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SERVICE DATE – OCTOBER 28, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36301¹

OAKLAND GLOBAL RAIL ENTERPRISE, LLC—ACQUISITION EXEMPTION—RAIL
LINE IN ALAMEDA COUNTY, CAL.

Docket No. FD 36302

OAKLAND BULK & OVERSIZE TERMINAL, LLC—ACQUISITION EXEMPTION—RAIL
LINE IN ALMEDA COUNTY, CAL.

Docket No. FD 36303

CITY OF OAKLAND, CAL.—ACQUISITION EXEMPTION—FORMER OAKLAND ARMY
BASE, ALAMEDA COUNTY, CAL.

Digest:² This decision denies a petition filed by the City of Oakland (the City) to reject or revoke two verified notices of exemption filed by Oakland Global Rail Enterprises, LLC, and Oakland Bulk and Oversize Terminal, LLC, regarding a rail line at the former Oakland Army Base in Oakland, Cal. The decision also sets an effective date for those two exemptions as well as for an exemption sought by the City regarding the same rail line.

Decided: October 22, 2019

On June 6, 2019, the City of Oakland, Cal. (the City), filed a petition to reject or revoke verified notices of exemption filed by Oakland Global Rail Enterprises, LLC (OGRE), and Oakland Bulk and Oversize Terminal, LLC (OBOT), for authority to lease and sublease, respectively, a rail line at the former Oakland Army Base in Oakland, Cal. (the Base). For the reasons stated below, the Board will deny the City's petition and set an effective date for the exemptions sought by OGRE and OBOT in Docket Nos. FD 36301 and 36302, respectively. The Board will also set an effective date for the exemption sought by the City in Docket No. FD 36303 regarding its prior acquisition of the same rail line.

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

On May 23, 2018, OGRE, a non-carrier, filed a petition for a declaratory order in Docket No. FD 36168 asking the Board to find that OGRE does not need Board construction authority under 49 U.S.C. § 10901 to rehabilitate a rail line at the Base. According to the City and OGRE, the rail line was acquired by the City, leased to OBOT (an affiliate of OGRE), and subleased to OGRE before OGRE filed its petition; no party sought or obtained Board acquisition authority. See OGRE Pet. 2-3; OGRE Suppl. 14, Aug. 21, 2018; City Reply 5, Sept. 18, 2018, all in Oakland Global Rail Enterprise—Pet. for Declaratory Order, FD 36168.

By decision served on March 15, 2019, the Board concluded that no Board authority is required to rehabilitate or replace certain portions of the track identified in OGRE's petition. Oakland Glob. Rail Enter.—Pet. for Declaratory Order (March 15 Decision), FD 36168 (STB served Mar. 15, 2019). Specifically, the Board found that certain track, which the Board referred to as the “Middle Segment,” was previously authorized by the Interstate Commerce Commission to be acquired and operated as jurisdictional track in Oakland Terminal Railroad Co. Purchase, Etc., FD 14115 et al. (ICC decided May 26, 1943), and, as it has not been abandoned, remains track subject to the Board's jurisdiction under 49 U.S.C. § 10901. March 15 Decision, slip op. at 6, 10. As the Board explained, existing jurisdictional track may be rehabilitated or replaced without Board authority. Id. (citing Jersey Marine Rail, LLC—Pet. for Declaratory Order, FD 36063, slip op. at 5 (STB served Jan. 31, 2017); Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508 et al., slip op. at 8 (STB served Sept. 14, 1999)). The March 15 Decision also ordered the City, OBOT, and OGRE to seek acquisition authority under 49 U.S.C. § 10901 for their acquisition, lease, and sublease, respectively, of the jurisdictional track or explain why acquisition authority is not required, within 60 days of the Board's decision. March 15 Decision, FD 36168, slip op. at 10.

The City filed a petition for reconsideration of the March 15 Decision on April 4, 2019. The City asserted that, on October 23, 2018, it served OBOT with a notice of default on OBOT's lease (the Lease) and that, pursuant to the terms of the Lease, the notice of default automatically terminated the Lease and therefore also terminated OGRE's sublease, both effective November 23, 2018. City Pet. for Recons. 2-3, 9, Oakland Glob. Rail Enter.—Pet. for Declaratory Order, FD 36168. In reply, OGRE stated that the issue of whether the Lease was terminated is the subject of ongoing litigation in state court and asserted that “OBOT/OGRE retains the right to possess and use the property unless and until a judicial determination is made finding that the lease was rightfully terminated or until the City successfully sues to evict.” OGRE Reply 3-4, April 17, 2019, Oakland Glob. Rail Enter.—Pet. for Declaratory Order, FD 36168.

On May 14, 2019, OGRE, OBOT, and the City each filed separate verified notices of exemption for acquisition authority in accordance with the March 15 Decision, in Docket Nos. FD 36301, FD 36302, and FD 36303, respectively. On May 30, 2019, the effective dates of the verified notices were postponed until further order of the Board, in light of the City's pending petition to reconsider the March 15 Decision. Oakland Glob. Rail Enter.—Acquis. Exemption—Rail Line in Alameda Cty., Cal., FD 36301 et al., slip op. at 1 (STB served May 30, 2019). The Board denied the petition for reconsideration on June 20, 2019, and, in that decision, also

ordered the City to file an amended verified notice of exemption because the track covered by its original verified notice was overinclusive. Oakland Glob. Rail Enter.—Pet. for Declaratory Order, FD 36168, slip op. at 9 (STB served June 20, 2019). On July 12, 2019, the City filed an amended verified notice of exemption.

Meanwhile, on June 6, 2019, the City filed, in Docket Nos. FD 36301 and 36302, the petition at issue here to reject or revoke the verified notices of exemption filed by OGRE and OBOT (the Notices). The City argues that the Notices should be rejected or revoked because they fail to mention that the City has terminated the Lease and are therefore false and misleading (City Pet. 6-7), and that the Board's exemption procedures are inappropriate for non-routine or controversial matters such as this one, where there is a dispute regarding the validity of the agreement purporting to serve as the basis of the exemption. (*Id.* at 7-8.)

OGRE and OBOT jointly replied to the City's petition to reject or revoke on June 25, 2019. They state that the Board is well aware of the dispute regarding the Lease and argue that the City's claim that they were attempting to mislead the Board is therefore incorrect. (OGRE and OBOT Reply 5.) In addition, OGRE and OBOT argue that, under Board precedent, a petition to reject or revoke a notice of exemption based on a contract dispute should be denied. (*Id.* at 4 (citing BNSF Ry.—Trackage Rights Exemption—Union Pac. R.R., FD 35601, slip op. at 4-6 (STB served Sept. 11, 2013)).) Finally, they assert that rejecting or revoking the Notices and requiring the full application process would directly contravene the rail transportation policy criteria of 49 U.S.C. § 10101 by increasing barriers to entry, reducing competition, and depriving OGRE and OBOT of the benefits of private contractual agreements. (*Id.* at 6.)

DISCUSSION AND CONCLUSIONS

If a verified notice of exemption “contains false or misleading information, the exemption is void ab initio.” 49 C.F.R. § 1150.32(c). Failure to disclose material information can render a notice misleading by omission. Ohio River Partners, LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016). “Material” means the transaction would not have otherwise qualified for an exemption. Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378, 381 (1st Cir. 1995). “A party seeking revocation or rejection of a notice of exemption has the burden of demonstrating that the notice contains false or misleading information, or that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. [§] 10101.” Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007). The Board on occasion has rejected or revoked notices of exemption in non-routine or controversial cases, because “the class exemption process is not appropriate for controversial cases in which a more detailed record is required than is produced through a notice of class exemption.” Riffin—Acquis. & Operation Exemption—in York Cty., Pa. & Balt. Cty., Md., FD 34484, slip op. at 3 (STB served Apr. 20, 2004). Here, the City has failed to demonstrate that the Notices are false or misleading or that the transaction is controversial or non-routine such that approval under the class exemption process is inappropriate. The Board will therefore deny the petition to reject or revoke, and permit OGRE's and OBOT's exemptions to become effective.

The Notices Filed by OGRE and OBOT Are Not False or Misleading

The City argues that, because the Board's regulations at 49 C.F.R. § 1150.33(c) require parties seeking an exemption to provide "[a] statement that an agreement has been reached or details about when an agreement will be reached," the failure of OBOT and OGRE to mention the dispute over whether the Lease remains in effect constitutes an omission of material fact rendering the Notices misleading. (City Pet. 5-6.) However, at the time OBOT and OGRE filed the Notices, the Board was already well aware of the dispute involving the Lease, and the parties' positions regarding that dispute, because the City's purported termination of the Lease was one of the primary bases of the City's petition for reconsideration of the March 15 Decision. Accordingly, the notion that OGRE and OBOT were attempting to misrepresent the status of the Lease by failing to mention the dispute in the Notices is not credible. In addition, the failure to note the dispute over the Lease is not a material omission. An omission of fact is material only if the transaction would not have qualified for the exemption absent the omission. See Berkshire Scenic Ry. Museum, Inc., 52 F.3d at 381. For the reasons explained below, the existence of the dispute is not a sufficient basis to reject or revoke the Notices.

The Use of the Exemption Procedures Is Appropriate for These Notices

The City claims that, due to the dispute over the validity of the Lease, the Notices involve non-routine and controversial matters that should be addressed through a full application process rather than the Board's exemption procedures. (City Pet. 7-8.) Citing Winamac Southern Railway—Trackage Rights Exemption—A. & R. Line, Inc., FD 35208, slip op. at 2 (STB served Jan. 9, 2009), the City argues that "where there is serious dispute or controversy regarding the action subject to exemption, such as a dispute over the validity of an agreement purporting to serve as the basis for the exemption, the Board will not permit its exemption procedures to be used."³ (City Pet. 7.) However, in Winamac, the Board found that "the more extensive record afforded in an application or petition for exemption proceeding likely would be needed to allow [the owner of the line] to air its objection and the Board to fully consider the matter." Winamac, FD 35208, slip op. at 3. Here, in contrast, a more extensive record would not contribute to the Board's understanding of the City's objection or other issues surrounding the acquisition of the Middle Segment, as those issues were extensively briefed in the declaratory order proceeding, Docket No. FD 36168. Thus, the present case is more similar to City of Alameda—Acquisition Exemption—Alameda Beltline Railroad, FD 34798 (STB served Apr. 3, 2006). In that case, the

³ The City also states that "with respect to the regulatory/jurisdictional history, the Board itself had difficulty in [FD] 36168 determining the historical regulatory history regarding the Line, and the City has sought reconsideration of the Board's determination regarding its jurisdiction over the Line." (City Pet. 7.) To the degree the City is arguing that uncertainties regarding the historical status of the track at issue or the City's petition for reconsideration in the declaratory order case make the notices of exemption in these dockets controversial or non-routine, the Board disagrees. The Notices seek authority to acquire, lease, or sublease (as the case may be) the Middle Segment, as directed by the Board in the March 15 Decision. No evidence has been presented that casts doubt on the Board's conclusion that the Middle Segment was historically, and remains, jurisdictional track. Moreover, the Board has already considered and denied the City's petition for reconsideration.

City of Alameda sought to acquire a line through the exemption process, but the owner of the line argued that the exemption process was procedurally inappropriate due to a dispute in state court regarding whether the City of Alameda had a contractual right to purchase the line. The Board stated there that “the fact that [the owner of the line] and the [City of Alameda] are litigating the validity of the repurchase option in state court, however, does not make the [City of Alameda’s] notice complicated or controversial insofar as use of the exemption is concerned.” *Id.* at 3. The Board went on to explain that because the parties had previously built a substantial record, “requir[ing] the [City of Alameda] to seek an individual exemption or file a full application would only lead to unnecessary fees and additional delays.” *Id.* at 4. Similarly, rejecting the Notices in the present case and requiring a full application would only lead to unnecessary expenses and delays.

As suggested in Alameda, and contrary to the City’s assertion, the Board does not typically reject or revoke a notice of exemption based solely on a contract or property dispute. *E.g., Lehigh Ry.—Lease Exemption Containing Interchange Commitment—Norfolk S. Ry.*, FD 36062, slip op. at 2 (STB served Oct. 14, 2016) (finding that a dispute regarding whether the lease renewal at issue was prohibited by contract was not a sufficient basis to reject a notice of exemption); Ohio River Partners, LLC, FD 35984, slip op. at 3 (finding that a dispute regarding whether the party seeking to acquire and operate a line would be prohibited from operating that line under an existing easement did not warrant rejection of a notice of exemption); BNSF Ry., FD 35601, slip op. at 5-6 (finding that a dispute regarding whether the trackage rights at issue were prohibited by contract was not a sufficient basis to revoke the notice of exemption); Gen. Ry., FD 34867, slip op. at 4 (finding that a dispute regarding the validity of a purchase agreement was not a sufficient basis to reject or revoke an exemption for acquisition of a line).⁴ As the Board has noted in such cases, the Board’s authority is permissive only and does not constitute a ruling on state contract or property disputes that may affect a party’s ability to exercise that authority. *See Lehigh Ry.*, FD 36062, slip op. at 2.; Ohio River Partners, LLC, FD 35984, slip op. at 3; BNSF Ry., FD 35601, slip op. at 5-6; Gen. Ry., FD 34867, slip op. at 4. “[I]n order to exercise [Board] authority . . . the carrier must still obtain the necessary rights under state property and/or contract law.” Ohio River Partners, LLC, FD 35984, slip op. at 3.

The cases involving a contract or property dispute where the Board has rejected or revoked an exemption generally involve other complicating factors or a clear attempt by the party seeking the exemption to provide false or misleading information. *E.g., Black Hills Transp., Inc.—Modified Rail Certificate*, FD 34924, slip op. at 4 (STB served Jan. 27, 2010) (finding that abandonment of the line had been consummated prior to the filing of a notice of modified certificate, and therefore the State’s representation that it had a property interest in the right-of-way was false); U S Rail Corp.— Lease & Operation Exemption—Shannon G., a N.J.

⁴ The Board acknowledges that in Rail Switching Services, Inc.—Operation Exemption—Pemiscot County Port Authority, FD 35685 et al. (STB served Jan. 8, 2013), the notice was rejected based on a dispute between the parties regarding whether the agreement at issue allowed the party seeking the exemption to provide service over the line. However, as indicated above, in numerous other cases, including more recent cases, the Board has refused to reject a notice based solely on a contract or property dispute. Accordingly, the Board does not find Rail Switching controlling here.

LLC, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008) (rejecting notice of exemption because failure to disclose the existence of a condemnation proceeding regarding the property at issue was misleading and Board authority was being invoked for improper purpose); Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—S. Dakota, FD 34645, slip op. at 2-3 (STB served Jan. 14, 2005) (involving issues, in addition to a contract dispute, regarding the level of service that would be provided over the line and competitive access for small carriers). No such complicating factors or attempt to mislead is present in this case.

For the reasons discussed above, the petition to reject the Notices will be denied.

Effective Dates of the Exemptions

As noted above, the effective dates for the exemptions sought in Docket Nos. FD 36301, FD 36302, and FD 36303 were postponed until further order of the Board. Because the City has amended its notice of exemption as ordered by the Board and because the City's petition to reject or revoke the Notices will be denied, the notices of exemption in Docket Nos. FD 36301, FD 36302, and FD 36303 will be served and published in the Federal Register concurrently with service of this decision, and the exemptions will become effective on November 11, 2019.

It is ordered:

1. The petition to reject or revoke the notices of exemption in Docket Nos. FD 36301 and FD 36302 is denied.
2. Notice of the exemptions in Docket Nos. FD 36301, FD 36302, and FD 36303 will be published in the Federal Register on October 28, 2019.
3. The exemptions in Docket Nos. FD 36301, FD 36302, and FD 36303 will become effective November 11, 2019.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.