

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36312

**OAKLAND GLOBAL RAIL ENTERPRISE—
AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA.**

**REPLY TO CITY OF OAKLAND’S REQUEST FOR ABEYANCE
AND MOTION FOR LEAVE TO FILE COMMENTS OUT OF TIME**

Oakland Global Rail Enterprise (“OGRE”) hereby submits this reply to the City of Oakland’s Request to Hold the Proceeding in Abeyance and Motion for Leave to File, filed with the Board on March 4, 2022 in response to OGRE’s Petition for Exemption from the prior approval requirements of 49 U.S.C. § 10901 to operate a rail line in Oakland, California (“Operating Petition”).

INTRODUCTION

The redevelopment of the West Gateway area of the former Oakland Army Base (“OAB”) has been long delayed by ongoing legal disputes with the City. As the Board knows, this conflict has frequently spilled over into Board proceedings related to OGRE’s planned rail operations at the West Gateway. Recently, however, OGRE has understood the parties to be working in good faith towards resolution of the ongoing disputes. In fact, on January 31, 2022, Oakland Bulk & Oversize Terminal (“OBOT”), OGRE, California Capital Investment Group, Insight Terminal Solutions,

and the City agreed to a settlement framework, under which the parties are working towards a settlement agreement to move the project forward.¹

Given these positive developments, OGRE was surprised to see the City's comments on its Operating Petition, filed eight days late, once again misconstruing facts, making misleading assertions, assigning ulterior motives to OGRE, and asking the Board to delay its proceedings. As always, it is OGRE's sole intent to further development of the West Gateway by providing much-needed rail service to its tenants. The timing of the Operating Petition had nothing to do with the ongoing settlement negotiations with the City but, rather, was motivated solely by the time needed to navigate the Board's regulatory and environmental review process.²

DISCUSSION

- I. Nothing precludes OGRE from seeking to operate on the existing on-dock tracks.**
 - A. OGRE has obtained the necessary property rights to operate on the on-dock tracks.**

The City's assertion that OGRE has not obtained the rights to access the "on-dock tracks" identified in the Operating Petition simply is inaccurate. The on-dock tracks unquestionably are part of OBOT's lease premises governed by the Army

¹ See February 2, 2022 Press Release by Oakland City Attorney Barbara J. Parker (available at https://www.oaklandcityattorney.org/News/Press%20releases/Ground_Lease_Settlement.html).

² OGRE also filed on the belief that it will help advance the Office of Environmental Analysis' environmental review, which must be completed before the Board can rule on the Operating Petition.

Base Gateway Redevelopment Project Ground Lease for West Gateway, dated February 16, 2016 (“Ground Lease”). The on-dock tracks are located on Lot 9, and Exhibit 1.1.1-A to the Ground Lease, a copy of which is attached hereto as Exhibit A, expressly identifies Lot 9 as part of the Lease Area.

When OBOT and OGRE entered into the Sublease Agreement dated June 26, 2018 (“Sublease”), it was contemplated that OGRE would be operating primarily within the Railroad R/O/W Property (as defined in the Ground Lease). Nevertheless, in the event there were other areas of the West Gateway outside of the Railroad R/O/W Property that OGRE needed to utilize to the benefit of the Sublease, Section 2.1 of the Sublease provides as follows:

Further, Sublandlord agrees to grant Subtenant additional rights of access over other portions of the West Gateway Lease Area if and to the extent (i) reasonably necessary for Subtenant to use the Sublease Premises for the purposes set forth in this Sublease, (ii) not prohibited by the terms of the [Ground] Lease”³

The City has not identified anything in the Ground Lease that prohibits OBOT’s or OGRE’s use of the existing on-dock tracks within Lot 9. Thus, if OBOT and OGRE agree that it is necessary to use the on-dock tracks, the Sublease between those two parties already provides a mechanism to handle such a request. No additional authorization from the City is necessary.

³ A copy of the Sublease is provided as Exhibit A to Comment of City of Oakland, Request to Hold the Proceeding in Abeyance, and Motion for Leave to File Time for Filing Having Otherwise Expired, STB Finance Docket No. 36312 (filed Mar. 4, 2022) (“City Comments”).

In any case, OGRE does not need the rights to the on-dock tracks prior to seeking operating authority from the Board. As the City itself acknowledges, the Board's grant of authority to operate is permissive only, and in order to exercise that authority and commence operations, the carrier must still obtain the necessary rights under state property and/or contract law.⁴ Thus, the Board routinely grants operating authority prior to the carrier obtaining the necessary rights.⁵ Nevertheless, it is clear that the City was mistaken and that OBOT and OGRE (through the Sublease) have the necessary property rights to the on-dock tracks.

B. The Board's prior decisions do not preclude OGRE from seeking operating authority over the on-dock tracks.

The City appears to believe that OGRE is concealing the motives behind its request to operate over the existing on-dock tracks. It states that "OGRE is seeking authority to operate rail line beyond the scope considered by the Board previously" and argues that such authority may be "invoked to influence the outcome of what are essentially property disputes."⁶ But OGRE is not seeking to "extend" anything—OGRE does not currently have operating authority from the Board. This is the first time it has asked the Board for authority to operate the planned rail line at the

⁴ See *Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC*, STB Finance Docket No. 35984, at 3 (served Apr. 1, 2016).

⁵ See, e.g., *id.*; *Lehigh Ry.—Lease Exemption Containing Interchange Commitment—Norfolk S. Ry.*, STB Finance Docket No. 36062, at 2 (served Oct. 14, 2016); *BNSF Ry.—Trackage Rights Exemption—Union Pac. R.R.*, STB Finance Docket No. 35601, at 4-6 (served Sept. 11, 2013).

⁶ City Comments at 5, 8.

West Gateway. Moreover, nothing in prior Board decisions related to this proceeding precludes OGRE from seeking authority to operate on its entire line of rail, including the on-dock tracks.

First, the City's assertion that the on-dock tracks have not been previously discussed with the STB is mistaken and misleading. OGRE's Petition for Declaratory Order in Finance Docket No. 36168 indicated that OGRE's planned future operations encompassed both the 22,202 feet of track OGRE intended to rehabilitate, "along with other pre-existing track at the OAB that is in good condition and does not require rehabilitation."⁷ That "pre-existing track" included, among other track identified in the Operating Petition, the existing Lot 9 on-dock tracks. Because OGRE was not intending on rehabilitating the existing on-dock tracks, a more thorough analysis of the same was not necessary or relevant for the Petition for Declaratory Order.

Second, a party is not precluded from seeking operating authority over track not previously subject to the Board's prior approval requirements at § 10901. While not required to do so (because such track could be considered excepted track under § 10906), OGRE chose to include *all* track that it may operate over in its Operating Petition out of an abundance of caution, to fully inform the Board of OGRE's planned operations. This approach also is consistent with the information OGRE

⁷ Oakland Global Rail Enterprise Petition for Declaratory Order, STB Finance Docket No. 36168, at 3 (filed May 23, 2018).

has provided to STB’s Office of Environmental Analysis in response to specific information requests.⁸

The City’s jurisdictional arguments relating to the on-dock tracks and the “West Segment”—and the related notion that OGRE is seeking STB’s preemptory authority to help it in negotiations with the City—are, again, misplaced. If OGRE did not seek operating authority over the on-dock tracks, STB’s jurisdiction over such track would not be impacted. OGRE plans to operate over those tracks as part of its common carrier service to shippers at the West Gateway, whether as part of its approved Board authority or as excepted industrial track to support its operations at the West Gateway. While excepted track does not require Board approval, it remains subject to STB’s jurisdiction and thus the preemptive effect of ICCTA.⁹

In short, contrary to the implications of the City, OGRE chose to include all track in its operating petition in an effort to be transparent with the Board regarding its planned operations.

⁸ See, e.g., Oakland Global Rail Enterprise Response to OEA’s May 25, 2018 Information Request No. 1 (EI-26805), at 1 (October 28, 2019); Oakland Global Rail Enterprise Response to OEA’s December 12, 2019 Information Request No. 4 (EI-26807), at 2 (December 19, 2019).

⁹ See, e.g., *Oakland Global Rail Enterprise—Petition for Declaratory Order*, STB Finance Docket No. 36302, at 8-9 (served June 20, 2019) (“*OGRE Petition for Dec. Order*”).

II. The status of negotiations with the City does not warrant an abeyance of this matter.

As demonstrated throughout the proceedings before the Board related to OGRE's operations, the City has opposed OGRE's efforts to obtain Board authorization to operate a rail line at the West Gateway, primarily based on concerns of federal preemption and how a finding that the OAB track falls under the Board's jurisdiction may impact the City's position in the pending legal matters. It has repeatedly misconstrued facts and made misleading arguments in an unsuccessful attempt to convince the Board to wade into the ongoing contractual and property disputes between the City and OBOT/OGRE and delay rail service at the OAB. This most recent filing is just more of the same.

Ongoing negotiations with the City have no impact on OGRE's planned operations or the Board's ability to review and authorize those operations. Obtaining Board authority does not somehow give OGRE any additional "leverage" in its property rights dispute with the Board. The Board has repeatedly made clear that it is well-aware of the legal dispute, that such disputes do not impact the Board's review, and that the Board will not weigh in on or interfere with those disputes.¹⁰ Thus, an abeyance pending resolution of a settlement in the ongoing contractual dispute is not necessary.

¹⁰ See *OGRE Petition for Declaratory Order*, FD 36318, at 5-8; *Oakland Global Rail Enterprise, LLC—Acquisition Exemption—Rail Line in Alameda County, Cal.*, STB Finance Docket No. 36301, at 4-6 (served Oct. 28, 2019).

III. The City's comments should be rejected as untimely.

The City acknowledges that its filing was eight days late but asks that the Court permit the filing for good cause.¹¹ However, the only “good cause” identified by the City is that it was not given *advance* notice by OGRE of the filing.¹² First, OGRE has made its intent to become a common carrier clear to the Board in various proceedings that the City was aware of and participated in. Moreover, nothing in the Board’s regulations require a petitioner to give any party “advance notice.” Here, knowing of its interest, OGRE provided a courtesy copy of its Operating Petition to the City, on the day it was filed, even though the filing occurred in a new docket with no parties of record. The City had ample time to file its comments within the 20-day period for replies.

In addition, the comments filed by the City do not contain “additional facts that will assist the Board.”¹³ As demonstrated throughout this reply, the comments of the City contain inaccurate facts and misleading arguments that do not further the compilation of a complete record. The City’s motion for leave to file should be denied.

¹¹ City Comments at 8.

¹² *Id.*

¹³ *Id.*

CONCLUSION

For the foregoing reasons, OGRE requests that the Board deny the City's Request for Abeyance and Motion for Leave to File Comments.

Dated: March 23, 2022

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Kathryn Kusske Floyd". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Kathryn Kusske Floyd
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*Counsel to Oakland Global Rail
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EXHIBIT A

**EXHIBIT 1.1.1-A
TO
GROUND LEASE
FOR
WEST GATEWAY**

DESCRIPTION OF WEST GATEWAY PROPERTY

[See Attached]

Land Descriptions of real property situate in the City of Oakland, County of Alameda, State of California, and being portions of Lots 9 and 10 as shown upon Parcel Map 10095 filed August 13, 2013, in Book 324 of Parcel Maps at Pages 6 thru 15 Official Records of said County, and being more particularly described as follows:

Lease Area / 827,193 SF

Beginning at a corner on the south line of Lot 9, same corner being at the east terminus of the line labeled North 81° 35' 05" East – 751.31 feet; Thence along the south line of Lot 9 for the following five (5) courses: (1) South 81° 35' 04" West – 751.31 feet, (2) South 74° 45' 15" West – 80.05 feet, (3) South 61° 28' 19" West – 85.21 feet, (4) South 48° 06' 56" West – 79.89 feet, and (5) South 41° 20' 07" West – 1332.88 feet to the southwest corner of Lot 9; Thence along the west line of Lot 9, North 48° 42' 09" West – 130.68 feet; Thence crossing through Lots 9 and 10 for the following seven (7) courses: (1) North 41° 16' 18" East – 80.00 feet, (2) North 48° 42' 09" West – 49.00 feet, (3) North 41° 16' 18" East – 120.80 feet, (4) North 48° 38' 16" West – 86.55 feet for the beginning of a curve to the left, from which point the center bears North 40° 58' 31" West, (5) in a northwesterly direction 255.68 feet along the arc of said curve to the left, having a radius of 75.00 feet and through a central angle of 195° 19' 28", (6) North 48° 38' 16" West – 75.11 feet, and (7) North 20° 41' 10" West – 524.19 feet to a point on the curving north line of Lot 10, being a curve to the left from which the center bears North 15° 13' 16"

Plat WGW-1 // West Gateway

West; Thence with said north line in a northeasterly direction 37.63 feet along the arc of said curve to the left, having a radius of 84.00 feet and through the central angle of 25° 39' 57"; Thence crossing through Lots 9 and 10 for the following six (6) courses: (1) North 81° 33' 14" East – 1168.97 feet, (2) South 08° 23' 15" East – 36.45 feet, (3) North 81° 36' 45" East – 28.00 feet, (4) North 08° 23' 15" West – 36.47 feet, (5) North 81° 33' 14" East – 1022.74 feet, and (6) North 87° 20' 57" East – 15.79 feet to a point on the extension of the south line of Lot 9; Thence along said extension and the south line of Lot 9 for the following two (2) courses: (1) South 08° 24' 05" East – 41.94 feet, and (2) South 07° 08' 26" East – 42.27 feet to **Point of Beginning**.

Containing 827,193 square feet (19.0 acres), more or less, measured in ground distances, as depicted on the Plat labeled (Exhibit "B" Plat WGW-1 West Gateway), attached and hereby made part of the land description.

Lease Area / 57,508 SF

Beginning at a south corner of Lot 9, same corner being at the east terminus of the line labeled North 48° 48' 07" West - 334.23 feet; Thence along the south line of Lot 9, North 48° 48' 07" West- 314.46 feet; Thence across Lot 9, North 81 ° 33' 14" East - 446.81 feet to a point on the south line of Lot 9; Thence along said south line for the following two (2) courses: (1) South 08° 55' 17" East - 32.38 feet, and (2) South 41° 08' 50" West- 319.72 feet to **Point of Beginning**.

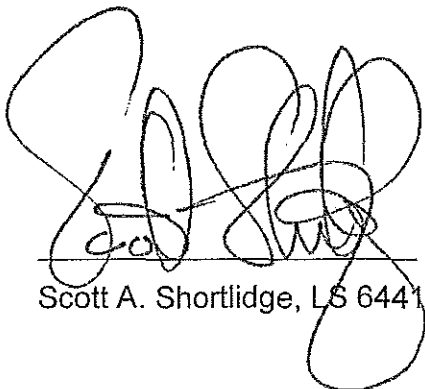
Plat WGW-1 // West Gateway

Containing 57,508 square feet (1.3 acres), more or less, measured in ground distances, as depicted on the Plat labeled (Exhibit "B" Plat WGW-1 West Gateway), attached and hereby made part of the land description.

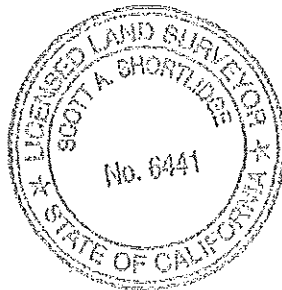
Bearings and distances called for herein are based upon the California Coordinate System, Zone III, North American Datum of 1983 (1986 values) as shown upon that certain map entitled Record of Survey 990, filed in Book 18 of Record of Surveys, Pages 50-60, Official Records of the said County of Alameda. To obtain ground level distances, multiply distances called for herein by 1.0000705.

End of Description

This description and its accompanying plat were prepared by me, or under my direction, in February 2016.



Scott A. Shortlidge, LS 6441



2-8-2016
Date

NOTE

BEARINGS AND DISTANCES ARE BASED ON RECORD OF SURVEY NO. 990. ALL DISTANCES SHOWN OR DERIVED FROM THIS DRAWING ARE GRID. TO OBTAIN GROUND LEVEL DISTANCES MULTIPLY BY 1.0000705.

LEGEND

P.O.B. POINT OF BEGINNING

LEASE LIMITS



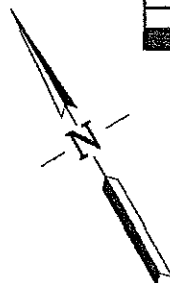
2-8-16

0 400 800



(IN FEET)

1 inch = 400 ft.



PARCEL 9
STATE OF CALIFORNIA
BK 4186 PG 156

BURMA ROAD

LOT 8
9.55± AC.

LOT 7
44.65± AC.

LEASE AREA
57,508± SQ. FT.
(1.3± AC)
(MEASURED IN
GROUND DISTANCES)

P.O.B.
PARCEL 1

P.O.B.
PARCEL 2

PARCEL F-1
PORT OF OAKLAND
2006-301849

LEASE AREA
827,193± SQ. FT.
(19.0± AC)
(MEASURED IN
GROUND DISTANCES)

CITY OF OAKLAND
STATUTES 1911, CHAPTER 657

Curve Table			
Curve	Radius	Delta	Length
C1	75.00'	195°19'29"	255.68'
C2	84.00'	25°40'00"	37.63'

Line Table		
Line	Bearing	Distance
L1	N48°48'07"W	314.46'
L2	N81°33'14"E	446.81'
L3	S08°55'17"E	32.38'
L4	S41°08'50"W	319.72'
L5	N74°45'15"E	80.05'
L6	N61°28'19"E	85.21'
L7	N48°06'56"E	79.89'
L8	N48°42'09"W	130.68'
L9	N41°16'18"E	80.00'
L10	N48°42'09"W	49.00'

Line Table		
Line	Bearing	Distance
L11	N41°16'18"E	120.80'
L12	N48°38'16"W	86.55'
L13	N48°38'16"W	75.11'
L14	N20°41'10"W	524.19'
L15	N08°23'15"W	36.45'
L16	N81°36'45"E	28.00'
L17	N08°23'15"W	36.47'
L18	N87°20'57"E	15.79'
L19	N08°24'05"W	41.94'
L20	N07°08'26"W	42.27'

USA
TRACT 14
PARCEL 1
REEL 32,
IMAGE 660

PARCEL F-1
PORT OF OAKLAND
2006-301849

PLAT WGW-1
WEST GATEWAY

CITY OF OAKLAND, ALAMEDA COUNTY, CALIFORNIA

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RJA

RUGGERI-JENSEN-AZAR

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4690 CHABOT DRIVE, SUITE 200 PLEASANTON, CA 94588
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SCALE:
1"=400'

DATE:
2-8-2016

JOB NO.:
111069

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this March 23, 2022, I caused a copy of the foregoing Reply to be served on all parties of record by email or first- class mail, postage prepaid.



Margaret K. Fawal