)(1) through (b)(7) regarding retroactivity of regulations, did not alter the authority granted to the Secretary with respect to administrative determinations not made by regulation. See P.L. 104-168 § 1101(a), 110 Stat. 1468. Accordingly, the rationale adopted by the Board in prior determinations to limit retroactive effect of coverage under the RUIA continues to provide a useful framework for analysis of the request by AOE Railway and its affiliated companies.

In this regard, I note that the Richmond Union Stockyards Company decision, supra, presented circumstances somewhat similar to those pertaining to AOE Railway. In March 1947, the IRS determined the Stockyards to be an employer subject to the Railroad Retirement Tax Act. In July 1952, the Board opened a coverage investigation, but then agreed to hold its decision in abeyance pending a review of Stockyard's status by the IRS. Six years later, in July 1958, the Board learned the IRS had denied further review. The Board then issued a determination in October 1958 that Stockyards was a covered employer retroactively to January 1937. The Stockyards agreed to file returns of compensation from 1937, but requested that coverage for purposes of liability for contributions under the RUIA begin January 1959. The General Counsel recommended that the Board consider that the status of Stockyards was a close legal question, and that the Board would likely have followed a second decision by the IRS finding Stockyards not a covered employer under the RRTA. Moreover, the employer paid contributions to the Virginia state unemployment insurance system in the good faith belief it was not covered by the RUIA, and it was possible that unemployment benefit payments by Virginia, which would be a subject of a subsequent coverage and contribution adjustment agreement between Virginia and the Board, would exceed the amount of contributions the Board would receive for the retroactive period. The General Counsel therefore recommended coverage begin effective with the date of the Board's coverage decision in October 1958.

In the current case, AOE Railway was initially determined to be a covered employer in February 2001, with coverage under the RRA and RUIA effective January 1995. The hearing process concluded with the

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Examiner's report in May 2003. Though the Board's Hearing Examiner recommend AOE Railway be found covered, the Board agreed to withhold its decision pending resolution of AOE Railway's petition to the Surface Transportation Board. The STB decision issued December 27, 2005. The fact that the Examiner recommended coverage of AOE Railway as a rail carrier rather than as a sleeping car company and the fact that the Board agreed to defer its decision until the matter was considered by the STB, both indicate that AOE Railway's case involved a close legal question. In addition, as indicated in the preceding discussion, the facts and procedural history of this case are unique. Moreover, the Management Member of the Board has filed a dissent from the majority decision on reconsideration. Clearly, just as was the case in Richmond Union Stockyards, until AOE Railway received the final decision on reconsideration from the Board, AOE Railway could in good faith have believed it would not be required to make contributions under the RUIA in lieu of the state systems. The same may be said for non-carrier affiliate companies AOE Equipment and AOE Rail Services, because coverage of these companies is of course dependent upon meeting the test for being under common control with a rail carrier. Further, just as in the Stockyards case, AOE Railway states that unemployment benefits have been claimed under the state systems. If RUIA coverage is applied retroactively, the possibility exists that under an agreement adjusting benefit payments and contributions with the affected state systems, the Board may ultimately assume liabilities in excess of contributions attributed to the compensation paid for these employees.

In view of the foregoing, it is my opinion that Board Coverage Decision 06-15 American Orient Express Railway, Inc., decision on reconsideration, should be applied without retroactive effect to the extent of relieving American Orient Express Railway Company, AOE Equipment Company, and AOE Rail Services, from payment of contributions which had accrued prior to the date of that decision, April 18, 2006. An appropriate draft Board Order is attached.

Attachment