

SERVICE DATE – AUGUST 1, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36168

OAKLAND GLOBAL RAIL ENTERPRISE—PETITION FOR DECLARATORY ORDER

Decided: August 1, 2018

On May 23, 2018, Oakland Global Rail Enterprise, LLC (OGRE), filed a petition for a declaratory order asking the Board to find that OGRE does not need Board approval under 49 U.S.C. § 10901 to rehabilitate approximately 22,202 feet of track within an existing right of way at the former Oakland Army Base (Army Base) in Oakland, Cal. The Board will institute a declaratory order proceeding and direct OGRE to provide additional information and clarify certain issues.

BACKGROUND

OGRE states that the U.S. Army used the Army Base as a cargo port and warehousing center until it was closed in 1995. (OGRE Pet. 2.) According to OGRE, until the Army Base closed and for a short time thereafter, Oakland Terminal Railway (OTR)—a joint venture between Union Pacific Railroad (UP) and BNSF Railway Company (BNSF)—operated over the rail line serving the Army Base. (*Id.*) OGRE asserts that in the years following closure of the Army Base, certain portions of the rail line serving the Army Base were removed by the City of Oakland (the City) and other portions fell into significant disrepair, but that the rail line was never formally abandoned. (*Id.*) OGRE states that in August 2006, approximately 170 acres of the former Army Base were conveyed to the City and another 200 acres were conveyed to the Port of Oakland (the Port). (*Id.*)

OGRE states that the Port and the City are redeveloping the former Army Base and that, as part of this redevelopment, Oakland Bulk and Oversized Terminal (OBOT), an affiliate of OGRE, has leased from the City the portions of the former Army Base known as the West Gateway and an existing railroad right of way in the West Gateway. (*Id.*) OGRE says it intends to rehabilitate approximately 22,202 feet of track in the existing railroad right of way, which it has subleased from OBOT. (*Id.*, Ex. 1, V.S. McClure at 2.) According to OGRE, this rehabilitated track along with existing track in good condition within the former Army Base will constitute OGRE's entire rail line. (*Id.*) OGRE asserts that no line of rail will be constructed outside the existing right of way. (*Id.*)

OGRE argues that, under Board precedent, an existing rail line that has not been authorized for abandonment can be repaired, replaced, rehabilitated, or rebuilt without Board

authority.¹ OGRE therefore claims that the contemplated track rehabilitation and repair within the former Army Base does not require Board construction authority. (*Id.* at 5.)

On June 29, 2018, the City filed a reply to OGRE’s petition,² which includes excerpts from OTR’s 1943 application to the Interstate Commerce Commission (ICC) to acquire the lines of railroad that OTR would use to serve the Army Base. (City Reply at Ex. 1, OTR Application, Mar. 11, 1943, Oakland Terminal R.R. Purchase, Etc., FD 14115.) The City states that the track described in OGRE’s petition was depicted in maps included with OTR’s application but was not identified in the application as track to be acquired by OTR. (City Reply 7.) The City also states that the available evidence raises the possibility that the track described in OGRE’s petition was historically operated as private track and, therefore, rehabilitation or replacement of that track could constitute construction of a rail line that would require Board authority. (*Id.* at 8.) The City requests that the Board investigate the regulatory status of the track at issue. (*Id.*)

On July 16, 2018, OGRE filed a reply to the City’s reply.³ OGRE’s reply states that the maps attached to OTR’s application show that OTR purchased a line of rail extending out to the West Gateway area. (OGRE Reply 4-5.) OGRE explains that the track depicted in the OTR application does not run the full length of the West Gateway area but claims that the OTR maps show that “nearly all of the track OGRE intends to rehabilitate is track for which the ICC previously exercised jurisdiction.” (*Id.* at 5.) With respect to the track that OGRE plans to rehabilitate but which OGRE states is not specifically identified in the OTR application, OGRE points to several pieces of evidence that it asserts support the conclusion that this track was operated as track under the agency’s jurisdiction and not as private track. (*Id.* at 5-7.)

Although not discussed in the filings by OGRE or the City, in 2014 and 2015, OGRE filed notices of exemption related to proposed rail operations in and around the former Army

¹ *Id.* at 4-5 (citing Jersey Marine Rail, LLC—Pet. for Declaratory Order, FD 36063, slip op. at 5 (STB served Jan. 31, 2017); Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal, FD 35424 (STB served June 14, 2011); Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508 et al., slip op. at 7 (STB served Sept. 14, 1999); Union Pac. R.R.—Pet. for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude & Ogden Junction, Tex., 3 S.T.B. 646, 651 (1998)).

² The City’s reply was filed after the deadline for replies set forth under 49 C.F.R. § 1104.13(a). However, the City simultaneously filed a motion asking that the Board accept the late-filed reply. The City’s late-filed reply will be accepted in the interest of a more complete record.

³ Under 49 C.F.R. § 1104.13(c) “[a] reply to a reply is not permitted.” OGRE has filed a motion asking that the Board find there is good cause to waive this prohibition and accept its reply. The Board will grant this motion and accept OGRE’s reply in the interest of a more complete record.

Base that appeared to contemplate activities similar to those described in the pending petition, but those notices did not mention track repair or rehabilitation. Rather, they suggested that OGRE or other parties would be involved in construction of a new rail line requiring Board authorization. See Oakland Glob. Rail Enter.—Acquis. & Operating Exemption—in Port of Oakland, Cal., FD 35807, slip op. at 1 (STB served April 30, 2014); Oakland Glob. Rail Enter.—Operation Exemption—Lines of R.R. Owned by the Port of Oakland, Cal., FD 35953, slip op. at 1 (STB served Sept. 25, 2015). Ultimately, OGRE filed motions to withdraw both notices, which the Board granted. However, in granting OGRE’s motion to withdraw in Docket No. FD 35953, the Board stated that, “as in...Docket No. FD 35807, it appears that there are plans for track construction activity that may require Board authorization . . . OGRE should address this construction issue in any future filing.” Oakland Glob. Rail Enter., FD 35953 at 2.⁴

DISCUSSION

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. Under Board precedent, a rail line that has not been authorized for abandonment may be repaired, replaced or rehabilitated without Board construction authority. See, e.g., Jersey Marine Rail, LLC, FD 36063, slip op. at 5; Mo. Cent. R.R., FD 33508 et al., slip op. at 8. However, due to the limited evidence in the current record and in light of statements made by OGRE in previous proceedings, more information is needed to determine whether Board approval is needed for the activities described in the pending petition. Specifically, the Board needs more information to reconcile OGRE’s statements in previous proceedings with its statements here and with the evidence submitted by the City in its reply; to determine if all the proposed track work will, in fact, take place within an existing right of way; and to determine whether OGRE has already engaged in activities for which Board authority is required. Accordingly, OGRE will be directed to provide additional information:

1. In previous proceedings before the Board, OGRE indicated that it or other parties planned to construct a rail line on property in the Port area for which Board authority may be required. Oakland Glob. Rail Enter., FD 35807, slip op. at 1; Oakland Glob. Rail Enter., FD 35953, slip op. at 1. Explain whether and, if so how, OGRE’s previous statements to the Board indicating that OGRE or other parties planned to construct a rail line within the Port area

⁴ OGRE and its affiliate, West Oakland Pacific Railroad, LLC, also filed, and later withdrew, two other notices of exemption related to proposed operations in or around the Port. West Oakland Pac. R.R.—Operation Exemption—Union Pac. R.R., FD 35639 (STB served July 19, 2012); Oakland Glob. Rail Enter.—Operation Exemption—Rail Line of Union Pac. R.R., FD 35822 (STB served July 24, 2014). These notices differed from the others and from the pending petition in that the proposed operations were limited to operations over pre-existing UP and BNSF tracks, and the notices did not mention the construction or repair of track or operations over track owned by the Port or the City.

are consistent with OGRE's pending petition, which states that no new rail line construction will occur and that the planned work involves only rehabilitation of existing line.

2. OGRE's petition includes a verified statement from Mark McClure, President of OGRE, stating that "[n]o new line of rail will be constructed outside of the existing right of way as part of the Project." (OGRE Pet., Ex. 1, V.S. McClure at 2; but see City Reply.) Explain the basis for this representation that the track work described in the petition and in the map attached to the petition will take place entirely within an existing rail line right of way and provide any supporting documentation.

3. OGRE's reply states that "nearly all of the track OGRE intends to rehabilitate is track for which the ICC previously exercised jurisdiction" pursuant to the 1943 proceeding in which OTR was issued acquisition authority. (OGRE Reply 5.) OGRE argues that any track not covered by the 1943 acquisition authority is nonetheless also subject to agency jurisdiction. (OGRE Reply 5-7.). Illustrate on the maps provided in OTR's application where all of the track that OGRE plans to rehabilitate is located. In doing so, identify on those maps, and distinguish between, the track that OGRE plans to rehabilitate that OGRE believes: (1) is subject to agency jurisdiction as a result of the 1943 proceeding and (2) was not covered by the 1943 acquisition authority but nevertheless is subject to agency jurisdiction, including any track that was not depicted in any form in the original OTR maps. For all track not subject to the 1943 proceeding, explain in detail why OGRE believes that such track is nonetheless subject to Board jurisdiction.

4. OGRE's petition states that OGRE plans to rehabilitate 22,202 feet of track on property owned by the City. (OGRE Pet. 1.) In contrast, in 2014, OGRE indicated that the City and OGRE would construct a total of 32,960 feet of track on City property, with OGRE constructing 15,000 feet of that total. Oakland Glob. Rail Enter., FD 35807, slip op. at 2. In that same proceeding, OGRE indicated that it would operate over 60,670 feet of track that would be owned by the Port. Id. at 1. In 2015, OGRE stated that it planned to operate over approximately 32,690 feet of track owned and/or being constructed by the City. Oakland Glob. Rail Enter., FD 35953, slip op. at 1. In that proceeding, OGRE also initially indicated that it would operate over 60,670 feet of existing track owned by the Port before amending its notice of exemption to seek authority only to operate over the 32,690 feet of track owned and/or being constructed by the City. Id. Explain how the length of track on City property (32,690 or 32,960 feet) cited in OGRE's previous notices of exemption and the length of track on Port property (60,760 feet) cited in the previous notices of exemption relate to the 22,202 feet of track identified in the pending petition as track to be rehabilitated. Provide a map or maps clearly showing and identifying all the lines referenced in Docket Nos. FD 35807 and FD 35953 in relation to the 22,202 feet of track to be rehabilitated under OGRE's current plan.

5. The petition states that OGRE's affiliate, OBOT, has leased the existing right of way from the City and OGRE has subleased it from OBOT. (OGRE Pet. 2-3.) Explain why OGRE believes that it and OBOT were not required to seek Board approval to enter into these leases and thereby acquire an existing rail line.

6. Clarify whether OGRE is currently conducting rail operations and whether it has entered into any agreements to provide rail transportation and, if so, provide details regarding those operations and agreements.

OGRE's supplement will be due by August 21, 2018. Comments will be due by September 10, 2018.

It is ordered:

1. A declaratory order proceeding is instituted.
2. The City's reply is accepted into the record.
3. OGRE's reply is accepted into the record.
4. OGRE's supplement is due by August 21, 2018.
5. Comments are due by September 10, 2018.
6. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.