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April 14, 2023

ENTERED
Office of Proceedings
April 14, 2023
Part of
Public Record

VIA ELECTRONIC FILING

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

Re: STB FD 36696- *Grafton and Upton Railroad Company –Petition for Declaratory Order*

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a request for a declaratory order filed by Grafton and Upton Railroad (“GURR”) and a motion for expedited handling. We respectfully request expedited consideration because the Town of Hopedale, Massachusetts, continues to attempt to impede the development that is underway of a rail transportation facility on GURR’s property, investments are at stake, GURR is actively discussing arrangements with rail customers, and the law governing this case compels a finding that preemption under 49 U.S.C. 10501 applies.

The sum of \$1,400, representing the appropriate fee for this filing, has been tendered electronically via Pay.gov.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

John M. Scheib
Attorney for Grafton
and Upton Railroad Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

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

**MOTION FOR EXPEDITED CONSIDERATION
OF GRAFTON AND UPTON RAILROAD COMPANY**

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Attorneys for Grafton
and Upton Railroad Company

Dated: April 14, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

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

**MOTION FOR EXPEDITED CONSIDERATION
OF GRAFTON AND UPTON RAILROAD COMPANY**

Grafton and Upton Railroad Company ("GURR") hereby petitions the Surface Transportation Board for expedited consideration of its petition for a declaratory order filed, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, simultaneously with this motion (1) to assist timely the Federal court; (2) to resolve the simple question presented that the actions by the Town of Hopedale to condemn railroad property at 364 West Street and by the Hopedale Conservation Commission to impose permitting and preclearance requirements are preempted; and (3) to ensure that GURR does not miss the construction season in Massachusetts to advance this project for the benefit of rail customers.¹

First, expedited consideration is appropriate to assist United States District Court for the District of Massachusetts. GURR filed its petition for a declaratory order because that court ordered GURR “to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town’s proposed taking and the Commission’s

¹ Arguments herein are supported by the Verified Statement of Jon Delli Priscoli submitted with the Petition for a Declaratory Order in this docket.

Enforcement Order.” *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv-40080-ADB (D. Mass. Apr. 3, 2023). The court has retained jurisdiction over the litigation and has stayed the court proceeding pending Board action. An expedited decision on the petition for declaratory order is appropriate and necessary to assist the court and to make clear that the Town’s continued attempts to use state and local law and regulations to stop a legitimate rail project are preempted.

Second, the issue presented is straightforward, there are no factual disputes, and there is ample precedent that makes expedited consideration appropriate. The declaratory order petition seeks a finding that the ongoing efforts permanently to preclude or to otherwise impede construction and operation of a railroad transloading facility are preempted pursuant to 49 U.S.C. § 10501. Specifically preempted are (1) the attempt of the Town of Hopedale, Massachusetts, (“Town” or “Hopedale”) to condemn the real property that is currently owned by and under construction by GURR as a transload facility and (2) efforts by the Hopedale Conservation Commission (“Commission”) to attempt to enforce a cease and desist order that would prohibit GURR from building and operating the facility without preclearance from the Commission.

This is a simple, straightforward case of state and local action being preempted. Indeed, the factual issues have been developed in the Federal court, leaving no factual disputes. GURR is a rail carrier. The Town of Hopedale seeks to condemn 130 critical acres of GURR’s 198 acres on which it is developing a rail transload facility. All 198 acres are essential for the planned development of a rail transportation facility that is under design. The Town’s continuing efforts to thwart the project by condemning GURR’s real property or by imposing preclearance requirements through the Commission are preempted by 49 U.S.C. § 10501(b).

As demonstrated below, the law is clear that a city may not condemn railroad, which action would prevent GURR’s ability to engage in rail transportation. *See e.g., City of Lincoln—Petition for Declaratory Order*, STB Finance Docket No. 34425, 2004 WL 1802302 (Aug. 11, 2004) (“City

of Lincoln"), *aff'd*, *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858, 862 (8th Cir. 2005). Furthermore, a local authority, such as the Commission, may not impose preclearance or permitting requirements that would unduly interfere with rail transportation. *See e.g.*, *City of Auburn v. U.S. Gov't*, 154 F.3d 1025 (9th Cir. 1998). Indeed, the Federal district court found that GURR is likely to succeed on the merits of its claim that the actions by the Town are preempted.

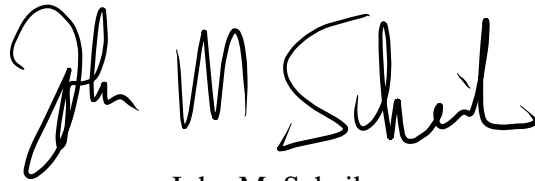
Third, expedited consideration will help GURR bring benefits to rail customers in a timely fashion by fully utilizing the rapidly approaching construction season in Massachusetts. GURR has experienced significant freight rail growth in recent years. For example, since 2008, GURR's year over year growth has averaged between ten and fifteen percent per year, and 2022 was no exception as new customers and increased demand with new products will exceed previous years' growth based on known projected volumes for recently added new customers. GURR anticipates continued steady growth in its business, and this projection is consistent with the expectations and estimates of the Commonwealth of Massachusetts. A 2018 State Rail Plan produced by the Massachusetts Department of Transportation projected that by 2040 the rail system in Massachusetts will need to accommodate approximately 19 million more tons of originating freight per year, 25 million more tons of terminating freight and 34 million more tons of rail freight traffic moving within the State. The plan recognizes that a well utilized rail network has many benefits for the state and its residents, including the reduction of greenhouse gases, less motor vehicle congestion, reduced wear and tear on the highways, travel time savings and economic development. *see* 2018 State Rail Plan *available at* https://www.mass.gov/files/documents/2018/01/26/2018PubComm_1.pdf.

The design and development of this rail transportation facility was well on its way to meeting customer needs before the Town and Commission's attempts in violation of 49 U.S.C. § 10501(b) to thwart it. Substantial progress has already been made by GURR in the development of the property. Approximately 102 acres of trees have been harvested, and the initial grading work

has commenced so that the construction of sidetracks and other rail facilities can begin. Rail ties have been delivered to the site. In addition, site work has been underway that includes water exploration and testing in coordination with governmental agencies, including the U.S. Army Corps of Engineers, as well as planning for wells, water treatment systems, storm waste basins. Delay will be costly to customers who seek to use or benefit from these facilities. In addition, GURR has secured financing that could be jeopardized by undue delay.

In sum, GURR respectfully seeks expedited consideration of its petition for declaratory order in the above captioned proceeding

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" being particularly prominent.

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Attorneys for Grafton
and Upton Railroad Company

Dated: April 14, 2023

CERTIFICATE OF SERVICE

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

DAVID S. MACKEY
ANDERSON KREIGER
50 Milk Street, 21st Floor
Boston, MA 02109
dmackey@andersonkreiger.com
T: 617.621.6531

on this 14th day of April, 2023.

A handwritten signature in black ink that reads "John M. Scheib". The signature is written in a cursive style and is positioned above a horizontal line.

John M. Scheib
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Attorney for Grafton
and Upton Railroad Company