

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

302335

ENTERED
Office of Proceedings
May 13, 2021
Part of
Public Record

**PETITION OF GRAFTON AND UPTON RAILROAD
COMPANY FOR DECLARATORY ORDER**

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233
jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

Dated: May 13, 2021

FEE RECEIVED
May 13, 2021
SURFACE
TRANSPORTATION BOARD

FILED
May 13, 2021
SURFACE
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INTRODUCTION

By this Petition, Grafton and Upton Railroad Company (“GU”) requests the Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to the effect that state and local statutes and regulations are preempted pursuant to 49 U.S.C. § 10501 in connection with the efforts of Hopedale Properties LLC (“Properties”) to rely on state and local law to attempt to prevent GU from closing two private grade crossings across the line of GU in the Town of Hopedale, Massachusetts. As explained below, closing of the crossings is necessary in order to prevent unreasonable interference with GU’s existing and future rail operations and to ensure the continued safe operation of rail service by GU. The threat by Properties to use state and local statutes and regulations to attempt to preclude the closing of the crossings is preempted by Section 10501.

FACTS AND RELEVANT BACKGROUND

GU is a Class III rail carrier that has been in continuous operation since its incorporation in 1873. GU owns and operates a 16.5 mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts and Milford, Massachusetts. Over the

last 10 years, GU has invested millions of dollars in order to upgrade its line and to establish transloading facilities at North Grafton and Upton, Massachusetts. At North Grafton, GU operates a facility where liquid propane arrives by rail and is transloaded to trucks for distribution in the Eastern Massachusetts area. GU has also developed a significant transloading operation in Upton, which handles a variety of chemicals and other bulk commodities. In addition, for many years GU has maintained and operated a yard at Hopedale where GU transloads cement, sheet rock and several other commodities. As explained below, the Hopedale yard is being significantly improved in order to handle and increasing volume of rail business there. See accompanying Verified Statement of John P. DeWaele (“DeWaele VS”) at ¶ 2.

GU has experienced significant traffic growth over recent years. In 2010, GU interchanged approximately 200 cars with CSX, and by 2019 the number of cars interchanged was approximately 3000. A steady growth in business is expected to continue into the future. For calendar year 2021, GU anticipates moving 3500 carloads. DeWaele VS at ¶ 3.

A recent acquisition transaction guarantees that GU will move a minimum of an additional 400 carloads per year of new business. CSX and GU have recently entered into a lease and related agreements pursuant to which GU will operate an 8.4 mile CSX line between the terminus of the GU-owned line in Milford and Franklin, Massachusetts, where GU will have a new, second interchange with CSX. See *Grafton and Upton Railroad Company--Acquisition and Operation Exemption—CSX Transportation, Inc.*, Docket No. FD 36444. The traffic over the line leased from CSX will move between the interchange with CSX in Franklin, through Hopedale, Upton and the CSX-GU interchange in North Grafton.

Expansion and upgrading of the track and facilities at the GU yard in Hopedale have been, and are anticipated to continue to be, an important and necessary part of the traffic growth

outlined above. GU has constructed additional yard tracks at Hopedale and has reconfigured other tracks in order to accommodate new business. In addition, GU is in the process of upgrading its main north-south line at the northern end of the Hopedale yard. In particular, GU has focused on the track on either side of a railroad bridge that crosses the Mill River at the point where the yard tracks begin. As described in more detail below, the elevation of the track has been raised in order to meet the level of the bridge, thereby reducing the possibility of damage to equipment and derailments. DeWaele VS at ¶ 4.

As shown in the drawing attached as Exhibit A to the DeWaele Verified Statement, the real estate on either side of the GU track at the location of the bridge is owned by Hopedale Properties (“Properties”). There are private grade crossings, which are less than 100 feet apart, on either side of the bridge. The crossings have not been used for many years, and Properties has blocked the crossings from use by vehicles by means of placing large stone blocks across the roadway. In addition, Properties is the owner of Fitzgerald Drive, which is the name of the private road in which the grade crossings are located, and has closed off any public access to Fitzgerald Drive at its only connection with a public street. Both of the crossings provide access to a property known as 7 Fitzgerald Drive, which has multiple means of access from other public streets, thereby making the two crossings at the bridge superfluous. DeWaele VS at ¶ 4.

The track work at the location of the bridge has necessitated the closure of the two grade crossings. Prior to the work, the track at the north side of the bridge was 1 foot below the level of the bridge, and the track on the south side was 1.5 feet below the bridge level. This created a serious safety hazard, because locomotives are subject to striking the asphalt in the crossings and rail cars were at risk of uncoupling or derailing when approaching and crossing the bridge. The

current project is designed to elevate the track on either side of the bridge in order to create a gradual approach to the bridge that will meet federal safety regulations. DeWaele VS at ¶ 5.

The work on the track on either side of the bridge will address the safety and operating problem, but it will no longer be possible to keep the two grade crossings open. Restoration of the crossings would not conform to modern engineering standards due to the proximity of the crossings to the bridge. Furthermore, GU has recently installed a new siding switch for a customer approximately at the location of the grade crossing on the south side of the bridge. In order to conduct weekly inspections and perform maintenance at the switch, the track cannot be covered by asphalt in order to restore the crossing. DeWaele VS at ¶ 5.

The increased volume of rail traffic into and out of Hopedale yard has necessitated the use of longer trains. This means that there is a likelihood that trains will frequently block grade crossings. In order to avoid or minimize blocking heavily congested public roadways, GU could assemble trains and perform brake tests by blocking the two private grade crossings at the bridge. This would require, however, that a train would be separated into different sections in order to do the brake tests, which would be inefficient and require additional time and personnel. DeWaele VS at ¶ 6.

Applicable federal regulations require that 100 feet of track on either side of the bridge be maintained at a minimum of Class 1 standard. If the crossings were restored, and asphalt for the crossings covered the track and the newly installed switch, it would be impossible to make sure that are a sufficient number of cross ties in order to meet the Class 1 status. DeWaele VS at ¶ 7.

If the grade crossings remain in place, it would be necessary to stop a train and provide flagging protection at the crossing. In the event that GU is using remote control to operate trains, as is sometimes the case, it would require railroad personnel to walk back and forth from the

yard in order to flag the crossing for each passing train. This would be time-consuming, unproductive and would lead to requirements for additional personnel. DeWaele VS at ¶ 8.

Closing the grade crossings will also eliminate a risk of injury to pedestrians. Local residents frequently use the grade crossings to walk to or from residential areas in Hopedale. More frequent trains at the location of the crossing would pose an increased risk of injury to pedestrians trying to cross the track. DeWaele VS at ¶ 9.

Properties has demanded that GU cease and desist from obstructing the use of the grade crossings. Properties has threatened to seek injunctive or monetary relief in the event that GU does not comply with the cease and desist demand.

ARGUMENT

As demonstrated above, there are compelling operational and safety reasons for closing the two grade crossings in question. The safety of train operations at the location of the crossings and bridge is of paramount concern to GU, both for the protection of pedestrians and GU personnel and to prevent derailments and damage to equipment and cargo. Restoration of the grade crossings is not feasible due to applicable maintenance regulations and, even if it were feasible, would cause avoidable operational problems and extra expense. In short, reopening the crossings would unreasonably burden and interfere with the rail operations of GU. Furthermore, keeping the crossings in existence is unnecessary given the alternative means of access available to Properties.

I. A Declaratory Order is Required to Remove Uncertainty.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. As demonstrated above, there is an actual controversy

between GU and Properties concerning GU's right to close and not to reopen the two grade crossings. The Board should issue the requested declaratory order to remove the uncertainty and to make clear that any effort by Properties to rely on state or local law to keep the grade crossings open is preempted.

II. Preemption Should Be Applied in this Case.

The applicable principles of preemption have been considered by the Board in a number of cases and are now well defined. Reliance on state and local law is preempted if it would have the effect of unreasonably burdening or interfering with rail transportation at the present time or in the future. *See, e.g., The City of Ozark, Arkansas—Petition for Declaratory Order*, Docket No. FD 36104, decision served July 28, 2017, reconsideration denied in a decision served December 8, 2017 (“*Ozark*”), and decisions cited therein. *Ozark* involved facts that are very similar to the situation in Hopedale. In *Ozark*, the city was attempting to compel the rail carrier to reinstall an at grade crossing that had been removed without appropriate authority 15 years earlier. The railroad presented evidence that reinstallation of the crossing would restrict its ability to conduct its then current and future operations, leading to the loss of the use of various facilities and delays and inefficiencies. In addition, the reopening of the grade crossing would have created safety risks for both the public and railroad employees. As a result, the Board concluded that the city's effort to compel reinstallation was preempted.

The facts of the GU line in Hopedale are very similar to the facts in *Ozark*. GU has presented evidence to the effect that reopening the crossings would unreasonably interfere with rail operations and present safety risks. The current level of business and rail traffic at the Hopedale yard are significantly greater than years ago when the grade crossings were initially opened. Furthermore, GU's projections are that business activity will continue to increase. As

the Board has noted, evaluation of the level of interference with rail operations takes into account not only current activities but also future plans and expectations. *Ozark; City of Lincoln—Petition for Declaratory Order*, Docket No. FD 34425, decision served August 12, 2004.

Properties may argue that GU has closed the grade crossings illegally or without proper authority. Even if it were assumed, however, that the crossings have been closed without proper authority, it makes no difference to the applicability of preemption. In *Ozark*, the Board expressly “rejected the notion that preemption hinges on whether the crossing was closed in violation of state law”. *Ozark*, decision on reconsideration at 4. The appropriate inquiry, according to the Board, is whether the action would unreasonably burden or interfere with rail transportation at the present or in the future.

Alternatively, Properties may contend, contrary to any facts or law, that it has a right to compel GU to keep the crossings open by reason of a claim of adverse possession or prescriptive easement pursuant to state law. Even if Properties could establish a claim of adverse possession or prescriptive easement for the crossings, Properties attempt to rely on state law to compel GU to continue to keep the crossings open would be preempted as an unreasonable interference with present and future rail operations. *14500 Limited LLC—Petition for Declaratory Order*, Docket No. FD 35788, decision served June 5, 2014; *Jie Ao and Xin Zhou—Petition for Declaratory Order*, Docket No. FD 35539, decision served June 6, 2012; *Tri-City Railroad Company—Petition for Declaratory Order*, Docket No. FD 35915, decision served September 14, 2016 (attempted condemnation and acquisition of a portion of a railroad right-of-way for an at grade crossing are preempted).

CONCLUSION

As demonstrated above, requiring GU to reopen and maintain the two grade crossings would impose an unreasonable burden on its current and future rail operations. Furthermore, it would create safety risks for both the public and employees of GU. Consequently, there are compelling reasons for the Board to issue a declaratory order to the effect that any attempt by Properties to rely on state or local law require GU to reopen and maintain the crossings is preempted.

Respectfully,

/s/James E. Howard

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233
jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

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VERIFIED STATEMENT OF JOHN P. DEWAELE

1. My name is John P. DeWaele, and I am the Senior Vice President of Railroad Operations and General Manager of Grafton and Upton Railroad Company ("GU"). I have held this position for the last 3 years. My responsibilities include supervision and direction of GU's rail operations, including maintenance of right-of-way and equipment. I am generally familiar with the business and operations of GU and with the matters referred to in the Petition of Grafton and Upton Railroad Company for Declaratory Order that is being filed simultaneously with this Verified Statement.

2. In recent years, GU has invested a substantial amount of capital in order to upgrade its line and yard facilities in order to serve a substantial demand for transloading services for commodities that are shipped to Eastern Massachusetts by rail and transloaded into trucks for final delivery. GU has transloading facilities in Upton, Massachusetts, where it handles a variety of chemicals and other bulk commodities, a facility in North Grafton, Massachusetts for the delivery by rail of liquid propane and transloading the propane to trucks for distribution and a facility in Hopedale, Massachusetts where it handles dry bulk materials, such as building materials.

3. GU's business has grown significantly over the last 10 years. In 2010, for example, GU interchanged approximately 200 cars with CSX in North Grafton. The projections for 2021 indicate that the number of carloads will be approximately 3500. The traffic volume at Hopedale as increased from no carloads in 2008 to an anticipated approximately 650 carloads in 2021.

4. GU's investment and focus most recently has been the yard in Hopedale, Massachusetts where GU transloads cement, sheet rock and other commodities. As described in more detail below, GU is in the process of adding and reconfiguring tracks in the Hopedale yard in order to accommodate anticipated additional business. As part of the upgrade at Hopedale, GU has also reconfigured the tracks on the main line at the north limits of Hopedale yard due to the constraint of a single track bridge where the line crosses the Mill River. As a necessary part of this track reconfiguration, as described in more detail below, GU has closed two old grade crossings, which are less than 100 feet apart on either side of the bridge, that have not been used for many years and do not conform to modern roadway construction standards. Hopedale Properties LLC, the owner of the property on either side of the rail line and private driveway at that location, have placed chains and gates with locks across the roadway leading to the crossings so that the crossings are impassable by vehicles. There are alternate means of entry to the land of Hopedale Properties from multiple entry points on Hopedale and Freedom Streets, which has been the preferred method of entry as evidenced by the recent building demolition taking place at 6 Fitzgerald Drive and the use of Depot Street as an entrance for the tenants of 7 Fitzgerald Drive. Fitzgerald Drive is closed by barricades and signs where it intersects with a public roadway at Route 16; therefore, there is no traffic on Fitzgerald Drive, the private roadway that extends to the grade crossings in question and no traffic entering either property

described above. The Hopedale yard, the bridge and crossings and the surrounding area are depicted in the drawing attached as Exhibit A.

5. GU is in the process of making significant necessary improvements to the track on either side of the bridge. The project will consist of track work to elevate the track north of the bridge, which is nearly 1 foot below the level of the bridge. The track on the south side of the bridge is 1 ½ feet below the bridge level. The situation presented an extreme safety hazard, because locomotives were at risk of striking the asphalt in the crossings and cars were at risk of being uncoupled or derailed when going up or down the 2.1% grade from the uneven characteristics of the crossing/bridge/crossing's poor vertical profile which is directly caused by crossings. Furthermore, a new customer siding switch has recently been installed in the approximate location of crossing 2 on the south side of the bridge. The switch is essential to serving the new customer and requires weekly inspection and maintenance that cannot be performed if the crossing is covered in asphalt. In order to fix the problem and maintain the new switch properly, the level of the track will be elevated on both sides of the bridge and blended into the existing grades to create a gradual approach and comply with federally mandated track maintenance standards. While this work will address the safety issue for trains, it has made it unsafe and infeasible to restore the crossings for the reasons outlined above. Restoration of the crossings would not conform to modern engineering standards due to the limited space available and would necessitate continued maintenance and expenditures in order to keep the crossings passable, which would be a wasteful use of maintenance resources especially given the fact that the crossings have not been used for many years and are not necessary to reach land of Hopedale Properties.

6. With the increased level of rail traffic into and out of Hopedale yard, the length of trains will increase, which will require GU to block grade crossings frequently. The choices are to block either Freedom Street or Route 16, both of which are heavily congested public roadways, in order to keep the private crossings open. The safest operation, and the one that would be least disruptive to automobile traffic, would be to discontinue the private crossings. This would permit GU to conduct required brake tests and perform the proper blocking of trains without interfering with traffic on public highways. If the crossings are reopened, the train crew would have to perform two brake tests on smaller portions of a train, and then the two or three sections of the train would have to be put together again, which would block the private crossings while the train is assembled. Having to do brake tests in sections would extend the overall duration of the test and require additional personnel to expedite the final assembly of a train, unnecessarily exhausting the time employees can work under federal hours of service regulations. This leads to more train movements, higher operational expenses and less productivity.

7. Keeping the crossings open would present an additional maintenance expense. Regulations require that 100 feet of track on either side of the bridge must be maintained to a minimum of Class 1 track. If the track and newly installed switch is covered in asphalt for grade crossings, it would be impossible to inspect ties to ensure that they are sufficient good cross ties in place to hold the track at proper gage and remain in Class I status. It would also prevent the railroad from establishing the proper profile to prevent unintended train separation (hi/low couplers) and potential derailments.

8. If the crossings remain, it would be necessary for a member of the crew to stop a train and provide flag protection prior to the crossing. When GU uses remote control to operate trains,

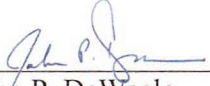
there would not be any crew member positioned to flag the crossing at each passing. It would be necessary to establish a radio-controlled zone in accordance with FRA regulations and erect fencing to prevent trespassers from entering the property, which they could do at a grade crossing. Any time a train needs occupy the crossing, the remote-control operator would have to walk from the south end of the yard to the north end of the yard where the crossings are located and provide flag protection. Given the frequency of switching, especially with the anticipated increases in business, this procedure, which would require a crew member to walk approximately 1000 feet in each direction, could go on almost continuously throughout the day. This procedure would add unnecessary time to the switching process and require additional crew members to operate over the crossing, which would take the employees away from other tasks.

9. Hopedale residents frequently use the grade crossings. Even though the crossings are blocked off from vehicular traffic, pedestrians often use the crossings to walk to or from residential areas in Hopedale. The increased frequency of trains at the location of the crossings and remote control operation, as described above, will present an increased risk of injury to trespassers trying to cross the track. Closing the grade crossings would permit GU and Hopedale Properties to establish and enforce stricter protection against pedestrian crossings.

VERIFICATION

I, John P. DeWaele, Senior Vice President of Railroad Operations and General Manager of Grafton and Upton Railroad Company, verify under penalty of perjury that the facts set forth in the foregoing Verified Statement are true and correct. Furthermore, I certify that I am qualified and authorized to verify the foregoing document and cause it to be filed.

Executed on May 13, 2021



John P. DeWaele

Exhibit A

