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SERVICE DATE – NOVEMBER 3, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Decided: November 3, 2021

On May 13, 2021, Grafton and Upton Railroad Company (Grafton & Upton), a Class III rail carrier, filed a petition for declaratory order asking the Board to find any state or local law that would prevent Grafton & Upton from closing two private grade crossings (the Crossings) across its line in the Town of Hopedale, Mass. (the Line), to be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Grafton & Upton states that it removed the Crossings in connection with certain upgrades it made to its track on either side of a railroad bridge near its yard in Hopedale. (*Id.* at 5.) It argues that restoration of the Crossings would unreasonably interfere with its “existing and future rail operations” and raise safety concerns.¹ (*Id.* at 2.) Therefore, Grafton & Upton submits that any effort by Hopedale Properties, LLC (Hopedale Properties), whose property is bisected by Grafton & Upton’s line, to rely on state and local laws to prevent Grafton & Upton from closing the Crossings should be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Hopedale Properties replied on July 16, 2021, arguing that it holds an easement over Grafton & Upton’s right-of-way that gives it the right to maintain the Crossings that Grafton &

¹ Grafton & Upton states that it maintains and operates the Hopedale yard and is improving it to handle an increased volume of rail business resulting from a recent lease agreement with CSX Transportation, Inc. (CSXT), pursuant to which Grafton & Upton will operate an 8.4-mile section of CSXT’s line. (Pet. 3-4); see also Grafton & Upton R.R.—Acquis. & Operation Exemption—CSX Transp., Inc., FD 36444 (Oct. 14, 2020). Further, Grafton & Upton states that, as part of these improvements, it has focused on improving the Line on either side of the railroad bridge that crosses the Mill River. (Pet. 4.) It represents that it will no longer be possible to keep the Crossings open because of the engineering standards required for track within 100 feet of a railroad bridge. (*Id.* at 5.) Grafton & Upton also states that closing the Crossings will reduce the risk of injury to pedestrians, (*id.* at 6), eliminate the need to provide flagging protection, (*id.* at 5), and allow Grafton & Upton to perform brake tests on its trains without having to separate the trains into different sections. (*Id.*) Because of these operational and safety concerns that Grafton & Upton alleges would result from restoring the Crossings in their previous locations, Grafton & Upton argues that any state action that would require it to restore the Crossings should be preempted by 49 U.S.C. § 10501.

Upton removed. (Hopedale Props. Reply 4.) Hopedale Properties represents that the right-of-way was conveyed to Grafton & Upton by a predecessor to Hopedale Properties subject to the easement. (*Id.* at 2, 4.) Hopedale Properties alleges that, by removing the Crossings, Grafton & Upton violated Hopedale Properties' rights pursuant to that easement.² (*Id.* at 5.) Hopedale Properties argues that the Board should deny the Petition and allow the parties to resolve their property dispute in a related state court proceeding, (*see id.* at 1-2, 8) in which Hopedale Properties and two other entities filed a complaint in Massachusetts Superior Court, Worcester County, seeking, among other things, the restoration of the Crossings. (*See id.*, Ex. A.) In that complaint, Hopedale Properties presented to the court its argument that Grafton & Upton violated Hopedale Properties' rights pursuant to the easement when it removed the Crossings and by refusing to restore them. (*Id.*, Ex. A, at 16-17.)

On July 28, 2021, Grafton & Upton filed a response to Hopedale Properties' Reply, asserting that it was unaware of the easement cited by Hopedale Properties but arguing that, regardless of the easement, the record makes clear that restoration of the Crossings would create an unreasonable burden on rail transportation and, therefore, any state action that would require Grafton & Upton to restore the Crossings should be preempted. (Grafton & Upton Reply 6-7.)

Hopedale Properties filed a sur-reply on September 7, 2021,³ arguing that Grafton & Upton's knowledge of the easement is immaterial to the dispute. (Hopedale Props. Sur-Reply 1-2.) Moreover, Hopedale Properties maintains that Grafton & Upton "has failed to show that it has suffered any interference, let alone substantial impediments, to its operations." (*Id.* at 3.) Hopedale Properties reiterates its request that the Board deny the Petition and allow the state court to decide the parties' dispute in the related state court action.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. *See Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Auth.—Declaratory Ord. Proc.*, 5 I.C.C.2d 675 (1989). For the reasons explained below, this proceeding will be held in abeyance pending resolution of the ongoing state court litigation.

Grafton & Upton seeks a declaration from the Board that any state or local law that would prevent Grafton & Upton from permanently closing the Crossings are preempted by

² According to Hopedale, "the only direct way to access" several of the parcels of its property is by use of the private grade crossing northwest of the Mill River. (Hopedale Props. Reply 3.) And the "only way to access" two other parcels from the rest of the Property is by using the private grade crossing just east of the Mill River. (*Id.*)

³ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted; however, in the interest of a complete record, Grafton & Upton's reply and Hopedale Properties' sur-reply will be accepted into the record. *See City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "[i]n the interest of compiling a full record").

49 U.S.C. § 10501(b). However, resolution of this dispute appears to be contingent upon the interpretation of an easement that Hopedale Properties allegedly has over Grafton & Upton's right-of-way. As the Board has explained, a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes. See, e.g., V&S Ry.—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459 (STB served July 12, 2012) (question about property rights should be decided by the district court applying state property and contract law); Allegheny Valley R.R.—Pet. for Declaratory Ord.—William Fiore, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court). Here, what rights Hopedale Properties has, if any, with regard to the Crossings pursuant to the claimed easement is before the Superior Court of the Commonwealth of Massachusetts, Worcester County. (Hopedale Props. Reply 1.) And the court is the more appropriate forum to decide that issue.

While Hopedale Properties has asked that Grafton & Upton's petition for declaratory order be denied, the proceeding instead will be held in abeyance. Abeyance is appropriate where it would promote efficiency and not be fundamentally unfair to any party. E.g., N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). Abeyance would promote efficiency here because resolution by the state court of the parties' rights under the easement could moot the need for the declaratory order, or, at the least, would inform the preemption analysis.⁴

Abeyance would not be fundamentally unfair to any party here because obtaining answers to the state property law issues and contractual questions would allow a more complete and accurate adjudication of the preemption dispute between the parties. Accordingly, this proceeding will be held in abeyance pending a decision from the state court. To ensure that the Board remains informed regarding the progress of the state court litigation, the parties will be directed to submit any decision by the court regarding the merits of any of the claims in the case (or any other decision relevant to this proceeding) within 5 days of its issuance.

It is ordered:

1. Grafton & Upton's reply and Hopedale Properties' sur-reply are accepted into the record.
2. The proceeding is held in abeyance pending further Board order.
3. The parties are directed to submit any merits decision or any other relevant decision by the court within 5 days of its issuance.

⁴ Furthermore, issues involving federal preemption under § 10501(b) can be decided either by the Board or the courts in the first instance as "both the Board and the courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal—Pet. For Declaratory Ord., FD 35819, slip op. at 4 (STB served Aug. 28, 2014). Given the confluence of issues here—state property law, safety standards, and preemption—the state court may decide to address all of the issues together itself or refer the preemption issue back to the Board.

4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.