

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

246438

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September 27, 2018
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Public Record

Finance Docket No. 36168

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

PETITIONER'S RESPONSE TO COMMENTS

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Dated: September 27, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168

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

**PETITIONER’S RESPONSE TO COMMENTS
OF CITY OF OAKLAND AND PORT OF OAKLAND**

Oakland Global Rail Enterprise (“OGRE”), pursuant to the accompanying motion for leave, respectfully submits this response to the comments of the City of Oakland (“City”) and the Port of Oakland (“Port”), both filed September 18, 2018.¹

INTRODUCTION

To ensure that all regulatory requirements are met before it proceeds with the rehabilitation of approximately 22,200 feet of track running along the northern edge of the former Oakland Army Base (“OAB”) West Gateway area (the “Track”),² OGRE has petitioned the Surface Transportation Board (the “Board”) to answer one

¹ Comments by the City of Oakland, California to OGRE’s August 21 Response, Oakland Global Rail Enterprise—Petition for Declaratory Order, STB Finance Docket No. 36168 (filed Sept. 18, 2018) (“City Comments”); Port of Oakland Comments in Response to Oakland Global Rail Enterprise Petition for Declaratory Order, Oakland Global Rail Enterprise—Petition for Declaratory Order, STB Finance Docket No. 36168 (filed Sept. 18, 2018) (“Port Comments”).

² The Track is depicted in Exhibit 1 and Exhibit 3 to Petitioner’s Response to the Surface Transportation Board’s Request for Additional Information, STB Finance Docket No. 36168 (filed Aug. 21, 2018) (“OGRE Response to STB Request”). As noted in that filing, the Track runs solely on City property, except for a short segment on Port property.

straightforward question: does the rehabilitation of the Track require prior Board approval? OGRE believes the answer to this question—based on well-established Board precedent—is “no”, as the information presented to the Board by both OGRE and the City demonstrates that the Track consists of jurisdictional common carrier rail lines and industrial track.³

Although the City and the Port have filed responses with the Board claiming that the historical status of the Track is in question,⁴ neither party has presented persuasive evidence that the Track was not historically jurisdictional. Instead, in an attempt to muddy the waters, the City and the Port raise a host of issues that simply are not germane to the jurisdictional status of the Track. The Board’s attention should not be diverted from OGRE’s straightforward petition asking whether the Board historically had jurisdiction over the Track. The answer to this question is needed now, so that all interested parties—including the City and the Port—can determine their relevant regulatory requirements moving forward.

³ See Petitioner’s Response to Reply to Petition for Declaratory Order, Oakland Global Rail Enterprise—Petition for Declaratory Order, STB Finance Docket No. 36168, at 5 (July 16, 2018); OGRE Response to STB Request at 10-11.

⁴ Note that the Port’s comments address only the jurisdictional status of the section of Track on Port property. The Port did not take a position on whether Board approval would be required for rehabilitation of track on City property. See Port Comments at 9.

DISCUSSION

I. Questions regarding OGRE's rights to build on Port property or to operate on Port track are outside the scope of OGRE's pending Petition for Declaratory Order.

As noted above, the Petition for Declaratory Order in this proceeding is narrow in scope. OGRE seeks only a declaration from the Board regarding the jurisdictional status of the Track so that OGRE is able to determine whether it can rehabilitate the Track without Board authority.⁵ The only information relevant to this decision is the Track's historical use.

The Port attempts to broaden the scope of issues before the Board to encompass questions of property rights, arguing that the Board should "refrain" from issuing a declaratory order because OGRE "has not yet obtained the property rights that it needs from the Port to build any track on Port property."⁶ Specifically, it claims that the City's rail easement over this segment of track has "expired" and therefore OGRE has no right to rebuild the segment of track in question. But this potential difference of opinion between OGRE, the City, and the Port is dependent on the interpretation of contract terms among the parties⁷ and has no bearing on the historical

⁵ As noted in OGRE's Petition for Declaratory Order, OGRE recognizes that, as a non-carrier, it must obtain authority to operate the rehabilitated rail line and intends to file a Petition for Exemption for such operations in the future.

⁶ Port Comments at 13.

⁷ OGRE maintains that it has the existing right to build this segment of track on Port property through Oakland Bulk & Oversized Terminal ("OBOT")'s contracts with the City. Specifically, when OBOT and the City entered into that certain Army Base Gateway Redevelopment Project Ground Lease for West Gateway, dated February 12, 2016 ("Ground Lease"), the City represented that it had easements with the Port that would allow OBOT and its subtenants the right to enter upon Port property to construct and use this segment of Track, and obligated OBOT to

jurisdictional status of the track in question. It is therefore not relevant to the Board's consideration of OGRE's Petition for Declaratory Order.

The Port also claims that, although negotiations are ongoing, OGRE does not yet have a right to operate on Port track and asks the Board to deny as "premature" any request by OGRE for operating authority.⁸ To be clear, OGRE is not filing for operating authority over any portion of track at the OAB at this time, and it does not intend to do so until it has secured all necessary operating rights.⁹ And OGRE's operating rights are irrelevant to the jurisdictional status of the approximately 22,200 feet of track at issue in the Petition for Declaratory Order.¹⁰ Thus, it is the Port's request that is premature.

the same. To the extent that the City's representations are no longer accurate, or to the extent the Office of the City Attorney is now taking the position that no easements may be granted between the City and Port because the two are not distinct legal entities, this is a matter for the parties to settle through local proceedings.

⁸ Port Comments at 14-15. Note that the City and Port entered into an Amended and Restated Cost Sharing Agreement, dated June 19, 2012, setting forth the framework for the City and the Port to enter into a "Rail Access Agreement" and requiring the City and the Port to negotiate in good faith for use of the "Port Rail Terminal to serve the City's rail needs"

⁹ A copy of the Port's own track data shows the existing Port track upon which OGRE will be seeking the right to operate as measuring 58,117.44 feet. *See* Exhibit 2 attached hereto (measurements are taken from the chart labeled "Track Owned and Maintained," where "12+88.25" is equal to 1,288.25 feet). This figure does not include the track on Port property OGRE intends to rehabilitate.

¹⁰ OGRE provided information regarding planned future operations in response to the Board's August 1, 2018 Decision in this matter. This information was intended to clarify for the Board differences between OGRE's prior Board filings and the current Petition for Declaratory Order. OGRE recognizes that its actual operational plans could change in the future, and any future filings with the Board for construction and/or operating authority would reflect those changes.

II. The Track on Port property is industrial track that falls within the scope of the Board’s jurisdiction.

The Port also claims that the historical information presented by OGRE and the City shows that the portion of Track on Port property is not located in the Oakland Terminal Railway (“OTR”) right-of-way. It claims this means the Track does not fall within the Board’s decision in *Jersey Marine*¹¹ and that therefore OGRE must seek construction authority from the Board to build this segment of Track.¹² This argument misconstrues the holding in *Jersey Marine*.

Under *Jersey Marine*, a non-carrier can rehabilitate any *jurisdictional* track without prior Board approval.¹³ Jurisdictional track includes not only common carrier rail lines, but also spur, industrial, team, switching, or side tracks (“industrial track”), even though industrial track generally is not subject to the Board’s licensing authority.¹⁴ In fact, the specific scenario presented in *Jersey Marine* involved the rehabilitation of industrial track, not a common carrier rail line.¹⁵

The Port concedes that the section of Track on Port property was historically industrial track. Specifically, the Port states that the “specific spur tracks which used

¹¹ *Jersey Marine Rail, LLC—Petition for Declaratory Order*, STB Finance Docket No. 36063 (served Jan. 31, 2017).

¹² Port Comments at 11-13.

¹³ *Jersey Marine Rail, LLC—Petition for Declaratory Order*, STB Finance Docket No. 36063, at 5.

¹⁴ *See, e.g., Joseph R. Fox—Petition for Declaratory Order*, STB Finance Docket No. 35161, at 4 (STB served May 18, 2009).

¹⁵ *Jersey Marine Rail, LLC—Petition for Declaratory Order*, STB Finance Docket No. 36063, at 2.

to exist in the curve area of OGRE's planned connection were likely owned and used by the U.S. Army as spur or industrial tracks... ."¹⁶ Thus, 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. Under *Jersey Marine*, Board authority is not required for the rehabilitation of this section of the Track.

III. OGRE is not currently conducting any rail operations at the OAB.

In its comments, the City "seeks further clarification" as to whether OGRE is currently conducting rail operations.¹⁷ It points to certain information included on OGRE's website as conflicting with the information OGRE provided to the Board on August 21, 2018. As noted by the City, OGRE's website is outdated. The statements regarding OGRE's operations were posted in 2014—when OGRE originally sought operating authority from the Board—and the website was not updated after OGRE withdrew that filing.¹⁸ This was an unintentional oversight on OGRE's part, and the statements on the website have now been removed.¹⁹

As stated in its August 21, 2018 Response, OGRE is not currently conducting any rail operations at the OAB.²⁰ Further, OGRE has not yet entered into any

¹⁶ Port Comments at 12-13.

¹⁷ City Comments at 5.

¹⁸ Verified Statement of Mark McClure at ¶ 5 (attached hereto as Exhibit 1).

¹⁹ *Id.*

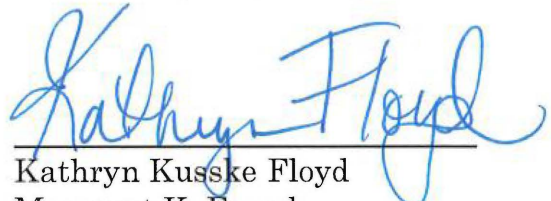
²⁰ OGRE Response to STB Request at 15. *See also* Verified Statement of Mark McClure at ¶ 4. West Oakland Pacific Railroad ("WOPR") is a separate entity from OGRE and currently conducts switching services under an agreement with BNSF and Union Pacific. WOPR and California Capital & Investment Group are joint venture partners in OGRE.

agreements to provide rail transportation.²¹ OBOT, however, is obligated by the City through its ground lease to rehabilitate the rail improvements as further explained in its August 21, 2018 Response.²²

CONCLUSION

For the reasons discussed above, the Board should grant OGRE's Petition for Declaratory Order and confirm that its planned rehabilitation activities described therein are not subject to the Board's prior approval.

Respectfully submitted,



Kathryn Kusske Floyd
Margaret K. Fawal

Counsel to Oakland Global Rail
Enterprise

Dated: September 27, 2018

²¹ Verified Statement of Mark McClure at ¶ 4.

²² See OGRE Response to STB Request at 15.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September 2018, I caused a copy of the foregoing Response to Comments to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Margaret K. Fawal

EXHIBIT 1

Finance Docket No. 36168_1

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

PETITIONER’S RESPONSE TO COMMENTS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168_1

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

**VERIFIED STATEMENT OF MARK MCCLURE
IN SUPPORT OF PETITIONER'S RESPONSE TO COMMENTS**

1. My name is Mark McClure. I am the President of Oakland Global Rail Enterprise, LLC ("OGRE"). My office is located at 300 Frank H. Ogawa Plaza, Suite 340, Oakland, CA 94612.

2. As President of OGRE, I have been actively involved in and am familiar with OGRE's planned rehabilitation and operation of approximately 22,200 feet of track within an existing rail right of way located at the former Oakland Army Base ("OAB") (the "Project").

3. I am submitting this Verified Statement in support of OGRE'S Response to Comments in the above proceeding. This Verified Statement is based on firsthand knowledge from my involvement, as President of OGRE, in the planning of the Project.

4. OGRE is not currently conducting any rail operations at the OAB, and OGRE has not yet entered into any agreements to provide rail transportation.

5. OGRE's website previously contained inaccurate statements regarding OGRE's status as a Class III railroad and its operations at the OAB. These statements were posted in 2014 when OGRE originally sought operating authority from the Board.

The website was not updated after OGRE withdrew that filing. This was an unintentional oversight, and those inaccurate statements have been removed from the website.

VERIFICATION

I, Mark McClure, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

A handwritten signature in black ink, appearing to read "Mark McClure", written over a horizontal line.

Mark McClure

September 26, 2018

EXHIBIT 2

Finance Docket No. 36168_1

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

PETITIONER'S RESPONSE TO COMMENTS

PRINT DATE 11-19-15 9:55:16 C:\pwworking\esdel\p0046568\p0046568.dwg User: j7841 SHEET 2-022.dwg Printed by: p0046568

Track Owned and Maintained					
Union Pacific Railroad			Port of Oakland		
Track	Begin	End	Track	Begin	End
			L1	1+30.61	64+40.00
			L2	0+00	12+88.25
			S1	0+00	48+25.52
			S2	0+00	38+95.81
			S3	0+00	40+14.31
			S4	0+00	45+39.16
			S5	0+00	41+44.53
			S6	0+00	39+90.65
			S7	0+00	50+34.27
			S8	0+00	42+47.62
			M1	0+00	40+24.46
			M2	0+00	36+30.13
			M3	0+00	24+94.83
			M4	0+00	21+95.59
			M5	0+00	21+66.32
			IRC-1	0+00	4+28.45
			XL1/L2	0+00	2+27.73
			WGL1	0+00	1+11.04
			WGL2	0+00	2+92.73
			T1	0+00	2+56.65

ZTS Matrix	
Port/OGRE	UPRR
L1	
L2	
M1	
M2	
M3	
M4	
M5	
S1	
S2	
S3	
S4	
S5	
S6	
S7	
S8	
IRC-1	
XL1/XL2	
T1	

Construction		
Track	PS	CP
UPRR		
Port		
S1 (S1-1)	0+00	1+55.58
S7 (S1-1)	0+00	0+03.81
S7 (S7-1)	0+00	1+47.07
L1 (S7-1)	0+00	4+25.92
L1 (L1-1)	0+00	4+26.71
S2 (S2-1)	0+00	2+83.06
S1 (S2-1)	0+00	7+99.59
S3 (S3-1)	0+00	1+59.08
S4 (S4-1)	0+00	2+90.80
S5 (S5-1)	0+00	1+59.08
S6 (S6-1)	0+00	1+59.38
S7 (S6-1)	0+00	7+68.21
S8 (S8-1)	0+00	1+47.21
M1 (M1-1)	0+00	1+47.53
M2 (M2-1)	0+00	1+47.45
M3 (M3-1)	0+00	1+47.45
M4 (M4-1)	0+00	1+51.02
L1 (L1-1)	0+00	13+88.84
M4 (M4-1)	0+00	5+46.83
M5 (M5-1)	0+00	1+85.86
M5 (M5-2)	21+66.32	16+49.77
M4 (M4-2)	21+95.59	20+09.94
M3 (M3-2)	24+94.83	23+20.34
M2 (M2-2)	36+30.13	26+19.59
M2 (M2-2)	36+30.13	34+44.27
M1 (M1-2)	40+24.46	35+78.55
L2 (L2-1)	0+00	1+62.66
L1 (L1-1)	0+00	46+37.03
M1 (M1-2)	40+24.46	38+62.42
S2 (S2-2)	38+95.81	37+26.81
S3 (S3-2)	40+14.31	36+11.64
S1 (S1-2)	48+25.52	46+47.61
S3 (S3-2)	40+14.31	38+70.23
S4 (S4-2)	45+39.16	41+17.98
S5 (S5-2)	41+44.53	39+85.45
S6 (S6-2)	39+90.65	38+31.28
S7 (S7-2)	50+34.27	44+59.30
S8 (S8-2)	42+47.62	41+05.59
L2 (L2-1)	0+00	5+35.68
L2 (L2-2)	12+88.25	11+02.39
WGL2 (WGL2-1)	0+00	1+80.00
L36 (L1-2)	66+76.28	65+27.60
L1 (L1-2)	66+76.28	65+40.53
WGL1 (WGL1-1)	0+00	1+47.45
IRC (IRC-1)	0+00	1+47.45
S1 (IRC-1)	0+00	34+47.04
T1	0+00	1+43.98
L1 (XL1/L2)	49+27.54	51+18.64
L1 (T-29)	0+00	1+42.09
L36 (T-29)	0+00	98+62.29

Road Crossings			
Crossing	Track	Begin	End
Port			
X51-1	S1	4+63.24	4+88.24
X51-2	S1	35+67.88	35+92.25
X57-1	S7	3+10.92	3+47.07
X58-1	S8	1+39.26	2+60.27
X51-3	S1	44+93.14	45+17.15
X53-1	S3	38+63.04	38+87.82
X54-1	S4	41+16.50	41+40.51
X55-1	S5	39+81.78	40+06.15
X56-1	S6	38+33.77	38+57.77
X57-2	S7	44+43.87	44+78.00
X58-2	S8	35+18.99	35+59.52
XM1-1	M1	34+61.47	34+85.85
XM2-1	M2	33+26.81	33+51.19
XL1-1	L1	26+55.62	26+96.24
XL1-2	L1	42+82.91	43+07.28
XIRC-1	IRC	1+46.34	3+73.84
XL1-3	L1	61+68.18	62+12.82
XT1-1	T1	1+79.46	2+56.65

Derail Schedule		
TRACK	NAME	STA
L1	L1-D1	4+90.84
L1	L1-D2	64+32.31
S7	S7-D1	2+08.02
S1	S1-D1	3+58.30

REFERENCES:
PLANS
FIELD BOOKS

CAUTION:
CHECK TRACING FOR LATEST REVISIONS

NO.	REVISIONS	DATE	REV'D	APP'D

DRAWN D. ITO
DESIGNED M. LEVE No. C47526
CHECKED L. GOOBOLD
REC. ENGINEER NO.
REC. ENGINEER NO.

PORT OF OAKLAND
530 WATER ST. OAKLAND, CALIFORNIA

PARSONS
155 Grand Avenue
Suite 350
Oakland, Ca 94612

For Use In Agreement with: **UNION PACIFIC RAILROAD**
And **PORT OF OAKLAND**
LOCATION & DESCRIPTION: Milepost 4.75 - Niles Subdivision
Station of Oakland, Alameda County, California
Roseville Service Unit
Trackage to Serve
PORT OF OAKLAND

OAKLAND ARMY BASE	
TRACK DATA	
DATE:	08-15-15
SCALE:	AS SHOWN
SHEET:	2 OF 7 SHEETS
G02	EXHIBIT A

CAUTION: THIS PLAN MAY BE REDUCED

0 1" 2" ORIGINAL SCALE