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May 13, 2023

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 36464- *Grafton and Upton Railroad Company –Petition for Declaratory Order*

Dear Ms. Brown:

Attached please find the following document filed by Grafton and Upton Railroad Company in the above-captioned docket.

Sincerely,

/s/ *John M. Scheib*

John M. Scheib
Attorney for Grafton
and Upton Railroad Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36464

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

**GRAFTON AND UPTON RAILROAD COMPANY’S
REPLY TO THE REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS TO
MOTION TO REOPEN AND REPLY TO PETITION FOR DECLARATORY ORDER**

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and Upton Railroad Company

Dated: May 13, 2023

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In its Reply to Grafton and Upton Railroad’s (“GURR”) Motion to Reopen (“Reply”), the Town of Hopedale (“Hopedale”) agrees that it is proper for the Surface Transportation Board (“Board”) to reopen this proceeding in light of is required by Hopedale’s bad-faith efforts to renege on the settlement that led to this proceeding being dismissed.¹ That took one-half of one page of its 31-page Reply. The remainder of Hopedale’s filing attempts to argue the merits of the case, which is inappropriate to respond to the motion to reopen.

In its Reply to GURR’s simple Motion to Reopen, Hopedale – perhaps recognizing that the facts are unhelpful to its continued effort to seize property that GURR has been developing as a rail transload facility -- uses unhelpful and incorrect language like “illegal” to try to describe GURR’s acquisition of the property at issue.

¹ Given that GURR and Hopedale agree that the proceeding should be reopened, this filing responds to Hopedale’s inappropriate attempt to respond to the merits of the Petition itself. To the extent necessary, GURR requests leave to file this letter as a “reply to reply,” the Board regularly accepts such filings for completeness of the record and when it assists with administrative efficiency. *See e.g., Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, 2017 STB Lexis 218 at *6-7 (Dec. 5, 2017) (Judge McCarthy) (listing numerous instances in which reply-to-reply permitted and permitting it in the case).

What Hopedale cannot obfuscate with such language are the indisputable facts that have already been determined by a court or the Board: (1) GURR is a rail carrier²; (2) GURR controls the property and has for several years – even according to the Massachusetts courts³; (3) GURR’s transload project on the property is “rail transportation”⁴; (4) GURR relied on Hopedale to abide by the settlement agreement, through which Hopedale acknowledged GURR’s control of and ability to develop the property and waived its Chapter 61 claims; (5) despite the settlement agreement, Hopedale has tried to use other state statutes to seize GURR’s property, which efforts were preempted⁵; and (6) Hopedale now seeks to renege on the settlement agreement that it entered into with GURR⁶ (and in which Hopedale waived its Chapter 61 rights) that led the Board to dismiss this proceeding. These facts, some of which have evolved in the interim since the Board dismissed this proceeding based on that settlement agreement, lead to the inescapable conclusion that Chapter 61 is preempted as applied to GURR’s property.

This is not a case where the question is whether the property is railroad property or not, making inapposite many of the cases cited by Hopedale in its argumentation that is non-responsive to the Motion to Reopen. Indeed, even the most recent court decisions expressly note that the property belongs to GURR. Motion to Reopen at 12 & Mordecai V.S., Attachment D.

Given the facts as they currently exist, Hopedale’s characterization of the case as one that presents a facial challenge is incorrect. This matter is much simpler under the current facts as

² *Grafton and Upton Railroad Company – Petition for Declaratory Order*, F.D. No. 36696 at 10 (STB Decided Nov. 14, 2023) (“*GURR Dec. Order*”).

³ *GURR Dec. Order* at 8; Motion to Reopen at 12, Mordecai Verified Statement (“Mordecai V.S.”), Attachment D (Order of the Massachusetts Land Court, at 34 (March 27, 2024)) (quoting Reilly, 102 Mass. App. Ct. at 374).

⁴ *GURR Dec. Order* at 10-11.

⁵ *GURR Dec. Order*.

⁶ Motion to Reopen at 2, Mordecai Verified Statement, Attachment B (Motion to Dismiss Proceeding based on settlement agreement dated February 8, 2021).

they have evolved. The as-applied test is now the proper analysis for evaluating whether Chapter 61 is preempted under the facts as they evolved since the proceeding was originally dismissed. GURR seeks a ruling that, under the present facts, Chapter 61 is preempted. Motion to Reopen at 3. Hopedale's latest attempt to use Chapter 61 – after its failed attempt to use eminent domain – is simply a pretext to seize GURR's property years after it entered into a settlement agreement with GURR and began developing the rail transload facility.

As a matter of policy, preemption exists to prevent the prevailing political winds from shifting back and forth to the detriment of interstate commerce. GURR entered into a settlement agreement with Hopedale. GURR relied on Hopedale to abide by that settlement agreement, and on Hopedale's dismissal with prejudice in state court (and before this Board) to any challenge to GURR's ownership of the property. GURR began to develop a rail transload facility and invested in engineering and development. Hopedale subsequently reversed course and attempted to take the property using a different state statute that the Board found preempted under these facts. *GURR Dec. Order*. Now it is continuing to pursue a reversed course and to renege on the settlement agreement. Preemption is designed to prevent the use of state statutes to take railroad property being used for rail transportation purposes. If localities were permitted to use state and local statutes years later to reclaim property previously approved for rail usage, that would be a devastating precedent for interstate commerce.

Respectfully submitted,

/s/ John M. Scheib

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Attorneys for Grafton
and Upton Railroad Company

Dated: May 13, 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, on this 13th day of May, 2023.

/s/ John M. Scheib

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Attorney for Grafton
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