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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
August 30, 2023
Part of
Public Record

Docket No. FD 36696

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

**REPLY TO TOWN OF HOPEDALE’S MOTION FOR LEAVE TO FILE
A REPLY TO A RESPONSE**

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Dated: August 30, 2023

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The Surface Transportation Board (“Board”) should deny the Town of Hopedale’s (“Town”) Motion for Leave to File a Reply to a Response (Reply to a Reply) (“Motion”) and to strike such Reply to a Response (“Town’s Reply to Reply”) from the record of this proceeding. The Town’s Motion and the Town’s Reply to Reply should be struck pursuant to 49 C.F.R. § 1104.13 because it adds nothing new: it regurgitates already-rejected positions regarding GURR’s ownership of the property at issue, contains repetitive case law discussions, asserts arguments irrelevant to the Town’s positions and intent with respect to the amount of Grafton and Upton Railroad Company’s (“GURR”) land the Town seeks to seize through condemnation, and improperly attempts to drag out briefing to avoid an expedited decision.

I. LEGAL STANDARD

The Board prohibits a “reply to a reply” pursuant to the longstanding rule set forth in 49 C.F.R. § 1104.13(c). Although the Board sometimes waives this rule when doing so creates a more complete record, such a waiver of that rule is inappropriate where the pleading adds nothing new. *Norfolk Southern Ry. Co.-Petition for Exemption-in Baltimore City and Baltimore County,*

MD, STB Docket No. AB-290 (Sub-No. 311X) (Served Mar. 19, 2010) (“Under Board rules at 49 CFR 1104.13(c), a reply to reply is not permitted. Moreover, Riffin's submission is repetitive or irrelevant, particularly regarding references to Maryland state law. Therefore, Riffin's March 10 reply will be stricken.”); *Consolidated Rail Corp. – Dec. Order Proceeding*, STB FD 34319 (Served Oct. 10, 2003) (“A "reply to a reply" is not normally allowed, see 49 C.F.R. 1104.13(c), and there appears to be no reason to make an exception for Conrail's reply, which adds to the record nothing of any significance. Conrail's motion for leave to file its reply will therefore be denied.”); *see also e.g., Consolidated Rail Corp.-Abandonment Exemption-in Hudson County, NJ; CSX Transp., Inc.-Discontinuance of Service Exemption-in Hudson County, NJ; Norfolk Southern Ry. Co.-Discontinuance of Service Exemption-in Hudson County, NJ*, Docket No. AB 167 (Sub-No. 1189X); Docket No. AB 55 (Sub-No. 686X); Docket No. AB 290 (Sub-No. 306X) (Served May 21, 2015); *R.R. Ventures, Inc. Abandonment Exemption Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA; Railroad Ventures, Inc.—Acquisition and Operation Exception –Youngstown & Southern R.R. Co.*, STB Docket No. AB-556 (Sub-No. 2X), STB Finance Docket No. 33385 (Served Oct. 3, 2000).

Here the Town’s Reply to Reply adds nothing new. Rather, it attempts for the third time to inject a non-issue into this proceeding that the Board has already rejected, repeats a case law discussion that it has already made in prior filings, and ignores the Town’s continuing efforts to seize the entirety of the approximately 130 acres of GURR’s property by eminent domain to prevent development of new rail transload facilities for the benefit of rail customers.

II. ARGUMENT

A. The Town's Reply to a Reply Repeats Positions on Ownership that the Board and the Federal District Court Have Already Rejected.

The Town's Reply to a Reply regurgitates its attempt to manufacture an issue—already rejected by the Board—regarding ownership of the property. There is no issue; GURR owns the property. GURR already debunked the Town's distracting ownership argument in its letter to the Board of April 26, 2023, in which it pointed out (1) GURR's ownership of the land that the Town seeks to take is not in question; (2) that the Federal District Court explicitly acknowledged GURR's ownership, in holding 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;”¹ and (3) the Town's actions are inconsistent with its claim that ownership is uncertain because the Town has sought and continues to seek 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.

Accordingly, the Board promptly ruled in GURR's favor only two days later:

Moreover, the District Court's order granting the preliminary injunction states that GU owns the property and its analysis relies on that fact. Accordingly, the alleged state law property dispute relied on by the Town in its motion is not relevant to this proceeding.

Grafton and Upton R.R. Co.—Petition for Dec. Order, STB FD 36696 at 2 (served Apr. 28, 2023) (emphasis added) (*citing Grafton & Upton R.R., v. Town of Hopedale*, Case No. 4:22-cv-40080-ADB, slip op. at 1, 23-24 (D. Mass. Apr. 3, 2023)).

Even worse, the Town's Reply to Reply is the second time that the Town has flouted the Board's Order of April 28, 2020. The Town made the same argument fewer than two weeks after

¹ *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv-40080-ADB, Docket Entry 72 at 23-24 (D. Mass. Mar. 31, 2023) (“Decision”) (attached to GURR's Apr. 14, 2023, Petition as Exhibit 2). The Court also found that GURR was likely to succeed on the merits of its preemption argument. Decision at 20-23.

the Board made it clear that the alleged property dispute was “not relevant to this proceeding” in its *Reply of the Town of Hopedale, Mass. to Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 (filed May 11, 2023), which is the subject of an outstanding Motion to Strike filed by GURR. *Motion to Strike, Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 (filed May 16, 2023) (“Motion to Strike”). With the Town’s Reply to Reply, the Town continues its campaign to “obfuscate by ignoring the STB Decision directive not to file irrelevant information,” which should not be countenanced.² Motion to Strike at 8. With its third attempt to inject irrelevant (and false allegations) about GURR’s ownership of the property into this dispute, at a minimum the Town’s Reply to Reply is irrelevant, repetitive, and adds nothing new.

B. The Caselaw “Discussion” in the Town’s Reply to Reply Merely Reiterates the Extensive Caselaw Originally Cited By GURR in Its Petition.

The Town also inaccurately accuses GURR of “advanc[ing], for the first time in its Reply, a new legal standard” on preemption. Town’s Reply to Reply at 4. But GURR does no such thing,

² The Town’s descriptions of the state court litigation are disingenuous at best. The state court case is not “pending,” as the Town describes it, but is “closed” per the Massachusetts Land Court:

20 MISC 000467 Town of Hopedale v. Jon Delli Priscoli Trustee of the One Hundred Forty Realty Trust , et al. RUBIN			
Case Type:	Miscellaneous	Initiating Action:	EOA - Equitable Action Involving Any Right, Title or Interest in Land, G.L. Chapter 185, § 1 (k)
Case Status:	Closed	Status Date:	02/10/2021
File Date:	10/28/2020	Case Judge:	Rubin, Hon. Diane R.
DCM Track:		Next Event:	10/13/2023
		Property Information	364 West Street Hopedale

The Town dismissed its state law claim to the property on February 10, 2021, and lost its attempt to vacate the dismissal on January 28, 2022. The Town also voluntarily dismissed its appeal of that decision in May 2022. Although the Town has now filed a second motion to vacate rehashing the same losing arguments, there are no pending state law claims. Nor does the Town have “co-plaintiffs in that litigation” as it claims. Town’s Reply to Reply at 3. A taxpayer group of proposed intervenors have moved to intervene in the dismissed case that is “closed,” but the proposed intervenors are not “co-plaintiffs.” Nor could they be because the Massachusetts Appeals Court already determined that they lack standing to claim ownership of the property on behalf of themselves or the Town. *See Reilly v. Hopedale*, 102 Mass. App. Ct. 367 (2023). The Town’s reliance on this state court litigation—which it voluntarily abandoned—is not accurate, and as the Board has already ruled, is not relevant to this proceeding.

and there is nothing “new” in GURR’s Reply warranting further briefing. Indeed, in addressing GURR’s so-called “new” position, the Town fills the bulk of its Reply to Reply with a selective “discuss[ion]” of cases, the vast majority of which were cited by GURR in its initial petition in this matter (along with many other cases supportive of GURR’s position). *Compare* Town’s Reply to Reply at 4-8 with *Petition of Grafton and Upton for Dec. Order, Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 at 9-13 (filed Apr. 14, 2023). This is not new. The Town first feebly attempted to address the overwhelming case law in support of GURR’s position in its reply to the petition filed months ago. *See Reply of the Town of Hopedale, Mass. to Petition for Dec. Order and Reply to Motion for Expedited Consideration, Petition of Grafton and Upton for Dec. Order, Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 at 20-22 (filed May 11, 2023) (“Reply”).

The overwhelming weight of authority supports GURR’s position that the Town’s attempt to take GURR property (and to impose preclearance requirements through the Town’s Conservation Commission (“Commission”)) is preempted. Indeed, the United States District Court for the District of Massachusetts found that GURR was likely to succeed on the merits of its preemption claim. *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv-40080-ADB (D. Mass. Apr. 3, 2023) (“Decision”). Certainly, that is in part because of the cases cited by GURR throughout this proceeding, including ones ignored by the Town like *Norfolk S. Ry. Co. and the Alabama Great S. R.R. Co.—Petition for Dec. Order*, STB FD 35196, at 3 (Served March 1, 2010), and ones from which the Town would like to run, including *City of Lincoln v. STB*, 414 F.3d 858, 862 98th Cir. 2005), which held that “[c]ondemnation 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.”

The Town's repetitive and feeble attempt to address the overwhelming caselaw support for GURR's position that was included in GURR's original petition adds nothing new and should be rejected.

C. The Town's Reply to Reply is Irrelevant to Its Stated Positions and Intent to Condemn the Entire Portion of the Land at Issue.

The Town's filing is smoke and mirrors because, at the end of the day, the Town simply seeks to thwart development of rail facilities on GURR's property. The Town seeks to condemn the entirety of approximately 130 acres of GURR's land at 364 West Street by eminent domain and to thwart rail development through the Commission to prevent the development of new rail facilities.

The Town continues to represent that it seeks to take that property to prevent GURR from completing the development of those facilities and to act accordingly. Notably, the Town has not in the Town's Reply to Reply provided some new position – for example, that it only seeks to condemn a portion of the property not subject to railroad use (if there are any). Rather, the Town continues to pursue the taking of the entire rail property by eminent domain, as most recently evidenced by the June 26, 2023, July 24, 2023, and now August 24, 2022, votes by the Town's Selectboard to take this property by eminent domain.³ 2nd Delli Priscoli VS at ¶ 20 & Exhibit 2; *see also* Town of Hopedale Select Board Special Meeting Minutes, Aug. 24, 2023 at p. 2.⁴ The Town is clear in the Town's Reply to Reply that the Town reluctantly will live with existing rail but will prevent any expansion, including on the land owned and already under development by

³ The Town seeks to claim that these votes are irrelevant. Town's Reply to Reply at fn. 1. They are highly relevant and demonstrate the Town's undeterred effort to take all ~130 acres regardless of whether or how GURR's engineering plans and phasing of project construction might change based on the passage of time, change in interest rates, and other factors.

⁴ Special Meeting Minutes available at: https://www.hopedale-ma.gov/sites/g/files/vyhlif711/f/minutes/meeting_minutes_08242022.pdf.

GURR -- as long as it can prevent through eminent domain the construction of new rail facilities built on GURR's property. Town's Reply to Reply at 9 (claiming to omit GURR's property that "GURR actually uses for railroad operations which includes the existing track and other rail infrastructure" while including all GURR's property needed for the development of new rail facilities). This position is also not new. See Reply at 20 ("Hopedale's Proposed Taking Will Not Interfere with GURR's Existing Use of the [GURR's approximately 130 acres]") (emphasis added).

Given the Town's continuing efforts to seize the entirety of GURR's approximately 130 acres of property by eminent domain, this case remains a simple one: (1) GURR is clearly a rail carrier; (2) GURR owns the property in question, has begun to develop it in to rail transload facilities, and plans to operate such facilities; (3) rail transload facilities are "transportation" under the Interstate Commerce Commission Termination Act; and (4) and state and local law is expressly preempted by 49 U.S.C. §10501(b).

D. The Town's Reply to Reply Was Filed to Drag Out Briefing and Thwart an Expedited Decision.

With no "new" facts or arguments to point to, or any other development warranting a Reply to Reply, the motivations for the Town's additional briefing become clear – further delay. The Board should reject the Town's attempts to drag out briefing and keep the Board from reaching the expedited decision on these important issues that GURR has requested pursuant to the order of the United States District Court for the District of Massachusetts ("District Court"). *Decision* (ordering GURR to file this petition with the Board and staying its proceedings pending Board action).

"The Town has delayed this project for years and GURR has suffered substantial costs as a result of this delay including, but not limited to, lost money, lost time, obstruction of service to existing and potential rail customers (see Petition at Exhibit 1, Verified Statement of Jon Delli Priscoli at 23 & Exhibit E thereto), and interference with the public interest in freight rail

transportation.” There is no question that GURR had already “begun to develop the land to support” a logistics and transload facility and “has invested substantial capital in said development.” Decision at 23.

The Town’s Reply to Reply instead serves as one further attempted NIMBY-inspired obstacle and obstruction to GURR’s development (and to an expedited decision from the Board allowing the same). This is exactly the type of local obstacle and obstruction that ICCTA’s preemption framework was designed to avoid. *Skidmore v. Norfolk S. Ry. Co.*, 1 F.4th 206, 213 (4th Cir. 2021) (“We’ve held that Congress intended § 10501(b) ‘to displace’ (and therefore preempt) ‘regulation,’ i.e., those state [and local] laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation”); *PCS Phosphate Co. v. Norfolk Southern Corp.*, 559 F.3d 212, 219 (4th Cir. 2009) (“The ICCTA was enacted in 1995 to deregulate the rail industry by eliminating direct economic regulation of railroads by the states”). *See also Grafton & Upton R.R., v. Town of Hopedale*, Case No. 4:22-cv-40080-ADB, Hearing Tr. July 19, 2022, at 29:3-10 (D. Mass. Apr. 3, 2023) (“To begin, and maybe to state the obvious, we need transportation facilities, including rail facilities, which are, generally speaking, more energy efficient than trucking, which is the realistic alternative. NIMBY-ism -- that is, "not in my backyard" -- NIMBY-ism is a real issue nationwide and one of the reasons that our transportation system is so broken compared to, let's say, that of Europe or other countries.”).⁵ These delay tactics continue even in federal courts where the Town continues expensive litigation by filing an appeal to the United States Court of Appeals for the First Circuit (“First Circuit”), then asking for an extension to file its brief, and then later asking the First Circuit to stay the appellate proceedings

⁵ Hearing Transcript available at [032 - defendants consolidated opposition to plaintiffs motion for preliminary injunction to enjoin taking and enforcement o 1.pdf](https://www.hopedale-ma.gov/032-defendants-consolidated-opposition-to-plaintiffs-motion-for-preliminary-injunction-to-enjoin-taking-and-enforcement-o-1.pdf) ([hopedale-ma.gov](https://www.hopedale-ma.gov))

it initiated while it petitioned the District Court for a hypothetical ruling of what it would do depending on how the First Circuit might rule. On August 30, 2023, the First Circuit ruled against the Town and denied the Town's motion to stay the appellate proceeding.⁶

All of this unnecessary litigation and expense would stop and rail shippers would get more capacity through additional transload facilities with an expedited ruling in this proceeding. GURR's sizeable loss of time, money, and construction opportunities necessitate expedited consideration. The need of rail customers for these facilities necessitates expedited consideration. The public interest necessitates expedited consideration. Filings that add nothing new, regurgitate arguments already lost, ignore the Town's continuing actions to seize the entirety of GURR's property by eminent domain should not be countenanced.

III. CONCLUSION

In short, the Town does not care about the plan and whether it expands or contracts or is done in one shot or in phases. It does not want any railroad development, which is why it seeks to take 130 acres+- of GURR's land at 364 West Street by eminent domain (and to impose preclearance requirements on GURR through its Commission). The Town's Reply to Reply does nothing to elucidate anything new and the Town's motion to file it should be rejected and the Town's Reply to Reply should be struck from the record.

⁶ GURR timely responded to the Town's court filings in both the First Circuit and the District Court, but these gambits by the Town do not affect this proceeding or the Board's jurisdiction to rule in this proceeding on an expedited basis. Indeed, the irrelevance and disingenuousness of the argument is highlighted by the fact that the Town did not even mention these recent Hail Mary filings to the Board, perhaps signaling its lack of confidence in the effort to prevent the Board from ruling on questions that are squarely within the Board's expertise. Indeed, the Board has jurisdiction over preemption questions and has ruled on those questions despite pending court proceedings. See *CSX Transp., Inc. -- Petition for Dec. Order*, STB FD 34662 (Served Mar. 14, 2005) (ruling without referral on preemption question with pending federal court case). And the First Circuit has previously ruled that where the Board has primary jurisdiction the district court should stay the "ICCTA claim while referring it to the STB" because the Board's expertise was clearly involved and to promote uniformity in standards. *Pejeboscot Indus. Park v. Me. Cent. R.R. Co.*, 215 F.3d 195, 205-206 (1st Cir. 2000).

The issue referred by the Court remains unchanged. Its resolution remains clear. GURR's entrepreneurial efforts to develop rail facilities to serve rail customers continue to face renewed efforts by the Town in ways that are clearly preempted by Section 10501. To protect rail transportation, GURR respectfully requests that the Board issue a Declaratory Order that the Town's latest efforts – to take by eminent domain the approximately 130 acres of GURR's real property at 364 West Street or to use its Commission to frustrate the project by application of preclearance regulations – are preempted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Scheib" following in a similar style.

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Attorneys for Grafton
and Upton Railroad Company

Dated: August 30, 2023

CERTIFICATE OF SERVICE

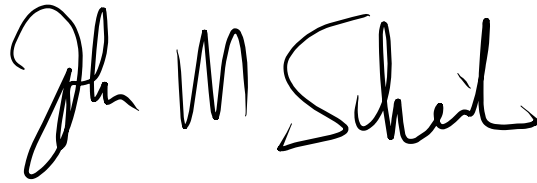
I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

Mr. Charles Spitulnik, Esq. (cspitulnik@kaplankirsch.com)

Mr. W. Eric Pilsk, Esq.(epilsk@kaplankirsch.com)

Kaplan Kirsch Rockwell 1634 Eye St., NW, Suite 300
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on this 30th day of August, 2023.

A handwritten signature in black ink, reading "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" being more prominent than the middle initial "M".

John M. Scheib
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