

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

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

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INTRODUCTION

By this Petition, Grafton and Upton Railroad Company (“GU”) requests the Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to the effect that state and local statutes and regulations are preempted pursuant to 49 U.S.C. § 10501 in connection with the efforts of Hopedale Properties LLC (“Properties”) to rely on state and local law to attempt to prevent GU from closing two private grade crossings across the line of GU in the Town of Hopedale, Massachusetts. As explained below, closing of the crossings is necessary in order to prevent unreasonable interference with GU’s existing and future rail operations and to ensure the continued safe operation of rail service by GU. The threat by Properties to use state and local statutes and regulations to attempt to preclude the closing of the crossings is preempted by Section 10501.

FACTS AND RELEVANT BACKGROUND

GU is a Class III rail carrier that has been in continuous operation since its incorporation in 1873. GU owns and operates a 16.5 mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts and Milford, Massachusetts. Over the

last 10 years, GU has invested millions of dollars in order to upgrade its line and to establish transloading facilities at North Grafton and Upton, Massachusetts. At North Grafton, GU operates a facility where liquid propane arrives by rail and is transloaded to trucks for distribution in the Eastern Massachusetts area. GU has also developed a significant transloading operation in Upton, which handles a variety of chemicals and other bulk commodities. In addition, for many years GU has maintained and operated a yard at Hopedale where GU transloads cement, sheet rock and several other commodities. As explained below, the Hopedale yard is being significantly improved in order to handle and increasing volume of rail business there. See accompanying Verified Statement of John P. DeWaele (“DeWaele VS”) at ¶ 2.

GU has experienced significant traffic growth over recent years. In 2010, GU interchanged approximately 200 cars with CSX, and by 2019 the number of cars interchanged was approximately 3000. A steady growth in business is expected to continue into the future. For calendar year 2021, GU anticipates moving 3500 carloads. DeWaele VS at ¶ 3.

A recent acquisition transaction guarantees that GU will move a minimum of an additional 400 carloads per year of new business. CSX and GU have recently entered into a lease and related agreements pursuant to which GU will operate an 8.4 mile CSX line between the terminus of the GU-owned line in Milford and Franklin, Massachusetts, where GU will have a new, second interchange with CSX. See *Grafton and Upton Railroad Company—Acquisition and Operation Exemption—CSX Transportation, Inc.*, Docket No. FD 36444. The traffic over the line leased from CSX will move between the interchange with CSX in Franklin, through Hopedale, Upton and the CSX-GU interchange in North Grafton.

Expansion and upgrading of the track and facilities at the GU yard in Hopedale have been, and are anticipated to continue to be, an important and necessary part of the traffic growth

outlined above. GU has constructed additional yard tracks at Hopedale and has reconfigured other tracks in order to accommodate new business. In addition, GU is in the process of upgrading its main north-south line at the northern end of the Hopedale yard. In particular, GU has focused on the track on either side of a railroad bridge that crosses the Mill River at the point where the yard tracks begin. As described in more detail below, the elevation of the track has been raised in order to meet the level of the bridge, thereby reducing the possibility of damage to equipment and derailments. DeWaele VS at ¶ 4.

As shown in the drawing attached as Exhibit A to the DeWaele Verified Statement, the real estate on either side of the GU track at the location of the bridge is owned by Hopedale Properties (“Properties”). There are private grade crossings, which are less than 100 feet apart, on either side of the bridge. The crossings have not been used for many years, and Properties has blocked the crossings from use by vehicles by means of placing large stone blocks across the roadway. In addition, Properties is the owner of Fitzgerald Drive, which is the name of the private road in which the grade crossings are located, and has closed off any public access to Fitzgerald Drive at its only connection with a public street. Both of the crossings provide access to a property known as 7 Fitzgerald Drive, which has multiple means of access from other public streets, thereby making the two crossings at the bridge superfluous. DeWaele VS at ¶ 4.

The track work at the location of the bridge has necessitated the closure of the two grade crossings. Prior to the work, the track at the north side of the bridge was 1 foot below the level of the bridge, and the track on the south side was 1.5 feet below the bridge level. This created a serious safety hazard, because locomotives are subject to striking the asphalt in the crossings and rail cars were at risk of uncoupling or derailing when approaching and crossing the bridge. The

current project is designed to elevate the track on either side of the bridge in order to create a gradual approach to the bridge that will meet federal safety regulations. DeWaele VS at ¶ 5.

The work on the track on either side of the bridge will address the safety and operating problem, but it will no longer be possible to keep the two grade crossings open. Restoration of the crossings would not conform to modern engineering standards due to the proximity of the crossings to the bridge. Furthermore, GU has recently installed a new siding switch for a customer approximately at the location of the grade crossing on the south side of the bridge. In order to conduct weekly inspections and perform maintenance at the switch, the track cannot be covered by asphalt in order to restore the crossing. DeWaele VS at ¶ 5.

The increased volume of rail traffic into and out of Hopedale yard has necessitated the use of longer trains. This means that there is a likelihood that trains will frequently block grade crossings. In order to avoid or minimize blocking heavily congested public roadways, GU could assemble trains and perform brake tests by blocking the two private grade crossings at the bridge. This would require, however, that a train would be separated into different sections in order to do the brake tests, which would be inefficient and require additional time and personnel. DeWaele VS at ¶ 6.

Applicable federal regulations require that 100 feet of track on either side of the bridge be maintained at a minimum of Class 1 standard. If the crossings were restored, and asphalt for the crossings covered the track and the newly installed switch, it would be impossible to make sure that there are a sufficient number of cross ties in order to meet the Class 1 status. DeWaele VS at ¶ 7.

If the grade crossings remain in place, it would be necessary to stop a train and provide flagging protection at the crossing. In the event that GU is using remote control to operate trains, as is sometimes the case, it would require railroad personnel to walk back and forth from the

yard in order to flag the crossing for each passing train. This would be time-consuming, unproductive and would lead to requirements for additional personnel. DeWaele VS at ¶ 8.

Closing the grade crossings will also eliminate a risk of injury to pedestrians. Local residents frequently use the grade crossings to walk to or from residential areas in Hopedale. More frequent trains at the location of the crossing would pose an increased risk of injury to pedestrians trying to cross the track. DeWaele VS at ¶ 9.

Properties has demanded that GU cease and desist from obstructing the use of the grade crossings. Properties has threatened to seek injunctive or monetary relief in the event that GU does not comply with the cease and desist demand.

ARGUMENT

As demonstrated above, there are compelling operational and safety reasons for closing the two grade crossings in question. The safety of train operations at the location of the crossings and bridge is of paramount concern to GU, both for the protection of pedestrians and GU personnel and to prevent derailments and damage to equipment and cargo. Restoration of the grade crossings is not feasible due to applicable maintenance regulations and, even if it were feasible, would cause avoidable operational problems and extra expense. In short, reopening the crossings would unreasonably burden and interfere with the rail operations of GU. Furthermore, keeping the crossings in existence is unnecessary given the alternative means of access available to Properties.

I. A Declaratory Order is Required to Remove Uncertainty.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. As demonstrated above, there is an actual controversy

between GU and Properties concerning GU's right to close and not to reopen the two grade crossings. The Board should issue the requested declaratory order to remove the uncertainty and to make clear that any effort by Properties to rely on state or local law to keep the grade crossings open is preempted.

II. Preemption Should Be Applied in this Case.

The applicable principles of preemption have been considered by the Board in a number of cases and are now well defined. Reliance on state and local law is preempted if it would have the effect of unreasonably burdening or interfering with rail transportation at the present time or in the future. *See, e.g., The City of Ozark, Arkansas—Petition for Declaratory Order*, Docket No. FD 36104, decision served July 28, 2017, reconsideration denied in a decision served December 8, 2017 (“*Ozark*”), and decisions cited therein. *Ozark* involved facts that are very similar to the situation in Hopedale. In *Ozark*, the city was attempting to compel the rail carrier to reinstall an at grade crossing that had been removed without appropriate authority 15 years earlier. The railroad presented evidence that reinstallation of the crossing would restrict its ability to conduct its then current and future operations, leading to the loss of the use of various facilities and delays and inefficiencies. In addition, the reopening of the grade crossing would have created safety risks for both the public and railroad employees. As a result, the Board concluded that the city's effort to compel reinstallation was preempted.

The facts of the GU line in Hopedale are very similar to the facts in *Ozark*. GU has presented evidence to the effect that reopening the crossings would unreasonably interfere with rail operations and present safety risks. The current level of business and rail traffic at the Hopedale yard are significantly greater than years ago when the grade crossings were initially opened. Furthermore, GU's projections are that business activity will continue to increase. As

the Board has noted. evaluation of the level of interference with rail operations takes into account not only current activities but also future plans and expectations. *Ozark; City of Lincoln—Petition for Declaratory Order*, Docket No. FD 34425, decision served August 12, 2004.

Properties may argue that GU has closed the grade crossings illegally or without proper authority. Even if it were assumed, however, that the crossings have been closed without proper authority, it makes no difference to the applicability of preemption. In *Ozark*, the Board expressly “rejected the notion that preemption hinges on whether the crossing was closed in violation of state law”. *Ozark*, decision on reconsideration at 4. The appropriate inquiry, according to the Board, is whether the action would unreasonably burden or interfere with rail transportation at the present or in the future.

Alternatively, Properties may contend, contrary to any facts or law, that it has a right to compel GU to keep the crossings open by reason of a claim of adverse possession or prescriptive easement pursuant to state law. Even if Properties could establish a claim of adverse possession or prescriptive easement for the crossings, Properties attempt to rely on state law to compel GU to continue to keep the crossings open would be preempted as an unreasonable interference with present and future rail operations. *14500 Limited LLC—Petition for Declaratory Order*, Docket No. FD 35788, decision served June 5, 2014; *Jie Ao and Xin Zhou—Petition for Declaratory Order*, Docket No. FD 35539, decision served June 6, 2012; *Tri-City Railroad Company—Petition for Declaratory Order*, Docket No. FD 35915, decision served September 14, 2016 (attempted condemnation and acquisition of a portion of a railroad right-of-way for an at grade crossing are preempted).

CONCLUSION

As demonstrated above, requiring GU to reopen and maintain the two grade crossings would impose an unreasonable burden on its current and future rail operations. Furthermore, it would create safety risks for both the public and employees of GU. Consequently, there are compelling reasons for the Board to issue a declaratory order to the effect that any attempt by Properties to rely on state or local law require GU to reopen and maintain the crossings is preempted.

Respectfully,

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