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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168

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

**PETITIONER’S REPLY TO CITY OF OAKLAND’S
PETITION FOR STAY**

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Dated: April 1, 2019

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Oakland Global Rail Enterprise (“OGRE”) respectfully submits this reply to the Petition for Stay filed by the City of Oakland (“City”) on March 25, 2019.¹

INTRODUCTION

In its March 15, 2019 decision (“Decision”), the Board issued a straightforward determination of the historical jurisdictional status of track located at the former Oakland Army Base (“OAB”).² The Decision was based on facts presented to the Board regarding historical operations at the site. It was *not* based on OGRE’s property rights at the OAB. And yet, the City now seeks a stay of the decision arguing that an ongoing contractual dispute between the City on one side and Oakland Bulk & Oversize Terminal (“OBOT”) and OGRE on the other somehow impacts the “context” of the Decision. It does not. The contractual property rights of OBOT/OGRE have no bearing on the jurisdictional status of the OAB track, and therefore the Board should reject the City’s Petition for Stay.

¹ City of Oakland Petition for Stay, STB Docket No. FD 36168 (filed March 25, 2019) (“City Petition”).

² *Oakland Global Rail Enterprise—Petition for Declaratory Order*, STB Docket No. FD 36168 (served March 15, 2019).

BACKGROUND

In May 2018, OGRE asked the Board to issue a declaratory order regarding the historical jurisdictional status of certain track at the OAB.³ OGRE believed that a declaratory order was necessary to clarify the regulatory obligations associated with its reconstruction of this track. After multiple filings by OGRE, the City, and the Port of Oakland regarding the historical use of and rail operations at the OAB, the Board issued a decision finding that a portion of the track was historically jurisdictional, while another portion would be considered excepted spur track.⁴

Even though the Board's determination did not rely on OGRE's contractual property rights at the OAB—and correctly acknowledged OGRE's multiple representations that it will seek subsequent operational approval from the Board (which still remains true)—the City now asks the Board to stay the Decision due to an ongoing contractual dispute between the City and OBOT/OGRE. This stay request—and an expected petition for reconsideration⁵—is yet another attempt in the City's continual efforts to block redevelopment of the OAB by OBOT and OGRE.

As OGRE has previously explained, the City has spent many years obstructing OBOT's and OGRE's activities at the OAB due to its opposition to the transport of coal through a rail-to-ship bulk commodity terminal facility at the OAB.⁶ In 2016, the City enacted an ordinance prohibiting the transportation, storage, and handling of coal at bulk good facilities in the City of Oakland.⁷ After a federal district court struck down application of the coal ban to OBOT as a

³ Oakland Global Rail Enterprise Petition for Declaratory Order, STB Docket No. FD 36168 (filed May 23, 2019) (“OGRE Petition”).

⁴ *Oakland Global Rail Enterprise*, FD 36168, at 6-7.

⁵ See City Petition at 1.

⁶ See Petitioner Response to the Surface Transportation Board's Request for Additional Information, STB Docket No. FD 36168, at 3-4 (filed Aug. 21, 2018) (“OGRE Response”).

⁷ *Id.* at 4.

breach of the development agreement between the City and OBOT,⁸ the City sought to terminate its ground lease with OBOT.⁹ This contractual dispute, which is ongoing in California state court, continues to delay the OAB redevelopment.¹⁰

The City's Petition for Stay omits these details and its strident opposition to this project. But it is clear that—despite accepting more than \$250 million dollars in federal and state money for redevelopment of the OAB into a rail-served trade and logistics center¹¹— the City remains steadfast in its commitment to block OBOT's and OGRE's project using any means necessary.

DISCUSSION

In deciding a petition for stay, the Board follows the traditional criteria by requiring the party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay.¹² The City has failed to demonstrate that any of these factors are present here.

I. The City is likely to fail on the merits of any petition for reconsideration.

A. There are no changed circumstances to justify reconsideration.

The City claims that “new” circumstances have arisen because the City has purported to terminate OBOT's lease—and thereby OGRE's sublease through OBOT—and OBOT has

⁸ *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986 (N.D. Cal. 2018). The City has appealed that decision to the 9th Circuit Court of Appeals.

⁹ City Petition at 2-3.

¹⁰ *Id.*

¹¹ OGRE Response at 3.

¹² See, e.g., *Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cnty., Md.*, STB Docket No. FD 35438, et al., at 2 (served Nov. 17, 2010).

separately filed a breach of contract claim against the City in state court.¹³ But these developments do not constitute “changed circumstances” at all.

As the City notes, it served OBOT with a Notice of Default on October 23, 2018.¹⁴ And OBOT and OGRE separately filed a complaint against the City for Breach of Contract on December 4, 2018.¹⁵ These actions were taken *months* before the Board issued its Decision. If the City truly believed that these developments “materially affect[] the context” of this proceeding,¹⁶ it should have—and could have—notified the Board *prior* to the Decision being issued. Instead, the City tellingly chose not to do so. The City’s failure to raise this so-called “new” information when it became available dooms any future petition for reconsideration it may file.¹⁷

Moreover, the City misleadingly asserts that OBOT’s ground lease with the City—and thereby OGRE’s sublease with OBOT—has been terminated. In California, the law is clear that where there is dispute over real property rights between a landlord and a tenant, the tenant’s right to possess the property will remain in effect until there is a judicial determination that the lease has been terminated.¹⁸ Here, there has been no such judicial determination. Because OBOT and OGRE retain a right to possess and use the property, there are no changed circumstances.

¹³ City Petition at 5.

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 3.

¹⁶ *See id.* at 1.

¹⁷ *See New England Central Railroad, Inc.—Trackage Rights Order—Pan Am Southern LLC*, STB Docket. No. FD 35842, at 4 (served Apr. 26, 2018) (“The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.”).

¹⁸ *Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 484 (Cal. Ct. App. 1970) (“The right of a tenant to the continued use of his rented property is a substantial and valuable right and until it has been judicially determined that such right has been forfeited because of the failure to meet certain conditions in the rental agreement . . . the right is entitled to judicial protection.”).

B. The Decision was not based on OGRE's property rights.

Even if the ongoing legal dispute between OBOT and the City could be viewed as “changed circumstances,” the dispute does not rise to the level necessary to support reconsideration. The Board will reopen a decision to consider changed circumstances only if the circumstances *materially affect* the Board's initial decision.¹⁹ In other words, the changed circumstance must “relate[] to a specifically identified and contested assumption in our prior decisions.”²⁰

The City does not argue that the contractual dispute would materially affect the Board's Decision. This is because the Decision addressed only the narrow question of whether the existing track at the OAB was historically jurisdictional. The contractual rights of OBOT and OGRE to the property in question are irrelevant to this “jurisdictional” question concerning rail property for which the City has been closely involved as party of the OAB development. Thus, the contractual dispute cannot “materially affect” the Board's Decision.

Instead, the City's primary argument is that the ongoing contractual dispute makes it “inappropriate for the Board to decide at this time what OGRE may or may not do on the City's property.”²¹ But a property rights dispute does not prevent the STB from exercising its jurisdiction. As the Board noted in its Decision, the lack of the necessary contractual and property rights does not foreclose a grant of Board authority.²² Under applicable STB precedent, the Board's exercise

¹⁹ *Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, STB Docket No. FD 35110, at 4 (served June 22, 2011).

²⁰ *Ariz. Pub. Serv. Co. & Pacificorp v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. NOR 41185, at 4 (served May 12, 2003).

²¹ City Petition at 5.

²² *Oakland Global Rail Enterprise*, FD 36168, at 11 n.12.

of jurisdiction is not impacted by a contractual dispute among private parties—“even one that could have the effect of undermining the transaction.”²³

Given the City’s ongoing plans to redevelop the OAB—plans that have always contemplated rail service—the need for clarity regarding the historical jurisdictional status of the OAB track exists regardless of OGRE’s/OBOT’s contractual rights. Because the City has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” the City’s expected petition for reconsideration will fail on its merits.²⁴ The Board should therefore deny the Petition for Stay.

II. The City has not demonstrated it would suffer irreparable harm absent a stay.

“A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay.”²⁵ In fact, the Board has consistently found that “the threshold consideration in deciding whether injunctive relief is appropriate is whether the petitioning party will be irreparably harmed without it.”²⁶ The City has failed to make this showing.

²³ *Missouri Central Railroad Co.—Acquis. and Operation Exemption—Lines of Union Pacific Railroad Company*, STB Docket No. FD 33508, at 4 (served Sept. 14, 1999). The cases cited by the City are inapposite to the present matter. In *James Riffin—Petition for Declaratory Order*, STB Docket No. FD 35245 (served Sept. 15, 2009), the Board found that even though it had granted operating authority to a party, that party did not have the ability to provide common carrier service because it did not have the rights to use the rail line. And in *Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc.—Petition for Declaratory Order*, STB Docket No. FD 34824, at 3 (served Aug. 11, 2006), the Board found that it did not have jurisdiction over rail/truck transloading activities not performed by a rail carrier. Neither of these cases involved the Board declining to clarify the jurisdictional status of a rail line due to an underlying property rights dispute.

²⁴ See *Jimmy Lee Waneck and Starr Swearingen Waneck, et al.—Petition for Declaratory Order*, STB Docket No. FD 36167, at 3 (served Oct. 31, 2018) (internal citations omitted).

²⁵ *Eighteen Thirty Group, LLC*, FD 35438, et al., at 3.

²⁶ *Id.*

The City claims that it will be irreparably harmed if the Decision stands because “until the state court resolves [the] property dispute, [the Decision] . . . has the potential for impinging on the City’s bundle of property rights associated with the Line.”²⁷ But it is unclear how the Board’s declaration that the OAB track falls within its jurisdiction impacts the City’s property rights at the OAB, and the City cites no supporting case law for this contention.

To the contrary, the Board previously addressed a similar situation and found that this type of “alleged harm” cannot justify a stay. In *Eighteen Thirty Group, LLC*, two petitioners sought to stay a notice of exemption because they had not, and would not, consent to transfer the underlying real estate and track to the entity seeking to acquire the rail line.²⁸ In response the Board explained that a notice of exemption “does not mandate the acquisition or bestow any property rights on the acquiring entity that the transferor does not already have to convey or sell.”²⁹ The Board further stated that “[c]oncerns regarding the [rail line’s] ownership involve questions of property law and bankruptcy law, and the Board’s permissive approval of the Notices will have no effect on the determination of those matters.”³⁰ Because of this, the Board found that the petitioners faced no irreparable harm and denied the motion to stay.

Similarly, the Board’s Decision here does not impact the City’s or OBOT/OGRE’s contractual property rights. Instead, the property rights dispute between the City and OBOT/OGRE is appropriately being litigated in state court. To the extent the City is worried that OGRE’s activities may “impinge” on its property rights, those concerns should be raised in those state court

²⁷ City Petition at 7.

²⁸ James Riffin Motion to Stay and Motion to Revoke, STB Docket No. FD 35438 (filed Nov. 8, 2010); Lois Lowe Motion and Motion to Revoke, STB Docket No. FD 35438 (filed Nov. 8, 2010).

²⁹ *Eighteen Thirty Group, LLC*, FD 35438, et al., at 3 (internal citations omitted).

³⁰ *Id.*

proceedings.³¹ Moreover, in the event OGRE relies upon the Decision to perform the rehabilitation work in the rail right of way to reconnect this area to the interstate rail network consistent with the City's published plans for the area, it is hard to see how the City would suffer any harm from this action. Instead it receives a direct benefit because its tenants (and subtenants) may once again receive rail service. Because the City cannot show irreparable harm absent a stay, its petition should be denied.

III. OGRE would suffer harm if a stay were granted.

In contrast, OGRE would suffer irreparable harm if the Board were to grant a stay and reinject uncertainty into its regulatory obligations with regard to the OAB track. To fulfill their contractual obligations to the City, OGRE and OBOT have been working to redevelop the OAB into a rail-serviced trade and logistics center and to attract tenants to the site. But the City's ongoing efforts to obstruct this redevelopment have resulted in great uncertainty that has hampered the ability to attract rail-serviced tenants to the OAB. A stay of the Board's decision would only serve to exacerbate this harm.

OGRE stands ready to move this project forward and reconnect the OAB to the interstate rail network.³² This includes filing for acquisition authority as directed by the Board in its Decision.³³ Moreover, OGRE has already spent millions of dollars purchasing rail materials to move forward with the rehabilitation work, and will likely incur additional delay costs from its contractor if it cannot proceed with the work. Based on the City's Petition for Stay, it is unclear

³¹ In fact, the City itself states that "OGRE will be unable to conduct any additional activities on the Line until [the] state court litigation is resolved." City Petition at 8.

³² The City is requiring OGRE to obtain the City's approval of the schematic rail drawings before beginning the rehabilitation work.

³³ *Oakland Global Rail Enterprise*, FD 36168, at 10.

whether it intends to do the same or whether it will continue its obstruction tactics to delay this project indefinitely.

IV. The public interest does not weigh in favor of a stay.

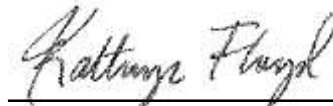
The City argues that a stay would favor the public interest by preserving the existing conditions at the OAB. But the City does not explain how blocking development at the OAB is in the public interest. The City has received a substantial amount of federal and state taxpayer dollars to redevelop the OAB into a rail-served trade and logistics center,³⁴ presumably to facilitate economic development in the City of Oakland. In fact, the City admits that economic redevelopment of the site will “serve the interests of the public.”³⁵

As noted above, OGRE is ready to rehabilitate the rail line and reestablish the connection the interstate rail network. It is prepared to do so, even it means taking on the risk that OBOT’s ground lease—and thereby OGRE’s sublease—is ultimately terminated. A stay of the Board’s Decision and delaying this reconnection to the interstate network and the economic development at the OAB is contrary to the public’s interest.

CONCLUSION

For the reasons discussed above, the Board should deny the City’s Petition for Stay.

Respectfully submitted,



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Counsel to Oakland Global Rail
Enterprise

Dated: April 1, 2019

³⁴ OGRE Response at 3.

³⁵ City Petition at 8.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April 2019, I caused a copy of the foregoing Response to City of Oakland's Petition to Stay to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Margaret K. Fawal