

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

246437

ENTERED
Office of Proceedings
September 27, 2018
Part of
Public Record

Finance Docket No. 36168

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

PETITIONER'S MOTION TO FILE RESPONSE TO COMMENTS

**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: September 27, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168

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

**PETITIONER’S MOTION FOR LEAVE TO FILE
RESPONSE TO COMMENTS**

Oakland Global Rail Enterprise (“OGRE”) respectfully moves for leave to file the attached Response to the comments submitted by the City of Oakland (“City”) and the Port of Oakland (“Port”) in the above proceeding.¹

The Board should grant OGRE leave to file the attached Response so that OGRE has an opportunity to address the issues raised by the City and the Port, and to provide the Board with a more complete record.² As detailed below, OGRE’s attached Response does not raise any new arguments in support of the Petition for

¹ See 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 Although 49 C.F.R. § 1104.13(c) indicates that “[a] reply to a reply is not permitted,” the Board has frequently waived that provision for good cause. See, e.g., *Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, STB Docket No. NOR 42133, at 1, n.1 (served Mar. 9, 2012); *Cross Oil Ref & Mktg., Inc. v. Union Pac. R.R. Co.*, STB Finance Docket No. 33582, at 1 (served Oct. 27, 1998). See generally 49 C.F.R. § 1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”).

Declaratory Order, but instead presents information that will aid the Board in its decision-making process in this proceeding.

First, the Response should be allowed because it responds to the Port's unsupported claim about the regulatory status of a segment of the rail line OGRE intends to rehabilitate.³ The Port misconstrues important facts, as well as prior Board precedent demonstrating that the segment of track in question falls within the Board's jurisdiction. The Port, a newcomer to this proceeding, has raised this argument for the first time. OGRE could not have reasonably anticipated the Port's comments; the Board has found good cause for leave to file a response in similar circumstances.⁴

The City's and the Port's comments also advance a variety of arguments that have no bearing on the issue raised in OGRE's Petition for Declaratory Order. The attached Response is OGRE's opportunity to explain why these arguments are irrelevant to its Petition and can be appropriately addressed in the context of any future filing with the Board for construction and/or operating authority, as needed.

Finally, affording OGRE an opportunity to respond will provide the Board with a more complete record without material delay.⁵ A fuller, more complete record will

³ Port Comments at 9-13.

⁴ See, e.g., *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.—Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (1993) (finding good cause for a reply to a reply where a party “asserts that it could not have anticipated the arguments set out” in the reply when it filed its petition and the issue “is central to the resolution of this proceeding”).

⁵ The attached Response is being filed 9 days after the City's and the Port's comments.

facilitate the Board's decision-making process as it addresses the Petition for Declaratory Order.⁶

CONCLUSION

For the forgoing reasons, OGRE respectfully requests that the Board grant this Motion for Leave to File a Response to Comments.

Respectfully submitted,



Kathryn Kusske Floyd
Margaret K. Fawal

Counsel to Oakland Global Rail Enterprise

Dated: September 27, 2018

⁶ See *Tex. Central R.R. and Infrastructure, Inc. & Tex. Central R.R., LLC—Petition for Exemption—Passenger Rail Line Between Dallas and Houston, Tex.*, STB Finance Docket No. 36025 at 3 n. 5 (served Jul. 18, 2016) (allowing a reply to a reply “[i]n the interest of compiling a more complete record.”); *Tongue River R.R. Co., Inc.—Construction & Operation—Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3), at 4 (served June 15, 2011) (“In the interest of compiling a more complete record in this case, we will accept into the record the surreplies.”); *Union Pac. R.R. Co.—Abandonment—In Lancaster & Gage Ctys., NE, and Marshall Cnty., KS*, STB Docket No. AB 33 (Sub-No. 140), at 1 (served Dec. 22, 1999) (replies accepted “where they will contribute to a complete record without prejudicing any party or delaying the proceeding”); *City of Alexandria, Va.—Pet. for Declaratory Order*, STB Finance Docket No. 35157, at 2 (served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

CERTIFICATE OF SERVICE

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



Margaret K. Fawal