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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. FD 36696

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

MOTION TO STRIKE

John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511
scheib@gentrylocke.com

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233 office
617-905-6083 mobile
jim@jehowardlaw.com

Attorneys for Grafton
and Upton Railroad Company

Dated: May 16, 2023

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**GRAFTON AND UPTON RAILROAD COMPANY –
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MOTION TO STRIKE

Grafton and Upton Railroad Company (“GURR”) hereby files this Motion to Strike seeking to strike material related to an alleged “state law property dispute” from the Town of Hopedale, Massachusetts’ (“Town’s”) recent filing because the Surface Transportation Board (“STB”) already has concluded that such arguments are “not relevant to this proceeding.” *Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 at 2 (Decided Apr. 28, 2023) (“STB Decision”). GURR owns the property at issue. As such, the Town’s continued attempt to obfuscate GURR’s ownership rights is irrelevant, a waste of the STB’s resources, and should be struck.

I. Factual Background

On April 14, 2023, GURR followed the direction of the United States District Court for the District of Massachusetts and commenced the instant proceeding. *Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 (“Petition”).

In its request for an extension of time to respond, the Town foreshadowed that it would attempt to muddy the waters with irrelevant information. Specifically, the Town requested a 22-day extension of time to file its reply to the Petition for Declaratory Order that GURR filed at the

direction of the United States District Court for the District of Massachusetts. *Grafton & Upton R.R. Co., et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv- 2 40080-ADB (D. Mass. Apr. 3, 2023) (“Court Decision”).¹ The Town contended that ownership of the property that GURR is developing into rail and rail transload facilities is disputed despite the fact that ownership is not in question. *Motion of Town of Hopedale, Mass. to Extend Time to Respond*, STB FD 36696 (filed Apr. 24, 2023).

GURR responded to that motion by pointing out that ownership was not in question. Opposition Statement of GURR, *Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 (filed Apr. 26, 2023) (“Letter”). Among other points GURR made is the fact that arguments about ownership of the property are inconsistent with the Court’s order directing GURR to file its Petition with the STB “to address questions related to federal preemption that were at issue in pending federal litigation.” The issue of ownership is not in question because the Court also concluded that GURR was entitled to a preliminary injunction enjoining the Town from taking its property (and enforcing the preclearance order from the Town’s Conservation Commission (“Commission”)) after noting that “if Hopedale is not enjoined from recording notice, GURR will quickly be divested of title to the property and therefore unable to continue developing its facility.”² Court Decision at 23-24. The dispute directed to the STB by the Court does not involve any property rights issue; rather, it is solely limited to whether the Town is preempted from taking GURR’s property by eminent domain and from enforcing a preclearance

¹ The Court Decision is provided as Exhibit 2 to the Petition in this proceeding. *Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 at Exhibit 2 (filed Apr. 14, 2023) (“Petition”).

² The Court also found that GURR was likely to succeed on the merits of its preemption argument. Court Decision at 20-23.

order. Letter at 2. Finally, the Town's own actions undermine any alleged uncertainty about ownership of the property because the Town's attempt to take GURR's property by eminent domain would not be necessary if GURR were not the owner of the property. Letter at 3.

On April 28, 2023, the STB issued a decision in which it noted that the Town argues that an extension is warranted because the issues in this case are complex and require understanding of the state property law issues that remain unresolved, as well as the issues related to federal preemption and state condemnation law. The STB rejected any claim that the Town needed an extension due to the complexity of state property law and instead granted only a modest seven-day extension for one reason only –“because counsel for the Town was only recently retained.” STB Decision at 2. In that decision, the STB emphasized that the ownership of GURR's property was not an issue relevant to this proceeding:

The Town claims that it requires additional time to analyze and understand the complexities of unresolved state property law issues present in this case. However, the Board has no authority to resolve state property law issues. Moreover, the District Court's order granting the preliminary injunction states that GU owns the property and its analysis relies on that fact. Grafton & Upton R.R., v. Town of Hopedale, Case No. 4:22-cv-40080-ADB, slip op. at 1, 23-24 (D. Mass. Apr. 3, 2023). ***Accordingly, the alleged state law property dispute relied on by the Town in its motion is not relevant to this proceeding.***

STB Decision at 2 (emphasis added). The STB correctly has narrowed the issues relevant to the instant case, and they do not include irrelevant arguments related to state property law issues. Accordingly, as discussed below, any attempt by the Town to relitigate irrelevant issues should be struck from its recent filing.

I. The STB Should Strike Irrelevant Material From The Town’s Reply

Despite this clear articulation of the STB’s unwillingness to permit obfuscation of the straightforward issues presented in this proceeding, the Town ignored the STB. This act of bad faith by the Town is just another in a long-history of its mistreatment of GURR, which includes among other things holding Town and Commission meetings regarding GURR and the property that the Massachusetts Attorney General’s office have found to violate the state’s open meeting law.³ Such behavior should not be countenanced.

Large portions of the Town’s filing entitled “Reply to Motion for Expedited Consideration” are discussions about the alleged “state law property dispute” that the STB already has found irrelevant. *Reply of the Town of Hopedale, Mass. to Grafton and Upton R.R. Co.—Petition for Dec. Order*, STB FD 36696 (Filed May 11, 2023)(“Reply”). Accordingly, the following portions of the Town’s Reply should be struck because they are “not relevant to this proceeding”:

- Introduction – paragraphs 2 (starting “Under Massachusetts General Laws . . .”) and 3 (starting “Because State law . . .”);
- Legal and Factual Background – sections I through VII, inclusive, in their entirety;
- Reply to Motion for Expedited Consideration – Section I paragraphs 3 (starting “More fundamentally . . .”) and 4 (starting “Second, GURR . . .”); and
- Reply to Petition for Declaratory Order – Sections I and II in their entirety.

Thus, the STB should strike nearly 13 of the 28 pages of the Reply as irrelevant because relitigating purported state property issues wastes the STB’s (and GURR’s) resources.

³ See The Commonwealth of Massachusetts Office of the Attorney General, OML 2023-71 (issued Apr. 25, 2023) and OML 2023-79 (issued May 10, 2023).

The extent to which the Town engages in logical cartwheels to try to claim that GURR is using preemption as a “sword” is Olympian. GURR is not trying to evade anything. Rather, GURR is responding to the Town’s hostile attempt to take GURR’s land by eminent domain. In other words, but for the Town’s ongoing,⁴ eminent domain efforts, there would have been no federal lawsuit and no STB proceeding. GURR is simply asserting its rights as a railroad under federal law in response to the Town’s eminent domain actions. GURR noted in the Petition the years of effort by the Town to violate federal law by placing roadblocks in GURR’s way to provide rail transportation facilities needed to serve rail customers and the public interest.⁵ The Town’s Reply continues to show those colors by ignoring the STB Decision and doing what the STB expressly told the Town not to do – present irrelevant information.

When all the elements of the Reply that are “not relevant to this proceeding” are struck,⁶ it is clear that GURR’s description of this proceeding as straightforward is accurate. GURR’s

⁴ The Town’s Select Board continues to vote every 30 days (including most recently on May 8, 2023) to take the subject property by eminent domain and to record the order of taking of the subject property.

⁵ The Town concedes this point as well, noting that “Mr. Milanoski mentioned a number of new customers that allegedly want access to the line.” That is a point that the Town must concede as the evidence in the record, includes a sample letter from one such customer. See Petition at Exhibit 1, Verified Statement of Jon Delli Priscoli at 23 and Exhibit E thereto).

⁶ Given that the ownership issue is not before the STB, it is not necessary here for GURR to point out all of the material omissions and misstatements in the Town’s Reply, particularly as they relate to chapter 61. The Town has no pending claim to acquire the subject property based on chapter 61. As the Town admits, no state court has found that the Town has a valid, existing claim pursuant to chapter 61. In the unlikely event that the Town succeeds in its second attempt to vacate the judgment dismissing its chapter 61 claim – a claim about which the Land Court stated in November 2020 that it could not “conclude that the Town has met its burden to prove a likelihood of success on the merits” – that claim was to compel GURR to sell the subject property to the Town, not to establish “a finding that GURR does not own the Forestland.” Town’s Reply at 7. This mischaracterization obscures the fact that GURR unequivocally is the owner of the subject property that the Town seeks to take by eminent domain. The Town does not at this time have any chapter 61 rights and if it does establish such rights in the future it would only involve a right of first refusal to acquire GURR’s property under that state statute,

development of its property is clearly activity by a rail carrier (undisputed by the Town) and is for rail facilities, which includes transloading (also undisputed). Moreover, the law is clear that attempts to take railroad property are preempted and the scope of that preemption is not limited to property that “avoid[s] interference with GURR’s *ongoing* transportation activities.” Reply at 21 (emphasis added).

Moreover, the evidence submitted with the Petition clearly shows that, contrary to the Town’s assertions, GURR is not involved in some “hypothetical” or “impractical and unbuildable” rail transportation project. Reply at 20. To the contrary, GURR already has commenced the development of this project including property clearance, the delivery of rail ties, and other material steps. See Petition at Exhibit 1, Verified Statement of Jon Delli Priscoli at paragraph 21 (and Exhibit D thereto). Thus, this is no *Girard*-type case. This case is like the litany of cases cited by GURR in which deciding bodies have found that federal law preempts state and local attempts to take railroad property and to impose preclearance requirements. See *e.g.*, Petition at 11-12.

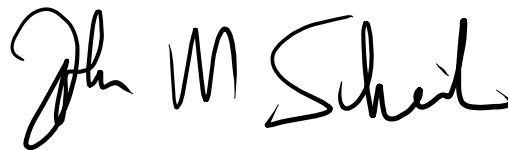
Finally, once the paragraphs listed above are struck from the Reply, the Town is left with little substantive opposition to expedited handling. The Town attempts to describe the delay it has imposed on GURR as no big deal; however, this is factually inaccurate. The Town has delayed this project for years and GURR has suffered substantial costs as a result of this delay including, but not limited to, lost money, lost time, obstruction of service to existing and potential rail customers (see Petition at Exhibit 1, Verified Statement of Jon Delli Priscoli at 23 & Exhibit E thereto), and interference with the public interest in freight rail transportation. As a

which itself would be subject to challenge as preempted by 49 U.S.C. § 10501(b). See *Grafton and Upton R.R. Co. – Petition for Dec. Order*, STB FD 36464 (filed Nov. 22, 2020).

good citizen, GURR “has voluntarily agreed to stay construction” to date, but it also has reserved the right to terminate that agreement after 30-days of notice at any time. See Town’s Reply at Exhibit 5. Accordingly, the Town overreads the importance of this terminable agreement in its attempt to show that this matter is not urgent and should not be expedited. GURR’s sizeable loss of time, money, and construction opportunities, the loss of opportunities for potential and existing rail customers, as well as the straightforward nature of the issue presented, all necessitate expedited consideration.

In short, when the Town’s efforts to obfuscate by ignoring the STB Decision directive not to file irrelevant information are cleared away, this is a straightforward case of the Town violating 49 U.S.C. 10501(b). Accordingly, GURR respectfully requests that the STB strike the irrelevant and immaterial portions of the Town’s Reply.

Respectfully submitted,

A handwritten signature in black ink, reading "John M. Scheib". The signature is fluid and cursive, with the first name "John" and last name "Scheib" being more prominent than the middle initial "M".

John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511
scheib@gentrylocke.com

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233 office
617-905-6083 mobile
jim@jehowardlaw.com

Attorneys for Grafton
and Upton Railroad Company

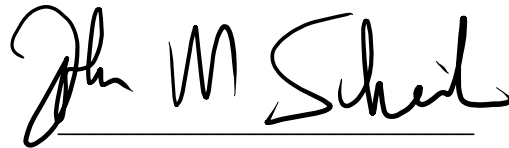
Dated: May 16, 2023

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:

Charles A. Spitulnik (cspitulnik@kaplankirsch.com)
W. Eric Pilsk (eplsk@kaplankirsch.com)
Daniel C. Orlaskey (dorlaskey@kaplankirsch.com)
Kaplan Kirsch & Rockwell LLP
1634 I Street, Suite 300
Washington, DC 20006
(202) 955-5600

on this 16th day of May, 2023.

A handwritten signature in black ink, reading "John M. Scheib", written over a horizontal line.

John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

Attorney for Grafton
and Upton Railroad Company