

307022

August 25, 2023

ENTERED
Office of Proceedings
August 25, 2023
Part of
Public Record

SUBMITTED VIA E-FILING

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

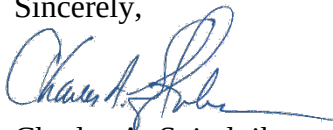
Re: *Grafton and Upton Railroad Company – Petition for Declaratory Order*
STB Finance Docket No. 36696

Dear Ms. Brown:

I am attaching for e-filing in the above-captioned proceeding the Town of Hopedale, Massachusetts' (1) Motion for Leave to File a Reply to a Response and (2) Reply to a Response in Further Support of the Petition of the Town of Hopedale, Massachusetts to Supplement the Record.

Please do not hesitate to contact me with any questions.

Sincerely,


Charles A. Spitulnik

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**REPLY TO A RESPONSE IN FURTHER SUPPORT OF THE PETITION OF THE
TOWN OF HOPEDALE, MASSACHUSETTS TO SUPPLEMENT THE RECORD**

Communications with respect to this pleading should
be addressed to:

Charles A. Spitulnik
W. Eric Pilsk
Daniel C. Orlaskey
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
epilsk@kaplankirsch.com
dorlaskey@kaplankirsch.com

David S. Mackey
Sean M. Grammel
Anderson & Kreiger, LLP
50 Milk Street, 21st Floor
Boston, MA 02109
(617) 621-6500
dmackey@andersonkreiger.com
sgrammel@andersonkreiger.com

Counsel for the Town of Hopedale, Massachusetts

Dated: August 25, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**REPLY TO A REPLY IN FURTHER SUPPORT OF THE PETITION OF THE TOWN
OF HOPEDALE, MASSACHUSETTS TO SUPPLEMENT THE RECORD**

INTRODUCTION

The Grafton & Upton Railroad Company’s (“GURR”) August 4, 2023 Response to the Town of Hopedale’s (“Hopedale”) Petition to Supplement the Record is GURR’s latest effort to create the appearance of a plan to use approximately 130.18 acres of land designated as protected forestland under Massachusetts law (the “Forestland”) in order to prevent Hopedale from acquiring the Forestland by eminent domain.

When GURR first sought to enjoin Hopedale from condemning the Forestland, it produced a hastily prepared schematic drawing purporting to show multiple warehouses and sidings covering the entire 130 acres. That plan was unworkable due to the steep slopes and lack of physical space for train and truck traffic, as Hopedale’s engineer showed. Nonetheless, GURR relied on that drawing to obtain an injunction from the District Court and to support its Petition in this proceeding. Less than two months later, however, GURR’s owner, Mr. Jon Delli Priscoli, conceded that GURR no longer intended to build the transload facility shown in that drawing because it would be impractical due to the same cost and engineering challenges identified by Hopedale’s engineer many months earlier. Affidavit of Jon Delli Priscoli dated June 2, 2023 (“JDP 6/2 Aff.”).

GURR did not disclose that decision to the Board, but now that Hopedale has done so GURR has produced a new, not previously disclosed, drawing purporting to show a smaller transload facility on a portion of the Forestland. In an attempt to downplay the significance of the JDP 6/2 Affidavit, GURR argues that Hopedale overstated the significance of the Affidavit and that Hopedale “cherry picked” language from the Affidavit. But Hopedale did not “cherry pick” or misrepresent his statement; it quoted it word-for-word, and GURR’s new drawing is, as GURR concedes, conceptual and subject to change in the future. GURR asserts that is nonetheless sufficient to support its preemption claim. Indeed, GURR argues that it need not show *any* specific plan to support its position because it asserts that any attempt to acquire railroad property by eminent domain is preempted.

GURR’s tactic of producing a new drawing when, and only when, it needs to demonstrate that it has *some* plan to make railroad use of the Forestland raises a fundamental question of whether there is in fact a practical, workable, legitimate plan to make railroad use of the Forestland. That question is more pressing given GURR’s open acknowledgment that the latest drawing is subject to future change, the cost and engineering challenges any development of the steeply sloped Forestland will face, and GURR’s ongoing internal turmoil. Moreover, GURR’s argument that it does not need to show any specific plan is contrary to this Board’s precedent and relies on readily distinguishable decisions that do not consider when a railroad’s notional plans to make future use of newly acquired property are protected from condemnation under state law. Finally, even if the Board were inclined to deem GURR’s drawing sufficient for purposes of preemption, the drawing will be moot if Hopedale prevails in the ongoing state court litigation over ownership of the Forestland. Because that issue could be decisive and is beyond the Board’s jurisdiction, the Board should dismiss, or hold this proceeding in abeyance, pending the resolution of that litigation.

ARGUMENT

I. THE BOARD MUST CONSIDER THE IMPACT OF THE PENDING STATE COURT LITIGATION OVER OWNERSHIP OF THE FORESTLAND

As Hopedale explained in its Answer to the Petition, a threshold issue is whether GURR has title to, or control over, the Forestland as a matter of state law. That issue is being actively litigated in Massachusetts state court. If Hopedale prevails in that litigation, GURR will have no property right to the Forestland and no ability to make *any* use of the Forestland no matter what its plans are. Accordingly, Hopedale urged the Board to follow its precedent and dismiss this proceeding, or hold it in abeyance, pending the outcome of that litigation.

GURR attempts to sidestep that precedent by citing to the Board's April 28, 2023 decision, denying in part Hopedale's motion for an extension of time for the proposition that the active, ongoing litigation in Massachusetts state court over whether GURR properly acquired the Forestland under Chapter 61 of the Massachusetts General Laws is irrelevant. Response at 4. That is not a correct statement of Board precedent, however. As Hopedale explained in its Answer, the state court litigation is relevant because if GURR does not own the property, its request for a declaration on preemption is moot. Answer at 15-20. As Board precedent makes clear, state court litigation over title under state law is not a "distraction" as GURR asserts; that litigation presents a threshold question of whether the Board has any jurisdiction over GURR's petition. *Id.*

In answering that threshold question, whatever plans and drawings GURR's engineer and management create are immaterial. If Hopedale and its co-plaintiffs in that litigation prevail, as two courts have suggested is likely, Hopedale, not GURR, will have title to the Forestland and GURR will not be able to build anything on that land. As explained in the Town's Answer, Board precedent should lead the Board to dismiss or hold in abeyance this proceeding pending the

outcome of that litigation. The Board must consider the impact of the state court litigation on GURR's Petition regardless of what plans GURR claims to be pursuing.

II. GURR'S NEW DRAWING FAILS TO DEFINE A RAILROAD USE OF THE FORESTLAND SUFFICIENT TO PREEMPT HOPEDALE'S CONDEMNATION ACTION

GURR's revised drawing is the latest in GURR's pattern of producing a new drawing purporting to show a railroad use of the Forestland when it needs to demonstrate that it has a plan. Although smaller in scale and less obviously impractical, this new drawing begs the fundamental question of whether there is any "plan," and whether GURR is reasonably likely to be able to bring any plan to fruition. *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005). GURR's drawing is merely "conceptual," and by GURR's admission subject to further change and revision. It does not commit GURR to build anything. GURR must still contend with the engineering and financial challenges of the steep slopes, as well as the consequences of the ongoing federal environmental investigations. Further, GURR's internecine litigation, as Mr. Delli Priscoli explains, is preventing GURR from obtaining the credit or taking any other action necessary to make any use of the Forestland. In short, GURR's presentation of simplistic drawings is insufficient to show that it has a bona fide, viable plan to bring to fruition any railroad use of the Forestland that would prevent the Town from exercising its eminent domain authority.

III. GURR RELIES ON AN INCORRECT LEGAL STANDARD FOR PREEMPTION

Implicitly recognizing that its conceptual plans for the Forestland are insufficient, GURR advances, for the first time in its Reply, a new legal standard to invoke preemption that is based on little more than railroad ownership of property and a statement of intent to develop that property for railroad use. Response at 2-3. That fundamental position is not supported by Board precedent or the cases GURR cites.

The Board has been crystal clear: “neither the court cases, nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible.” *Lincoln Lumber Co. – Petition for Declaratory Order – Condemnation of Railroad Right-of-Way for a Storm Sewer*, FD 34915 Slip Op. at 2-3 (STB served Aug. 13, 2007) (rejecting preemption for “routine, non-conflicting uses” on railroad property); see *Benton v. CSX Transp.*, Case No. 19-109, 2021 WL 3099502, at *3 (E.D. Pa. July 21, 2021) (noting that “particularly expansive claims” of ICCTA preemption “have been criticized and rejected by courts”). Instead, “interference with rail transportation must always be demonstrated” to invoke preemption. *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009). ICCTA preempts eminent domain only when it would “have the effect of unreasonably burdening or interfering with rail transportation.” *Franks Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010). See also *Bayou Dechene Reservoir Comm’n v. Union Pac. R.R Corp.*, Case No. 09-0429, 2009 WL 1604658, *2 (W.D. La. June 8, 2009) (collecting decisions from courts and the STB for this standard).

None of the cases cited by GURR are to the contrary. All involved land the railroad had long owned, and many of the cases involved a taking that would have clearly interfered with or prevented existing railroad operations. None involve potential interference with constantly changing and entirely speculative future plans on newly acquired property.

GURR relies on *Skidmore v. Norfolk Southern Ry. Co.*, 1 F.4th 206, 214 (4th Cir. 2021) to argue that because GURR “may” use the Forestland, Hopedale may not condemn it. But *Skidmore* involved a claim of adverse possession which is clearly preempted because only this Board has exclusive jurisdiction over abandonments, express or implied. *Id.* (citing *Jie Ao & Xin Zhou – Pet. For Declaratory Order*, FD 35539, Slip Op at 7, (Decided June 4, 2012)). Further, both *Skidmore* and *Jie Ao* involved land the railroad had long owned and long used in connection with railroad

operations. *Skidmore* does not stand for the proposition that a railroad may acquire property (or attempt to do so) and invoke preemption based on notional and inchoate future plans. Further, that reading of *Skidmore* is clearly overbroad because a railroad can always assert the possibility of future use, which results in the kind of per se prohibition against condemnation the Board rejected in *Lincoln Lumber*. The actual nature of the proposed use and the likelihood of it coming into fruition are necessary elements of any inquiry into whether condemnation is preempted.

Indeed, the Eighth Circuit made that point clear in a case GURR cites, *City of Lincoln*, 414 F.3d at 862. GURR cited *City of Lincoln* for the proposition that “condemnation is a permanent action and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” But GURR omits the immediately preceding sentence that “the Board can consider the railway’s future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition.” That is the key legal rule from *City of Lincoln Lumber*, not the per se rule advanced by GURR.

City of Lincoln involved an attempt to condemn a strip of land immediately adjacent to an active rail line on property long owned by the railroad. Here, Hopedale has expressly excluded that property from condemnation and seeks only to acquire the Forestland GURR recently (and purportedly) acquired and for which GURR has only notional future plans.

Similarly, *Union Pacific R.R. Co. v. Chicago Transit Auth.*, 647, F.3d 675, 682 (7th Cir. 2011) involved an attempt to condemn tracks and land immediately adjacent to Union Pacific’s tracks. The Court found that the taking would interfere with the railroad’s *current* operations, as well as adding additional tracks to its existing right of way. Further, the Court used an as applied preemption analysis, not the kind of categorical analysis GURR relies on. *Id.* at 680. *Zayo Group LLC v. Norfolk Southern Ry. Co.*, 610 F.Supp.3d 851 (E.D. Va. 2022), appeal pending, No. 22-

837 (filed Aug. 10, 2022 4th Cir.), involved an attempt to acquire a permanent, exclusive easement across an active rail line. Further, the Court applied a categorical rule against condemnation that is not consistent with *Lincoln Lumber* and the other authority cited above requiring a showing of actual interference.

Importantly, all of the cases cited by GURR involved property the railroad had previously owned and used in conjunction with historic operations. Courts that have considered whether a railroad's *future* plans for undeveloped property are shielded from condemnation have required *more* than the conceptual plans advanced by GURR. In *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 91 (2012), the court concluded that a conceptual plan without "concrete plans to put these hypothetical plans into execution" was not subject to preemption. The existence of a paper plan or stated desire to improve a piece of property is not sufficient. At a minimum, the Board should examine whether, in light of all of the circumstances including the steep slopes and ongoing federal investigations, GURR has a credible, implementable plan to build its claimed transload facility. Mr. Delli Priscoli's affidavit is certainly relevant to that inquiry and should be considered by the Board.

GURR spends much ink attempting to justify its shifting conceptual plans as acceptable because, in effect, "plans change." While that is true as a general matter, it begs the critical question of whether there is *any* plan that can reasonably be expected to come to fruition. Here, GURR's pattern of revealing plans only when pressed in litigation combined with the steeply-sloped nature of the Forestland make clear that GURR has no actual plan to use the Forestland for railroad purposes that can reasonably be expected to come to fruition. Further, *Detroit/Wayne County Port Auth. v. I.C.C.*, 59 F.3d 1314, 1316 (D.C. Cir. 1995), Response at 3, is inapposite even for the notion that GURR's plans can change. It is not a condemnation case, but construed

the meaning of “extension” and “additions” to an existing rail line to determine whether ICC approval was required for the construction of a replacement tunnel.

Applying the correct legal standard, the Board should consider the JDP 6/2 Aff. together with the other evidence before it to make a determination whether GURR has presented a sufficiently defined plan that it can bring to fruition to make any railroad use of the Forestland. GURR’s mere claim to title to the Forestland is not sufficient, and its notional plans fail to meet the legal standards discussed above.

IV. THE DISTRICT COURT’S ORDER DOES NOT LIMIT THE BOARD’S NEED TO CONSIDER WHETHER GURR’S PLANS FOR THE FORESTLAND ARE BONA FIDE

GURR argues for the first time in its Reply that the District Court’s order of reference somehow precludes the Board from considering whether its plans are bone fide or buildable. Response at 2. That is incorrect and reflects GURR’s erroneous spin on the law. First, the District Court did not address the impact of the on-going state-court litigation over title to the Forestland, and further did not give appropriate consideration to the legal standard requiring that GURR have a bona fide plan to bring its conceptual plan to fruition. As the JDP 6/2 Aff. makes clear, the District Court’s factual assumptions about GURR’s plans are incorrect, and the Board should not rely on a counter-factual assumption to guide its consideration of the case.

Second, as discussed above, any consideration of whether a condemnation action is preempted depends on establishing whether the action will interfere with railroad operations and, with respect to purported plans to use newly acquired land, whether the plans represent a bona fide plan for a railroad project that is likely to come to fruition.

In order to make that assessment, the Board must consider what GURR proposes and whether it reflects a plan that is likely to come to fruition. GURR’s shifting, conceptual, simplistic drawings fail to meet that standard. Mr. Delli Priscoli’s rejection of the earlier plan and GURR’s

newly revealed drawing simply underscore that GURR has no real plan but wants to create the appearance of a bona fide plan. Moreover, GURR's impermissible clear-cutting of the Forestland does not reflect the advancement of a railroad use – by GURR's own admission most of that land is practically unusable for railroad purposes. Those are all factors the Board should weigh in considering the Petition.

V. HOPEDALE DOES NOT SEEK TO CONDEMN GURR'S RAIL LINE OR ADJACENT RIGHT OF WAY OR INTERFERE WITH ONGOING RAILROAD OPERATIONS

Finally, GURR incorrectly states that Hopedale seeks to acquire the entire Forestland tract. That contention is misleading because Hopedale seeks to acquire only the 130.18 acres of designated Forestland and expressly excluded from the taking the areas GURR actually uses for railroad operations which includes the existing tracks and other rail infrastructure and a reasonable buffer. Hopedale does not seek or intend to prevent GURR's actual and ongoing railroad operations.¹

The Town does, however, intend to prevent GURR from gaining control of the Forestland in violation of state law based on an unworkable and impractical notional transload facility that will never be built. Accordingly, Hopedale continues its effort to acquire the Forestland by eminent domain or by prevailing in the state court Chapter 61 litigation, as well as by opposing GURR's Petition in this proceeding. GURR's ever changing and shrinking plans further substantiate that GURR has no bona fide plan to use the Forestland for railroad purposes and Board precedent makes clear that GURR cannot use such notional plans to prevent the Town from exercising its eminent domain authority. Further, even if the Board considers GURR's vague plans

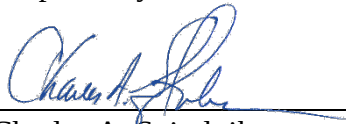
¹ Despite GURR's attempt to imply some improper purpose, Response at 1, Hopedale's renewed resolutions authorizing eminent domain are ministerial in nature. Under Massachusetts law, an authorization to initiate eminent domain expires after 30 days. Accordingly, Hopedale regularly re-authorizes eminent domain to preserve its authority. That re-authorization is of limited effect, however, due to the District Court's injunction.

sufficient, GURR's Petition is at best unripe because the threshold issue of whether it owns the Forestland is currently being litigated in Massachusetts state court.

CONCLUSION

For the foregoing reasons, the Town of Hopedale respectfully requests the Board to allow Hopedale to supplement the record in this proceeding with the Affidavit of Mr. Jon Delli Priscoli dated June 2, 2023, in further support of the arguments Hopedale made in its Reply to the Petition.

Respectfully submitted,



Charles A. Spitulnik
W. Eric Pilsk
Daniel C. Orlaskey
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
epilsk@kaplankirsch.com
dorlaskey@kaplankirsch.com

David S. Mackey
Sean M. Grammel
Anderson & Kreiger, LLP
50 Milk Street, 21st Floor
Boston, MA 02109
(617) 621-6500
dmackey@andersonkreiger.com
sgrammel@andersonkreiger.com

Dated: August 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have on the 25th of August 2023, caused to be served a copy of the foregoing **Reply to a Response In Further Support of the Petition of the Town of Hopedale, Massachusetts to Supplement the Record**, upon the following parties of record in this proceeding by email:

John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
scheib@gentrylocke.com

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

Sarah Yurasko
50 F Street NW
Suite 500
Washington, DC 20001
syurasko@aslrra.org



Charles A. Spitulnik

Dated: August 25, 2023