

SERVICE DATE – MAY 5, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36312

OAKLAND GLOBAL RAIL ENTERPRISE—
OPERATION EXEMPTION—IN OAKLAND, CAL.

Digest:¹ This decision initiates a proceeding under 49 U.S.C. § 10502(b) and holds the proceeding in abeyance.

Decided: May 5, 2022

On February 4, 2022, Oakland Global Rail Enterprise (OGRE), a noncarrier, filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 for OGRE to operate over approximately 18.2 miles of track located at the former Oakland Army Base (OAB) in Oakland, Cal. The Board will initiate a proceeding under 49 U.S.C. § 10502(b) and hold the proceeding in abeyance as explained further below.

BACKGROUND

According to OGRE, its proposed rail operations would provide service between the main line of Union Pacific Railroad Company (UP) and a rail-to-ship bulk commodity marine terminal at a portion of the OAB referred to as the West Gateway that Oakland Bulk and Oversized Terminal (OBOT), an affiliate of OGRE, plans to develop. (Pet. 5-6, 9.) OGRE states that this connection would also provide access to BNSF Railway Company (BNSF). (*Id.* at 9.) According to OGRE, the 18.2 miles of track over which OGRE plans to operate consists of several sections that are owned or controlled by various entities: itself, the City of Oakland (the City), the Port of Oakland (the Port), BNSF, and UP. (*Id.* at 7-8.) OGRE claims that it has entered into an industrial track agreement with UP providing for OGRE's operations over UP's track, (*id.* at 8 n.13), and that it is working to finalize an industrial track agreement with BNSF providing for OGRE's operations over BNSF's track, (*id.* at 8 n.11). With respect to the Port's track, OGRE states that it plans to enter into a rail operating agreement with the Port but that progress on this agreement has been hindered by a legal dispute with the City. (*Id.* at 8 n.12.)

As to the track controlled by the City, OGRE states that OBOT entered into a lease with the City for the West Gateway and an existing railroad right-of-way on a portion of the OAB controlled by the City. (*Id.* at 5-6.) OGRE states that it has subleased the railroad right-of-way

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

from OBOT and plans to rehabilitate 22,202 feet of track in the right-of-way.² (Pet. 6.) However, OGRE asserts that its planned rehabilitation of the track has been delayed by the legal dispute with the City. (*Id.*)

On March 4, 2022, the City filed a reply to OGRE's petition asking the Board to hold this proceeding in abeyance.³ The City states that it, OGRE, and OBOT are negotiating the roles, obligations, and rights regarding the proposed rail operations but that OGRE did not consult with the City before filing the petition. (City Reply 1.) The City argues that the Board should hold this proceeding in abeyance pending the completion of settlement negotiations.⁴ (*Id.* at 7-8, 9.) On March 23, 2022, OGRE filed a reply opposing the City's request to hold the proceeding in abeyance.

DISCUSSION AND CONCLUSIONS

The Board has broad discretion whether to hold a proceeding in abeyance, and "its decision to do so in any particular case is highly dependent on the facts and circumstances of the case." Pet. of Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048, slip op. at 4 (STB served Oct. 3, 2016) (citing E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012)). Under the circumstances presented here, the Board will initiate this proceeding but hold it in abeyance.

The parties indicate that the rail project at issue has not progressed due to an ongoing legal dispute. The City explains that the parties are currently in settlement negotiations regarding that dispute. It appears that the plan for settling this dispute revolves around reaching an agreement to ensure that no coal or coke is transferred or handled at the West Gateway.⁵

² The Board previously addressed the status of the track in Oakland Global Rail Enterprise—Petition for Declaratory Order, FD 36168 (STB served Mar. 15, 2019). OGRE asserts that the Board found that rehabilitation of this track did not constitute construction requiring the Board's prior approval. (Pet. 6 n.3.) However, in that decision, the Board divided the track identified by OGRE into three segments for purposes of its analysis—the West Segment, the Middle Segment, and the East Segment. The Board did not make any findings with respect to the East Segment because OGRE had provided conflicting information regarding this segment of track and there was insufficient information on the record for the Board to determine its status. Oakland Glob. Rail Enter., FD 36168, slip op. at 10.

³ The City's reply was filed after the deadline for replies set forth under 49 C.F.R. § 1104.13(a) and included a motion asking that the Board accept the late-filed reply. OGRE argues that the Board should reject the City's reply because it was filed late. (OGRE Reply 8.) The City's late-filed reply will be accepted in the interest of a more complete record.

⁴ The proceeding will be held in abeyance for the reasons explained below, but the termination of the period of abeyance will not be tied to the completion of settlement negotiations as requested by the City.

⁵ OGRE's reply refers to a press release by the City Attorney for the City of Oakland. (OGRE Reply 2 n.1 (citing Oakland City Attorney, City of Oakland Agrees to Settlement

However, the Board notes that a carrier, as part of its common carrier obligation under 49 U.S.C. § 11101(a), is required to transport any commodity, including coal or coke, upon reasonable request by a shipper. See, e.g., Strohmeier—Acquis. & Operation Appl.—Valstir Indus. Track in Middlesex & Union Cntys., N.J., FD 35527, slip op. at 2 (STB served Oct. 20, 2011), aff’d sub nom. Riffin v. STB, 733 F.3d 340 (D.C. Cir. 2013); see also Rio Grande Pac. Corp.—Continuance in Control Exemption—Colo., Midland & Pac. Ry., FD 36470 et al., slip op. at 4 (STB served Mar. 25, 2021). Thus, any denial by OGRE of a reasonable request to transport coal or coke would be contrary to federal law.

Because OGRE may not lawfully refuse a reasonable request to carry coke or coal, it appears that the parties’ settlement framework may not be viable. If the parties do not reach a settlement, OGRE might never obtain the necessary state law rights to operate at the OAB. OGRE cites cases for the proposition that Board operating authority is permissive and that the Board may grant authority where a carrier does not yet have the contract and/or property rights necessary to conduct the proposed operations.⁶ However, the Board has also held cases in abeyance where an ongoing legal dispute between the parties could inform or moot the proceeding before the Board in order to ensure the efficient use of Board resources. E.g., Ballard Terminal R.R.—Pet. for Declaratory Ord., FD 36261, slip op. at 4 (STB served June 27, 2019); Pet. of Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048, slip op. at 4. Moving forward in this case, unlike in the cases cited by OGRE, would likely involve a significant environmental and historic review and would therefore require expending considerable Board resources in a matter where rail operations may never be possible. Moreover, none of the cases cited by OGRE involved a petitioner requesting operating authority when that petitioner also appeared to be negotiating an agreement to limit its common carrier obligation in violation of § 11101(a).

The Board also considers whether abeyance would be fundamentally unfair to any party, see Ballard Terminal R.R., FD 36261, slip op. at 4, or would materially harm any party, see Pet. of Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048, slip op. at 4. At this time, abeyance would not be fundamentally unfair in light of the uncertainties surrounding whether OGRE intends to fulfill its common carrier obligation and whether OGRE

Framework to Resolve Lawsuits Regarding the 66-Year Ground Lease of the West Gateway of the Former Oakland Army Base for a Bulk Commodity Terminal, (Feb. 2, 2022), https://www.oaklandcityattorney.org/News/Press%20releases/Ground_Lease_Settlement.html.) That press release states, “[T]he parties will immediately proceed to craft the terms of a settlement agreement and related documents to (1) ensure that no coal or coke will be loaded, unloaded, [or] transferred between any mode of transportation, including without limitation between or among a motor vehicle, ship, or train at the West Gateway.” It further explains that the current legal dispute is focused on whether the City has the right to terminate the lease with OBOT.

⁶ OGRE cites to Ohio River Partners LLC—Acquisition & Operation Exemption—Hannibal Development, LLC, FD 35984 (STB served Apr. 1, 2016); Lehigh Railway—Lease Exemption Containing Interchange Commitment—Norfolk Southern Railway., FD 36062 (STB served Oct. 14, 2016); and BNSF Railway—Trackage Rights Exemption—Union Pacific Railroad, FD 35601 (STB served Sept. 11, 2013). (Pet. 8 n.12; OGRE Reply 4 n.5.)

will ever obtain the property rights necessary to operate, and considering the burden involved in proceeding with an environmental and historic review. In addition, even if OGRE did possess the necessary property rights, it would not be materially harmed by abeyance as it does not appear that it would be able to begin operations in the near future. OGRE has indicated that the marine terminal to be served by OGRE is still under development, the rail line to be used by OGRE still has to be rehabilitated, and agreements for the use of BNSF's and the Port's tracks still have to be reached before OGRE can begin its proposed operations.

To ensure the efficient use of Board resources, the Board will hold this case in abeyance until it has more clarity regarding when and how the legal dispute between the parties might be resolved. Moreover, abeyance is warranted at this time because it appears that OGRE is considering limiting its common carrier obligation potentially in violation of 49 U.S.C. § 11101(a). Cf. Strohmeier, FD 35527, slip op. at 2 (rejecting an application to acquire and operate a line because the applicants stated that they would not transport any commodities designated as a toxic inhalation hazard).

For the reasons explained above, this proceeding will be held in abeyance until further order of the Board. OGRE will be directed to file a status update by November 7, 2022.

By this decision, a proceeding is instituted under 49 U.S.C. § 10502(b).

It is ordered:

1. Under 49 U.S.C. § 10502(b), a proceeding is instituted.
2. The docket is held in abeyance until further order of the Board.
3. OGRE is directed to file a status update by November 7, 2022.
4. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.