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**ENTERED**

**Office of Proceedings**

**April 26, 2023**

**Part of**

**Public Record**

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**VIA ELECTRONIC FILING**

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

Re: STB FD 36696- *Grafton and Upton Railroad Company –Petition for Declaratory Order*

Dear Ms. Brown:

Grafton and Upton Railroad (“GURR”) hereby respectfully objects to the Motion to Extend Time to Respond (“Town’s Motion”) recently filed in this matter by the Town of Hopedale, Massachusetts (“Town”). As the Board is aware, the United States District Court for the District of Massachusetts (“Court”) ordered GURR to file the instant Petition for Declaratory Order after the filing of numerous briefs by both parties over eight (8) months during the period July 2022 through the Town’s most recent filing in March 2023. That the Town now needs even more time to determine how to respond to the issues presented here, which were also presented to the Court, should not be countenanced – especially when rail customers are being deprived of legitimate rail facilities by the actions of the Town, which its own attorney counseled were preempted by 49 U.S.C. 10501(b).

The Town cannot claim to have been caught off guard. The arguments about preemption and whether the Court should refer that question to the STB were made and briefed by GURR and the Town before the Court for eight (8) months. Indeed, the Town filed briefs with the Court on the preemption issue on August 12, 2022, in which it argued that “[i]f GURR wants to use 10501 as a sword to state an affirmative claim, it must do so in the STB,” and on September 7. On August 10, 2022 GURR requested that the Court direct GURR to file a Petition with the Board. Given the history of the Court proceedings over the past eight (8) months, it took GURR only eleven days after the Court’s Order of April 3, 2023 to file the Petition for Declaratory Order on April 14, 2023. GURR should not be further penalized with more delay because the Town procrastinated in retaining STB counsel even though the potential referral to the STB had been a significant likelihood for months.

Moreover, this case is straightforward and presents simple facts that lead to the clear ultimate conclusion that the Town's efforts to take GURR's property by eminent domain and the Town's Conservation Commission's ("Commission") attempts to impose preclearance and permitting requirements are preempted by 49 U.S.C. 10501(b). GURR asked for expedited consideration precisely because the facts are undisputed, the law is clear, and the Town's efforts to delay and prevent the construction of rail transportation facilities must end. There is nothing new to develop.

The Town's attempt to allege that the ownership of the property is somehow in dispute is disingenuous and misleading. The Town is flatly incorrect to assert that GURR has a mere "claim of ownership" to the property or that there are "questions about the validity of GU[RR]'s acquisition of the property in the first instance." Town's Motion at 2.

First, GURR's ownership of the land that the Town seeks to take is not in question. As the beneficial owner under a nominee trust, GURR is recognized under indisputable Massachusetts case law as the owner of the property. *Goodwill Enterprises, Inc. v. Kavanagh*, 95 Mass. App. Ct. 856, 858-859, 132 N.E.3d 129, 132-133 (2019). Further, it conclusively has been established in state court proceedings that the taxpayers lack standing to challenge GURR's ownership of the subject property and that the Town dismissed its claim and subsequent appeal.

Second, the Town's statements in the Town's Motion are inconsistent with the Court's Order. The Town claims that the Court ordered GURR to file its Petition "to address questions related to federal preemption that were at issue in pending federal litigation." Town's Motion, p. 1. The Court was much more specific than this. It found that GURR was entitled to a preliminary injunction enjoining the Town from taking its property (and enforcing the preclearance order from the Commission) after noting that "if Hopedale is not enjoined from recording notice, GURR will quickly be divested of title to the property and therefore unable to continue developing its facility."<sup>1</sup> The Court then ordered GURR to file a Petition for Declaratory Order "for the purpose of the STB issuing a declaratory order regarding the Town's proposed [eminent domain] taking and the Conservation Commission's Enforcement Order." Decision at 27. Thus, the preliminary injunction was issued precisely to prevent GURR from being divested of title to its property. The dispute directed to the Board by the Court does not involve a title issue;<sup>2</sup> rather, it is limited to whether the Town is preempted from taking GURR's property by eminent domain.

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<sup>1</sup> *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv-40080-ADB at 23-24 (D. Mass. Apr. 3, 2023) (provided as Appendix 2 to the Petition for Dec. Order) (emphasis added)("Decision"). The Court also found that GURR was likely to succeed on the merits of its preemption argument. Decision at 20-23.

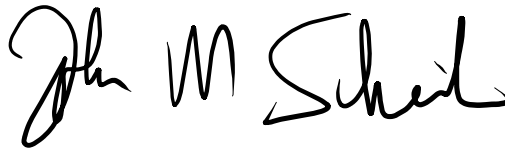
<sup>2</sup> GURR submitted the long history of its acquisition of its interests in the property and the Town's long fight to stop that acquisition in the Affidavit of Michael Milanoski of July 18, 2022, submitted as Exhibit 3 to the Petition for Declaratory Order filed in this proceeding ("Milanoski VS").

Third, the Town's own actions undermine any asserted uncertainty about ownership of the property. The Town has sought to use eminent domain law to take the property from GURR, which would not be necessary if GURR were not the owner of the property. Additionally, the Town continues to take aggressive action consistent with its belief that GURR owns and controls the subject property as its Selectboard voted again just two weeks ago to take the property by eminent domain. A video of this meeting can be seen at this link at 2:15:35 [https://townhallstreams.com/stream.php?location\\_id=56&id=52332](https://townhallstreams.com/stream.php?location_id=56&id=52332).<sup>3</sup>

In short, there is nothing advanced by the Town to justify any extension. The possibility of litigation at the STB has been known for months. GURR is a rail carrier. GURR owns the property. The property is "transportation." And the property is being developed into rail transportation facilities that GURR will operate. The state court proceedings are simply not relevant to the Board's consideration of the issues referred to it by the federal District Court and afford the Town no justification for delay.

The request for an extension of time is just another in a long line of tactics by the Town to thwart the development of legitimate rail transportation facilities by GURR. Indeed, the development of the legitimate rail facilities by GURR to serve rail customers has been substantially delayed already to the detriment of interstate commerce. To prevent further delay that is impacting rail customers who will use the new rail transportation facilities that were under development by GURR before the Town initiated its delay tactics, GURR respectfully requests that the STB deny the request for an extension of time and move this matter expeditiously to its ultimate conclusion.

Respectfully submitted,



John M. Scheib  
Attorney for Grafton  
and Upton Railroad Company

cc: All Parties of Record

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<sup>3</sup> Under Massachusetts law, a vote by a Selectboard to take property by eminent domain must be carried out within 30 days. Since July 18, 2022, the Town has been enjoined from recording an Order of Taking by Eminent Domain. The recording of an Order of Taking would immediately divest GURR of title to the property. Since August 1, 2022, the Selectboard has voted every 30 days to take the subject property by eminent domain, the last such vote occurring on April 10, 2023.