



NOSSAMAN LLP
246478

ATTORNEYS AT LAW

1666 K Street, NW
Suite 500
Washington, DC 20006
T 202.887.1400
F 202.466.3215

Justin J. Marks
D 202.887.1412
jmarks@nossaman.com

ENTERED
Office of Proceedings
October 9, 2018
Part of
Public Record

By E-Filing

October 9, 2018

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 36168, *Oakland Global Rail Enterprise Petition for
Declaratory Order*

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is a Motion for Leave to File Supplemental Comments and Supplemental Comments submitted on behalf of the Port of Oakland in response to the Oakland Global Rail Enterprise's September 27, 2018 filing.

If you have any questions about the enclosed, please contact me.

Respectfully submitted,

Justin J. Marks
Counsel for the Port of Oakland

cc: Charles A. Spitulnik, Kaplan Kirsch & Rockwell
Kathryn Kusske Floyd, Venable LLP

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
PETITION FOR DECLARATORY ORDER**

**PORT OF OAKLAND MOTION FOR LEAVE TO FILE SUPPLEMENTAL
COMMENTS**

Kevin M. Sheys
Edward J. Fishman
Justin J. Marks
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

Danny Wan
Mary Richardson
Port of Oakland
530 Water Street
Oakland, CA 94607
(510) 627-1100

Counsel for the Port of Oakland

October 9, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
PETITION FOR DECLARATORY ORDER**

**PORT OF OAKLAND MOTION FOR LEAVE TO FILE SUPPLEMENTAL
COMMENTS**

The Port of Oakland (“Port”) hereby respectfully files this Motion for Leave to File Supplement Comments in this proceeding for the limited purpose of clarifying the Port’s position with respect to the non-jurisdictional status of the former industrial track on Port property that Oakland Global Rail Enterprise, LLC (“OGRE”) seeks to reconstruct and/or rehabilitate. Good cause exists to grant the Port’s Motion for Leave because the Port’s Supplemental Comments will assist the Board in developing a complete and accurate record in this proceeding on important legal and factual issues. The Port’s Supplemental Comments are being filed to correct certain misstatements made by OGRE in its September 27 Response about the Port’s position with respect to the non-jurisdictional nature of the track in question. The Port does not object to the filing of OGRE’s Response, which was accompanied by a similar motion for leave because it constituted a prohibited reply to a reply, as long as the Port’s Supplemental Comments also are accepted into the record.

MOTION FOR LEAVE

The Port respectfully requests leave to file its Supplemental Comments in order to clarify the Port’s position on the non-jurisdictional nature of the track in question. Under 49 C.F.R. §

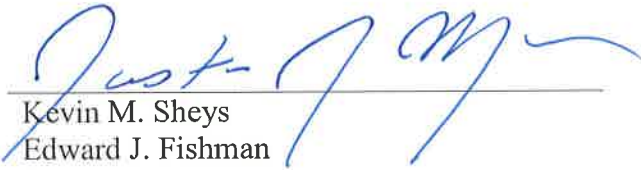
1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete and accurate record, the Board will routinely grant motions for leave to file surreplies or similar pleadings. *Canadian Nat. R.Y. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, Finance Docket 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017).

In this case, good cause exists for the Board to grant the Port's motion for leave and accept the Port's Supplemental Comments into the record. The Port's Supplemental Comments are being filed for the limited purpose of clarifying the Port's position with respect to the non-jurisdictional nature of the private industrial track that used to be located on Port property and that OGRE is seeking to reconstruct and/or rehabilitate. The Port's Supplemental Comments correct certain factual and legal inaccuracies about the Port's position that were set forth in the Response filed by OGRE. The issues addressed by the Port's Supplemental Comments are central to the declaratory order request that is pending before the Board in this proceeding and will not expand or broaden the scope of the issues in dispute in this proceeding. Moreover, there is no evidence that any party will be unduly prejudiced from a timing standpoint by the acceptance into the record of the Port's Supplement Comments. As stated above, the Port does not object to the filing of OGRE's Response (which itself constituted a prohibited reply to a reply under the Board's regulations) as long as the Port's Supplemental Comments are accepted into the record.

CONCLUSION

For the foregoing reasons, the Port respectfully requests that the Board grant the Port's Motion for Leave to file its Supplemental Comments in this proceeding.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Justin J. Marks", is written over a horizontal line.

Kevin M. Sheys

Edward J. Fishman

Justin J. Marks

Nossaman LLP

1666 K Street, NW, Suite 500

Washington, DC 20006

(202) 887-1400

Danny Wan

Mary Richardson

Port of Oakland

530 Water Street

Oakland, CA 94607

(510) 627-1100

Counsel for the Port of Oakland

Dated: October 9, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
PETITION FOR DECLARATORY ORDER**

PORT OF OAKLAND SUPPLEMENTAL COMMENTS

Kevin M. Sheys
Edward J. Fishman
Justin J. Marks
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

Danny Wan
Mary Richardson
Port of Oakland
530 Water Street
Oakland, CA 94607
(510) 627-1100

Counsel for the Port of Oakland

October 9, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
PETITION FOR DECLARATORY ORDER**

PORT OF OAKLAND SUPPLEMENTAL COMMENTS

The Port of Oakland (“Port”) hereby respectfully files these Supplemental Comments for the limited purpose of clarifying the Port’s position with respect to the non-jurisdictional status of the track on the Port’s property that OGRE seeks to construct and/or rehabilitate.

Background

On May 23, 2018, Oakland Global Rail Enterprise, LLC (“OGRE”) filed a Petition for Declaratory Order asking the Board to rule that OGRE does not require Board approval for OGRE’s proposed track construction and rehabilitation project in the vicinity of the former Oakland Army Base property. On September 18, 2018, the Port and the City of Oakland filed separate Comments in response to the OGRE Petition for Declaratory Order.

On September 27, 2018, OGRE filed a Response to those Comments (“OGRE’s Response”) in which it mischaracterizes the Port’s position with respect to the regulatory status of the relevant portion of private industrial track which used to exist on the Port’s property and which OGRE is seeking to reconstruct and/or rehabilitate. The Port’s previous filing in this proceeding explained that the evidence of record demonstrates that the portion of industrial track in question was not owned or operated in common carrier service by the Oakland Terminal Railway (“OTR”) but instead appears to have been owned and/or used by the U.S. Army for

moving its own property around the warehouses that existed on that portion of the former Oakland Army Base property.¹ Therefore, such private industrial track is outside of the Board's jurisdiction under 49 U.S.C. § 10906.

Supplemental Comments

OGRE's Response does not contain any evidence that OTR owned, or operated as a common carrier over, the relevant portion of former industrial track located on Port property. Instead, OGRE asserts that "while the segment of Track on Port property may not be part of the OTR right-of-way, it was historically industrial track falling under the Board's jurisdiction."² OGRE's position mistakenly conflates industrial track used by and ancillary to a common carrier's main line track and/or operations (which ancillary industrial track would be subject to Board jurisdiction under 49 U.S.C. § 10906)³ with private industrial track which is not subject to Board jurisdiction.⁴ In this proceeding, there is no evidence that the OTR operated as a common carrier over the industrial track on the Port's property. Instead, the evidence appears to indicate that the U.S. Army used the track in question as private industrial track to move property around its warehouses.⁵

¹ Port's Comments at 11-12.

² OGRE's Response at 6.

³ 49 U.S.C. § 10906 provides that "without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks." Thus, such industrial, spur or side tracks that are owned and/or operated by a rail carrier as an ancillary part of its common carrier operations are within the Board's jurisdiction but not subject to its licensing requirements.

⁴ See *Bar Techs., Inc. v. Conemaugh & Black Lick R.R.*, 73 F. Supp. 2d 512, 515-517 (W.D. Pa. 1999)(explaining the difference between industrial track subject to 10906 jurisdiction and private industrial track); see also *Old Augusta R.R. Co. – Whole-Line Abandonment Exemption – In Perry County, MS*, Docket AB-474X (STB served Jan. 21, 1997)(granting an abandonment exemption to convert a common carrier rail line into private industrial track.).

⁵ Generally speaking, the U.S. Army functions like any company that manages large industrial facilities with rail infrastructure. Under Army business models, "the Army owns the track on its installations."

OGRE also misconstrues the holding in *Jersey Marine*. OGRE claims that the “specific scenario presented in *Jersey Marine* involved the rehabilitation of industrial track, not a common carrier rail line.”⁶ OGRE once again ignores the important distinction between industrial track used by a rail carrier as an ancillary part of its common carrier operations and subject to the Board’s jurisdiction under 49 U.S.C. § 10906 with private industrial track outside of the Board’s jurisdiction. In *Jersey Marine*, the petitioner represented that the three holding yard tracks and three industrial tracks at issue were “*previously served by a common carrier*” and thus should be characterized as “ancillary industrial spur or side tracks” subject to the Board’s jurisdiction under Section 10906.⁷ OGRE ignores this important distinguishing factor.

In this proceeding, the Port has rebutted OGRE’s claim with contrary evidence that appears to indicate that the relevant track was not operated by the OTR as part of its common carrier service but instead was private industrial track that falls outside of the Board’s jurisdiction. Therefore, the Board’s decision in *Jersey Marine* does not support OGRE’s claim that its planned reconstruction and/or rehabilitation of track on the Port’s property would be exempt from the requirement to obtain Board authority under 49 U.S.C. § 10901.⁸

CONCLUSION

See Ellen M. Pint ET AL., ARMY INSTALLATION RAIL OPERATIONS, 5 (RAND Corporation 2017) available at

https://www.rand.org/content/dam/rand/pubs/research_reports/RR2000/RR2009/RAND_RR2009.pdf

⁶ OGRE’s Response at 5.

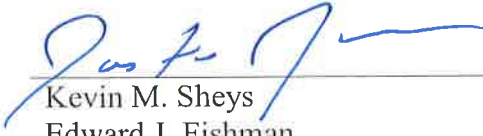
⁷ *Jersey Marine Rail, LLC – Petition for Declaratory Order*, Finance Docket 36063, slip op. at 2 (STB served Jan. 31, 2017)(“*Jersey Marine*”)(emphasis added). This representation by the petitioner in *Jersey Marine* with regard to the regulatory status of the tracks in question was not challenged by any party and was accepted as accurate by the Board in the absence of any contrary evidence.

⁸ OGRE attempts to support its flawed argument that all industrial track is subject to STB jurisdiction by citing to *Joseph R. Fox – Petition for Declaratory Order*, Finance Docket 35161 (STB served May 18, 2009)(“*Joseph R. Fox*”). However, in that case, the track in question was owned and operated by the Union Pacific Railroad Company as yard track in connection with its common carrier operations. *Joseph R. Fox* did not involve private industrial track and therefore is inapplicable in this proceeding.

In conclusion, OGRE has not introduced any evidence that OTR owned or operated as a common carrier over the industrial track in question on Port property. Therefore, OGRE has not sustained its burden of establishing that its proposed reconstruction and/or rehabilitation of such track on Port property would not require Board approval.⁹

⁹ The Port continues to believe that OGRE's request for a declaratory order in this proceeding is premature because OGRE does not have the property or contract rights necessary to implement its plan to reconstruct track and operate as a common carrier over Port property. The Port's initial pleading in this proceeding sufficiently addressed this issue and therefore no further comment about OGRE's Response on this point is necessary.

Respectfully submitted,



Kevin M. Sheys
Edward J. Fishman
Justin J. Marks
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

Danny Wan
Mary Richardson
Port of Oakland
530 Water Street
Oakland, CA 94607
(510) 627-1100

Counsel for the Port of Oakland

Dated: October 9, 2018

CERTIFICATE OF SERVICE

I certify that on October 9, 2018 a true copy of the foregoing was served via email or first class mail upon the following counsel of record:

Kathryn Kusske Floyd
Venable LLP
600 Massachusetts Ave.
Washington, DC 20001
kkfloyd@venable.com

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Ave, N.W. Suite 800
Washington, DC 20036
cspitulnik@kaplankirsch.com



Justin J. Marks