



KAPLAN KIRSCH ROCKWELL

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

Re: *Oakland Global Rail Enterprise – Authority to Operate A Rail Line in Oakland, CA –
Petition for Exemption From 49 U.S.C. § 10901, STB Finance Docket No. 36168*

Dear Ms. Brown:

Attached is the City of Oakland, California Comments to OGRE's August 21 Response
in the above-captioned proceedings.

Please do not hesitate to contact me with any questions.

Sincerely,

Charles A. Spitulnik
Counsel for the City of Oakland

cc: Kathryn Kusske Floyd, Esq.

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB 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**

**COMMENTS BY THE CITY OF OAKLAND, CALIFORNIA
TO OGRE’S AUGUST 21 RESPONSE**

Communications with respect to this
document should be addressed to:

Charles A. Spitulnik
Christian L. Alexander
KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue, N.W. Suite 800
Washington, DC 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
calexander@kaplankirsch.com

Counsel for the City of Oakland, California

Dated: September 18, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
– AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA –
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**COMMENTS BY THE CITY OF OAKLAND, CALIFORNIA
TO OGRE’S AUGUST 21 RESPONSE**

INTRODUCTION

The City of Oakland, California (“City”) respectfully submits these comments in response to Oakland Global Rail Enterprise’s (“OGRE”) responses to the Surface Transportation Board’s (“Board”) August 1, 2018 order in these proceedings (“OGRE’s Response”). The City remains unconvinced by OGRE’s assertions regarding the regulatory status of some of the track in the former Oakland Army Base (“OAB”). The City also seeks to comment on other aspects of OGRE’s Response.

BACKGROUND

The City’s and OGRE’s previous filings in this proceeding describe their relationship to each other and to the OAB, including the rail right-of-way located within the OAB. On May 23, 2018, OGRE filed an expedited petition for declaratory order with the Board requesting a declaration that OGRE does not need Board approval under 49 U.S.C. § 10901 to reconstruct track located at the former Oakland (CA) Army Base. On June 29, 2018, the City filed a reply to OGRE’s

petition raising concerns that a portion of the track on which OGRE proposes to engage in construction activities may be private track not currently subject to the Board's jurisdiction. On July 16, 2018, OGRE replied to the City's filing, contesting the possibility raised by the City.

On August 1, 2018, the Board's Director of Proceedings issued an order requiring OGRE to respond to six questions regarding specific aspects of OGRE's reconstruction activities. The Board's questions focused on reconciling various assertions made in OGRE's 2018 petition with an earlier 2014 filing in which OGRE sought Board authority to operate as a common carrier over substantially the same trackage. The Board also sought clarification over exactly which track OGRE believed to be "industrial" track subject to Board jurisdiction rather than private track. On August 21, 2018, OGRE filed a response to the Board's order answering the Board's six questions.¹ The City's comments with respect to these responses follows².

COMMENTS

A. The City remains unconvinced by OGRE's assertions that the trackage leading and onto the West Gateway property is subject to STB jurisdiction

OGRE argues that although not all of the track to be rehabilitated is depicted in the 1943 Oakland Terminal Railway ("OTR") documents, "details in the [1943] OTR application suggest the rail extended to dock at the end of the rail right of way." OGRE Response at 10. These include that in the 1943 OTR application OTR describes that it "constructed certain docks and track along the waterfront" and "tracks connecting its lines along the northerly side of the [Outer Harbor District]". *Id.* OGRE states that these activities were located on the West Gateway. *Id.* OGRE also

¹ On September 10, 2018, the Board issued an order extending the time for interested parties to file comments on OGRE's response to September 18, 2018.

² The City does not have any comments on OGRE's responses to the Board's questions 2 and 4.

states that the OTR application “indicates that export and import business occurred in this area, and that the Port leased the same property from the Army in 1999 to conduct shipping activities. *Id.* Accordingly, OGRE argues that “given the historic use of this rail by a common carrier to provide rail service to third parties, OGRE believes that the rail not depicted in the 1943 map was historically industrial track subject to Board jurisdiction.” *Id.* at 10-11.

The City’s previous research was inconclusive regarding the status of the trackage, but as it indicated in its last filing to the Board, it believes that there is support for categorizing some of the track that is the subject of OGRE’s Petition as private track. As additional evidence, the City submits that the Interstate Commerce Commission decision approving the 1943 OTR transaction states that in the Outer Harbor District “[n]ine private industries in the area include nationally known packers of foodstuffs, which furnish traffic on which the transcontinental carriers obtain, or in more normal times will obtain, long hauls. While the industries along the lines to be used under trackage rights do not have competitive service, Southern Pacific cars are and will continue to be switched between Yerba Buena Yard and their plants as expeditiously as those of the parent companies.” Finance Docket No. 14115, slip op. at 12. This statement suggests that individual shipping industries, not OTR or the railroad, owned and controlled the industrial track located in areas such as the Gateway West property.

It is also noteworthy that the track identified by OGRE in its latest filing as rehabilitated track subject to STB jurisdiction not depicted in the 1943 OTR application appears to start at or around the border of the lot boundary for the West Gateway property. *Cf.* OGRE Response, Exhibit 2 (map of 1943 track with unmarked track to be rehabilitated by OGRE) *with* Survey diagram depicting the West Gateway property and right-of-way subleased to OGRE (attached hereto as

Exhibit 1) (survey diagram for railroad ROW subleased to OGRE, depicting West Gateway property as Lot 10 and the property between it and the mainland as Lot 9). This correlation might suggest that the line depicted in the 1943 OTR application stopped where it did because the trackage entered property that was privately controlled or operated by the tenant at the time authority for rail operations was granted.

OGRE's petition should not serve as a backdoor means of impermissibly extending the STB's jurisdiction over privately used track on private property that is not considered part of the interstate rail network.

B. In light of the unusual nature of OGRE's petition, the Board should require OGRE to undertake the full regulatory process for authority to acquire common carrier status over an OAB right-of-way subject to the Board's jurisdiction

To the extent the Board's holding in *Jersey Marine* is used as a basis for bypassing the Board's procedures for acquiring authorization to operate as a common carrier, that reliance would be entirely misapplied. *Jersey Marine* concerned a non-carrier seeking to essentially reconstruct trackage within existing right-of-way subject to the Board's jurisdiction that had not been used in 30 years and was in need of removal and reconstruction of the entire line. *Jersey Marine*, slip op. at 2-3. The non-carrier sought to reconstitute the trackage in order to operate over it, thereby becoming a new carrier. *Id.*, slip op. at 1. The Board was clear in its decision affirming the would-be carrier's petition that even if the new service took place over rehabilitated track, operation of that track amounted to an expansion of service into new territory that would require Board authorization. *Id.* slip op. at 4, 5. In addition, because the rehabilitated track was the new carrier's only railroad line, the new carrier was required to seek Board authority to operate on the rehabilitated track. *Id.* slip op. at 4. The "novel" aspect of *Jersey Marine* was that a new carrier did not need Board authorization to *both* initiate service and rehabilitate an existing line under the

jurisdiction of the Board. It does not stand for the proposition that a non-carrier can upgrade or reconstruct trackage in jurisdictional right-of-way and then operate it without further Board authority.

Regarding the need to seek authorization to acquire the OAB trackage, the City notes that it did not acquire the OAB trackage with the intent to conduct any railroad operations. The City was unaware at the time of acquisition of any requirement to seek authority from the Board, and assumed that the concessionaire for redevelopment of the OAB would be responsible for all federal regulatory authorizations.

In any event, if the City, or OGRE now that it has acquired the contractual right to operate the OAB trackage, is required to seek Board approval, the City requests that the Board ensure that the full regulatory process, including a right for the City to comment on any application by OGRE, is conducted.

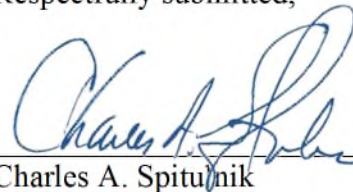
C. The City seeks further clarification on OGRE's statements regarding its common carrier status and contractual agreements for the provision of rail service

Although OGRE characterizes itself in the documents filed in this proceeding as a non-carrier and states that it is not currently conducting rail operations, *see* OGRE Response at 15 (Response to Question 6), its public statements on its website suggest otherwise. On its website homepage, OGRE holds itself out to be a common carrier. It states that "Oakland Global Rail Enterprise, LLC (OGRE) is a Class III railroad serving portions of the former Oakland Army Base and the Port of Oakland." Oakland Global Rail Enterprise, Home, <http://ogrejv.com/> [visited Aug. 29, 2018]. On its "About Us" page OGRE states that it is "a newly created Class III, Surface Transportation Board certified short line rail company that is currently operating in Oakland, CA at the former OAB." *See* Oakland Global Rail Enterprise, About Us,

<http://ogrejv.com/index.php/about-us> (July 8, 2014) [visited Aug. 29, 2018]. The About Us page also states that one of its owners, the West Oakland Pacific Railroad (“WOPR”) “currently holds the contract with UPRR and BNSF for switching rights at the Port of Oakland” *Id.* Although the date of the post indicates that these statements were made in anticipation of OGRE’s initial 2014 Board filing, the fact that they remain public indicate that OGRE has been both operating as a railroad and holding itself out as one.

At the present the City is unaware whether this is the only representation that OGRE has made asserting that it is a Class III carrier. If it is, it may be a simple inadvertent oversight made on a neglected website. The City has no knowledge of whether there are other instances of the same misrepresentation.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik
Christian L. Alexander
KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue, N.W. Suite 800
Washington, DC 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
calexander@kaplankirsch.com

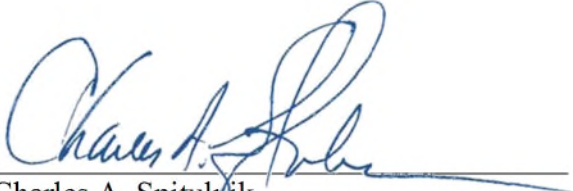
Counsel for the City of Oakland, California

Dated: September 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing Reply to be served by first class mail, on all parties of record in this proceeding.

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



Charles A. Spitulnik

Dated: September 18, 2018

Exhibit 1

Survey diagram depicting the West Gateway property and right-of-way subleased to OGRE
(excerpted from OBOT sublease to OGRE)

NOTE

BEARINGS AND DISTANCES ARE BASED ON
RECORD OF SURVEY NO. 990. ALL
DISTANCES SHOWN OR DERIVED FROM THIS
DRAWING ARE GRID. TO OBTAIN GROUND
LEVEL DISTANCES MULTIPLY BY 1.0000705.

LEGEND

P.O.B. POINT OF BEGINNING

LEASE LIMITS

LEASE AREA
248,604± SQ. FT.
(5.7± AC)
(MEASURED IN
GROUND DISTANCES)

PARCEL 5
STATE OF CALIFORNIA
BK 4186 PG 156

BURMA ROAD

PARCEL 2

PARCEL F-1
PORT OF OAKLAND
2006-301849

CITY OF OAKLAND
STATUTES 1911, CHAPTER 657

Curve Table			
Curve	Radius	Delta	Length
C1	84.00'	30°13'15"	44.31'
C2	91.00'	69°15'01"	109.99'
C3	334.00'	6°32'04"	38.09'

Line Table		
Line	Bearing	Distance
L1	S08°55'17"E	87.47'
L2	N48°48'07"W	19.77'
L3	S80°58'50"W	241.57'
L4	N08°24'05"W	1.43'
L5	S87°20'57"W	15.79'
L6	N88°08'30"E	29.27'

USA
TRACT 14
PARCEL 1
REEL 32,
IMAGE 660

PARCEL MAP 10095
324 PM 6

PARCEL F-1
PORT OF OAKLAND
2006-301849



(IN FEET)

1 inch = 400 ft.



2-8-16

G:\Job2016\11069\Mapping\Plats\PLAT RR-Ldwg

PLAT RR-1
RAIL ROW AT WEST GATEWAY

CITY OF OAKLAND, ALAMEDA COUNTY, CALIFORNIA

RJA
RUGGERI-JENSEN-AZAR
ENGINEERS • PLANNERS • SURVEYORS
4890 CHABOT DRIVE, SUITE 200 PLEASANTON, CA 94588
PHONE: (925) 227-9100 FAX: (925) 227-9300

SCALE:
1"=400'

DATE:
2-8-2016

JOB NO.:
111069