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SURFACE TRANSPORTATION BOARD

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March 27 2026
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Public Record

Docket No. FD 36909

TRANSLOADX RAILROAD COMPANY, INC. —

ACQUISITION AND OPERATION EXEMPTION —

CSX TRANSPORTATION, INC.

COMBINED PETITION FOR STAY

&

FILED
March 27, 2026
SURFACE

PETITION TO REVOKE EXEMPTION

FEE RECEIVED
March 27, 2026
SURFACE

TRANSPORTATION BOARD

FILED BY:

TRANSPORTATION BOARD

CHALMERS (CHOP) HARDENBERGH AS AN INTERESTED PARTY

I. PRELIMINARY STATEMENT

Petitioner Chalmers (Chop) Hardenbergh, a former rail journalist and interested member of the public, respectfully submits this combined *Petition for Stay and Petition to Revoke the Notice of Exemption* filed by TransloadX Railroad Company, Inc. ("TransloadX-RR") on March 17, 2026 in the above-captioned **Docket No. FD 36909**.

The exemption, if not stayed, will become effective on or about April 16, 2026. For the reasons set forth herein, the Board should: (1) immediately stay the exemption pending full review; and (2) revoke the exemption on the merits pursuant to 49 U.S.C. § 10502(d).

This matter raises serious public interest and fitness concerns. The principals of TransloadX-RR have been found by a Massachusetts Superior Court to have engaged in unfair and inequitable conduct and to have intentionally violated a court order. TransloadX is presently operating a transloading facility in Framingham, Massachusetts in defiance of a municipal cease-and-desist order. Granting this exemption would reward noncompliance, undermine the integrity of the Board's oversight function, and expose the public and the Maine rail network to harm from operators who have demonstrated disregard for legal obligations.

II. PARTIES

Petitioner. Chalmers Hardenbergh (Chop) is a former rail editor (*Atlantic Northeast Rails & Ports* 1994-2018) and interested member of the public residing at PO Box 357, Freeport, Maine 04032. Petitioner has a long-standing professional interest in the integrity of the national rail network and the fitness of entities seeking operating authority before this Board. He may be reached at 207-865-2922 or insider@chalmersh.com.

Respondent. TransloadX Railroad Company, Inc. (TransloadX-RR) is a non-carrier which filed the *Notice of Exemption* in Docket No. FD 36909 on March 17, 2026, seeking authority as a Class III carrier to lease and operate two branch lines of CSX Transportation, Inc. in Maine. TransloadX-RR's address is 360 Amherst Street, Nashua, NH 03063. Its representative of record is Thomas W. Wilcox, Law Office of Thomas W. Wilcox, LLC, 1629 K Street, NW, Suite 300, Washington, D.C. 20006, 202-508-1065, tom@twilcoxlaw.com.

III. JURISDICTION AND STANDING

This Board has jurisdiction over this matter pursuant to 49 U.S.C. §§ 10502 and 10901. The Board may exempt transactions from prior approval requirements under 49 U.S.C. § 10502(a), and may revoke such exemptions under 49 U.S.C. § 10502(d) upon a finding that the exemption is inconsistent with the public interest or the transportation policy of the United States.

Petitioner has standing as a member of the public and as a former rail industry journalist with a professional and civic interest in the fitness of new entrants to the national freight rail network. The public interest concerns raised herein are cognizable before the Board. See 49 U.S.C. § 10101 (national rail transportation policy includes promotion of safe and efficient transportation).

IV. BACKGROUND

A. The Notice of Exemption.

On March 17, 2026, TransloadX Railroad Company, Inc. filed a Notice of Exemption pursuant to 49 U.S.C. §§ 10901 and 10502, and 49 C.F.R. Part 1150, Subpart D (§§ 1150.31–1150.36), seeking authority to lease and operate as a Class III carrier two branch lines owned by CSX Transportation, Inc.:

(1) approximately 18.3 miles known as the Augusta Branch, running from Waterville, Maine (MP WVT 0.7) to Augusta, Maine (MP WVT 19.0), in Kennebec County; and

(2) approximately 18.8 miles known as the Bucksport Branch, running from Bangor, Maine (MP WVB 0.2) to Bucksport, Maine (MP WVB 19.0), in Penobscot and Hancock Counties.

The total route miles to be leased are approximately 37.1 miles. The exemption is scheduled to become effective on or about April 16, 2026, absent a stay by this Board.

B. TransloadX-RR's Unauthorized Operations Framingham, Massachusetts.

TransloadX-RR is presently operating the Central Mass Transloading and Logistics Center at 480 Hollis Street, Framingham, Massachusetts without the required

municipal permit. The City of Framingham has issued a notice to cease and desist such operations [Exhibit C]. TransloadX-RR has not complied. This ongoing defiance of municipal authority is directly relevant to the fitness inquiry before this Board.

[Letters from Framingham municipal officials are attached as Exhibit C.]

C. Judicial Findings of Unfair and Inequitable Conduct.

The principals of TransloadX-RR, Michael Milanowski and John DeWaele, have been the subject of adverse findings in the Massachusetts Superior Court. In a decision dated January 10, 2024, the Court found that Milanowski and DeWaele had engaged in "unfair and inequitable conduct." *Milanowski and DeWaele v. Delli Prescoli*, Superior Court Civil Action Nos. 2384CV00071-BLS2, 2384CV00958-BLS2, 2384CV02141-BLS2 (Jan. 10, 2024), at 13. [Exhibit A.]

In a subsequent hearing before a different judge in the same matter, the Court found that "Milanoski and DeWaele intentionally violated paragraph 1 of this Court's Order" and held them in contempt. *Milanowski and DeWaele v. Delli Prescoli*, Superior Court Civil Action No. 2384CV00071 (June 24, 2024), at 2. [Exhibit B.]

[Texts of these decisions attached as Exhibit A and Exhibit B.]

D. Apparent Purpose of the Maine Application.

It appears that TransloadX-RR's principals seek Class III railroad status in Maine in order to invoke federal preemption under 49 U.S.C. § 10501(b) and thereby insulate the Framingham transloading operation from municipal oversight.

As a resident of Maine, Petitioner has travelled the length and breadth of Maine, and as a journalist he has seen nearly all sites where railroads directly serve customers.

Because of his abiding interest in Maine rail operations, after Petitioner ended his publication of his award-winning newsletter *Atlantic Northeast Rails & Ports*, he frequently observes existing and former rail sidings.

In Petitioner's direct knowledge by observation of the sidings of former users of the two branches TransloadX-RR seeks to operate, no former customer on either branch has used rail for at least two years, nor has any information emerged which indicates that a former customer will resume using rail, or that a new customer may come on line.

This void may give credence to a possible purpose of TransloadX-RR's purpose in seeking Class III status: to obviate oversight of its transload operation in Framingham Massachusetts.

If this is the case, the Notice of Exemption is being used as a legal stratagem to avoid local regulatory accountability rather than to serve a legitimate transportation purpose — a use wholly at odds with the national rail transportation policy this Board is charged with advancing.

V. PETITION FOR STAY

Petitioner respectfully requests that the Board stay the effectiveness of the exemption pending resolution of this Petition to Revoke, pursuant to 49 C.F.R. § 1121.4 and the Board's inherent authority to protect the public interest.

The Board considers four factors in evaluating petitions for stay: (1) likelihood of success on the merits; (2) irreparable harm to the petitioner absent a stay; (3) harm to other parties from a stay; and (4) the public interest. All four factors favor a stay here.

1. Likelihood of Success on the Merits. As detailed in Section VI below, there is a substantial likelihood that the Board will find this exemption inconsistent with the public interest once it considers the fitness of TransloadX-RR's principals, their record of noncompliance with judicial orders, and their apparent improper purpose in seeking railroad status.

2. Irreparable Harm Absent a Stay. Once TransloadX-RR is permitted to operate as a Class III railroad, it will immediately assert federal preemption defenses against the City of Framingham and any other governmental body seeking to enforce local law. Revocation of the exemption after the fact may not adequately unwind these legal consequences. Moreover, harm to the integrity of the Maine rail network from the operation of lines by principals found in contempt of court is not easily remediated.

3. Harm to Other Parties. TransloadX-RR will suffer no cognizable harm from a brief stay. The Augusta Branch and Bucksport Branch are presently unused. A short delay while the Board reviews the fitness of the applicant imposes no operational disruption and no harm to existing customers, as there are no current operations to interrupt.

4. The Public Interest. The public interest strongly favors a stay. The national rail transportation policy declared in 49 U.S.C. § 10101 includes the promotion of safe, efficient, and economically sound transportation. Authorizing operators who have

been found to engage in inequitable conduct and contempt of court to assume control of rail infrastructure is inconsistent with that policy.

Moreover, the likelihood of revival of either branch is small. In Petitioner's direct knowledge by observation of former customers on the two branches TransloadX-RR seeks to operate, no former customer on either branch has used rail for at least two years. This may give credence to TransloadX-RR's possible purpose in seeking Class III status: to avoid municipal oversight of its operation in Framingham.

VI. PETITION TO REVOKE

Pursuant to 49 U.S.C. § 10502(d) and 49 C.F.R. § 1121.4, Petitioner requests that the Board revoke the exemption on the ground that granting it would be inconsistent with the public interest and with the national rail transportation policy set forth in 49 U.S.C. § 10101.

A. The Board has Authority and Responsibility to Assess Fitness.

Although the Notice of Exemption procedure under 49 C.F.R. § 1150.31 et seq. is designed to streamline routine acquisitions, the Board retains authority to revoke an exemption where public interest concerns are raised. 49 U.S.C. § 10502(d). Fitness of the applicant — including the character and conduct of its principals — is a legitimate public interest consideration. See 49 U.S.C. § 10901(c) (requiring Board to consider public interest in rail construction and operation proceedings); cf. 49 C.F.R. § 1182.2 (fitness criteria in related contexts).

B. The Principals' Record Demonstrates Unfitness.

A court of competent jurisdiction has twice made adverse findings regarding TransloadX-RR's principals. The January 2024 finding of "unfair and inequitable conduct" and the June 2024 contempt finding for intentional violation of a court order together present a clear pattern of disregard for legal obligations. The Board should not extend the privilege of operating authority to principals with this record without a full evidentiary hearing.

C. TransloadX-RR Is Presently Operating in Violation of Local Law.

The Framingham cease-and-desist situation is not a peripheral matter. It demonstrates that TransloadX-RR's principals are currently, as of the date of this filing, operating a facility in defiance of municipal authority. This is not a

historical violation but a continuing one. The Board should not reward such conduct by granting federal operating authority.

D. The Apparent Purpose Is to Evade Local Regulation.

If TransloadX-RR seeks Class III railroad status primarily to invoke the preemption provisions of 49 U.S.C. § 10501(b) against the City of Framingham, it is seeking to weaponize federal railroad law as a shield against legitimate local oversight. Granting operating authority for this purpose would be contrary to the public interest and would bring the Board's exemption process into disrepute. The Board should require TransloadX to demonstrate a bona fide transportation purpose for its Maine application.

VII. RELIEF REQUESTED

Petitioner respectfully requests that the Board:

1. Immediately stay the effectiveness of the Notice of Exemption in Docket No. FD 36909 pending resolution of this petition;
2. Require TransloadX Railroad Company, Inc. to respond to the fitness concerns raised herein and to demonstrate a bona fide transportation purpose for its application;
3. Revoke the exemption upon a finding that granting it would be inconsistent with the public interest; and
4. Grant such other and further relief as the Board deems just and proper.

VIII. VERIFICATION

I, Chalmers Hardenbergh, hereby verify under penalty of perjury that the foregoing statements of fact are true and correct to the best of my knowledge, information, and belief.

Respectfully submitted,

_____/s/Chalmers Hardenbergh Date: March 27, 2026

Chalmers Hardenbergh

Pro Se

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EXHIBITS INCLUDED:

Exhibit A: *Milanowski and DeWaele v. Delli Prescoli* Jan 9 2024 (unclean hands)

Exhibit B: *Milanowski and DeWaele v. Delli Prescoli* June 24 2024 (contempt)

Exhibit C: City of Framingham cease and desist order

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding by first-class mail and/or electronic mail, consistent with 49 C.F.R. § 1104.12(a), as follows:

Thomas W. Wilcox
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Washington, D.C. 20006
tom@twilcoxlaw.com
(Attorney for TransloadX Railroad Company, Inc.)

CSX Transportation, Inc./attention general counsel
500 Water Street
Jacksonville, FL 32202
(Transferring railroad)

_____/s/Chalmers Hardenbergh
Chalmers Hardenbergh

Date: March 27, 2026

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPERIOR COURT
2384CV00071-BLS2
2384CV00958-BLS2
2384CV02141-BLS2

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

JON DELLI PRISCOLI

JON DELLI PRISCOLI

v.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE,
AND THE GRAFTON & UPTON RAILROAD COMPANY

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

GRAFTON & UPTON RAILROAD COMPANY;
FIRST COLONY GROUP, LLC; AND JON DELLI PRISCOLI

**DECISION AND ORDER GRANTING SUMMARY JUDGMENT
UPHOLDING DANA RAIL CARE'S RIGHT OF FIRST REFUSAL**

Michael R. Milanoski and John P. DeWaele, III, allege that they entered into a binding agreement to purchase Grafton & Upton Railroad Company ("GURR") from Jon Delli Priscoli. But Dana Transport, Inc., which has done business under the name Dana RailCare ("Dana"), contends that it is entitled to enforce a contractual right of first refusal and buy GURR.

Delli Priscoli filed suit seeking a declaratory judgment as to whether Dana's ROFR is enforceable. Milanoski and DeWaele contend that the letter of intent containing Dana's ROFR was never enforceable and Dana should be estopped from contending it is enforceable, or the letter of intent was terminated and Dana's ROFR did not survive the termination, or the letter of intent was superseded by later contracts. Dana, GURR, and Delli Priscoli contend that Dana's ROFR is enforceable and was properly invoked by Dana. The parties seem to agree that the material facts are not in dispute, and ask the Court to resolve the issue on summary judgment.

The Court will **allow** Dana's motion for declaratory relief, **deny** the motion by Milanoski and DeWaele to enforce their contract with Delli Priscoli, and order

Counsel
Notified
via email
1/9/24.
Bull
Asst Clerk

that final judgment shall enter declaring that Dana's ROFR is valid, still in effect, and enforceable, and that Dana made a proper and timely exercise of its right to purchase GURR.

Dana is entitled to declaratory relief in its favor because there is an actual controversy about whether Dana's ROFR is valid and enforceable, Milanoski and DeWaele have standing to challenge the validity of this ROFR, all necessary parties have been joined as parties in civil action 2384CV00958-BLS2,¹ and the undisputed material facts demonstrate that Dana's ROFR is valid and enforceable as a matter of law.²

The Court concludes that Milanoski and DeWaele have standing to assert that Dana's ROFR is invalid and may not be enforced, but that their challenge to this ROFR is without merit. The Court finds and concludes that the letter of intent containing Dana's ROFR is an enforceable contract, Dana is not estopped by prior statements from asserting that this ROFR is enforceable, Dana's ROFR was not terminated, and subsequent contracts with affiliates of Dana did not supersede this ROFR. Furthermore, Delli Priscoli's agreement to sell GURR to Milanoski and DeWaele triggered Dana's ROFR, and Dana gave prompt and timely notice of its intent to exercise its ROFR. Since Dana's ROFR is valid and enforceable, allegations that Dana has somehow colluded with GURR and Delli Priscoli to protect its legal rights are beside the point.

1. Undisputed Factual Background. The summary judgment record shows that the following facts are true.

¹ Delli Priscoli filed his declaratory judgment action in Worcester Superior Court on January 10, 2023. It was docketed as civil action 2385CV00022. The case was then transferred to the Suffolk Business Litigation Session, and assigned the new docket number 2384CV00958-BLS2.

Though Delli Priscoli's complaint names "Dana RailCare" as a defendant, Dana Transport, Inc., answered the complaint, representing that Dana RailCare is a trade name used by Dana Transport, Inc. The parties have all treated Dana Transport, Inc., as being a party to this civil action, and seem to agree that it was also party to the letter of intent between GURR and "Dana RailCare," which is discussed below.

² See generally *Buffalo-Water 1, LLC, v. Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18–20 (2018) (requirements for declaratory judgement claim); *Bortolotti v. Hayden*, 449 Mass. 193, 206 (2007) (party seeking to enforce right of first refusal was entitled to summary judgment and entry of declaration that right was valid and enforceable).

1.1. **Dana's ROFR.** Starting in 2008, GURR and Dana discussed working together to grow GURR's rail business by having Dana develop mostly vacant industrial land pit in Upton, Massachusetts, into a rail yard. They entered into a letter of intent in January 2009 (the "Dana LOI") that gave Dana the right to lease and an option to purchase the property. The Dana LOI identified the property that Dana was leasing, and had an option to purchase, as comprising roughly 33 acres of industrial land located on Maple Avenue, Upton, Massachusetts, as shown on a plan by Allen Engineering dated June 3, 2008.

The Dana LOI included the price terms of the lease arrangement and the purchase option, and contemplated that a more detailed lease or license agreement would be negotiated and executed within a month. The price terms in the Dana LOI were as follows:

- Dana was required to make a down payment of \$50,000 upon signing the Dana LOI.
- Once Dana installed the first two lengths of rail track infrastructure, which was expected to be complete by around June 1, 2009, Dana was required to start making GURR's mortgage loan payments of roughly \$3 million per month and to start making monthly lease payments.
- The monthly lease payment started at \$3,500, would increase to \$7,500 once the new rail yard achieved a weekly average of 35 railcar transloadings, and would increase to \$15,000 once there was a weekly average of 75 railcar transloadings.
- Dana could exercise an option to purchase the property for \$6 million on April 1 of 2010, 2011, 2012, or 2013. The initial \$50,000 downpayment would be credited toward the purchase price; the monthly mortgage and lease payments would not.

This agreement required Dana to develop the leased premises as a rail yard, and to perform all necessary design and construction work at its own risk, subject to GURR's approval of all plans. And it also required Dana to use its best efforts to develop new rail business for GURR at the Upton Rail Yard, and permit GURR to use the planned facility for its rail transportation activities.

In addition, the Dana LOI provided that GURR and Dana would enter into "standard sidetrack and switching agreements governing rail operations and

service at the Upton Rail Yard," that would authorize Dana to act as GURR's agent "for purposes of transloading or other rail transportation activities."

Finally, the Dana LOI gave Dana "the right of first refusal to purchase or operate the GURR if there is a change of control of the GURR from the current owner, Jon Delli Priscoli, or if he chooses to cease rail operations at the Upton Rail Yard." It provided that Dana's ROFR would survive Dana's option to purchase the rail yard property.

1.2. Implementation of the Dana LOI. There is no evidence that GURR and Dana entered into a more detailed lease of the Upton Rail Yard property. But the summary judgment record establishes that GURR and Dana treated the Dana LOI itself as constituting an enforceable lease of the property.

Dana paid the \$50,000 down payment required in the Dana LOI. It also made the monthly lease payments to GURR that were required in the Dana LOI; at some point the lease payment amounts rose to \$15,000 per month. As discussed below, however, for a time Dana was late in making these payments.

Dana developed the land that it was leasing into the Upton Rail Yard and proceeded to have an affiliate operate that facility for GURR. Dana says that it invested closed to \$50 million to do so.

GURR entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC in December 2010; this LLC is an affiliate of Dana. At the same time, GURR entered into a Purchase and Sale Agreement regarding the Upton Rail Yard property with Equipment Care Center of Grafton, LLC, which is another affiliate of Dana. This P&S was drafted to implement Dana's option to purchase the property for \$6 million.

1.3. Milanoski and DeWaele's Purchase Agreement. In late 2022, Milanoski and DeWaele agreed to buy and Delli Priscoli agreed to sell to them his 100 percent ownership interest in GURR and all of GURR's assets except for Delli Priscoli's 50 percent ownership interest in Upton Development Group. On December 1, 2022, all three of them executed and entered into a restated letter of intent (the "2022 Restated LOI"), in which they agreed upon the material terms of a future purchase and sale agreement.

Milanoski and DeWaele agreed to pay Delli Priscoli \$36 million and to assume roughly \$6 million in debt to acquire GURR and most of its assets, including the Upton Rail Yard. The 2022 Restated LOI requires Delli Priscoli to deliver his

interest in GURR “free and clear of all liens with clear title” aside from certain specified debt.

1.4. Dana’s Exercise of its ROFR. Delli Priscoli notified Dana about his acceptance of Milanoski’s and DeWaele’s offer to purchase GURR.

Dana responded by promptly notifying GURR that it intended to exercise Dana’s ROFR. On December 28, 2022, Ron Dana sent an email to Jon Delli Priscoli that said, “It is my intent to move forward to exercise my right of first refusal on the purchase of the Grafton and Upton Railroad.” On January 5, 2023, an attorney representing Dana sent a letter to an attorney representing Delli Priscoli, reiterating that “Dana hereby exercises its right of first refusal to purchase GURR on the terms set forth in the offer Mr. Priscoli received to sell his ownership interest in GURR.”

2. Analysis. The undisputed material facts show that Dana’s ROFR was and still is enforceable. Dana is therefore entitled to summary judgment in its favor declaring its rights under the binding right of first refusal. See *Bortolotti v. Hayden*, 449 Mass. 193, 206 (2007).

2.1. Standing. Milanoski and DeWaele have standing to challenge the validity and enforceability of Dana’s 2009 ROFR. The assertion by GURR that they lack standing is without merit.

A party that has entered into a contract to purchase specific real estate has standing to challenge a purported right of first refusal on that property that is claimed by a third-party. See *Bortolotti, supra*, at 196–198.

As discussed above, Milanoski and DeWaele entered into a binding letter of intent to purchase GURR and most of its assets from Delli Priscoli for \$36 million plus the assumption of roughly \$6 million in debt. That gives Milanoski and DeWaele “a cognizable legal interest in the validity” of the Dana ROFR, “and that is enough to confer standing.” *Id.* at 198.

2.2. The Dana LOI Was a Binding Contract. Milanoski and DeWaele contend that the Dana LOI was never an enforceable contract because it “contemplates the execution of subsequent formal agreements,” does not include all material terms, and does not expressly state that the parties intended the document to be binding. They also contend that Dana should be estopped, by prior testimony before the Federal Surface Transportation Board, from asserting that the Dana LOI was and is an enforceable contract. The Court disagrees.

2.2.1. Material Terms and Intent to be Bound. The Dana LOI was and is an enforceable contract, even though it contemplated that “GURR & Dana will enter into a fuller detailed Lease/License agreement” and into a separate contract to govern transloading and other rail transportation activities.

“[T]o create an enforceable contract, there must be agreement between the parties on the material terms of the contract, and the parties must have a present intention to be bound by that agreement.” *K&K Development, Inc., v. Andrews*, 103 Mass. App. Ct. 338, 344 (2023), quoting *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 878 (2000).

“A purported contract which is no more than an agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable.” *Air Tech. Corp. v. Gen. Elec. Co.*, 347 Mass. 613, 626 (1964).

But an agreement will be enforceable even if it “anticipates a more formal writing,” so long as the parties “have agreed upon either the material terms, or upon the ‘formulae and procedures’ that will provide the material terms at some future date.” *K&K Development, supra*, quoting *Frishman v. Maginn*, 75 Mass. App. Ct. 103, 110–111 (2009). Where the parties “have agreed upon all material terms,” but contemplate the further execution of a final written agreement, it is reasonable to infer “that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract.” *McCarthy v. Tobin*, 429 Mass. 84, 87 (1999) (accepted offer to purchase real estate was binding contract, even though it contemplated further purchase and sale agreement), quoting *Goren v. Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 140 (1987) (same).

The Dana LOI was much more than a mere “agreement to agree.” It contained all material terms of the lease of the planned rail yard site to Dana, of Dana’s option to purchase the site, and of Dana’s ROFR to purchase GURR if Delli Priscoli were to decide to relinquish control of the company or cease rail operations at the Upton Rail Yard.

The material terms of the **lease arrangement** are set forth in the Dana LOI. As discussed above in more detail, this contract identified the premises to be leased by reference to a specific plan, specified the payment terms, and required Dana to build out and operate the leased premises.

The parties made clear that they intended to be bound by these terms, not only by agreeing to them, but also by following these terms even though the parties never entered into a more detailed lease agreement. Where contract language is ambiguous, “[t]here is no surer way to find out what parties meant, than to see what they have done.” *Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund*, 466 Mass. 368, 378 (2013), quoting *Brooklyn Life Ins. Co. of New York v. Dutcher*, 95 U.S. 269, 273 (1877).

The Dana LOI also contained all material terms regarding Dana’s **option to purchase** the Upton property. It specified the price, and the four specific dates when Dana was entitled to exercise the option.

In any case, **Dana’s ROFR** was valid and enforceable as written, whether other provisions of the Dana LOI were contractually binding or not.

Dana’s ROFR was enforceable because it contained all material terms. No price or timing term was required, because the ROFR merely gives Dana the right to purchase at the right offered by a third-party, if and when Delli Priscoli decided to accept any such offer. See *Bortolotti*, 449 Mass. at 201.

A right of first refusal involving real estate “becomes operational when the ‘owner has decided to accept a third person’s outstanding and enforceable offer and the holder of the right has been informed of the details of that offer and has had a reasonable time to meet it.’ ” *Id.* at 200, quoting *Roy v. George W. Greene, Inc.*, 404 Mass. 67, 71 (1989). “At the time of a third-party offer that the owner has decided to accept, the right of first refusal ripens into an option to purchase according to the terms of the third-party offer.” *Id.* at 201.

Dana’s ROFR was contractually binding because the material terms of that right were spelled out; and it remains contractually binding even if other parts of the Dana LOI were nothing more than an unenforceable agreement to negotiate further about other issues. See *Schwanbeck v. Federal-Mogul Corp.*, 412 Mass. 703, 705–707 & n.2 (1992). In *Schwanbeck*, the parties entered into a letter of intent in which they agreed to “negotiate in good faith” over the terms for the purchase and sale of a business division of the defendant corporation, and also agreed that the potential buyer would have a right of first refusal if any third-party made a firm offer to purchase the business. *Id.* at 705 n.2. The Supreme Judicial Court held that, although the “negotiate in good faith” provision was not contractually binding, the separate right of first refusal was nonetheless enforceable (though it was not triggered because there was not a firm offer that complied with the Statute of Frauds). *Id.* at 705–710.

Though the Dana LOI did not contain terms of the transloading agreement that GURR later entered into with Grafton Upton Railcare LLC ("GU Railcare"), which is an affiliate of Dana, that is beside the point. Since the Dana LOI was an enforceable contract with respect to the property lease, Dana's option to purchase the property, and (most importantly) Dana's ROFR, it does not matter that the parties contemplated entering into additional business arrangements the material terms of which were not included in the Dana LOI.

2.2.2. Estoppel Argument. Milanoski and DeWaele argue that the Court "must hold Mr. Delli Priscoli and Mr. [Ron] Dana to their prior testimony" in affidavits submitted in 2012 and 2013 to the Federal Surface Transportation Board about the relationship between GURR and Dana, and bar them from "provid[ing] contradictory testimony here."

In other words, Milanoski and DeWaele are asking the Court to apply the doctrine of judicial estoppel, even though they do not use the term and do not cite or address any of the relevant case law.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position that it had previously asserted in another proceeding." *Mullins v. Corcoran*, 488 Mass. 275, 286 (2021), quoting *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 639–640 (2005). "A successful claim of judicial estoppel generally requires the showing of two core elements: (1) the party to be estopped is asserting a position that is 'directly contrary' to a position asserted in a prior case, and (2) that party 'succeeded in convincing the court to accept its prior position.'" *Spinosa v. Tufts*, 98 Mass. App. Ct. 1, 5 (2020), quoting *Otis*, *supra*, at 641. With respect to the second of these elements, it is not enough to show that the party prevailed in the prior proceeding; instead there must be evidence that the prior tribunal adopted the position that allegedly is contrary to the party's position in the current litigation. See *Mullins*, 488 Mass. at 287.

"Application of the equitable principle of judicial estoppel to a particular case is a matter of discretion." *Otis*, 443 Mass. at 639–640. "The Supreme Judicial Court has 'decline[d] to construct a categorical list of requirements or to delineate each and every possible exception.'" *Spinosa*, 98 Mass. App. Ct. at 6, quoting *Otis*, *supra*, at 642. "Instead, judges are to 'use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose' of safeguarding the integrity of the courts. *Spinosa*, *supra*, at 6, quoting *Otis*, *supra* at 642.

The Court declines to estop Dana from asserting that the Dana LOI was and is an enforceable contract. It does so for four reasons.

First, Milanoski and DeWaele do not cite to any Massachusetts case law applying estoppel in a civil action based on allegedly inconsistent statements made before an administrative agency, rather than in a court proceeding. The Court “is not aware of any case in Massachusetts that directly applies the doctrine of judicial estoppel to positions adopted in administrative proceedings,” see *Trustees of Boston College v. Boston Academy of the Sacred Heart, Inc.*, 103 Mass. App. Ct. 83, 93 (2023), though it recognizes that a number of federal courts have done so, see, e.g., *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (collecting cases, and cited in *Boston Academy of the Sacred Heart, supra.*)

Since Milanoski and DeWaele have not provided any substantive argument in support of their position that judicial estoppel can be applied in the circumstances of this case, the Court considers that legal argument to have been waived. Cf. *Halstrom v. Dube*, 481 Mass. 480, 483 n.8 (2019) (argument raised “in a cursory fashion without citation to supporting legal authority” is waived); *Commonwealth v. Johnson*, 470 Mass. 300, 319 (2014) (trial court acted “well within” its discretion in declining to consider unsupported and undeveloped argument). Milanoski and DeWaele have filed a motion seeking summary judgment in their favor as to the enforceability of Dana’s ROFR. In the Superior Court, moving parties are required by rule to file a written memorandum that includes “a statement of reasons, with supporting authorities, why the motion should be granted.” Sup. Ct. Rule 9A(a)(2). Parties therefore waive issues and arguments that they do not raise and develop in their written memoranda.

Second, Milanoski and DeWaele have not shown that the STB adopted the statements in Mr. Dana’s affidavits about Dana Transport’s relationship with GURR.

The Court is troubled that Ron Dana seems to have made sworn statements to the STB that are directly contrary to his assertions in this case, and are directly contrary to the plain meaning of the Dana LOI signed in early 2009. Mr. Dana told the STB that (i) none of the Dana Companies leased the Upton Rail Yard from GURR, and (ii) although the Dana affiliate Grafton Upton Railcare, LLC (“GU Railcare”) provided transloading services for GURR, Dana Transport had no contractual relationship with and did not perform any services for GURR.

But Milanoski and DeWaele have not met their burden of proving that the STB adopted Dana's position about its legal relationship with GURR.

The STB's decision in the matter in which Mr. Dana submitted the affidavits cited by Milanoski and DeWaele make clear that the STB did **not** adopt or in any way rely upon Mr. Dana's representations that no Dana company other than GU Railcare had any contractual relationship with GURR and that Dana never leased the rail yard. The STB held that GU Railcare's was conducting transloading activities at the Upton facility on behalf of GURR, that these activities fell within the statutory definition of "transportation" and were performed under the auspices of a "rail carrier," and that federal law therefore preempted local regulation of those activities. See *Del Grosso*, STB Docket No. FD 35652, 2014 WL 6852990, at *1-*4, slip. at 1-5 (STB Dec. 4, 2014).³ The Board noted that, since "the relevant issue ... is whether *GU Railcare's* transloading activities are part of rail transportation, it would "not address ... alleged activities by *other* companies" (emphasis in original). *Id.* 2014 WL 6852990, at *9, slip op. at 11.⁴

Since the STB did not adopt Mr. Dana's stated positions regarding the legal relationship between GURR and Dana affiliates other than GU Railcare, and instead stated that it did not have to reach the issue, there is no basis for estopping Dana from taking a potentially inconsistent position in these civil actions. See *Mullins*, 488 Mass. at 287.

³ The STB makes its decisions available at its website. See stb.gov/proceedings-actions/decisions/.

⁴ Though the petitioners in that STB proceeding sought judicial review of the Board's determination that the activities at the transloading facility constitute rail "transportation," they did not seek review of the Board's that GU Railcare was acting on behalf of GURR and thus that the transloading activities were being performed by a "rail carrier." See *Del Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 117 & 120 (1st Cir. 2015). The First Circuit held that the Board applied the wrong standard in deciding whether the transloading activities constituted transportation. *Id.* at 118-120. On remand, the STB held that the activities that GU Railcare was undertaking for GURR constitute transportation that is within the Board's statutory jurisdiction, which means that local regulation of those activities was preempted by federal law. *Del Grosso—Petition for Declaratory Order*, FD 35652, slip op. at 11 (STB served July 31, 2017). The First Circuit affirmed. *Del Grosso v. Surface Transp. Bd.*, 898 F.3d 139 (1st Cir. 2018).

Third, Mr. Delli Priscoli's statements to the STB could not estop Dana, even if the doctrine of judicial estoppel applied in these circumstances.

Fourth, even if Milanoski and DeWaele had shown that the doctrine of judicial estoppel would otherwise be applicable, which they have not, the Court would exercise its discretion not to estop Dana from arguing that the 2009 Dana LOI was and is an enforceable contract because it finds that Milanoski and DeWaele make that request with unclean hands.

Since judicial estoppel is an equitable doctrine, a judge may exercise their discretion not to apply it if the party seeking judicial estoppel "comes to the court with unclean hands." *Spinosa v. Tufts*, 98 Mass. App. Ct. 1, 8 (2020), quoting *Galaz v. Katona*, 841 F.3d 316, 326 (5th Cir. 2016). The unclean hands doctrine allows a judge to deny equitable relief to someone who has acted in bad faith or otherwise engaged in unfair or inequitable conduct. See *Thayer Co. v. Binnall*, 326 Mass. 467, 483 (1950); *Murphy v. Wachovia Bank of Delaware*, 88 Mass. App. Ct. 9, 15 (2015). "The question whether to deny relief based on 'unclean hands' is committed to the broad discretion of the trial judge." *Reilly v. Local 589, Amalgamated Transit Union*, 31 Mass. App. Ct. 633, 639 (1991).

The summary judgment record establishes the following, which indicates that Milanoski and DeWaele come to court with unclean hands.

- Delli Priscoli decided to sell GURR in September or October of 2022.
- Milanoski was the President of GURR. DeWaele also worked for GURR. When they learned that Delli Priscoli had decided to sell the company, they asked for an opportunity to buy GURR.
- Milanoski was well aware of Dana's ROFR. When Milanoski began working for GURR in 2017, Stan Gordon (who was GURR's Vice President) emailed a copy of the Dana LOI to Milanoski and specifically noted Dana's ROFR in his summary of the terms of that agreement. Then, in September 2022, Milanoski forwarded that Gordon email from Milanoski's email address at First Colony Development to Milanoski's email address at GURR.
- While the Milanoski and DeWaele were negotiating with Delli Priscoli to buy GURR soon thereafter, Delli Priscoli asked Milanoski about that status of Dana's ROFR in the 2009 Dana LOI.

- Milanoski told Delli Priscoli that Dana's ROFR had been "taken care of" and was no longer valid or enforceable. Milanoski made this representation on behalf of himself and DeWaele.
- Delli Priscoli accepted Milanoski's representation as true, because he knew that as President of the company Milanoski had complete access to GURR's books and records.
- But Milanoski knew his representation that Dana's ROFR had been terminated was **not** true. Milanoski sent an email on December 8, 2022, to his contact at the bank that Milanoski had asked to finance his purchase of GURR that said in part, "We are going to resolve the ROFR with Ron Dana from an old Letter of Intent and get signoff satisfactory to Bank's attorney."
- When Delli Priscoli's attorney reviewed the 2022 Revised LOI with Milanoski and DeWaele, the attorney followed up by asking Milanoski about Dana's ROFR, and telling Milanoski that he would not be able to get a bank loan to finance a purchase of GURR without providing evidence that Dana's ROFR had been terminated. Delli Priscoli's attorney knew that in 2020, when the limited liability company that owns the site of the Upton Rail Yard was seeking a bank loan, Milanoski provided the bank with documentation that included the Dana LOI.
- Milanoski responded by sending a number of documents to the attorney. None of them demonstrated that Dana's ROFR had been terminated. After Dana gave notice that it was exercising its ROFR, Milanoski sent additional documents to the attorney. They did not show that Dana's ROFR had been terminated either.
- Delli Priscoli met with Milanoski and DeWaele, and said he could not sell GURR to them unless Dana agreed to waive or not exercise Dana's ROFR. Milanoski did not respond. DeWaele said, "Well, let us think about it."
- Delli Priscoli's attorney concluded that there was an actual controversy about whether Dana's ROFR was enforceable, and advised Delli Priscoli to file an action seeking a declaratory judgment to resolve the issue. Which he did.

The Court finds and concludes that Milanoski and DeWaele engaged in unfair and inequitable conduct by telling Delli Priscoli that Dana's ROFR had been "taken care of," even though they must have known that Dana was likely to take the position that Dana's ROFR was valid and still enforceable. In essence, Milanoski and DeWaele tricked Delli Priscoli into selling GURR to him and signing the 2022 Restated LOI, without exploring a possible sale to Dana, by giving Delli Priscoli a misleading and knowingly incomplete assurance that Dana's ROFR was no longer valid or enforceable. The Court credits Delli Priscoli's representation, in his legal memorandum, that he would not have agreed to sell GURR to Milanoski and DeWaele if Milanoski had not assured him that Dana's ROFR was no longer valid.

In the exercise of its discretion, the Court concludes that Milanoski and DeWaele have come to court with unclean hands, and that it would therefore be inequitable for them to obtain any advantage in this litigation through application of the equitable doctrine of judicial estoppel.

2.3. GURR Did Not Terminate the Dana LOI. The summary judgment record establishes that, although GURR said it was terminating the Dana LOI in late 2010, GURR and Dana then resolved their differences and thereafter GURR treated the Dana LOI as being in effect.

GURR, its owner Mr. Delli Priscoli, and Dana all agree that, although conflicts arose between GURR and Dana in 2009 and 2010 as their business relationship was developing, and for a time Dana was not making lease payments required by the Dana LOI, they ultimately resolved their disputes. They also agree that the Dana LOI was not terminated, Dana proceeded to invest roughly \$50 million to develop the Upton property based on the terms of the Dana LOI, and GURR continued to carry out its obligations under the Dana LOI. The undisputed factual record supports the parties view that the Dana LOI remained and remains in effect.

It follows that the Dana LOI was and still is enforceable. Where one party commits a material breach of contract, but the other party elects to continue performing, the contract remains in effect and both parties are bound by its terms. See *Kass v. Todd*, 362 Mass. 169, 175-176 (1972). "An injured party may refuse to consider a breach as a material one and elect to keep the contract alive. The contract then continues for the benefit of both parties[.]" *Lander v. Samuel Heller Leather Co.*, 314 Mass. 592, 598 (1943).

During 2010, GURR was getting increasingly concerned that Dana was not implementing and fully complying with the Dana LOI. In September 2010, GURR's Vice President Stan Gordon sent a letter to Dana's attorney complaining that Dana had repeatedly breached the Dana LOI, and taking the position that as a result the Dana LOI was "no longer in effect" and was "null and void." A month later, Gordon sent a letter with the subject line "Notice of Default" and stating that "Dana are hereby formerly [sic] notified of their default under the LOI and that the LOI is hereby formerly [sic] terminated."

But it is undisputed that soon thereafter Mr. Delli Priscoli, Mr. Dana, Mr. Gordon and others met and resolved their issues. Thereafter both GURR and Dana considered the Dana LOI as remaining in effect. Both GURR and Dana continued to invest and work together to develop the Upton property based on that shared understanding. At the end of December 2010, GURR entered into a Terminal Transloading Agreement with GU Railcare, as contemplated in the Dana LOI, and also entered into a Purchase and Sale Agreement for the Upton party with Equipment Care Center of Grafton, LLC ("Equipment Care," another Dana affiliate) consistent with the purchase option contained in the Dana LOI. That is consistent with the undisputed evidence that GURR and Dana had resolved their differences and GURR was no longer terminating the Dana LOI.

When Milanoski began working for GURR in 2017, Gordon sent him an email attaching a copy of the Dana LOI, and describing Dana's ROFR. Gordon did not suggest had been terminated. Instead, it appears that Gordon was providing Milanoski with a copy of a key contract that continued to govern the relationship between GURR and Dana with respect to the Upton property.

In February 2020, an attorney representing GURR drafted an agreement with Dana (never executed) that was intended "to consolidate and supersede" some of the agreements between GURR and Dana or Dana's affiliates. The draft included a provision that would have expressly terminated the Dana LOI from 2009. This confirms that GURR understood that the Dana LOI was still in force. There would be no need to ask Dana to terminate its LOI if GURR had already terminated that agreement years earlier.

It is undisputed that Dana continues to pay monthly rent to GURR for the Upton Rail Yard. GURR's continued acceptance of that rent, and continued performance by allowing Dana to help run the Upton property, establishes that the Dana LOI remains in effect. See *Kass* and *Lander, supra*.

2.4. Subsequent Contracts Did Not Supersede Dana's ROFR. Milanoski and DeWaele also contend that Dana's ROFR was "fully integrated into" and thus eliminated by the subsequent contracts that GURR entered into with GU Railcare and Equipment Care. This argument is without merit.

The Terminal Transloading Agreement between GURR and GU Railcare provides in § 7.D:

This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

Though the term "Parties" is capitalized, it is not defined in the contract. But the only parties to this agreement were GURR and GU Railcare.

The Purchase and Sale Agreement between GURR and Equipment Care provides in the first sentence of ¶ 13:

This Agreement embodies the entire agreement between the parties hereto with respect to the purchase and sale and operation of the Property and supersedes any and all prior negotiations, agreements and understandings, written or formal, all of which are deemed to be merged herein.

Neither of these integration clauses had the effect of eliminating Dana's ROFR from the Dana LOI. By their terms, these clauses only defined the agreements that GURR entered into with GU Railcare and Equipment Care. They did not affect, alter, or limit the prior contract that GURR had entered into with Dana, because Dana was not a party to the transloading agreement or to this P&S. Furthermore, the subject matter of Dana's ROFR was outside the subject matter of the transloading agreement, and did not concern the sale of property to or operation of property by Equipment Care.

If GURR and Dana had intended to terminate Dana's ROFR when GURR executed the transloading agreement and this P&S, they would have had to enter into a new contract or amend the Dana LOI to do so. Dana Transport, Inc., is a "separate and distinct" legal entity; integration clauses defining the contractual rights of its affiliates GU Railcare and Equipment Care did not affect Dana's ROFR. See generally *Scott v. NG US 1, Inc.*, 450 Mass. 766, 766 (2008) (separate corporations or LLCs are generally "regarded as separate and distinct entities," even if there are "relationships between or among them.").

2.5. Dana Exercised Its Right of First Refusal. Dana properly exercised its ROFR after learning that Milanoski and DeWaele had made a bona fide offer to purchase the Upton property, as reflected in the 2022 Restated LOI that Milanoski, DeWaele, and Delli Priscoli executed on or about December 1, 2022. Dana promptly informed Delli Priscoli that it intended to exercise Dana's ROFR. It did so by email on December 28, 2022, and in a follow-up letter to Delli Priscoli's attorney on January 5, 2023.

The assertion by Milanoski and DeWaele and Delli Priscoli and Dana engaged in "collusion" in order torpedo the 2022 Restated LOI is without merit.

GURR had a contractual obligation to inform Dana about the bona fide offer by Milanoski and DeWaele to purchase the property. A right of first refusal is "a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price." *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 442 Mass. 376, 383 (2004). "The owner's obligation under a right of first refusal is to provide the holder of the right seasonable disclosure of the terms of any bona fide third-party offer." *Id.* at 383-384.

And, since Dana's ROFR was valid and enforceable, Dana did nothing improper by exercising that right.

3. Separate and Final Judgment. Though civil action 2384CV00958-BLS2 was previously consolidated with civil actions 2384CV00071-BLS2 and 2384CV02141-BLS2, the Court finds that there is no just reason for delaying the entry of declaratory judgment in Dana's favor on the issues that the Court has now decided regarding the enforceability of Dana's ROFR. It will therefore order that separate and final declaratory judgment shall enter forthwith in civil action 2384CV00958-BLS2. Cf. Mass. R. Civ. P. 54(b).

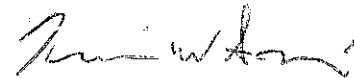
ORDERS

The motion by Dana Rail Care for declaratory relief in civil action 2384CV00958-BLS2 is **allowed**. The motion by Michael Milanoski and John P. DeWaele, III, to enforce their December 2022 letter of intent with Jon Delli Priscoli is **denied**.

The clerk's office shall enter separate and final judgment in civil action 2384CV00958-BLS2, stating as follows:

"This action for declaratory relief came before the Court (Salinger, J.) on cross-motions for summary judgment. Having decided those motions and resolved the controversy among the parties regarding the enforceability of a particular right of first refusal, the Court hereby declares the parties' rights as follows:

- (1) The right of first refusal that Grafton & Upton Railroad Company ("GURR") granted to Dana Rail Care (a trade name used by Dana Transport, Inc.) in a Letter of Intent that these parties entered into on or about January 23, 2009, was and still is an enforceable contract.
- (2) This January 2009 Letter of Intent was not terminated by GURR.
- (3) Under this Letter of Intent, Dana has a right of first refusal to purchase or operate GURR if Jon Delli Priscoli decides to sell or otherwise give up control of GURR. This right of first refusal is valid and enforceable.
- (4) The agreement to Michael Milanoski and John DeWaele to purchase GURR and most of its assets from Mr. Delli Priscoli is a firm offer that triggered Dana's right of first refusal to purchase GURR.
- (5) Dana made a timely and proper exercise of its right of first refusal by giving notice of its intent to purchase GURR soon after Mr. Delli Priscoli agreed to sell that company to Mr. Milanoski and Mr. DeWaele.
- (6) Now that Dana has exercised its legal right to purchase GURR on the terms offered by Mr. Milanoski and Mr. DeWaele, it follows that Mr. Milanoski and Mr. DeWaele may not enforce the December 2022 revised letter of intent in which Mr. Delli Priscoli had agreed to sell GURR to them.



Kenneth W. Salinger

Justice of the Superior Court

9 January 2024

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV00071

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

JON DELLI PRISCOLI

Consolidated with

NO. 2384CV00958

JON DELLI PRISCOLI

vs.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON
& UPTON RAILROAD COMPANY

and

NO. 2384CV02141

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY GROUP, LLC, AND
JON DELLI PRISCOLI

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON GRAFTON & UPTON
RAILROAD COMPANY'S COMPLAINT FOR CONTEMPT AGAINST MICHAEL R.
MILANOSKI AND JOHN P. DEWAELE, III, AND MEMORANDUM AND ORDER ON
MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III'S MOTION TO
RECONSIDER AND GRAFTON & UPTON RAILROAD COMPANY'S MOTION FOR
ATTORNEYS' FEES AND COSTS,**

In this hard-fought case, the Grafton & Upton Railroad Company ("GURR") has filed a
complaint for contempt pursuant to Mass. R. Civ. P. 65.3 against Michael R. Milanoski and John

Notice of
Findings of Fact
& Conclusions of
Law emailed to
Counsel of Record
6/24/24

P. DeWaele, III (collectively, “Defendants”), alleging that they violated this Court’s October 16, 2023 preliminary injunction order (“Order”). GURR also filed a motion for attorney’s fees and costs incurred in obtaining the Order. The Defendants have filed a motion to reconsider the Order.

On April 3, 2024, trial was held on GURR’s complaint for contempt. The Court considered the complaint and the Defendants’ answer, Defendants’ Memorandum Relative to Grafton & Upton Railroad Company’s Complaint for Contempt, GURR’s Motion for Assessment of Legal Fees and Costs against Michael Milanoski and John DeWaele, with a supporting affidavit, as well as the opposition to that motion by Milanoski and DeWaele.

Also on April 3, the Court heard argument on the Defendants’ Motion for Reconsideration of Decision on Motion for Preliminary Injunction filed in November 2023, and considered Defendants’ supporting memorandum and materials, GURR’s opposition to that motion filed in November, GURR’s supplement to its opposition filed in December 2023, and GURR’s Memorandum of Law on Clarification of the Courts October 16, 2023 Preliminary Injunction filed on April 1, 2024.

For the reasons discussed below, the Court concludes that Milanoski and DeWaele intentionally violated paragraph 1 of this Court’s Order, and therefore are **HELD IN CONTEMPT** and **ORDERED** to pay the reasonable attorney’s fees and costs incurred by GURR in bringing the contempt action.

As to the motion for reconsideration, the Court heard the motion primarily to determine whether its Order was overbroad in its analysis and thus erroneous as a matter of law. The Court concludes that it was, but only with respect to a portion of paragraph 2 (a), a provision of the Order not at issue in the contempt proceeding. Accordingly, the motion and the Defendants’

related request to be relieved from their assent to the entry of paragraph 2 are **ALLOWED IN PART**, and paragraph 2 (a) as it applies to Milanoski is amended to excise the phrase “and/or in the possession of the Companies.”

GURR’s motion for attorney’s fees incurred in obtaining the injunction is **ALLOWED IN PART** pending a more detailed breakdown on the fees claimed.

FINDINGS OF FACT¹

A. Overview

The Defendants are plaintiffs in case 2384CV02141. Paragraph 1 of the Court’s Order, issued October 16, 2023 in that case, states:

Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts.

The Defendants received notice of the Order on October 16, and filed an emergency motion for a stay on or about that date, which was denied. Answer, ¶ 3.

Despite receiving the Order, both the Defendants personally and through an LLC they formed to perform work for EPIC, called TransloadX, willfully and intentionally violated the Order by further engaging in business with EPIC related to the transshipment of contaminated soil from the Allston rail yard (hereinafter, “the Project”). Indeed, the work continued unchanged until EPIC terminated its agreement with TransloadX on December 18, 2023 in response to GURR’s threatening EPIC with a lawsuit.

¹ At the outset of the hearing, the parties stipulated to the admission of Exhibits 1 through 24, and the Court accepted Exhibit 25 during the hearing.

B. Detailed Findings

Jean Mongui, an employee of a GURR affiliate, testified. I credit his testimony. Mongui traveled to the Allston site at approximately 11 A.M. on October 18, 2023 with Jon Delli Priscoli, one of the parties in this case, and observed containers being loaded onto railcars using cranes and Milanoski driving a yard truck.

Shaun Keefe, who is not employed by GURR, testified. I credit his testimony. Keefe went to the Allston rail yard on November 29, 2023, and saw containers bearing EPIC logos being loaded onto rail cars using cranes. He asked a crane operator about the work, who referred Keefe to the manager. In the trailer for the manager, Keefe saw both Milanoski and DeWaele. Keefe had known Milanoski from his work with GURR, and knew that DeWaele had formerly served as general manager for GURR. Keefe spoke with Milanoski and DeWaele and learned that they had left GURR, formed their own company, and were involved in loading contaminated soil onto rail cars at the Allston site for transport and disposal. Milanoski gave Keefe his card, which identified him as an employee of TransloadX.

DeWaele testified. As detailed below, I do not credit most of his testimony.

DeWaele testified that, in or about January 2023, while serving as the general manager of GURR, he started his own consulting company (Exhibit 18) to consult in the railroad industry.

Also while serving as general manager of GURR, and in furtherance of GURR's business, DeWaele met with Elliot Pomeranz, Vice President of EPIC, at GURR's Hopedale site on March 2, 2023 to discuss GURR's role in the Project.

On March 6, 2023, again while employed as GURR's general manager, DeWaele reached out to EPIC by email (Exhibit 19) to solicit, on behalf of himself and Milanoski, transloading

services in Massachusetts and Maine. Milanoski was copied on the email. DeWaele signed the email as a representative of his consulting company.

DeWaele resigned from GURR on March 13, 2023. He testified that he was owed money under his employment contract with GURR at the time he resigned and that the failure to pay him was a material breach of his employment contract, which meant he was no longer bound by the non-solicitation and other covenants in it. As was the case when Defendants opposed the preliminary injunction, the Defendants produced no information to support this theory other than DeWaele's own testimony.

On March 17, 2023, four days after he resigned from GURR, DeWaele sent another e-mail to Pomeranz (Exhibit 20), again as a representative of his consulting company, regarding the Project. He copied Milanoski on the e-mail. Among other things, DeWaele noted that he and Milanoski could work with local railroads to fulfill any contract, exactly the role that GURR was in a position to play in the Project.

TransloadX was subsequently formed by the Defendants, who became its sole managers. DeWaele testified that Pomeranz contacted him in April, after TransloadX was formed, seeking the same services as he sought from GURR, but from a different location. The project under discussion in April between DeWaele and Pomerantz was the same project the two discussed earlier, when DeWaele was general manager of GURR.

In August 2023, TransloadX contracted with EPIC (hereinafter, "the August Agreement") to provide personnel and personnel management for Project at the Allston rail yard on behalf of EPIC. Exhibit 21. DeWaele signed the contract as TransloadX's manager. This was TransloadX's first project. To fulfill it, the company, through the Defendants, bought equipment

and hired, trained, and licensed workers. TransloadX began providing services under the August Agreement in September 2023.

The Order was issued on October 16, 2023. DeWaele testified that he understood the Order to only require that he and Milanoski stop working on the Project, and that TransloadX, the entity they ran, could continue to do so. In other words, DeWaele claimed he understood that the Project could continue in the same manner despite the Order, so long as he and Milanoski did not personally perform the work, even though they had not personally performed the work before the Order was entered. This testimony was illogical and incredible. It was unsupported by any objective evidence, and undercut by the Defendants' motion for reconsideration. Simply put, there would have been no need to move to reconsider if DeWaele believed this improperly narrow reading of the Order.

DeWaele also testified that he removed himself from the Project and that he stopped daily operations on behalf of TransloadX. However, the evidence shows that both Defendants continued working on the Project after the Order. DeWaele admitted that after October 16, when the Order was issued, he went to the Allston site with Milanoski and performed work for the Project, and as noted above, Keefe witnessed both at the site on November 29. DeWaele also admitted that, a week after the Order was entered, Milanoski was still running TransloadX.² Several emails, moreover, reflect DeWaele and Milanoski's involvement in the Project on or after October 16. See Exhibits 1-7, 9-16, 19-20 (DeWaele); Exhibits 2, 3, 5, 7, 9, 11-13, 15, 16, 19, 21 (Milanoski). For example, the record contains an email dated October 23, 2023 from

² DeWaele refused to concede that Milanoski continued to work for EPIC at the Allston site. Instead, he claimed that Milanoski was not there every day, and testified that he did not think Milanoski was regularly on site from October to December. This testimony was not credible and even if it were credible, would have been unconvincing. Milanoski's regular appearance at the Allston site was irrelevant to whether he further engaged in any further business for EPIC after the Order was entered.

Milanoski to Pomeranz reporting rail car movements, Exhibit 3, as well as an October 24, 2023 e-mail from “John DeWaele” to Pomeranz and others at EPIC stating that a railcar was ready to be shipped for the second time, “reconfigured” and with “heavier loads.” Exhibit 4.³

Additionally, in an email from Milanoski to EPIC dated November 19, 2023 (Exhibit 13), Milanoski explained that he and DeWaele would “continue to not bill our time” because of the Order, implicitly confirming that both were still working on the Project more than a month after the Order was entered. It is of no moment that DeWaele worked on other business at the site, as he claimed, or that he personally received no compensation, as the Order forbade the Defendants from further engaging in any business with EPIC in connection with the Project. Further, the record contains an invoice sent from milanoski@transloadx.com to EPIC dated October 29, 2023, reflecting work for the week ending October 28, 2023. See Exhibit 6. The Court concludes that Milanoski sent that e-mail.

DeWaele additionally testified that he and Milanoski took steps promptly after the Order was entered to transfer its employees to EPIC. This testimony was not credible, and the documentary evidence shows that this was not true. Although DeWaele testified that he discussed with EPIC winding down TransloadX in October, the December 11, 2023 agreement (“December Agreement”) between EPIC and TransloadX (Exhibit 17), in which they agreed to terminate the August Agreement on December 18, 2023, makes clear that a transfer did not

³ DeWaele testified that multiple people had access to the e-mail address used and refused to concede that he was present at the Allston site that day or sent the e-mail. The underlying claim, that DeWaele was not knowledgeable about and responsible for the content of the emails that bore his name, was not credible. Only one e-mail, a status report sent to EPIC on November 1, 2023 (Exhibit 8), was arguably sent by someone else, and the evidence reflects that Milanoski sent it. DeWaele conceded this email could have been sent by Milanoski, and offered no testimony suggesting that someone else named Michael could have sent the e-mail. The Court infers that Milanoski sent the email. I further note that DeWaele admitted that he had not stopped working for EPIC as of October 24, 2023, the date of the e-mail contained in Exhibit 4.

happen until December 2023.⁴ Moreover, DeWaele admitted that EPIC (not TransloadX, DeWaele or Milanoski) initiated the termination of the August Agreement because GURR threatened EPIC with litigation. The transfer was not the product of any affirmative action by the Defendants, and no evidence shows that the Defendants took prompt and effective steps to come into compliance with the Order. To the contrary, the fact that the Defendants discussed compliance with the Order promptly after its issuance showed that the Defendants understood it and how to comply with it, but chose not to do so for months. Further, the fact that the Defendants took no concrete steps to transfer the business to EPIC until December renders thoroughly incredible DeWaele's assertion that the emails he sent were to keep the Project on a sound footing while it was being transferred to EPIC.

DeWaele additionally claimed that disengaging from EPIC was complicated by the fact that TransloadX had loaded hazardous materials onto railcars and was responsible for them until they arrived at their ultimate destination, a process that requires 30 days or so. But he failed to testify as to whether that responsibility could have been transferred to EPIC or some other entity such that DeWaele could have complied with the Order.

Milanoski testified. As detailed below, I do not credit most of his testimony.

Milanoski, similar to DeWaele, testified that GURR owed him in excess of \$800,000 in wages at the time of his termination in February 2023. He claimed that GURR's chief financial officer confirmed this with its auditor, and that therefore his contract had been breached and he

⁴ Pursuant to the December Agreement, TransloadX agreed that EPIC could hire TransloadX's seven employees currently working at the Allston site, and EPIC agreed that if the injunction was removed, it would revive the August Agreement. The agreement was countersigned by both Milanoski and DeWaele. The signatures were dated December 12, 2023.

was no longer bound by the restrictions in his employment agreement. He, however, provided no further support for the claim that he was owed wages under the contract.

Milanoski also testified that while at GURR, he had no contact with Pomeranz, and that his first contact with Pomeranz was through DeWaele in April 2023, after he was terminated from GURR. He admitted on cross, however, that he was copied on the March 6, 2023 e-mail (Exhibit 19) sent from DeWaele to Pomeranz in which DeWaele told Pomeranz that “we” – the Court infers that “we” refers to DeWaele and Milanoski – wanted to work with EPIC on transloading in Massachusetts and Maine. He also conceded that he saw the March 17, 2023 e-mail from DeWaele to Pomeranz (Exhibit 20), on which he was copied, providing prospective hourly rates and other details for the Project. The email was sent three days before he and DeWaele established TransloadX.

Milanoski claimed he was confused by the language in the Order because it was not clear whether it required him to terminate the contract, especially in light of TransloadX’s environmental responsibility for the contaminated soil while it was in transit. This testimony incredible – as noted above, soon after the Order was issued, Milanoski and DeWaele discussed terminating the contract with EPIC and transferring TransloadX’s employees, showing that they understood the Order. Further, it was also unsupported by the record. For instance, in the memorandum in support of the Defendants’ motion for reconsideration, Defendants’ counsel did not contend that the Order was unclear or confusing. In any event, these claimed issues did not prevent compliance, which he and DeWaele belatedly effected in December, two months after the Order issued, notably at EPIC’s insistence.

Milanoski further testified that there were safety issues in terminating the business immediately and that he began the process of winding down the company when the Order was

issued. This testimony was not credible. The Court finds that the safety issue was the environmental responsibility DeWaele claimed TransloadX bore for the contaminated soil while in transit. Milanoski testified that it took approximately 30 days to dispose of the contaminated soil, and that TransloadX was responsible under the applicable regulations for that soil, but Milanoski did not claim it was impossible to transfer that responsibility elsewhere, such as to EPIC, which presumably occurred after the December Agreement, or explain why this supposed obligation prevented compliance going forward with shipments that were not in transit as of the date of the Order. Moreover, the evidence does not reflect that he began the process of winding down the company when the Order was issued. Milanoski continued going to the Allston site and continued billing EPIC for TransloadX's work, and admitted seeing both Keefe and Mongui at the Allston site. Indeed, after the injunction was issued, Milanoski sent the Order to Pomeranz, agreed with Pomeranz to continue the business of TransloadX at the Allston site as usual, and discussed with Pomeranz EPIC's hiring of TransloadX's staff to continue to work *if* TransloadX could no longer manage them. This makes clear that Milanoski could have complied with the Order but chose to continue to operate TransloadX despite it.

CONCLUSIONS OF LAW

A. Contempt

"[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." In re Birchall, 454 Mass. 837, 853 (2009).

The first question is: was paragraph 1 of the Order clear and unequivocal? The Court concludes that it was.

Paragraph 1 of the Order, issued October 16, 2023, states:

Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement

Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts.

This portion of the Order is clear and unequivocal. Nothing in this record suggests the Defendants failed to comply with paragraph 1 of the Order because of any confusion as to what it meant. Indeed, their motion for reconsideration raised no claim of ambiguity, and in December 2023, the Defendants eventually complied with the Order by transferring its employees to EPIC. Both of the Defendants testified they began discussing the transfer in October as a method to comply with the Order but inexplicably failed or refused to undertake it until prompted by EPIC.

The only potential ambiguity to which the Defendants point is the phrase “engaging in business.” In essence, they argue that because they did not take any compensation for their work on the Project, they were no longer engaging in business with EPIC. This argument fails for at least two reasons.

First, the Defendants’ overly-narrow reading of the Order to limit its application to their personal profit-making makes little sense given the factual context in which the preliminary injunction was sought. The Defendants did not personally contract with EPIC to do any work on the Project in the first place, and instead engaged in business with EPIC through TransloadX, an entity they solely owned and controlled. The Order thus plainly prohibited them from “further” engaging in business with EPIC through TransloadX.

Second, the Defendants’ argument that they could have continued business through TransloadX is meritless as a matter of law. Although expressly directed at the Defendants, TransloadX itself was also subject to the injunction. Under Mass. R. Civ. P. 65(d), an injunction is binding not only upon the parties to the action, but “upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.”

Cf. Bird v. Capital Site Mgmt. Co., 423 Mass. 172, 178–179 (1996) (“A person who was not a party to an action in which an order was entered may in certain circumstances be found to be in contempt of that order. ‘Any person ... though not a party to the cause, who counsels or aids a party in disobeying a decree, is himself punishable.’ Commonwealth v. Hudson, 315 Mass. 335, 347 (1943). ... The concept is reflected in the Massachusetts Rules of Civil Procedure. See Mass. R. Civ. P. 71 ... [and] 65(d)[.]”).

To the extent that the Defendants argue that the Order was unclear because compliance was impossible, that contention is baseless. The Defendants concede that, after the Order was issued, they discussed with EPIC winding down TransloadX’s operations by transferring its employees to EPIC. That is exactly what they did in December, at EPIC’s insistence, not theirs. They inexcusably failed to effect this method of complying with the Order, and failed to take any other steps to comply with the Order, until then. If nothing else, the December Agreement demonstrates plainly that compliance was not impossible.

The second question is: is there clear and convincing evidence of disobedience? There is. The evidence before the Court clearly and convincingly reflects that the Defendants willfully refused to comply in any respect with the Order from October 16, 2023, when it was issued, to December 18, 2023, when the August Agreement was terminated. Instead, the Defendants, personally and through their company, TransloadX, continued to engage in business with EPIC in connection with the Project as per usual, despite the Order. The Defendants’ arguments to detract from this conclusion are meritless.

The Defendants argue that their motion for reconsideration somehow suspended the Order. It did not. First, that motion was immediately denied. Second, they offer no support for the theory that they could ignore a court order because they believed they might eventually be

relieved from complying with it. The law is directly to the contrary. “Even if erroneous, a court order must be obeyed, and until it is reversed by orderly review, it is to be respected. Only where the court lacks jurisdiction to make an order or where an order is transparently invalid on its face may a party ignore a court order and attempt to evade sanctions by litigating the validity of the underlying order.” Mohamad v. Kavlakian, 69 Mass. App. Ct. 261, 264 (2007) (internal citations and quotations omitted). See also, e.g., D.A.C. v. L.M.C., 93 Mass. App. Ct. 1109, 2018 WL 2106863, at *3 (2018) (Rule 1:28 decision) (a party cannot unilaterally ignore an order in the hopes of obtaining other relief).

The Defendants also claim they needed time to comply with the Order. This argument is also meritless. The record in this case shows that the Defendants failed to comply *at all* with the Order until EPIC forced the issue, not that they failed to *promptly* comply. Further, Fortin v. Commissioner of Massachusetts Dep’t of Pub. Welfare, upon which the Defendants rely, does not hold that needing time to comply is a defense; to the contrary, it holds that good faith is not a defense to civil contempt, only impossibility is. 692 F.2d 790, 796 (1st Cir. 1982). Here, as noted above, compliance was not impossible. Even had a short period of time been necessary to transfer operations from TransloadX to EPIC, the evidence shows that the Defendants did not even attempt immediate and prompt compliance.

Since the Court concludes that the predicates for contempt have been established, the third question is: what sanctions are appropriate?

“[T]he purpose of civil contempt is remedial.” Sodones v. Sodones, 366 Mass. 121, 129–130 (1974). While punitive fines are available in criminal contempt convictions, the Court in a civil contempt proceeding is only authorized to impose compensatory fines for the actual loss caused by the contemptible action and attorney’s fees and costs. Town of Manchester v.

Department of Env't Quality Eng'g, 381 Mass. 208, 215 (1980), abrogated on other grounds by In re Birchall, 454 Mass. 837 (2009) (“[A] punitive fine cannot be imposed upon a contemnor in a civil contempt proceeding. Where a fine is imposed in a civil contempt proceeding it must not exceed the actual loss to the complainant caused by the contemnor’s violation of the order in the main case, plus the complainant’s reasonable expenses in enforcing his rights.”) (internal citation omitted); Labor Relations Comm’n. v. Fall River Educators’ Assn., 382 Mass. 465, 475 (1981) (both compensatory and coercive orders are appropriate remedies in civil contempt proceedings). See also Giannetti v. Thomas, 32 Mass. App. Ct. 960, 961 (1992) (“there is no question that counsel fees and costs are allowable in determining a compensatory fine payable to the prevailing party in a civil contempt proceeding”); Demoulas v. Demoulas Super Mkts., 424 Mass. 501, 571 (1997) (“As a matter of law, the awarding of attorney’s fees and costs is an appropriate element of a successful civil contempt proceeding ... This award is proper regardless of whether the court has considered the violation of the underlying order to be wilful, and it is within the court’s discretion to formulate a remedy in a civil contempt proceeding.”).

There is no basis to assess actual losses suffered by GURR other than reasonable attorneys’ fees and costs in bringing the contempt action. The Court will award those reasonable attorneys’ fees and costs.

B. Reconsideration

The Defendants seek reconsideration of both paragraphs 1 and 2 of the Order, two extraordinary requests, particularly given that they assented to the restrictions contained in paragraphs 2 (a) and 2 (b) of the Order at the original hearing on GURR’s motion for the preliminary injunction. As to paragraph 2, they are, in essence, requesting to be relieved from that agreement as to those provisions.

Under the Business Litigation Session's Formal Guidance Regarding Motions to Reconsider ("Formal Guidance"), "[a] motion for reconsideration should only be filed when there has been an intervening change in the law, newly discovered evidence that was not previously available, or a clear error of law." This is consistent with Rule 9D of the Superior Court Rules, which provides that:

A Motion for Reconsideration shall be based on (1) newly discovered evidence that could not be discovered through the exercise of due diligence before the original motion was filed; (2) a change of relevant law; or (3) a particular and demonstrable error in the original ruling or decision. A Motion for Reconsideration shall otherwise raise no new grounds for relief not raised in the original motion or opposition and shall not reiterate previously advanced arguments.

The Formal Guidance is also consistent with case law holding that "[a] motion for reconsideration 'should specify (1) 'changed circumstances' such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision.'" Commonwealth v. Charles, 466 Mass. 63, 84 (2013), quoting Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of America, Inc., 82 Mass. App. Ct. 461, 470 (2012).

The Defendants do not point to newly discovered evidence, but rather seek to present evidence that could have been submitted during the original motion for a preliminary injunction or to re-present unsuccessful arguments they made earlier, such as GURR's alleged breach of their employment agreements, an argument they insufficiently supported. This is improper. They also seek to relitigate the Court's interpretation of the word "account" in their employment agreements. The Defendants point to no new authority supporting its position on this point or any error of law in the Court's interpretation of that word.

The only potential demonstrable error of law the Defendants raise concerns whether the Court's order was overbroad. They argue that the Order improperly enforced the non-compete provisions of their employment agreements, which GURR did not seek, presumably to avoid conflict with the Non-Compete Act, G. L. c. 149, § 24L.⁵ That statute sets forth the minimum requirements for an enforceable "non-competition agreement." See G. L. c. 149, § 24L (b). A "noncompetition agreement" within the scope of the statute includes "an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended." Id. at § 24L (a). It also "include[s] [a] forfeiture for competition agreement[]." Id. However, "(i) covenants not to solicit or hire employees of the employer [and] (ii) covenants not to solicit or transact business with customers, clients, or vendors of the employer" are not considered noncompetition agreements. Id.

The Order, at 11-12, relies on the non-competition language of the employment agreements, not the non-solicitation language. This non-competition language does not meet the minimum standards set out in the statute. The non-competition restriction in Milanoski's contract is overlong – 24 months rather than 12 months. See id. at § 24L (b) (iv). Both employment agreements do not state that the employee has the right to consult with counsel, and there is no mention or no evidence of a 10-day consideration period. See id. at § 24L (b) (ii). The agreements also contain no geographic limit (§ 24L (b) (v)), are not limited to services provided during the last two years of employment (§ 24L (b) (vi)), and include no garden leave

⁵ GURR concedes that it did not and does not seek to enforce any non-competition provisions.

clause (§ 24L (b) (vii)). Therefore, to the extent the Court's analysis relied on enforcing the non-competition language of the agreements, it was in error.

However, paragraph 1 is still valid. The Court had before it, and considered, the non-solicitation provisions, which are exempt from the scope of § 24L (b). See G. L. c. 149, § 24L (a). Moreover, as GURR argues, the evidence shows DeWaele, while still employed by GURR and on behalf of himself and Milanoski, violated these restrictions by soliciting business from EPIC, a former GURR customer, as reflected in the March 6, 2023 email (Exhibit 19). Therefore, paragraph 1 of the Order, which only prohibits the Defendants from continuing business with EPIC, falls within the carve-out to § 24L. Accordingly, the Defendants motion for reconsideration as to this paragraph of the Order is denied.

That leaves paragraph 2. It states:

Until February 10, 2025, for Milanoski, and until March 27, 2024, for DeWaele, Plaintiffs are enjoined from:

- (a) Soliciting or accepting business relating in any manner to competing products or to products, processes, or services from any of the customers or accounts of the Companies and/or in the possession of the Companies. "Competing product" means any product, process, or service (A) which is identical to, substantially the same as, or an adequate substitute for, any product, process, or service of the Companies, in existence or under development, on which Milanoski and/or DeWaele worked during the time of employment with the Companies or about which Milanoski and/or DeWaele acquired confidential information and (B) which is (or could reasonably be anticipated to be) marketed or distributed in such a manner and in such a geographic area as to actually compete with such, product, process or, service of the Companies and/or any of the Companies which they manage; and
- (b) Either directly or indirectly, soliciting or encouraging any employee or independent contractor or business associate of the Companies to end or diminish in any way his or her employment or other relationship with the Companies or any of the Companies they manage, including by contacting GURR employees with job opportunities with TransloadX.

Under the Order, the restrictions against DeWaele expired in March. Thus, as to DeWaele, there is no reason to allow the Defendants' request to be relieved of their assent to these provisions or the motion for reconsideration.

Nor is there any reason to allow this unusual request as to Milanoski with respect to paragraph 2 (b), as "covenants not to solicit or hire employees of the employer" are another type of non-solicitation provision that are exempted from § 24L (b). See G. L. c. 149, § 24L (a)

That leaves paragraph 2 (a) as it applies to Milanoski. The language in that paragraph is based on Section 8(b) of Milanoski's employment agreement in which he agreed to restrictions against soliciting or accepting "business relating in any manner to competing products or to products, processes or services ... from any of the customers or accounts of the Companies and/or in the possession of the Companies" for 24 months following termination of his employment.⁶ As noted above, the statute exempts "covenants not to solicit or transact business with customers, clients, or vendors of the employer." G. L. c. 149, § 24L (a). Accepting business from a customer or account, as reflected in the agreement, is the functional equivalent of transacting business, a restriction allowed under the statute. Thus, the contractual provision is consistent with the statutory carve out if the Court eliminated the phrase "and/or in the possession of the Companies," which arguably applies beyond GURR's customers, as it would prohibit soliciting or accepting business relating in any manner to competing products or to products, processes, or services then in the possession of the Companies. Under the agreements and the statute, the Court has discretion to reform or revise the agreements to render them valid and enforceable to the extent necessary to protect legitimate business interests. See id. at § 24L (d). Were the phrase "and/or in the possession of the Companies" excised, paragraph 2 (a) would

⁶ DeWaele's agreement had similar language.

be valid. The Court thus partially allows the Defendants' request to be relieved of their agreement and their motion for reconsideration, amending paragraph 2 (a) of the Order as it applies to Milanoski to excise the phrase "and/or in the possession of the Companies."

In the agreements, parties agreed the GURR would be entitled to "recover any attorneys' fees and costs incurred in obtaining [injunctive] relief," but that "[o]therwise, in connection with any action to enforce the terms of this Agreement, each party shall bear such parties own costs and expenses including without limitation, attorneys fees related to such enforcement." GURR is thus entitled to reasonable attorney's fees and costs for obtaining the original injunction, and not for the subsequent litigation, such as with respect to the motion to reconsider. See, e.g., Citizens Bank of Massachusetts v. Travers, 69 Mass. App. Ct. 174, 176-177 (2007) (award of attorney's fees expressly permitted under a contract limited to those that are fair and reasonable).

ORDER

For the foregoing reasons, as to the Complaint for Contempt, the Court finds Defendants Michael Milanoski and John DeWaele **IN CONTEMPT**, and **ORDERS** them to pay GURR its reasonable attorneys' fees and costs in bringing the contempt action.

As to the Defendants' Motion for Reconsideration, that motion and related request to be relieved from their assent to entry of paragraph 2 the Order is **ALLOWED IN PART** in that the phrase "and/or in the possession of the Companies" as it applies to Milanoski is excised from paragraph 2 (a) of the Order.

GURR's motion for attorney's fees incurred in obtaining the injunction is **ALLOWED IN PART**.

Ten days from the docketing of this decision, GURR, after compliance with Superior Court Rule 9C, shall serve on the Defendants pursuant to Superior Court Rule 9A a motion and

full support for any claim it seeks to make for reasonable attorney's fees and costs incurred in obtaining the original injunction and/or arising from litigation of the contempt complaint.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Chief Justice of the Superior Court

Dated: June 20, 2024

**MICHAEL R. MILANOSKI
AND JOHN P. DEWAELE, III
Business Civil Litigation**

1) Michael R. Milanoski and John P. DeWaele, III request for relief from signed restrictive covenants while employed by the Grafton & Upton Railroad was denied by Massachusetts Justice of the Superior Court Michael D. Ricciuti. (October 16, 2023)

2. Michael R. Milanoski and John P. DeWaele, III found to have “come to court with unclean hands” by Massachusetts Superior Court Judge Kenneth W. Salinger. (January 9, 2024)

3) Michael R. Milanoski and John P. DeWaele, III found to have “willfully and intentionally violated the Order” and their “testimony was not credible...” by Chief Justice of the Massachusetts Superior Court Michael D. Ricciuti. (June 20, 2024)

4) Michael R. Milanoski and John P. DeWaele, III found to be in contempt of court with attorney fees being awarded to Jon Delli Priscoli by Massachusetts Chief Justice Michael D. Ricciuti. Request for 90 days to pay \$30,741.25 judgement was denied. (October 24, 2024)

5) City of Framingham Massachusetts asks TransloadX to cease operations at the old General Motors rail yard as no permits have been obtained by TransloadX. (December 10, 2025)

February 17, 2026



CITY OF FRAMINGHAM

CITY COUNCIL

o 508-532-5655
f 508-532-5409

w www.framinghamma.gov/CityCouncil

MEMORIAL BUILDING
150 Concord Street
Framingham, MA 01702

December 10, 2025

Dear Solicitor Fallon and Building Commissioner Bray,

I am writing to formally express strong concerns for issues that have arisen at the CSX Central Mass Transloading and Logistics Center at 480 Hollis Street in Framingham, MA. In July of 2024, Mr. Michael Milanoski and John DeWaele of TransloadX appeared before the Council to provide an informational presentation of the operations and services they were to begin at the CSX location.

In the year or so following, the residents and businesses in the area have brought to our attention great concern for strong odors of garbage spreading well beyond the immediate location, as well as an increase in large truck traffic.

The Interstate Commerce Act 1980 governs preemption. Since 1995, the ICCTA now fully governs all rail authority- nothing rests with State or Local Government. However, to be subject to this law and act you must be an existing railroad fully authorized by the Federal Government. Transload X is simply a transload contractor, NOT a railroad.

These are undisputed facts:

1. Transload X is NOT a railroad and can not become a Railroad for the sole purpose of preemption- this would be a Surface Transportation Board (STB) matter and would never be allowed as it would make a mockery of the purpose of the law.
2. CSX owns the land, however, CSX is NOT in control of the site. The site has been leased to Transload X.
3. These employees are NOT CSX employees. They work for a NON-Railroad called Transload X.
4. Transload X is operating with NO Local or State permits whatsoever. They are NOT permitted. They need local permitting. Without City approval, Transload X is in gross violation of the Zoning Laws, and since this activity has been ignored by the City Enforcement Officials, there is nothing stopping anyone else from ignoring City Zoning Laws as Transload X has done.

5. Transload X represented to the State Department of Transportation (DOT) in their IRAP grant that they had all permits and were preempted hence they were awarded a \$700,000 taxpayer grant (free money with little oversight) and the grants were based on misrepresentation and fraud. Once again, they are NOT a Railroad, and this violation is now approaching two years.

6. The Transload X principles, Michael Milanoski and John DeWaele also have recent, very damaging court decisions in the Business Litigation Sessions that states by the Chief Justice of the Superior Court that they both have "unclean hands" and on a related action they were found in contempt of court and were fined and had to pay major damages.

7. The City of Framingham is essentially sponsoring these very unreliable characters who have as the judge pointed out "unclean hands" and state numerous misrepresentations to the State by allowing them to run this business with no permits whatsoever. These two principles of Transload X continue to operate with total disregard for the City. Yet, here they are, even with an unenforced letter from the City, continuing to operate, putting the City and its residents at great risk. It is hard to believe this type of activity is allowed to continue in this day and age.

I look forward to a response from each of you regarding efforts to address this very concerning matter.

Thank you,



Philip R. Ottaviani, Jr.
District 6 Councilor
Chair
(774) 245-1055
pottaviani@framinghamma.gov

CC: Charlie Sisitsky, Mayor

Michael Tusino, COO
City Council

Attachments:

Relevant court cases with insights
Unenforced letters from the City



CITY OF FRAMINGHAM

Office of the City Solicitor

Kathryn Fallon

City Solicitor

Shelly Nicholls

Assistant City Solicitor 2

Bridget Bradley

First Assistant City Solicitor

Jasmine Choate

Office Administrator/Paralegal

MEMORIAL BUILDING

150 Concord Street, Room B2

Framingham, MA 01702

Tel. 508-532-5648

Fax 508-532-5737

June 16, 2025

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

CSX Transportation, Inc.
480 Hollis Street
Framingham, MA 01702

CSX Transportation, Inc.
Attn. Karen Clark
500 Water Street – J180
Jacksonville, FL 32202

RE: Demand to Cease and Desist from Zoning and Nuisance Violations at 480 Hollis Street

Dear Owner(s),

This office represents the City of Framingham ("City"). We have recently been informed by the City's Code Enforcement Officers that CSX Rail Corporation has been improperly leasing the property to third-party companies such as TransloadX and B-P trucking in violation of the City's Zoning Ordinances. The City performed an inspection on March 27, 2025.

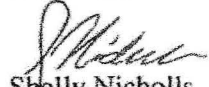
The City sent a citation on March 28, 2025 warning CSX that you were found to be in violation of the City's Zoning Ordinance § 435-7 due to the presence of operating a business for storage of dumpsters on the property. A review of the property shows the unlawful activity has not ceased since that date. Please refer to the City's Ordinances, which are available for review online.

The City's Ordinance § 435-42 states that whoever violates any provision of this chapter shall be liable to a fine of not more than \$300 for each violation and each violation of this chapter shall constitute a separate offense. Each day that any such violation shall continue shall constitute a separate offense. Furthermore, if, after such notice and order, such violation continues, the Building Commissioner may revoke any permit issued for the occupation of the premises, may make complaint to the Superior Court or any court of competent jurisdiction for an injunction or order restraining the further use of the premises, and may take such other action as is necessary to enforce the provisions of this chapter.

Accordingly, you are hereby directed to immediately Cease and Desist from the unlawful use of the land of 480 Hollis Street, Framingham, MA 01702 in violation of the City's Zoning and Nuisance Ordinances.

Please contact the City with any questions, or if you need further information.

Sincerely,



Shelly Nicholls

cc: *via email transmission*
Kathryn Fallon, City Solicitor
Fred Bray, C.B.O
Suellen Seta, Code Enforcement Officer
Joanne Panarelli, Code Enforcement Officer