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Public Record

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

Re: *Grafton and Upton Railroad Company – Petition for Declaratory Order*, STB Docket
No. FD 36518

Dear Ms. Brown:

We attach for filing in the above-captioned proceeding the Sur-Reply of Hopedale Properties, LLC.

Thank you very much for your attention to this matter.

Sincerely,

Allison I. Fultz
Counsel for Hopedale Properties, LLC

David E. Lurie
Harley C. Racer
LURIE FRIEDMAN LLP
Counsel for Hopedale Properties, LLC



Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

**STB DOCKET NO. FD 36518
GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**MOTION FOR LEAVE TO FILE SUR-REPLY
and
SUR-REPLY OF HOPEDALE PROPERTIES, LLC**

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Counsel for Hopedale Properties, LLC

Dated: September 7, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

**STB DOCKET NO. FD 36518
GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

REPLY OF HOPEDALE PROPERTIES, LLC

Hopedale Properties, LLC (“Hopedale Properties”) respectfully seeks this Board’s leave to file a Sur-reply in response to the Reply filed by the Grafton and Upton Railroad Company (“GU”) in this proceeding on July 28, 2021 (“GU Reply”), in order to correct various misleading characterizations in that pleading. Hopedale Properties is cognizant that the filing of both the GU Reply and this Sur-reply are subject to the Board’s discretion and respectfully requests that Hopedale Properties be permitted to file its response on a limited number of matters that do not expand the scope of issues in this proceeding.

GU seeks this Board’s imprimatur to justify what are, in reality, trespasses upon Hopedale Properties’ rights and interests.

It is axiomatic that the holder of real property rights is presumed to be aware of any instruments recorded in the land registry creating, qualifying, or otherwise affecting its interests (*See Bank of America, N.A., v. Casey*, 52 N.E.3d 1030, 1039-1040 (Mass. 2016)), so GU’s claim that it was previously unaware (GU Reply at 3) of the deed that answers all of the relevant issues in this matter does not excuse GU from being bound by the conditions in the deed. Since this Board does not have jurisdiction over state real property or contract matters (*JBG Properties, LLC – Petition for Declaratory Order*, STB Docket No. FD 35817 (Service Date May 22, 2015), slip op. at 7 (finding that a railroad cannot invoke federal preemption to avoid the consequences

of its unlawful actions under state property law); *Mid-America Locomotive and Car Repair, Inc.*, STB Docket No. FD 34599 (Service Date June 6, 2005) (declining to institute a declaratory order proceeding where a dispute over easement rights would be properly resolved in state court); *Lackawanna Co. R.R. Auth. – Acquisition Exemption – F&L Realty, Inc.*, STB Finance Docket No. 33905), and *Delaware-Lackawanna R.R. Co., Inc. – Operation Exemption – Lackawanna Co. R.R. Auth.*, STB Finance Docket No 33906 (Service Date Oct. 22, 2001), slip op. at 6 (distinguishing the STB’s grant of regulatory authority from the property interests and contractual rights arising under state law enabling the railroad to exercise its federally-granted authority)), this proceeding must be dismissed to enable GU to acquaint itself with its rights and obligations under the appropriate recorded instruments, which the pending state court action addresses.

The cases GU cites in support of its position are readily and fundamentally distinguishable from the circumstances in this matter. Here, GU has substantially interfered with Hopedale Properties’ rights and interests without leave to do so. Diametrically opposite circumstances obtained in the cases up on which GU relies:

- In *James Riffin – Petition for Declaratory Order*, STB Docket No. FD 34997 (Service Date May 2, 2008), the purported maintenance at issue involved no interference with an at-grade crossing, and the case as a whole stands for the proposition that a railroad cannot do what GU seeks to do, that is, to act without regard for or leave from others simply because it is conducting activities in railroad right of way, and that a railroad’s maintenance activities do not entitle it to interfere with the rights of others (“Petitioner may not use the Board’s jurisdiction over

transportation by rail carrier as a shield against [state laws] that do not unreasonably interfere with interstate commerce”), FD 34997, slip op. at 6.

- *Tri-City Railroad Company – Petition for Declaratory Order*, STB Docket No. FD 35915 (Service Date Sept. 14, 2016) and *Wichita Terminal Assn., BNSF Ry. Co. and Union Pacific R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35765 (Service Date June 23, 2015) both involved requests to establish new at-grade crossings, whereas here Hopedale Properties’ and GU’s property rights are already established and it is GU that is interfering with Hopedale Properties’ long-established and recorded rights to cross GU’s right-of-way.
- *Jie Ao and Xiu Zhou – Petition for Declaratory Order*, STB Docket No. FD 35539 (Service Date June 6, 2012), involved claims of prescriptive easement and adverse possession over a railroad right-of-way, fundamentally distinct interests from those at issue in the instant proceeding, which are set forth in recorded instruments.

GU’s assertion that a railroad has the right to damage the property of adjacent landowners is incorrect and inapplicable to the current circumstances. The threshold for weighing the interests of a railroad against those of its injured neighbors is whether the prevention of or remedy for such damage would unreasonably interfere with the railroad’s ability to fulfill its common carrier obligation, as the cases cited by GU, *Tubbs v. Surface Transportation Board*, 812, F.3d 1141 (8th Cir. 2015), and *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Docket No. FD 35832 (Service Date July 31, 2015), demonstrate. Here, GU has failed to show that it has suffered any interference, let alone substantial impediments, to its operations, and its neglect of its obligation not to interfere with Hopedale Properties’ rights and interests is simply a matter of convenience to GU. This it has no right to do, as the Board demonstrated in

Riffin, FD 34997, at 6. A railroad's self-determined maintenance needs are not a license to trespass.

Because of the bald misrepresentations in GU's Reply to Hopedale Properties' Reply, Hopedale Properties is taking the unusual step to seek the Board's leave to respond. As Hopedale Properties has demonstrated, the dispute in connection with GU's track and Hopedale Properties' adjacent land is solely a matter of state real property law and is the subject of a pending complaint in Massachusetts Superior Court to address all of the relevant issues. GU cannot demonstrate that it has suffered any harm that this Board can address, and any actions GU has unilaterally undertaken, to the detriment of Hopedale Properties, are post-hoc attempts to rectify self-created operational hardships. Hopedale Properties reiterates its position that the Board's denial of GU's Petition for Declaratory Order is the appropriate relief in this matter.

WHEREFORE, and in view of the foregoing, Hopedale Properties, LLC, respectfully requests this Board to expeditiously deny the GU Petition.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Allison I. Fultz", is positioned above the contact information for David E. Lurie and Harley C. Racer.

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Counsel for Hopedale Properties, LLC

Dated: September 7, 2021

Certificate of Service

I hereby certify that I have this 7th day of September, 2021, caused to be served a copy of the foregoing Sur-Reply of Hopedale Properties, LLC, to the Reply of Grafton and Upton Railroad Company for Declaratory Order, upon the following party of record via electronic mail:

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Counsel for Grafton and Upton Railroad
Company



Allison I. Fultz