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June 6, 2019

Via Electronic Filing

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

ENTERED
Office of Proceedings
June 6, 2019
Part of
Public Record

Re: *Oakland Global Rail Enterprise – Acquisition Exemption – Rail Line in Alameda County, CA, STB Docket No. FD 36301, and Oakland Bulk & Oversize Terminal, LLC – Acquisition Exemption – Rail Line in Alameda County, CA, STB Docket No. FD 36302*

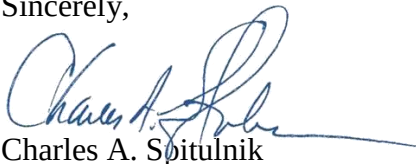
Dear Ms. Brown:

Enclosed please find for filing in the above-captioned proceedings the Petition of City of Oakland to Reject or Revoke Notices of Exemption.

I am also depositing the \$300 filing fee for each docket (\$600 total) electronically pursuant to 49 C.F.R. § 1002.2(f)(61). However, the City of Oakland seeks a waiver of the filing fee based on the fact that it is a local government entity filing the Petitions to Reject or Revoke on behalf of the general public. See 49 C.F.R. § 1002.2(e). The City of Oakland is directed by duly elected officials who are filing this Petition to Reject or Revoke to further the public's benefit and interest in the matter at hand.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Charles A. Spitulnik
Counsel for City of Oakland, California

cc: All Parties of Record

Enclosures

FILING FEE WAIVED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36301

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

STB FINANCE DOCKET NO. 36302

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

**PETITION OF CITY OF OAKLAND TO REJECT OR REVOKE
NOTICES OF EXEMPTION**

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Dated: June 6, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36301

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

STB FINANCE DOCKET NO. 36302

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

**PETITION OF CITY OF OAKLAND TO REJECT OR REVOKE
NOTICES OF EXEMPTION**

INTRODUCTION

The City of Oakland, California (“City”) hereby petitions this Board to reject or revoke two Verified Notices of Exemption Under 49 C.F.R. § 1151.31, each one filed separately on May 14, 2019, by the Oakland Global Rail Enterprise, LLC (“OGRE”) in Finance Docket No. FD 36301, and by the Oakland Bulk & Oversize Terminal, LLC’s (“OBOT”) in Finance Docket No. FD 36302 (collectively, the “NOEs”). The NOEs were filed in response to an order from this Board in *Oakland Global Rail Enterprise—Petition for Declaratory Order*, STB Docket No. FD 36168 (Service Date March 15, 2019) (“*March 15th Decision*”) and relate to the prior acquisition of approximately 15,000 lineal feet of rail line (the “Line”) located on a portion of the former Oakland Army Base owned by the City (“OAB Property”). Rejection or revocation of the NOEs is appropriate here, because they contain misleading information and are accordingly void *ab*

initio, and they involve non-routine and controversial matters over which Board regulation is appropriate.

Because the NOEs are largely identical and involve the same parties, line of railroad, and factual circumstances, and because the City's grounds for rejection or revocation are the same in both cases, the City will address both Notices in this single Petition.

BACKGROUND

The Board is no stranger to the Line, which has been the subject of several proceedings before it over the last several years. *See Oakland Global Rail Enterprise, LLC—Operation Exemption—Lines of Railroad Owned by the Port of Oakland, Cal., and the City of Oakland, Cal.*, STB Docket No. FD 35953 (Service Date Sept. 25, 2015); *March 15th Decision*. Indeed, it was the Board's *March 15th Decision* concerning OGRE's purported rehabilitation of the Line that ordered OBOT and OGRE to file the NOEs, and likewise ordered the City to file a Verified Notice of Exemption, which it did in Docket No. FD 36303. *See OGRE Verified Notice of Exemption Under 49 C.F.R. 1151.31, Oakland Global Rail Enterprise, LLC—Acquisition Exemption—Rail Line in Alameda County, CA*, STB Docket No. FD 36301 (Filed May 14, 2019) ("OGRE's NOE"); OBOT Verified Notice of Exemption Under 49 C.F.R. 1151.31, *Oakland Bulk & Oversize Terminal, LLC—Acquisition Exemption—Rail Line in Alameda County, CA*, STB Docket No. FD 36302 (Filed May 14, 2019) ("OBOT's NOE"); City Verified Notice of Exemption, *City of Oakland, CA—Acquisition Exemption—Former Oakland Army Base, Alameda County, CA*, STB Docket No. FD 36303 (Filed May 14, 2019) ("City's NOE").

The Board ordered the parties to file for authority with respect to the previous acquisitions of the rail lines on the OAB Property after the Board determined in the *March 15th Decision* that the Line was subject to its jurisdiction and that the City, OBOT and OGRE should

have secured acquisition authority from the STB when they acquired their respective interests in the line. See *March 15th Decision*, slip op. at 10-11. Because neither the City, when it acquired the Line over time with the OAB Property from the Army through various transactions starting in the 2000's, nor OBOT, when it leased the Line from the City in 2016, nor OGRE, when it subleased the Line from OBOT in 2018, sought acquisition authority under 49 U.S.C. § 10901, the Board in the *March 15th Decision* ordered all three parties to seek such acquisition authority “by May 14, 2019, or to explain to the Board why such authority is not required.” *Id.*, slip op. at 15. In response to the Board's order, on May 14, 2019, the City, OBOT, and OGRE all filed notices of exempt acquisition for their previous respective acquisitions of the Line.

As the City's subsequent filings in Docket Nos. FD 36168 and FD 36303 have also made clear, the City has terminated its lease with OBOT effective November 23, 2018. See *Petition of City of Oakland for Reconsideration, Oakland Global Rail Enterprise—Authority to Operate a Rail Line in Oakland, CA—Petition for Exemption from 49 U.S.C. § 10901*, STB Docket No FD 36168, at 2-3 (Filed Apr. 4, 2019) (“City's April 4th Petition”); City's NOE, at 3. It is in part on the basis of this termination, and in part on the basis that the Board erred in determining its jurisdiction over a portion of the Line, that the City filed a petition for reconsideration of the *March 15th Decision*. See City's April 4th Petition, at 11-15.

Recognizing the connection between the City's April 4th Petition and the May 14th filings, on May 30, 2019, the Board issued a decision delaying the effective dates of the City's NOE, OBOT's NOE, and OGRE's NOE pending a Board decision on the City's April 4th Petition. See STB Finance Docket Nos. 36301, 36302, and 36303 (Service Date May 30, 2019).

Although the Board's May 30th decision postponed the effective date of OBOT's and OGRE's NOEs, they remain defective and this Board should reject or revoke them both.

ARGUMENT

A. Standard for Granting Rejection or Revocation

If a notice for exempt acquisition “contains false or misleading information, the exemption is void *ab initio*.” 49 C.F.R. § 1150.32(c). “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.” *General Ry. Corp., d/b/a Iowa Northwestern R.R.—Exemption for Acquisition of R.R. Line—In Osceola and Dickinson Counties, IA*, STB Docket No. FD 34867, slip op. at 3 (Service Date June 15, 2007). *See also* 49 C.F.R. § 1150.32(c). “Failure to disclose material information can render a notice misleading by omission, and therefore void *ab initio*.” *Rail Switching Service, Inc.—Operation Exemption—Pemiscot County Port Authority*, STB Docket No. FD 35686 *et al.*, slip op. at 4 (Service Date Jan. 8, 2013). “Material” means “the transaction would not have otherwise qualified for an exemption.” *Id.*

Furthermore, although “[n]otices of exemption are intended to be used for routine and non-controversial cases . . . [i]n cases where unresolved issues arise, the Board will reject a notice.” *Winamac S. Ry. Co.—Trackage Rights Exemption—A. & R. Line, Inc.*, STB Docket No. FD 35208, slip op. at 2 (Service Date Jan. 9, 2009).

B. The OGRE and OBOT NOEs Meet the Criteria Rejection or Revocation

1. The NOEs contain false and misleading information and are void *ab initio*

Omission of information regarding whether the applicant has a sufficient property interest in the line constitutes false or misleading information sufficient to reject or revoke the Board’s exemption procedures. *See Rail Switching*, slip op. at 4 (rejecting exemption where the filing party “failed to advise the Board of the active dispute between it and the owner of the Line

regarding the interpretation of the agreement” underpinning the exemption.). *See also U.S. Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC*, STB Docket No. 35042, slip op. at 3-4 (Service Date Oct. 8, 2008); *Black Hills Transp., Inc., d/b/a/ Deadwood, Black Hills & W. R.R.—Modified R. Certificate*, STB Docket No. FD 34924, slip op. at 4 (Service Date Jan. 27, 2010) (concerning exemption procedures for issuance of a modified certificate).

Specifically, with respect to its exemption procedures under 49 C.F.R. Part 1150, Subpart D, the Board has included a requirement that parties disclose “[a] statement that an agreement has been reached or details about when such an agreement will be reached,” 49 C.F.R. § 1150.33(c). The regulations “contemplate[] that the party seeking authority to operate as a common carrier over the subject line either has, or is in the process of acquiring, an agreement with the underlying owner to provide that service.” *Rail Switching*, slip op. at 4. The Board has been quite clear that “[w]ithout an agreement, or a plan to reach an agreement, a transaction would not qualify for an exemption under Subpart D.” *Id.*

In *Winamac*, the Board rejected a notice of exemption for prior acquisition of trackage rights over a line where the purported conveyor of the trackage rights objected to the proceedings on the basis that it had terminated the trackage rights before the effective date of the notice, and that the trackage rights were in any event abandoned and invalid. *Winamac*, slip op. at 1-2. The Board noted that “[t]his serious contractual dispute raises issues of state law that the Board is not in a position to resolve and calls into question whether a key component of the trackage rights class exemption—that the trackage rights be based on a written agreement—is met. These uncertainties preclude use of the expedited notice of exemption process here.” *Id.*, slip op. at 2.

Winamac and other Board decisions reflect the principle that while the Board’s authorization process is permissive, and disputes concerning property and contract law are

outside of its jurisdiction, *see Eastside Community R., LLC—Acquisition and Operation Exemption—GNP Rly Inc.*, STB Docket No. FD 35692, slip op. at 7-8 (Service Date Dec. 13, 2018), the very existence of a valid property interest is central enough to the Board’s regulatory duties to constitute a valid basis for rejecting or revoking a notice of exemption at the outset when such a property interest is absent. *See Rail Switching*, slip op. at 4; *U.S. Rail Corp.*, slip op. at 3-4, *Black Hills*, slip op. at 4 (“Although the Railroad is correct that it was not specifically required by the regulations to provide information regarding the pending property interest disputes, the issue of whether the State ever actually obtained a property interest in the ROW was key to our authority to grant the modified certificate”).

Here, in response to the question found at 49 C.F.R. § 1150.33(c), OBOT’s NOE states that “OBOT and the City of Oakland entered into a ground lease for control of the [Line] on February 16, 2016.” OBOT’s NOE, at 3. Similarly, OGRE’s NOE states that OBOT and OGRE entered into a sublease for the [Line] on June 26, 2018.” OGRE’s NOE, at 3. Neither of the NOEs, both filed in 2019, make any mention anywhere in the NOEs that the City terminated its ground lease with OBOT, and thus terminated the sublease with OGRE, effective November 23, 2018. In fact, the NOEs make no mention whatsoever about any dispute between OBOT/OGRE and the City regarding property rights over the Line, even though the City’s actions have been made clear in previous filings in Docket No. 36168.

Without an effective agreement between OBOT and the City, or where there is a dispute about the existence of such an agreement, there is no basis upon which OBOT or OGRE can file a notice of exempt acquisition. *See Rail Switching*, slip op. at 4; *Winamac*, slip op. at 2. Omitting this fact, which is so material to the NOEs as to be essential, constitutes false and misleading

information rendering the NOEs void *ab initio*. See *Rail Switching*, slip op. at 4. Accordingly, the City seeks a Board declaration that the NOEs have been rejected or revoked.

2. *The subject of the NOEs is non-routine and controversial, and Board regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101*

The Board's notice of exemption process "is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board's regulations, that ordinarily do not require greater regulatory scrutiny." *Winamac*, slip op. at 2. See also 49 U.S.C. § 10502. Exemption procedures may further federal transportation policy by, for instance, minimizing the need for federal regulatory control, reducing regulatory barriers to entry into and exit from the industry, and encouraging honest and efficient management of railroads. 49 U.S.C. § 10101 (2), (7), (9). However, 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. See *Winamac*, slip op. at 2.

Here, jurisdiction and federal regulatory issues concerning the line have been the subject of extensive discussion and dispute among the parties before the Board across several proceedings. See STB Finance Docket Nos. 35953 and 36168. In the City's April 4th Petition, it noted its termination of the ground lease with OBOT and the state law proceedings between the parties relating to development of the OAB Property. Further, with respect to the regulatory/jurisdictional history, the Board itself had difficulty in Finance Docket No. 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. Clearly, this is not a routine or non-controversial transaction. In circumstances such as these, where there are legitimate disputes about property rights, using the Board's exemption procedures does not

encourage honest and efficient management of railroads or absolve the need for federal regulation. Instead, flawed notices of exemption undermine federal transportation policy.

Accordingly, the Board's notice of exemption procedures are not the appropriate process when there is a dispute over property rights. Any such acquisition should go through full application procedures to permit a full examination of the question whether the public convenience and necessity support the acquisition of the interests in real estate (*see* 49 U.S.C. 10901(c)) that are covered by the OGRE and OBOT NOEs.

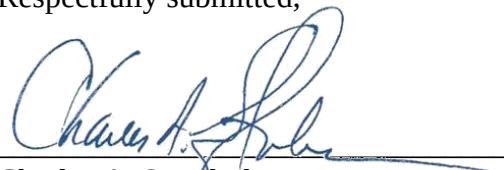
CONCLUSION

In omitting the fact that there is no valid property agreement between the City and OBOT conveying the necessary property interests to OBOT and OGRE, both OBOT's NOE and OGRE's NOE contain false and misleading information and are thus void *ab initio*. These transactions also cover a non-routine controversial subject for which the Board's notice of exemption procedures are inappropriate.

WHEREFORE, and in view of the foregoing, the City respectfully requests this Board to reject or revoke the OGRE and OGOT NOEs.

Dated: June 6, 2019

Respectfully submitted,

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

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Certificate of Service

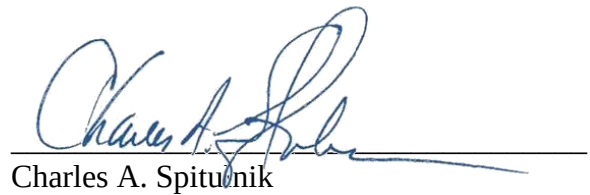
I hereby certify that I have this 6th day of June, 2019, caused to be served a copy of the foregoing Petition of City of Oakland to Reject or Revoke the Notices of Exemption upon the following parties of record by e-mail and by first-class mail, with postage prepaid:

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