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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36301

**OAKLAND GLOBAL RAIL ENTERPRISE, LLC
—ACQUISITION EXEMPTION—RAIL LINE IN ALAMEDA COUNTY, CA**

Finance Docket No. 36302

**OAKLAND BULK & OVERSIZE TERMINAL, LLC
—ACQUISITION EXEMPTION—RAIL LINE IN ALAMEDA COUNTY, CA**

**OAKLAND GLOBAL RAIL ENTERPRISE, LLC’S REPLY TO CITY OF OAKLAND’S
PETITION TO REJECT OR REVOKE NOTICES OF EXEMPTION**

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Dated: June 25, 2019

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Oakland Global Rail Enterprise (“OGRE”) and Oakland Bulk & Oversize Terminal (“OBOT”) respectfully submit this reply to the Petition of the City of Oakland to Reject or Revoke Notices of Exemption filed by the City of Oakland (“City”) on June 6, 2019.¹

INTRODUCTION

The City asks the Board to reject or revoke OGRE’s and OBOT’s Notices of Exemption (“NOEs”) that were filed at the Board’s direction and that pertain to acquisitions that occurred years ago. The Board should deny the request for a multitude of reasons. First, as explained in previous filings before the Board, the City has repeatedly made clear that it opposes OBOT’s proposed redevelopment and the City’s Petition is just one more attempt to unlawfully block this

¹ Petition of City of Oakland to Reject or Revoke Notices of Exemption, STB Docket Nos. FD 36301, FD 36302 (filed June 6, 2019) (“City Petition”).

project.² Moreover, the City’s request fails to satisfy the applicable standard for revocation because the acquisitions in question are based on valid written agreements. Even if the City has subsequently attempted to terminate those agreements, revocation of the NOEs would be premature at this point in time, as the contractual dispute is still pending in state court and no final determination as to the status of the agreements has been issued. California law is clear: until there is a judicial determination that a lease has been terminated, the tenant may continue to enjoy the use and occupancy of its leased premises.³ Finally, revocation would directly conflict with established rail transportation policy by needlessly creating barriers to entry and deprive OGRE and OBOT of the benefits of validly executed agreements. The Board should therefore deny the City’s Petition.

BACKGROUND

OGRE plans to rehabilitate track in an existing right-of-way (“ROW”) at the former Oakland Army Base (“OAB”) in Oakland, California. On May 23, 2018, OGRE filed a petition for a declaratory order asking the Board to determine whether the track within the existing ROW was historically jurisdictional.⁴ The Board determined that the track is jurisdictional and directed OGRE, OBOT, and the City to seek authority for prior acquisitions of the track.⁵ Accordingly, in compliance with the Board’s instructions, OGRE and OBOT properly filed NOEs for their prior

² See, e.g., Complaint, *Oakland Bulk and Oversized Terminal, LLC et al. v. City of Oakland*, No. RG18930939, at ¶¶ 104-37 (Cal. Super. Ct. Dec. 4, 2018) (explaining how the City has repeatedly, affirmatively and unlawfully obstructed the proposed development).

³ See Petitioner’s Reply to City of Oakland’s Petition for Stay, STB Docket No. FD 36168, at 4 (filed April 1, 2019) (citing *Mihans v. Mun. Court*, 7 Cal. App. 3d 479, 484 (Cal. Ct. App. 1970)). The City has failed to provide any case law to the contrary.

⁴ Petition for Declaratory Order, STB Docket No. FD 36168, at 1-5 (filed May 23, 2018).

⁵ *Oakland Global Rail Enterprise—Petition for Declaratory Order*, STB Docket No. FD 36168, at 11 (served March 15, 2019).

acquisitions.⁶ Now, the City asserts that OGRE's and OBOT's NOEs should be rejected or revoked. But because exemption is proper under the circumstances, and the City has failed to satisfy the standard for revocation, the City's Petition should be denied.

ARGUMENT

A request to revoke an exemption is proper where revocation is necessary to advance the rail transportation policy criteria of 49 U.S.C. § 10101.⁷ The party seeking revocation has the burden to prove by "articulating reasonable, specific concerns addressing the revocation criteria," that revocation is justified.⁸ Here, the City has failed to meet this burden.

I. Exemption is proper because OBOT's and OGRE's acquisitions of the track were based on valid written agreements.

The purpose of the notice of exemption process is to provide "an expedited means of obtaining Board authority in certain classes of transactions . . . that ordinarily do not require greater regulatory scrutiny."⁹ Acquisition exemptions are "routinely granted" and are proper, among other things, when the acquisition (i) is based on a "written agreement[]" and (ii) is not filed or sought in rail consolidation proceedings.¹⁰ Here, these requirements are clearly satisfied.

There is no question that the acquisitions by OBOT and OBRE have nothing to do with rail consolidation proceedings, and no one disputes that valid written agreements existed when

⁶ Oakland Global Rail Enterprise—Notice of Exemption, STB Docket No. FD 36301 (filed May 14, 2019); Oakland Bulk & Oversize Terminal—Notice of Exemption, STB Docket No. FD 36302 (filed May 14, 2019).

⁷ See *Portland & Western R.R. Inc.—Lease and Operation Exemption—Lines of Burlington N. R.R. Co.*, STB Docket No. FD 32766, at *5 (served October 15, 1997) ("[W]e may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. [§] 10101.").

⁸ *Canadian Nat'l Ry. Co.—Trackage Rights Exemption—Bangor and Aroostook Ry. Co. and Van Buren Bridge Co.*, STB Docket No. FD 34014, at *5 (served June 25, 2002).

⁹ *Winimac S. Ry. Co.—Trackage Rights Exemption—A. & R. Line, Inc.*, STB Docket No. FD 35208, slip op. at 2 (served January 9, 2009).

¹⁰ 49 C.F.R. § 1180.2(d)(7); *Burlington N. R.R. Co. v. United Transp. Union*, 862 F.2d 1266, 1269-70 (7th Cir. 1988).

OBOT and OGRE acquired the track at issue.¹¹ Rather, the only “dispute” the City raises is its contractual authority to unilaterally terminate its agreement with OBOT based on its own interference with OBOT’s (and OGRE’s) performance of the contract.¹² But it has long been clear that disputes regarding contractual rights of parties to an agreement must be resolved in a different forum.¹³ The Board has therefore found that a request revoke an exemption should be denied where the request is based on a contractual dispute.¹⁴

Moreover, even if the contractual dispute between the City and OBOT were a valid reason to reject or revoke the exemption, which it is not, the City’s Petition is premature. As the City has acknowledged, the contractual dispute between OGRE and the City is ongoing,¹⁵ and under California law, OBOT and OGRE retain property rights under the contract until the state court issues a determination that the contract has validly been terminated.¹⁶ If the state court

¹¹ See City Petition at 3 (acknowledging that valid agreements existed in 2018).

¹² See Complaint, *Oakland Bulk and Oversized Terminal, LLC et al. v. City of Oakland*, No. RG18930939, at ¶¶ 112-128 (Cal. Super. Ct. Dec. 4, 2018).

¹³ See, e.g., *Ind. Harbor Belt R.R. Co.—Trackage Rights—Consol. Rail Corp., CSX Transp. Inc., and Norfolk S. Ry. Co.*, STB Docket Nos. FD 36099, FD 36100, FD 36101, FD 36102, at *4 (served March 14, 2017) (“[T]he Board has consistently stated that contractual disputes are properly for courts to decide.”); *Wis. Central, Ltd.—Trackage Rights Exemption—Lines of Union Pac. R.R. Co. and Ill. Central R.R. Co.*, STB Docket No. FD 35992, at *2 (served March 4, 2016) (Contractual disputes are “matter[s] for another forum to decide and need not be resolved before the Board’s permissive authority [to grant an exemption] is allowed to take effect.”).

¹⁴ *BNSF Ry. Co.—Trackage Rights Exemption—Union Pac. R.R. Co.*, STB Docket No. FD 35601, slip op. at 4-6 (served September 11, 2013) (denying revocation request based on dispute regarding whether “one contract between BNSF and UP . . . violates another agreement between BNSF and UP.”).

¹⁵ See Petition of City of Oakland for Reconsideration, STB Docket No. FD 36168, at 7 (filed April 4, 2019).

¹⁶ See Petitioner’s Reply to City of Oakland’s Pet. for Stay, STB Docket No. FD 36168, at 4 (filed April 1, 2018) (citing *Mihans v. Mun. Court*, 7 Cal. App. 3d 479, 484 (Cal. Ct. App. 1970)); see also *Bedi v. McMullan*, 160 Cal. App. 3d 272, 276 (Cal. Ct. App. 1984) (holding that a “valid writ of execution is the *ultimate indispensable element* of the legal process by which a party entitled to possession of the property acquires possession.”) (emphasis added). Here, the City acknowledges that, at least at one point, there was a valid written lease between the City and OBOT. Thus, for the City to prove that such a lease is no longer valid, it would need to produce a valid writ of execution. It cannot.

ultimately finds for the City, only at that time would it be proper for the City to petition for a revocation of OBOT's and OGRE's acquisition exemption.¹⁷

Finally, the City's assertion that the NOEs are void *ab initio* because they did not mention the City's attempt to terminate its lease with OBOT is incorrect. First, the Board is well aware of the dispute between the City and OBOT/OGRE, and the notion that OBOT and OGRE are attempting to mislead the Board is absurd. In any case, as the City concedes, failure to disclose information only renders a notice of exemption void *ab initio* if the information is "material."¹⁸ Here, the contractual dispute between OGRE and the City is entirely immaterial to the Board's decision because, as explained above, OGRE's and OBOT's property rights remain in effect until a court of valid jurisdiction determines that the contract between OBOT and the City was properly terminated. Until such a decision is issued, the contractual dispute between OGRE and the City has no effect on OBOT's or OGRE's property rights. Accordingly, the NOEs were neither false nor misleading and should not be rejected or revoked.

II. A full application is not necessary to further the rail transportation policy.

The City's half-hearted attempt to argue that revocation is necessary and a full application is needed to further the rail transportation policy criteria of 49 U.S.C. § 10101 falls flat.¹⁹ In its one-page argument, the City relies on a baseless dispute that the City itself has created and argues that an exemption is improper because the project is "controversial."²⁰ But the only "controversy" is over what commodity will be shipped through the redeveloped terminal, an issue the City itself created because it dislikes a potential commodity that OBOT and OGRE

¹⁷ See, e.g., *Ind. Harbor Belt R.R. Co.—Trackage Rights—Consol. Rail Corp., CSX Transp. Inc., and Norfolk S. Ry. Co.*, STB Docket Nos. FD 36099, FD 36100, FD 36101, FD 36102, at *4 (served March 14, 2017) ("If the District Court voids the Agreement, [a party] may file a petition to reject or revoke the notices *at that time.*") (emphasis added).

¹⁸ See City Petition at 4 ("Failure to disclose *material* information can render a notice . . . void *ab initio.*") (emphasis added).

¹⁹ See City Petition at 7

²⁰ *Id.* at 7-8.

propose to ship—coal.²¹ This “controversy” is not only self-imposed by the City, but it has nothing to with the validity of the agreements underpinning OGRE’s or OBOT’s acquisition of track.

Contrary to the City’s position, a revocation under the existing circumstances would directly conflict with the policy criteria set forth in Section 10101. “Sections 10101(1), (4), (5), (6), (7), and (12) [of ICCTA] favor competition [and] reduced barriers to entry into rail service,” which “are the types of considerations that were behind the ICC’s decision to adopt the trackage rights class exemption in the first place.”²² Here, to require OGRE and OBOT to go through the full application process would directly contravene these policy considerations. Such a decision would increase barriers to entry, reduce competition, and deprive OGRE and OBOT of the benefits of agreements reached “over a year ago in arm’s-length private-sector discussions.”²³ This is exactly what Section 10101 and the exemption process seek to avoid.

CONCLUSION

To reject or revoke the NOEs that the Board itself instructed OGRE and OBOT to file is not warranted by the existence of a yet-to-be-resolved state law contractual dispute. Granting the City’s Petition under these circumstances would directly contravene the policy considerations set forth in 49 U.S.C. § 10101. For these reasons, the Board should deny the City’s Petition to Reject or Revoke Notices of Exemption.

²¹ See e.g., Complaint, *Oakland Bulk and Oversized Terminal, LLC et al. v. City of Oakland*, No. RG18930939, at ¶¶ 60-67 (Cal. Super. Ct. Dec. 4, 2018).

²² *Canadian Nat’l Ry. Co.—Trackage Rights Exemption—Bangor & Aroostook R.R. Co. and Van Buren Bridge Co.*, STB Docket No. FD 34014, at *5 (served June 25, 2002).

²³ *Id.*

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Kathryn Kusske Floyd". The signature is fluid and cursive, with the first name "Kathryn" being more prominent.

Kathryn Kusske Floyd
Margaret K. Fawal

Counsel to Oakland Global Rail
Enterprise and Oakland Bulk & Oversize
Terminal

Dated: June 25, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June 2019, I caused a copy of the foregoing Reply to City of Oakland's Petition to Reject or Revoke Notices of Exemption to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Margaret K. Fawal