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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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April 17, 2019
Part of
Public Record

Finance Docket No. 36168

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

**PETITIONER'S REPLY TO CITY OF OAKLAND'S
PETITION FOR RECONSIDERATION**

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Dated: April 17, 2019

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SURFACE TRANSPORTATION BOARD**

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Oakland Global Rail Enterprise (“OGRE”) respectfully submits this reply to the Petition for Reconsideration filed by the City of Oakland (“City”) on April 4, 2019.¹

INTRODUCTION

In this matter, the Board addressed one straightforward question: does certain track located at the former Oakland Army Base (“OAB”) historically fall within the jurisdiction of the STB?² OGRE asked the Board this question so that it—or any other developer of the OAB, including the City—would know its regulatory obligations associated with that track. The matter is *not* about OGRE’s property rights at the OAB. Yet the City now asks the Board to revoke its March 15, 2019 Decision (“Decision”) and refrain from providing this much-needed clarity because of an ongoing contractual dispute between the City on one side and Oakland Bulk & Oversize Terminal (“OBOT”) and OGRE on the other. But the contractual dispute does not have any bearing on the jurisdictional status of the OAB track, and it does not impact the “context” of the Board’s Decision. Rather, the City simply does not want the Board to make a pronouncement about its jurisdiction

¹ City of Oakland Petition for Reconsideration, STB Docket No. FD 36168 (filed April 4, 2019) (“Petition for Reconsideration”).

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

over the track at the OAB, because it views Board jurisdiction over this track as a barrier to its exhaustive attempts to block coal from traveling on rail through Oakland and out the terminal being developed at the OAB. But the fact that a party does not like a Board decision and wants to avoid Board jurisdiction is not a basis for granting reconsideration.

BACKGROUND

The background relevant to this matter has been thoroughly covered in the Board's Decision and prior filings in FD 36168 by OGRE, the City, and the Port of Oakland (the "Port").

DISCUSSION

Reconsideration is appropriate only where a petition identifies new evidence, changed circumstances, or material error that "would mandate a different result."³ Because none of these circumstances are present here, the City's Petition for Reconsideration should be denied.⁴

I. The property dispute between the City and OBOT/OGRE is not new evidence or changed circumstances.

The City claims that there are "changed circumstances" because the City has purported to terminate OBOT's lease—and thereby OGRE's sublease through OBOT—and OBOT has separately filed a breach of contract claim against the City in state court.⁵ But as explained in OGRE's Reply to the City's Petition for Stay, these developments do not constitute "changed circumstances" because these actions occurred *months* before the Board issued its Decision.⁶ The

³ 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).

⁴ OGRE also addressed the merits of the City's Petition for Reconsideration in its Reply to the City's Petition for Stay. Therefore, OGRE incorporates those arguments herein by reference.

⁵ Petition for Reconsideration at 5-7.

⁶ Petitioner's Reply to City of Oakland's Petition for Stay, STB Docket No. FD 36168, at 3-4 (filed April 1, 2019).

City's failure to raise this so-called "new" information when it became available dooms the City's Petition for Reconsideration.⁷

The City argues that the Board should still consider this new information because it arose after the parties completed their final submissions to the Board but before the Decision was issued.⁸ But the one case the City cites to support this argument does not stand for this proposition. In *Wisconsin & Southern R.R. C.—Acquisition Exemption—Iowa, Chicago & Eastern RR. Corp.*, STB Docket No. FD 34464 (served July 30, 2004), the Board granted reconsideration based on information that the petitioner demonstrated it "*could not have offered*" until after the Decision was issued.⁹ Here, in contrast, the City has failed to provide a plausible rationale as to why it could not have notified the Board in the 3.5 months that passed between the City "terminating" the lease and the Board issuing its Decision.¹⁰

In any case, the City does not dispute that its "termination" of the lease remains the subject of ongoing litigation in state court. Nor does the City dispute that OBOT/OGRE retains the right to possess and use the property unless and until a judicial determination is made finding that the

⁷ 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.").

⁸ Petition for Reconsideration at 6-7.

⁹ *Wisconsin & Southern R.R. C.—Acquisition Exemption—Iowa, Chicago & Eastern RR. Corp.*, FD 34464, at 2 n.2 (emphasis added).

¹⁰ The City appears to claim that it did not immediately notify the Board of the changed circumstances because OGRE's contractual rights have not yet been settled in the ongoing state court litigation. See Petition for Reconsideration at 7. But this reasoning belies the basis for the City's Petition for Reconsideration and demonstrates that there in fact have been no changed circumstances at all.

lease was rightfully terminated or until the City successfully sues to evict.¹¹ Because OBOT and OGRE retain these rights, there are no new or changed circumstances.

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

Even if the property dispute could be considered new evidence or changed circumstances, reconsideration is appropriate only if a Board decision is *materially affected* by that new evidence or changed circumstances.¹² To determine whether there will be such a material effect, the Board considers whether the information “relates to a specifically identified and contested assumption in [the Board’s] prior decision[.]”¹³

OGRE’s contractual rights cannot “materially affect” the Decision because OGRE’s rights to the property were not a specifically identified or contested assumption underlying that Decision. In fact, OGRE’s contractual rights are irrelevant to the Board’s historical “jurisdiction” over track at the OAB.¹⁴

III. The City has failed to identify any material error in the Board’s decision.

The City claims that the Board materially erred in asserting jurisdiction over a line for which no carrier seeks to operate. The City claims that the contractual dispute “materially affects”

¹¹ See Petition for Reconsideration at 9 n.4, which fails to cite any case law contrary to that cited by OGRE.

¹² *Fla. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, STB Docket No. FD 35110, at 4 (served June 22, 2011).

¹³ *Ariz. Pub. Serv. Co. & Pacificorp v. Burlington N. & Santa Fe. Ry. Co.*, STB Docket No. NOR 41185, at 4 (served May 12, 2003).

¹⁴ The City claims that the Board declined to address the “East Segment” because of a property rights dispute between OGRE and the Port of Oakland. But the Board declined to address the jurisdictional status of that segment of track due to conflicting historical information and because it was not clear whether OGRE was asking the Board to determine its status. *Oakland Global Rail Enterprise—Petition for Declaratory Order*, FD 36168, at 10. Property rights played no part in that aspect of the Decision.

the Decision because without the necessary property rights or Board authority, the Board should not weigh in on its jurisdiction.¹⁵ This argument is unavailing.

First, the City's assertions that OGRE is not a "would-be" rail carrier ignore OGRE's repeated statements that it plans to file for operating authority at the appropriate time.¹⁶ When it does so, there is nothing preventing the City from raising its concerns about OGRE's contractual rights with the Board at that time.

Second, as explained in OGRE's Reply to the City's Petition for Stay, a property rights dispute does not prevent the STB from exercising its jurisdiction.¹⁷ The City—unable to point to any cases where the Board has found otherwise—misconstrues prior Board precedent to fit its narrative. For example, 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.¹⁸

¹⁵ Petition for Reconsideration at 12-13.

¹⁶ See OGRE Petition for Declaratory Order, STB Docket No. FD 36168, at 5 n.16 (filed May 23, 2018); Petitioner's Response to Reply to Petition for Declaratory Order, STB Docket No. FD 36168, at 2 n.5 (filed July 16, 2018).

¹⁷ *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).

¹⁸ Moreover, *Tri-State* involved a case where property rights were lacking prior to the filing of the petition. Here, the City does not dispute that at the time OGRE filed its Petition for Declaratory Order, OBOT/OGRE held rights to the OAB rail right-of-way.

Finally, the City’s hyperbolic claim that the Board has now given OBOT/OGRE—and shippers, would-be railroads, and disgruntled tenants—the ability “to wield the Board’s authority” and to “steamroll . . . state courts into accepting federal preemption where there is none”¹⁹ is nothing more than a “parade of horrors.” There is a long line of precedent establishing the bounds of activities preempted by STB authority.²⁰ The Board’s Decision here does not somehow change that body of case law or enable OBOT/OGRE to claim preemptive authority where there is none.

The truth is the City is not concerned that OBOT/OGRE will assert preemption where there is none; it is afraid that Board jurisdiction over the track in question will preempt its ability to block the transport of coal by rail through Oakland. The City has made very clear that it opposes any plans to move coal through the redeveloped terminal at the OAB, and it will use every means possible to block the project from moving forward.²¹ The City’s fears about STB jurisdiction preempting those efforts is not a reason to reconsider the Board’s Decision in this matter.

¹⁹ Petition for Reconsideration at 15-16.

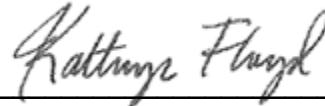
²⁰ See, e.g., *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010) (noting that ICCTA preemption displaces “those state laws that may reasonably be said to have the effect of managing or governing rail transportation”) (citations omitted); *Association of Am. R.R. v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (“ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.”); *New York Susquehanna & W. Ry. Co. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007) (“according to the Board, state regulation is permissible if it passes a two-part test: (1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads”); *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1337 n.9 (explaining that the ICCTA preempts laws that directly regulate rail transportation as well as those that are so intertwined with the provision of rail transportation that they would frustrate the objectives of federal railroad regulation) (11th Cir. 2001); *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (reciting and endorsing several decisions explaining the scope of the ICCTA preemption clause).

²¹ See, e.g., May 15, 2018 news article quoting City Council Member Dan Kalb (“We need to do whatever it takes within the law to hold firm in our opposition to this ridiculous proposal. The residents in that area, the workers of Oakland and the entire world need us to stop this export terminal”), available at <https://www.sfgate.com/bayarea/article/Federal-judge-overturns-Port-of-Oakland-coal-ban-12916650.php>; May 29, 2018 City Attorney Announcement of Oakland’s

CONCLUSION

The City concedes that it still intends to redevelop the OAB for multimodal transportation purposes.²² Given these plans—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,”²³ the Board should deny the City’s Petition for Reconsideration.

Respectfully submitted,



Kathryn Kusske Floyd
Margaret K. Fawal

Dated: April 17, 2019

Counsel to Oakland Global Rail Enterprise

Appeal of Coal Ban Ruling (“The City Council has voted to appeal the federal district court’s May 23 judgment enjoining the City from enforcing its ordinance banning coal with respect to the proposed export terminal at the former Army Base. We believe the City has the responsibility and the authority to act when the health and safety of our residents is endangered.”), available at <https://www.oaklandcityattorney.org/News/Press%20releases/Statement%20Appeal%20of%20Coal%20Ban%20Ruling.html>; April 9, 2019 Email from John Monetta, Project Manager, City of Oakland, to Mark McClure, Oakland Bulk & Oversize Terminal (attached as Exhibit A) (refusing to review OBOT/OGRE’s schematic drawings for rail improvements).

²² Petition for Reconsideration at 15-16.

²³ 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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April 2019, I caused a copy of the foregoing Response to City of Oakland's Petition for Reconsideration to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Margaret K. Fawal

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EXHIBIT A

From: [Monetta, John](#)
To: [Mark McClure](#)
Cc: [Skyler Sanders](#); [Amanda Price Mendoza](#); [Landreth, Sabrina](#); [Lake, Betsy](#); [Patel, Bijal](#)
Subject: RE: Oakland Army Base - Request for Landlord's Approval of Schematic Drawings for Rail Improvements
Date: Tuesday, April 9, 2019 2:33:37 PM

Dear Mark,

We are in receipt of your request for review of drawings for rail improvements under the West Gateway Ground Lease between the City and OBOT. However, as you know, the Ground Lease for West Gateway automatically terminated on November 22, 2018, when the 30-day time period referenced in the City's October 23, 2018 Notice of Default lapsed. Accordingly, the provisions of section 6.2.1 do not apply and the City will not review this submittal.

Regards,

JOHN MONETTA PROJECT MANAGER I

CITY OF OAKLAND, City Administrator's Office
Oakland Army Base Project Implementation

250 Frank H. Ogawa Plaza, 5th Floor, Oakland CA 94612
Tel: 510.238.7125 Fax: 510.238.3691

From: Amanda Price Mendoza [mailto:aprice@californiagroup.com]
Sent: Tuesday, March 19, 2019 4:20 PM
To: Landreth, Sabrina <SLandreth@oaklandca.gov>; Patel, Bijal <BPatel@oaklandcityattorney.org>; Monetta, John <JMonetta@oaklandca.gov>; Lake, Betsy <ELake@oaklandca.gov>
Cc: Mark McClure <mmclure@californiagroup.com>; Skyler Sanders <ssanders@californiagroup.com>
Subject: Oakland Army Base - Request for Landlord's Approval of Schematic Drawings for Rail Improvements

All,

Please see the below Dropbox link for the letter and Schematic Drawings for Rail Improvements delivered to your offices this afternoon.

https://www.dropbox.com/s/x1bsmxdy9gpjvt/OGRE%20-%20Initial%20Improvements%20-%20Schematic%20Drawings%20%283_19_19%29.pdf?dl=0

Best,

Amanda Price Mendoza
Legal and Compliance Analyst
510-463-6357
aprice@californiagroup.com



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