

246080

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
July 16, 2018
Part of
Public Record

Finance Docket No. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
-AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA-
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

**PETITIONER'S RESPONSE TO REPLY TO
PETITION FOR DECLARATORY ORDER**

**Kathryn Kusske Floyd
Margaret K. Fawal
Venable LLP
600 Massachusetts Ave.
Washington, D.C. 20001
(202) 344-4000
(202) 344-8300 (fax)**

Counsel to Oakland Global Rail Enterprise

Dated: July 16, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
–AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA–
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

**PETITIONER’S RESPONSE TO REPLY
TO PETITION FOR DECLARATORY ORDER**

Oakland Global Rail Enterprise (“OGRE”), pursuant to the accompanying motion for leave, respectfully submits this Response in support of its May 23, 2018 Petition for Declaratory Order.¹

INTRODUCTION

The City of Oakland (“City”) and the Port of Oakland (“Port”) have undertaken a major redevelopment of the former Oakland Army Base (“OAB”) to “provide new, state-of-the-art facilities to support the international, national, regional and local movement of goods by way of seaport, railroad and roadway networks.”² As part of that redevelopment, OGRE intends to rehabilitate, and eventually operate over, approximately 22,202 feet of track (the “Segment”) within an existing rail right of

¹ Oakland Global Rail Enterprise Petition for Declaratory Order, STB Finance Docket No. 36168 (filed May 23, 2018) (“Petition for Declaratory Order”).

² 2012 Oakland Army Base Project Initial Study/Addendum at 29 (May 2012), *available at*

<http://www2.oaklandnet.com/government/o/PBN/OurServices/Application/DOWD009157>.

way running along the northern edge of the OAB.³ The Segment would serve future tenants located in the West Gateway and MH-1 Lease Area portions of the OAB.⁴

In its Petition for Declaratory Order, OGRE asked the Board to confirm that Board approval is not required for its rehabilitation of track within the existing right of way.⁵ The City, in response, raises a question as to whether the Segment was historically STB jurisdictional track. But contrary to the City's suggestion, because the track previously was used to serve shippers other than the track's owner, it cannot be considered "private track" falling outside of the Board's jurisdiction.

DISCUSSION

I. Private track is a narrow exception from Board jurisdiction.

The Board enjoys broad jurisdiction over "transportation by rail carrier."⁶ As acknowledged by the City, this jurisdiction not only covers rail lines, but also extends to spur, industrial, team, switching, or side tracks ("industrial track"), even though such industrial track generally is not subject to the Board's licensing

³ See Petition for Declaratory Order, Exhibit 2.

⁴ See *id.* at 3.

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 near future.

⁶ 49 U.S.C. § 10501(a)(1).

authority.⁷ Industrial track typically is used for “loading, unloading, storage, switching, and other purposes . . . incidental to . . . transportation service.”⁸

The agency’s jurisdiction does not extend, however, to the construction of or operation over “private tracks.”⁹ Private tracks constitute “a narrow, limited category of rail operations”¹⁰ covering only those tracks built, owned, maintained, and operated by a shipper *to serve only that shipper to move its own goods*.¹¹ In these limited circumstances, there is no “holding out” of common carriage.¹² Although a shipper can arrange for a contractor to conduct operations over the track,¹³ a track cannot be considered “private” where the carrier serves shippers *other than the owner of the track*.¹⁴

⁷ See, e.g., *Joseph R. Fox—Petition for Declaratory Order*, FD 35161 at 4 (STB served May 18, 2009).

⁸ *Nicholson v. I.C.C.*, 711 F.2d 364, 367-68 (D.C. Cir. 1983); see also *Swanson Rail Transfer, LP—Declaratory Order*, FD 35424 at 4 (STB served June 14, 2011).

⁹ See *B. Willis, C.P.A., Inc.—Petition for Declaratory Order*, FD 34013 at 2 (STB served Oct. 3, 2001).

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² *Id.*

¹³ *Id.* at 3 n. 5.

¹⁴ See *id.* (citing *United States v. B&O R. Co.*, 333 U.S. 169 (1947)); see also *Public Service Co. of Colorado—Construction Exemption—Pueblo Cnty., Colo.*, FD 33862 (STB served Aug. 23, 2000) (finding that construction of track falls under the Board’s jurisdiction because, even though the owner initially would be the only shipper served by the line, other shippers would be permitted to use the rail line in the future should a demand arise).

II. The existing track running out to the West Gateway area was historically STB jurisdictional track.

The City states that its “previous research . . . indicates that there may be some question regarding [the] regulatory status” of the Segment.¹⁵ Specifically, the City claims it is unclear who constructed the track, as well as what shippers were served by that track, and that it is “possible” the “previous owners and tenants of the West Gateway Area served by the Segment used the connecting track to move their own goods.”¹⁶ Therefore, the City argues, it is “possible” the track was historically characterized as private track.¹⁷

The City offers nothing more than its own conjecture regarding the historical status of the track. It highlights certain limited historical information, including (1) an application submitted in 1943 by Oakland Terminal Railway (“OTR”) to the Interstate Commerce Commission (“ICC”) for authority to purchase certain properties and acquire trackage rights; (2) two purchase agreements underlying that application; and (3) the ICC decision on that application. But none of this information shows that the Segment was historically private. In fact, a thorough review points to the opposite conclusion.

First and foremost, the maps attached to OTR’s application and the underlying purchase agreements clearly show that OTR purchased a rail line extending out to

¹⁵ Reply of the City of Oakland, California, STB Finance Docket No. 36168 at 1-2 (filed June 29, 2018) (“City Reply”).

¹⁶ *Id.* at 8.

¹⁷ *Id.*

the present-day West Gateway area.¹⁸ Although the track depicted in the OTR application does not run the full length of the West Gateway, this illustrates that nearly all of the track OGRE intends to rehabilitate is track for which the ICC previously exercised jurisdiction.

The City focuses on the fact that the rest of the Segment is not specifically identified in the OTR application or purchase agreements.¹⁹ But the OTR application confirms that the City “constructed certain docks and track along the waterfront.”²⁰ While the exact location of these tracks is not identified, the OTR application further confirms that Oakland Terminal Railroad Co.²¹ “constructed tracks connecting its lines *along the northerly side* of the [Outer Harbor District]”²² with this City

¹⁸ See Exhibit 6 to Application of Oakland Terminal Railway for Authority to Purchase Certain Properties and Acquire Trackage Rights over Certain Other Properties Owned or Used by Oakland Terminal Railroad Co., ICC FD 14115 (March 11, 1941), attached as Exhibit 1 to City Reply; Exhibit A, Sheet 1 of 5 to Purchase Agreement between Santa Fe and Western Pacific and Oakland Terminal, Railway Equipment & Realty Company, Ltd., and Key System (Dec. 8, 1942), attached as Exhibit 2 to City Reply.

¹⁹ As noted by the City, the maps attached to its Reply were photographed at several difference scales from the collections of the National Archives. Due to this, all of the information originally depicted in the maps may not be clearly legible.

²⁰ See City Reply, Exhibit 1 at 4. Perhaps in reference to this language, the City in its acknowledges that it “likely constructed and owned this track.” City Reply at 7.

²¹ Oakland Terminal Railroad Co. was the predecessor to Oakland Terminal Railway.

²² The “Outer Harbor District” includes the OAB, including the West Gateway area. See City Reply, Exhibit 1 at 3 (explaining that the Outer Harbor District “embraces about one square mile of land, piers and docks, [] bounded on the north by the main easterly approach to the San Francisco-Oakland Bay Bridge, on the easterly and southerly sides by the Southern Pacific tracks, and on the westerly side by San Francisco Bay.”).

trackage, and then was given the right to operate, and did in fact operate, over these City tracks.²³ Notably, the OTR application explains that the purpose of this connection, which occurred many years before the Army purchased the OAB, was to provide competitive service to the industries located in the Outer Harbor District, “many of which conducted a large export and import business.”²⁴

The City also makes much out of the fact that it has been unable to determine what shippers were located in the present-day West Gateway and what their exact activities were. But this should not matter, as every indication is that the City initially constructed and owned the track in question. Thus, available information actually contradicts the City’s position and supports the view that the track was not owned by a shipper and therefore could not have been private track. To the extent the City is claiming that there were no shippers in the West Gateway area prior to the Army’s purchase of the OAB, such claims cannot be squared with the the OTR application, which confirms the historical industrial activities in the Outer Harbor District prior to 1931.²⁵ Indeed, none of the information provided by the City indicates that these activities were not occurring in the West Gateway area.²⁶

Finally, according the U.S. Army Corps of Engineers, after the Army closed the OAB in 1999 but before it was transferred to the City, the West Gateway was leased

²³ City Reply, Exhibit 1 at 4 (emphasis added).

²⁴ *Id.*

²⁵ *Id.*

²⁶ In fact, the OTR application confirms that warehouses were constructed in the OAB area prior to the Army’s purchase of the area. *Id.*

to the Port of Oakland, which used the area for its shipping activities.²⁷ Specifically, according the Corps' Environmental Impact Statement issued in 2001, the West Gateway Area was "intensively used in the Port's maritime operations" and was occupied by the Bay Bridge, Sea-Land, Yusen, Maerisk, and Trans-Bay Container Terminals.²⁸ At that time, rail cars destined for the Outer Harbor (which includes the West Gateway area) were delivered by Union Pacific to the intermodal yard, where it would interchange with OTR.²⁹ This information on its own demonstrates that any track serving the West Gateway area is, at the very least, industrial track subject to the Board's jurisdiction.³⁰

²⁷ See U.S. Army Corps of Engineers, Environmental Impact Statement for the Disposal and Reuse of Oakland Army Base, Oakland, California, at 4-3 (June 2001), available at

<https://play.google.com/store/books/details?id=8io0AQAAMAAJ&rdid=book-8io0AQAAMAAJ&rdot=1>. Although the EIS refers to the area as the Maritime Area, Figure 4.2.1 confirms that this area encompasses the West Gateway.

²⁸ *Id.* at 4-6.

²⁹ *Id.* at 4-33.

³⁰ See *The Atchison, Topeka and Santa Fe Railway Company—Abandonment Exemption—In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X), slip op. at 5 (ICC served June 17, 1991) ("Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur . . . solely through the railroad's unilateral decision to change its use of the track segment over time.").

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,

A handwritten signature in blue ink, appearing to read "Kathryn Kusske Floyd", is written over a horizontal line.

Kathryn Kusske Floyd
Margaret K. Fawal

Counsel to Oakland Global Rail
Enterprise

Dated: July 16, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July 2018, I caused a copy of the foregoing Response to Reply to Petition for Declaratory Order to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Margaret K. Fawal