

April 24, 2023

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Submitted via e-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
April 24, 2023
Part of
Public Record

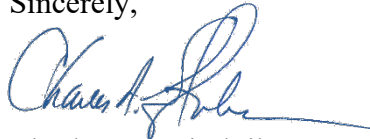
Re: *Grafton and Upton Railroad Company – Petition for Declaratory Order*, STB
Docket No. FD 36696

Dear Ms. Brown:

I am attaching for e-filing the Town of Hopedale, Massachusetts' Motion to Extend Time to Respond in the above-captioned proceeding.

Please do not hesitate to contact me with any questions.

Sincerely,



Charles A. Spitulnik
Counsel for the Town of Hopedale, Massachusetts

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**MOTION OF TOWN OF HOPEDALE, MASSACHUSETTS
TO EXTEND TIME TO RESPOND**

Communications with respect to this pleading
should be addressed to:

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Counsel for the Town of Hopedale, Massachusetts

Dated: April 24, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**MOTION OF TOWN OF HOPEDALE, MASSACHUSETTS
TO EXTEND TIME TO RESPOND**

The Town of Hopedale, Massachusetts (“Hopedale”), within which the Grafton & Upton Railroad Company (“GU”) endeavors to build a transload facility on 155 acres of property that GU purports to have acquired, submits this Motion to Extend Time to Respond to the Petition for Declaratory Order filed by GU on April 14, 2023.

Pursuant to the Board’s rules at 49 C.F.R. § 1104.13(a), a reply to GU’s Petition would be due no later than May 4, 2023. As the municipality most directly and significantly impacted by GU’s actions, Hopedale respectfully requests a 22-day extension of time, to May 26, 2023, to respond to GU’s Petition. At that time Hopedale will comment in detail on the issues framed by GU’s pleadings in order to provide the Board with a fully developed record on which to base its decision in this matter.

DISCUSSION

This declaratory order proceeding is only one piece of a puzzle that involves multiple years of litigation and multiple proceedings in state and federal court. The United States District Court for the District of Massachusetts ordered GU to “file a Petition for Declaratory Order with the STB” to address questions related to federal preemption that were at issue in pending federal litigation. *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv-

40080-ADB (D. Mass. Apr. 3, 2023). Predating this order, however, were years of litigation in state court about state law property issues, disputes that remain live today.

As background for this Board, in October 2020, GU purported to have acquired ownership of a 155-acre parcel of land located at 364 West Street in Hopedale. However, in view of ongoing litigation in Massachusetts state courts regarding the question whether that acquisition was lawful or was lawfully consummated, GU's ownership of the property remains in question. In November 2020, Hopedale, through its Select Board, filed suit in the Massachusetts Land Court claiming it possessed, under state law, a valid and ripened right of first refusal option to purchase 130.18 acres of the 364 West Street parcel and sought specific performance that the 130.18 acres be transferred by GU to Hopedale. In January 2021, Hopedale and GU entered into a settlement agreement regarding the Land Court litigation and the parties filed a Stipulation of Dismissal with Prejudice on February 10, 2021. Litigation over the effectiveness of that settlement agreement remains ongoing and will have a direct impact on GU's claim of ownership of the property at issue, which ownership presents a fundamental precursor to the railroad's claim of preemption that it presents here.

In its petition before this Board, GU argues that Hopedale's efforts to acquire the property upon which GU wishes to build its transload facility through eminent domain is preempted by 49 U.S.C. § 10501(b). GU, however, ignores the ongoing proceedings that raise questions about the validity of GU's acquisition of the property in the first instance. The attorneys from Kaplan Kirsch & Rockwell, LLP ("Kaplan Kirsch"), who have recently been engaged by the Town, require time to become familiar with the entire record of all of these proceedings – both the federal court and the state court – in order to comprehensively and effectively represent the interests of the Town before this Board.

ARGUMENT

The Board's rules governing extensions of time to respond provide that, upon request, the reply period may be extended by the Board in its discretion and for good cause. 49 C.F.R. § 1104.7(b). Requests for extension must be filed "not less than 10 days before the due date." *Id.*

Kaplan Kirsch was retained to represent Hopedale in this proceeding shortly before GU filed its petition with the Board. Kaplan Kirsch has not previously been involved in this matter either before the Board in previous proceedings or before the state courts.¹ Therefore, Kaplan Kirsch will need time to review the record, become familiar with the issues at hand, and craft an appropriate response to GU's initial pleadings. Moreover, the issues in this case are complex and require understanding of the state property law issues that remain unresolved, as well as the issues related to federal preemption and state condemnation law. In the interests of creating a full and complete record upon which to base its opinion, the Board should ensure that all parties have ample time to submit reasonable and well-informed filings.

The Board has granted motions to extend the time for response in similar cases. In another case involving GU (unrelated to the current case), the Board granted additional time to respond in the interests of creating a full and complete record. *See Grafton & Upton Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 36518 (Decided May 28, 2021).

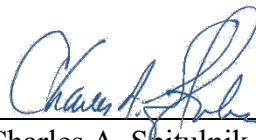
The May 4, 2023, deadline for the Town to respond to the Petition for Declaratory Order does not provide sufficient time for Kaplan Kirsch to fully evaluate and advise the Town on an appropriate response to GU's pleadings in the context of the litigation involving the two parties

¹ Kaplan Kirsch represented Hopedale Properties in the proceedings in STB FD 36518, *Grafton & Upton Railroad Company – Petition for Declaratory Order*, but the facts and issues there are different from the matters related to the ongoing dispute about the legitimacy of GU's claim to ownership of the property at issue in the current proceeding and assertions of federal preemption of the Town's rights under applicable state law.

that remains ongoing. The Board should allow additional time for the Town's newly engaged counsel any other interested parties to respond so that the record may be fully developed for careful consideration by the Board of those issues within the Board's jurisdiction.

WHEREFORE, Hopedale, by and through its undersigned counsel, respectfully requests that the Board grant this Motion to Extend Time to Respond to GU's pleadings in the above-captioned proceeding through May 26, 2023.

Respectfully submitted,



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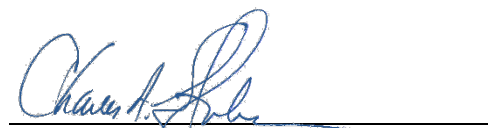
Dated: April 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have on the 24th of April, 2023, caused to be served a copy of the foregoing MOTION TO EXTEND TIME TO RESPOND, upon the following parties of record in this proceeding by email:

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Charles A. Spitulnik

Dated: April 24, 2023