EMPLOYER STATUS DETERMINATION
American European Express, Inc.

This is the reconsideration decision of the Railroad Retirement Board concerning the status of American European Express, Inc. (AEE) 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).

PROCEDURAL BACKGROUND

In Legal Opinion L-90-38, I determined that AEE became an employer under the RRA and the RUIA effective November 15, 1989, the date that it commenced the transportation of passengers in interstate commerce, because I found that it is a sleeping car company under section 1(a)(1)(i) of the RRA (45 U.S.C. §231(a)(1)(i)) and section 1(b) of the RUIA (45 U.S.C. §351(b)). I noted in L-90-38 that despite having been requested to do so, AEE had not furnished any documentation of authorization by the Interstate Commerce Commission (ICC) for its operation; nor had I located any such authorization. However, the lack of any specific ICC authorization does not necessarily mean that AEE is not, in fact, subject to ICC jurisdiction.

L-90-38 stated that the Interstate Commerce Act defines the term "sleeping car carrier" as meaning "a person providing sleeping car transportation for compensation." (See 49 U.S.C. § 10102(23).) A "sleeping car carrier" is clearly subject to part I of the Interstate Commerce Act. (See 49 U.S.C. § 10501(a)(1).) L-90-38 cited a case involving the attachment of a sleeping car owned by the Pullman Company, which had furnished such car to be regularly used by the Baltimore & Ohio Railroad Company for the accommodation and transportation of passengers between the cities of Columbus, Ohio, and Washington, D.C., wherein the United States District Court for the Southern District of Ohio stated that:

> "A sleeping car company, it is true, by furnishing sleeping cars under a contract with a railroad company to be used by the traveling public, does not thereby assume or acquire the status of a common carrier of goods or passengers . . . unless declared to be such by some constitutional or statutory provision. It merely furnishes accommodations to the passengers of another company and performs only an auxiliary function in their transportation; but it is nevertheless engaged in a public calling . . . Section 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. L. 584, provides that the term 'common carrier' as used in that act shall include sleeping car companies. By virtue of this statutory provision, the plaintiff's status * * * was in legal contemplation the same as that of an interstate carrier. The car, moreover, was an instrumentality of commerce and was when seized actually employed as such in interstate transportation." Pullman Co. v. Linke, 203 F. 1017, 1019-1020 (S.D. Ohio, 1913) (Citations omitted.).

In L-90-38, The Deputy General Counsel found that AEE, like the Pullman Company, is a sleeping car company and, moreover, is engaged in the interstate transportation of passengers. Unlike the arrangement in the decision in Pullman Co. v. Linke, where Pullman simply furnished a sleeping car to the Baltimore & Ohio, AEE contracts directly with its own passengers for the overnight journey between Chicago and Washington, D.C. The Deputy General Counsel concluded that the fact that AEE may not have sought ICC authorization for its operation is not relevant to a determination as to whether it is subject to ICC jurisdiction.

Subsequent to issuance of Legal Opinion L-90-38, AEE filed a timely request for reconsideration of that determination and submitted a written argument in support of that request.

Effective February 5, 1992, the Board's regulations were amended so as to provide that the three-member Board, and not the Deputy General Counsel, makes all initial and reconsideration determinations of employer status. (See 20 CFR § 259.1 and 259.3). This decision on reconsideration constitutes the final decision of the agency (20 CFR § 259.6).

Copies of all documents which have been considered in this decision on reconsideration, some of which may have been previously provided to AEE, are attached, together with an Index of the Administrative Record on Reconsideration.

FACTUAL BACKGROUND

Information in the administrative record on reconsideration indicates that AEE entered into an agreement with Amtrak dated August 28, 1989, pursuant to which Amtrak agreed to move a minimum of 3 and a maximum of 5 railcars owned by AEE between Chicago, Illinois and Washington, D.C. on a five-day per week scheduled basis during 12 months of the year, commencing on a mutually agreed-upon date between October 15, 1989, and November 15, 1989, and terminating 5 years thereafter. The agreement provides that the railcars, which shall be occupied only by AEE's passengers and crews, shall be attached to Amtrak's regularly scheduled trains 29 and 30, the Capitol Limited, and that the railcars shall be occupied by no more than 22 passengers per sleeper. An amendment to the agreement, dated October 10, 1989, increased the frequency of the service from 5 to 6 days per week effective November 15, 1989.

According to an article in the Travel section of the Chicago Tribune of Sunday, November 26, 1989, entitled "New Train Passes Its First Test," the first regularly scheduled run of AEE occurred on November 15, 1989. The article referred to AEE as "the country's first luxury train in decades." The article stated that normally AEE will operate with three Pullman sleepers, a club car, and a dining car, configured to carry a maximum of 56 passengers and a crew of 13. The article stated that the first regularly scheduled trip from Chicago to Washington carried 31 passengers.

Information in the administrative record on reconsideration indicates that in May 1990 AEE added a second route between Chicago and New York, with a stop in Philadelphia. According to

an article in the Transportation section of the Chicago Tribune of Sunday, December 30, 1990, in late December 1990 AEE began to send its trains over a new route that included a major resort, the Greenbrier at White Sulphur Springs, West Virginia, in the middle of its journey between Chicago and Washington, Philadelphia and New York. The article indicated that the change in routing was intended to increase AEE's average sales to about 60 percent of the train's capacity, from a then-current level of about 50 percent, so that AEE could begin to realize a profit. The article indicated that Greenbrier was selected as a "perfect" spot for a meeting destination so that AEE could attract more group business. That article also stated that:

> "In addition to a meeting site to attract groups, Spann [i.e., William F. Spann, AEE's President] said, AEE realized it needed a strong marketing partner and control over the schedule and routing of its own trains, rather than having to depend on Amtrak.
>
> "AEE found the marketing partner and the train operator in the same company, CSX Corp., he said. Besides owning and running freight trains over the new rail line that AEE trains will be using, CSX or its corporate predecessors have owned the 5,000-acre Greenbrier resort since the mid-19th Century.
>
> "CSX will operate the train between Chicago and Washington, but AEE will have to return to letting Amtrak haul the cars between Washington and New York. CSX tracks only run as far north as Philadelphia, and because CSX is only a freight railroad these days, it has no passenger stations of its own in the Northeast."[1]

That article also stated that once regular service to the Greenbrier starts in March 1991, a total of four stops a week, two eastbound and two westbound, will be made at the Greenbrier. Passengers going west may board the train at New York, Philadelphia or Washington and ride as far as the Greenbrier, or all the way to Chicago. Going east, accommodations can be made for groups boarding at Indianapolis, in addition to Chicago.

APPLICABLE STATUTES AND REGULATIONS

Section 1(a)(1)(i) of the RRA (45 U.S.C. §231(a)(1)(i)) provides that the term "employer" under the Act includes:

---

[1] It must also be noted that that same article stated that:

> "In another major change, AEE will begin using locomotives under its own control, rather than being hauled behind Amtrak's regularly scheduled trains. That will make the AEE the nation's first privately operated all-sleeping car train since 1967, when the Pennsylvania Railroad quit running the Broadway Limited, AEE officials said."

(i) any express company, sleeping-car company, and carrier by railroad, subject to Part I of the Interstate Commerce Act.

If this change occurs, it would appear that AEE would then be a common carrier by railroad under section 1(a)(1)(i) of the RRA (45 U.S.C. §231(a)(1)(i)) and section 1(b) of the RUIA (45 U.S.C. §351(b)).

Section 1(b) of the RUIA (45 U.S.C. §351(b)) contains the same definition. The term "sleeping-car company" was also included in the definition of "employer" contained in the Railroad Retirement Act of 1937, the predecessor of the present Railroad Retirement Act of 1974.

The term "sleeping-car companies" was added to the definition of the term "common carrier" in the Interstate Commerce Act by the Hepburn Act, approved June 29, 1906 (34 Stat. 584). An amendment to the Interstate Commerce Act in 1978 changed the term to "sleeping-car carrier." However, the 1978 amendment (P.L. 95-473) was a codification of the Interstate Commerce Act, and the legislative history of that amendment expressly provides that no substantive change was intended by a mere change of terminology:

> Substantive change not intended. Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged. H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 3009, 3018.

DISCUSSION

The argument submitted in support of AEE's request for reconsideration states essentially that because AEE's operations differ from the operations which were conducted by the Pullman Company and AEE's business and contractual relationships with Amtrak "are vastly different" from the Pullman Company's relationships with the various railroads with which it contracted, AEE is not a sleeping car company. This argument is grounded on AEE's assertion that at the time that the Interstate Commerce Act was amended in 1906 to include the term "sleeping-car companies," the Pullman Company was the sole manufacturer and servicer of sleeping cars. For the reasons explained below, the Board does not find this argument persuasive.

First of all, the term "sleeping-car company" is a generic term. Neither the RRA nor the RUIA define the term, apparently because Congress considered it to be self-explanatory. The Interstate

Commerce Act defines "sleeping car carrier" as "a person providing sleeping car transportation for compensation" (49 U.S.C. §10102(23)). Webster's has defined "sleeping-car" as follows:

> "a railway car furnished with berths, compartments, etc. in which passengers may sleep." Webster's Dictionary of the English Language Unabridged, Deluxe Ed. 1977, p. 1706.

The term "company" is defined as:

> " a number of persons united for the same purpose, either in private partnership or as a business concern. Id. at 368."

Thus, a sleeping-car company is a business involving railway cars in which people may sleep.

In order to determine whether a sleeping-car company is one which would be subject to the Interstate Commerce Act, a determination must be made as to whether the company holds itself out to the public as engaging in the business of providing sleeping-car transportation for compensation. The Interstate Commerce Commission has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. State of Washington ex rel. Stimson Lumber Company v. Kuykendall, 275 U.S. 207, 72 L.Ed. 241, 48 S. Ct. 41 (1927); Ensco, Inc. v. Weicker Transfer and Storage Co., 689 F. 2d 921, 925 (10th Cir. 1982); Lone Star Steel Company v. McGee, 380 F. 2d 640, 643 (5th Cir. 1967), cert. denied 389 U.S. 977, 19 L.Ed. 2d 471, 88 S. Ct. 480 (1967). It is the right of the public to demand service that is the real criterion which is determinative of its character as a common carrier. United States v. Stephen Brothers Line, 384 F.2d. 118, 122-123 (5th Cir. 1967). "The distinctive characteristic of a common carrier is that it undertakes to carry for all people indifferently." Ciaccio v. New Orleans Public Belt Railroad, 285 F. Supp. 373, 375(D.C. La. 1968).

In contrast, a private carrier is one who without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Demetrion v. Edwards, 416 F. 2d. 958, 959 (7th Cir. 1969). Private carriers thus undertake not to carry for all persons indiscriminately, but rather transport only for those with whom they see fit to individually contract. Id., at 959; Florida Power & Light Company v. Federal Energy Regulatory Commission, 660 F.2d 668, 674 (5th Cir. 1981), cert. denied, Ft. Pierce Utilities Authority v. Federal Energy Regulatory Commission, 459 U.S. 1156, 103 S.Ct. 800, 74 L.Ed. 2d 1003 (1983). See also The Tap Line Cases, 234 U.S. 1, 58 L.Ed. 1185, 1194 (1913).

As can be seen from the discussion above, it is not the nature of the contracts pursuant to which a company provides sleeping-car transportation which determines whether it is a sleeping-car

company subject to the Interstate Commerce Act, but instead the determining factor is whether such company holds itself out to the general public as a provider of sleeping-car transportation. It is clear from the administrative record on reconsideration that AEE holds itself out to the general public as a provider of sleeping-car transportation between Chicago and Washington and Chicago and New York.

In specific response to AEE's argument that because the Pullman Company was allegedly the only sleeping-car company in existence at the time that the term "sleeping-car companies" was added to the Interstate Commerce Act in 1906 and that therefore the term was intended to cover only Pullman or a company conducting operations in the same manner as Pullman, it must be pointed out that the term enacted was not only generic, but was also plural. Thus, although there may have been only one company which would fall subject to ICC regulation immediately upon enactment of the 1906 amendment (see United States v. Pullman Co., 50 F. Supp. 123, 125 (E.D.Pa. 1943)), Congress made it clear by its use of the plural generic term that it intended to include any such company which might begin to provide sleeping-car transportation to the general public. This intention was again manifested in the enactment of the definition of "employer" in the RRA, which includes "any" sleeping-car company within the definition of an "employer."

It should also be noted that the term "sleeping-car company" remains in some form in the RRA, the RUIA, and the Interstate Commerce Act, despite the fact that the Pullman Company was dissolved on December 2, 1980. (See Articles of Dissolution in the enclosed administrative record on reconsideration.) All three of these Acts

have been amended since December 1980, and Congress plainly could have removed the term from any or all of them if, as AEE apparently contends, the term only applied to the Pullman Company or an identical operation.

The argument in support of AEE's request for reconsideration states (at page 12) that AEE owns and operates approximately ten rail cars which travel in interstate commerce in each direction between Chicago, Illinois and Washington, D.C. and Chicago, Illinois and New York, New York. The argument states that AEE has a contract with Amtrak whereby Amtrak agrees to pull those cars for AEE in five car sets attached to Amtrak's regularly scheduled trains and that each set of rail cars consists of one dining car, one parlor/lounge car and three sleeping cars. The argument states that AEE's ticketing is completely separate from that of Amtrak and that AEE maintains its own ticketing offices and agents. A passenger purchases only an AEE ticket; no Amtrak ticket is required for travel on AEE's cars. The argument then proceeds to argue that because AEE does not have an integrated relationship with Amtrak, AEE is not a "Pullman-type company" and is therefore not subject to the RRA and the RUIA.

However, the very facts recounted in the argument presented by AEE to show how AEE's operations differ from those formerly conducted by the Pullman Company also demonstrate that AEE operates a sleeping car business expressly designed to transport the public in interstate commerce. AEE sells its own tickets and thus contracts directly with those persons wishing to

use AEE's sleeping car service between Chicago and Washington or New York. AEE handles all the revenue brought in through its sale of its transportation services. AEE exercises sole control over the services provided on its rail cars and provides all on-board services to its own passengers, who would come under the control of Amtrak only during emergency operations and for safety purposes (page 13 of argument in support of request for reconsideration). Moreover, through its contract with Amtrak, AEE has acquired the use of

tracks, locomotive power, and on-route maintenance. AEE is, in the Board's opinion, operating a sleeping car company within interstate commerce.

It is therefore the opinion of the Board upon reconsideration that American European Express, Inc. is a sleeping car company within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)(i)) and section 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §351(b)).

CONCLUSION

For the reasons discussed herein, the opinion expressed in Legal Opinion L-90-38, that American European Express, Inc. has been an employer covered by the Railroad Retirement Act and the Railroad Unemployment Insurance Act since November 15, 1989, is hereby affirmed.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

INDEX OF ADMINISTRATIVE RECORD ON RECONSIDERATION

		PAGES
1.	G-115a Memorandum dated September 18, 1989, with attached article	1-2
2.	"New Train Passes Its First Test," and companion articles, Travel section, Chicago Tribune, Sunday, November 26, 1989	3-5
3.	"American Version of 'Orient Express' Offers Opulent Ride"	6-8
4.	"Fast-trackers' basic training: a $695 shuttle" 9-10	
5.	Letter dated October 5, 1989 to Robert L. Lewis, III from George F. Traynere	11-12
6.	Letter dated October 19, 1989 to George F. Traynere from Robert L. Lewis, III, with attached Amtrak-AEE Operating and Maintenance Agreement, as amended	13-28
7.	Letter to W.E. Spann from George F. Traynere 29-30	
8.	Letter dated January 8, 1990 to George F. Traynere from Robert E. Stigger	31-32
9.	Form G-215 dated March 20, 1990	33
10.	Legal Opinion L-90-38, dated March 20, 1990	34-37
11.	Letter dated July 12, 1990 to Steven A. Bartholow from Scott R. Borstein with attached argument in support of request for reconsideration	38-53
12.	Pullman Co. v. Linke, 203 F.1017 (S.D.Ohio 1913)	54-58
13.	"Luxury Train Tries New Route as a First Resort" Transportation Section, Chicago Tribune, Sunday, December 30, 1990	59-60
14.	Articles of Dissolution of the Pullman Company, December 2, 1980	61-63