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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

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DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH,
CHERYL HATCH, KATHLEEN KELLY, ANDREW
WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

**RESPONSE OF GRAFTON & UPTON
RAILROAD COMPANY TO REPLY
OF PETITIONERS**

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Dated: March 9, 2017

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Grafton & Upton Railroad Co. ("G&U") hereby submits this Response to certain portions of the Reply of Petitioners dated January 9, 2017 (the "Reply"). As explained below, the Reply contains arguments and documents that are not responsive to the Reply of G&U dated December 8, 2016, are new or both. As a consequence, the Board should reject or refuse to take into account such arguments and documents. To the extent that the Board accepts these unresponsive or new arguments from the Petitioners, the Board should also accept and consider this Response.

Allowing G&U to file this Response would be entirely consistent with the Board's usual practice of accepting filings in order to provide a complete record. Furthermore, this Response will not delay the ultimate resolution of this matter, which was initiated in August, 2012, decided by the Board in favor of G&U in December, 2014, remanded by the Court of Appeals in October, 2015 and briefed on remand by the parties beginning with the Opening Statement of Petitioners in October, 2016.¹

¹ See City of Woodinville – Petition for Declaratory Order, STB Docket No. FD 35905 (served October 7, 2015), slip op. at 4.

ARGUMENT

The issue in this proceeding is whether the transloading of wood pellets from railcars to trucks, including placing the pellets in bags in order to facilitate the transfer to trucks, constitutes rail transportation. Contrary to the allegation of the Petitioners, there is nothing in the Reply or any earlier pleadings of the Petitioners that establishes that there is manufacturing of pellets taking place at G&U's Upton yard or that disproves that the pellets handled through the Upton yard were fully manufactured at the time they left the manufacturer's facilities prior to the beginning of their rail journey to Upton, as demonstrated by G&U.

I. Documents from the Viridis Bankruptcy are Not Probative.

The Petitioners have submitted documents (Exhibits 1 and 2 of the Reply) from the bankruptcy proceedings of Viridis Merchants, Inc. ("Viridis"), purportedly as "evidence" that Grafton Upton Rail Care, the transloading subcontractor of G&U, has conceded that pellet manufacturing is taking place at the G&U yard in Upton. The Petitioners have made no attempt to demonstrate why the Viridis bankruptcy documents, which are from a wholly unrelated proceeding, are probative or should be accepted as evidence in this matter. More importantly, the conclusion that the Petitioners would have the Board draw from these documents--that G&U believes that pellets are being manufactured at Upton--does not follow, as explained below, from a proper understanding of the documents themselves.

Viridis was a distributor of wood pellets and a customer of G&U prior to Viridis' bankruptcy. Viridis was never a pellet manufacturer; rather, Viridis arranged for the shipment of fully manufactured pellets in bulk form in railcars to Upton for purposes of

transloading the pellets into bags and distributing the pellets in trucks arranged by Viridis. Supplemental Verified Statement of Michael J. Polselli ("Polselli Supplemental VS") at ¶ 4.

The Petitioners, referring to documents filed in the bankruptcy of Viridis, have assumed that references to "raw materials" are to pellets in bulk form and that references to "finished goods" are to pellets that have been bagged. Reply at page 4. Based upon these assumptions, the Petitioners argue that the transloading operations at Upton constitute manufacturing. As explained below, the Petitioners have fundamentally misunderstood the bankruptcy documents and have, as a consequence, incorrectly concluded that G&U manufacturers pellets.

A review of the forms filed by Viridis in order to initiate its bankruptcy proceeding shows that Viridis was required to list its assets in certain categories, including raw materials, work in progress and finished goods. Reply Exhibit 2, page 9. The total of raw materials, work in progress and finished goods is reported in the bankruptcy forms as "inventory". Reply Exhibit 2, page 12. While it is not entirely clear from the bankruptcy forms, Viridis may have referred to unbagged pellets as raw materials and bagged pellets as finished goods. See Reply Exhibit 2, page 15 (describing inventory in railcars, and inventory not in railcars). Even assuming that is the case, it does not indicate, much less compel the conclusion, that pellets are being manufactured at Upton. At most, the information in the bankruptcy forms shows only that Viridis believed that some pellets it had shipped to Upton had already been bagged and some were awaiting bagging.

The bankruptcy documents provided by the Petitioners show that Grafton Upton Rail Care and Dana Transport were attempting to obtain authority from the bankruptcy court to sell their collateral in order to satisfy the Viridis debt. Reply Exhibit 1. The collateral is clearly defined as all of Viridis' "inventory" located at the yard in Upton "whether in bulk or in bags". Certification of Michael Polsell, which is part of Reply Exhibit 1 ("Polselli Certification"), at paragraph 7. Subsequently in the certification, Mr. Polsell refers somewhat inartfully to the collateral as raw materials used to form pellets. Polsell Certification at paragraph 13. As explained by Mr. Polsell in the accompanying Supplemental Verified Statement, he did not mean to imply, and it would be incorrect to say, that the inventory of pellets at Upton consisted of raw materials that would be used to manufacture pellets at Upton. Polsell Supplemental VS at ¶ 7. Rather, the raw materials referred to in paragraph 13 of the Polsell Certification were the fully manufactured pellets, whether they had already been bagged or were still awaiting bagging. In fact, at the time the Polsell Certification was executed and filed in the bankruptcy proceeding all of the pellets constituting Viridis' inventory had been fully manufactured by producers such as Pinnacle and Georgia Biomass, transported to Upton by rail and placed in bags at Upton. Polsell Supplemental VS at ¶ 6.

In sharp contrast to the unverified assumptions and tortured argument relied upon by the Petitioners to attempt to show that raw materials are being manufactured into pellets at Upton, G&U has presented, over the course of the proceedings, sworn testimony from 4 knowledgeable pellet industry witnesses (Messrs. Murray, Middleton, Bassett and Roecker) to the effect that raw materials for pellets consist of fiber and wood chips that are manufactured into pellets prior to shipment in bulk form to Upton.

Whatever distinction Viridis drew in order to categorize its inventory of pellets as raw materials or finished goods for purposes of completing the bankruptcy forms, it is clear that fiber and wood chips are not being shipped to, present ator being manufactured into pellets at Upton. Polselli Supplemental VS at ¶ 7.

II. The Murray Business Plan is Irrelevant.

Reply Exhibit 3 purports to be a business plan for the construction and operation of a pellet manufacturing facility in British Columbia. The business plan is dated 2010 and was apparently prepared by Gordon Murray, who previously submitted a statement in this proceeding to the effect that the manufacture of pellets is complete when they leave the manufacturers' facilities in railcars.

The business plan provides no probative evidence in this proceeding. As a threshold matter, the plan is not authenticated by any witness. Furthermore, as a document that appears to have been created in 2010, the Petitioners could have submitted it as part of their Opening Statement. The business plan and the Petitioners' arguments based on the plan should be rejected by the Board.

Even if the Board takes the business plan into account, it does not support the arguments advanced by the Petitioners. Although Figure 7 on page 20 of the business plan is labeled "Pellet Manufacturing Process", clearly only the section designated "Wood Pelleting Plant" really involves the manufacturing process. Neither the foresting activities nor the production of independent sawmills that generate the fiber and woodchips used for pellet manufacturing are designated in the business plan as being part of the manufacturing process. Moreover, packaging is referred to in the business plan as

being part of the warehouse and delivery (transportation) process. Clearly, the business plan is entirely consistent with Mr. Murray's previous testimony.

III. The Board Should Place No Reliance on Blog Entries.

Reply Exhibit 5 is described by the Petitioners as blog entries posted by Douglas Middleton, who earlier, as an employee of Viridis, provided testimony in these proceedings to the effect that the manufacturing of pellets is complete when the pellets are loaded in railcars and shipped from the manufacturers' facilities. The Petitioners make no attempt to authenticate or provide a context for the blog entries, which are nothing more than random thoughts in cyberspace. On this basis alone, the Board is fully justified in ignoring Exhibit 5 and any argument based upon it as having no probative value in these proceedings.

The Petitioners rely in particular on one blog entry claiming that Dana Transport owns the pellet bagging facility at the G&U yard in Upton. Ownership of the facility is not an issue in these proceedings. The Board determined in its original decision that the pellet bagging facility constituted a G&U transloading operation with Grafton Upton Rail Care as the subcontractor acting under G&U's control. This aspect of the Board's decision was not raised by the Petitioners with the Court of Appeals and is, therefore, final. Even if the Board were to consider the blog entry, however, it is simply not true. As reaffirmed in the Supplemental Verified Statement of Mr. Polselli, neither Dana Transport nor any other Dana company owns the pellet bagging facility. Furthermore, Mr. Middleton does not work or speak for Dana Transport. Polselli Supplemental VS at ¶ 8.

CONCLUSION

For the reasons outlined above, the Board should refuse to take into account the documents and arguments offered by the Petitioners. Alternatively, the Board should accept as part of the record in these proceedings the arguments set forth above and testimony of Mr. Polselli now being offered by G&U. Either way, the record compels a determination that the pellets being shipped to Upton are fully manufactured when they leave the facilities of the manufacturers. The manufacturers do not send wood fiber or chips or other materials used at their plants to manufacture pellets. There are no manufacturing activities that take place at Upton; rather, the only activities involve the transloading of pellets from railcars, placing them in bags and loading the bags on trucks arranged by the distributors that have purchased and taken ownership of the pellets at the plants of the manufacturers.

G&U has demonstrated that the various pellet transloading activities at its yard in Upton--temporary storage, vacuuming, screening, repelletizing, bagging and palletizing the pellets--constitute rail transportation by facilitating the transloading of the pellets between railcars and trucks. Not only do these activities facilitate the physical transfer of the pellets, they are integral to such transfer. The Oxford American Dictionary and Thesaurus defines "integral" as "of a whole or necessary to the completeness of a whole", "forming a whole" or "whole; complete". The various steps in the transloading process, including bagging, are necessary for the completion of the whole process of transportation of pellets from the plants of the manufacturers to the trucks supplied by buyers to move the pellets from Upton.

Respectfully submitted,

GRAFTON & UPTON
RAILROAD COMPANY

/s/James E. Howard

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831-659-4112

Dated: March 9, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Response of Grafton & Upton Railroad Company to Reply of Petitioners and the accompanying Verified Statement to be served by sending copies by e-mail on March 9, 2017 to all parties on the service list.

/s/James E. Howard

James E. Howard

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**SUPPLEMENTAL VERIFIED STATEMENT OF
MICHAEL J. POLSELLI**

1. My name is Michael J. Polselli. I am the Terminal Manager for Grafton Upton Rail Care, LLC ("Grafton Upton Rail Care"), and as such I am responsible for the management and operation of the transloading activities that are performed by Grafton Upton Rail Care for Grafton & Upton Railroad Co. ("G&U") at G&U's rail yard in Upton, Massachusetts. I am also the New England Regional Manager for Dana Transport, Inc. ("Dana Transport"), and I am familiar with the business and operations of Dana Transport.

2. I have reviewed the Reply of Petitioners on remand filed on January 9, 2017 (the "Petitioners Reply") and in particular the Exhibits attached thereto. I previously submitted several verified statements in these proceedings, including a Verified Statement in support of the Reply to the Opening Statement filed by G&U on December 8, 2016.

3. In this Supplemental Verified Statement, I want to provide additional information regarding the bankruptcy proceeding of Viridis Merchants, Inc. ("Viridis")

and in particular the Viridis Chapter 7 petition (Exhibit 2 of Petitioners Reply) and the motion for relief (Exhibit 1 of Petitioners Reply).

4. During most of the period covered by these proceedings, Viridis was the largest shipper of wood pellets at the G&U Upton yard. Viridis was not a manufacturer of pellets. Rather, it was merely a merchandiser / distributor. It purchased wood pellets from manufacturers such as Georgia Biomass and Pinnacle and had them shipped in bulk by rail to Upton. At Upton, Viridis paid to have the pellets bagged and palletized so that they could be loaded onto trucks for distribution and sale by Viridis.

5. Viridis ran into financial difficulties, and eventually filed for Chapter 7 bankruptcy (liquidation) in September, 2016. (See Exhibit 2 of Petitioners Reply.) In completing the bankruptcy filing forms, Viridis described its pellet inventory (as of July 29, 2016) as “raw materials” and “finished goods.” (See Exhibit 2, p. 9 of 40 of Petitioners Reply.) As shown later in the same filing, Viridis apparently used these terms solely to distinguish between the bulk pellets in rail cars (raw) and the pellets that were already bagged (finished). (See Exhibit 2, p. 15 of 40 of Petitioners Reply). I do not know why Viridis chose the terms raw and finished to distinguish between pellets that were still in railcars in bulk form and pellets that had been bagged. By referencing raw materials, however, Viridis was clearly not referring to fiber and wood chips that were going to be manufactured into pellets, because there never has been any fiber or wood chips at Upton, or any manufacturing of pellets at Upton. The only distinction made by Viridis between raw and finished pellets was whether the pellets were bagged and ready for distribution.

6. At the time of the bankruptcy filing in September, 2016, Grafton Upton Rail Care's records indicate that there were only 6,760 tons of pellets in Viridis' inventory remaining at Upton, which was less than the total inventory of 7,303 tons shown by Viridis in its schedules as of July 29, 2016. In fact, as of the date of the bankruptcy filing, all of the Viridis pellets had been bagged; there were no Viridis pellets in bulk in rail cars at Upton.

7. As described in the bankruptcy documents (Exhibit 1 of Petitioners Reply), Grafton Upton Rail Care and Dana Transport were asking for authority to sell their collateral, which is clearly defined as all of the Viridis inventory of pellets located at Upton, whether in bulk or in bags. Certification of Michael Polselli, which is part of Petitioners Exhibit 1 ("Polselli Certification") at paragraph 7. Subsequently, I referred to the collateral not as the inventory of pellets located at Upton but rather as raw materials used to form pellets. Polselli Certification at paragraph 13. This description was not accurate. I did not mean to suggest or imply that the Viridis inventory consisted of raw materials such as wood chips or fiber that were to be used to manufacture pellets at Upton. Rather, as described above, the Viridis inventory at Upton consisted solely of pellets that were already fully manufactured and bagged. Furthermore, there have never been any wood chips or fiber or any pellet manufacturing from wood chips or fiber at Upton. The bankruptcy court ultimately granted the motion and released all of the inventory.

8. I have reviewed Exhibit 5 of the Petitioners Reply, which is described as blog entries posted by Douglas Middleton, who was formerly an employee of Viridis. Mr. Middleton states in one of the blog entries that the pellet bagging facility at the G&U

yard in Upton is owned by Dana Transport. Mr. Middleton does not work for or speak for Dana Transport, and neither Dana Transport nor any other Dana company owns the pellet bagging facility at Upton.

VERIFICATION

I, Michael J. Polselli, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Supplemental Verified Statement.

Executed on March 9th, 2017.


Michael J. Polselli