

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

**REPLY OF GRAFTON AND UPTON RAILROAD
COMPANY TO REPLY OF HOPEDALE PROPERTIES, LLC
TO PETITION FOR DECLARATORY ORDER**

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

Attorney for Grafton and
Upton Railroad Company

Dated: July 28, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

**REPLY OF GRAFTON AND UPTON RAILROAD
COMPANY TO REPLY OF HOPEDALE PROPERTIES, LLC
TO PETITION FOR DECLARATORY ORDER**

On May 13, 2021, Grafton and Upton Railroad Company (“GU”) filed a Petition for Declaratory Order requesting a determination that state and local statutes and regulations are preempted in connection with the efforts of Hopedale Properties, LLC (“Properties”) to rely on such statutes and regulations to attempt to require GU to reopen private grade crossings in the Town of Hopedale, Massachusetts. On July 16, 2021, Properties filed a Reply to the Petition, which included as an attachment a complaint filed on July 14, 2021 in the Superior Court of Worcester County, Massachusetts against GU and several other defendants seeking, among other things, injunctive relief to require GU to restore the crossings. The 23 page complaint was accompanied by numerous documents, drawings and maps that relate to the matters raised in the complaint.

GU acknowledges that the Board’s regulations do not permit the automatic filing of a reply to a reply. The Board has, however, regularly exercised its discretion to waive this regulation in order to accept additional filings to provide a complete record for purposes of deciding the matter at hand. At the time of the filing by GU of the Petition for Declaratory

Order, the threat of litigation by Properties was known, but the full extent of the arguments advanced by Properties was not revealed until the filing of the complaint. Considerations of due process and the opportunity to address all of the issues before the Board support the exercise of discretion by the Board to accept and consider this Reply by GU.

In its complaint, Properties seeks injunctive relief to require GU to restore the private crossings and certain other relief, such as damages, based on various state law theories, such as trespass. Properties attached to its complaint a 1904 deed, of which GU was previously unaware, upon which Properties alleges that its crossing rights are based. GU disagrees with Properties' interpretation of the deed, but more importantly for purposes of the Board's decision there is no need to resolve any disagreement. Even if Properties has certain crossing rights, its claims and remedies based on state law are nonetheless preempted for the reasons set forth in GU's Petition for Declaratory Order and below.

GU will be filing an answer to the Properties' complaint in which GU will deny that Properties is entitled to any of the relief requested. In addition, GU will ask the state court to hold the litigation in abeyance until such time as the Board can issue a decision on the GU Petition. GU will keep the Board advised of the status of proceedings in the state court.

I. Properties Legal Arguments are Not Persuasive.

Properties argues in its Reply that the closing of the crossings does not constitute "transportation", and therefore the Board lacks jurisdiction over the subject matter of the dispute. This argument is unsustainable, ignoring as it does many decisions of the Board recognizing that the maintenance of track, which necessitated the closing of the crossings, is "transportation". For example, in *James Griffin—Petition for Declaratory Order*, Docket No. FD 34997, decision served May 2, 2008, the Board stated that "track maintenance by a rail carrier within its right-of-

way on a line that it operates is necessary to provide rail service over that rail line” and such maintenance “would constitute part of rail transportation by rail carrier”. *See, also, Tri-City Railroad Company—Petition for Declaratory Order*, Docket No. FD 35915, decision served September 14, 2016 (condemnation and acquisition of a portion of the right-of-way for a grade crossing that would bisect both a line of railroad and a siding was preempted as an unreasonable burden on both current and future operations); *Jie Ao and Xin Zhou--Petition for Declaratory Order*, Docket No. FD 35539, decision served June 6, 2012 (state law claims that would directly affect the amount and type of maintenance on a railroad right-of-way are preempted); *Wichita Terminal Association--Petition for Declaratory Order*, Docket No. 35765, decision served June 23, 2015 (forcing a railroad to accept a crossing at a certain location could unreasonably burden interstate commerce). Furthermore, state law claims based on the alleged faulty design, construction or maintenance of a line are preempted if they would unreasonably interfere with rail transportation even when there is damage to the adjacent landowner’s property. *Tubbs v. Surface Transportation Board*, 812 F.3d 1141 (8th Cir. 2015); *CSX Transportation, Inc.--Petition for Declaratory Order*, Docket No. FD 35832, decision served July 31, 2015, and other decisions cited at pages 4-5 of the decision.

Properties has cited several decisions that purportedly support its argument that the track work and closing of the crossings by GU do not come within the scope of “transportation”. As explained below, these cases are distinguishable and do not undermine the conclusion that the maintenance work by GU, including closing the crossings, is part of rail transportation.

Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), stands only for the proposition that the operation of a private distribution facility on rail owned property leased to the non-railroad operator without any railroad involvement does not

constitute transportation provided by a rail carrier. In *Hatcher—Petition for Declaratory Order*, Docket No. FD 35581, decision served September 21, 2012, the salvage of a line by a railroad after a Board authorized abandonment caused damage to an adjacent landowner. Because the line had been abandoned and could no longer be used for transportation purposes, there could be no burden on rail transportation by the state action. The Board went on to state that it was not addressing the railroad’s argument “that any claims regarding design, construction, or maintenance actions taken when [the railroad] had a common carrier obligation over the line are preempted”.

Another decision relied upon by Properties, *Franks Investment Company LLC v. Union Pacific Railroad Company*, 593 F.3d 404 (5th Cir. 2011), does not help Properties. In that case, Union Pacific closed several private grade crossings, and an adjacent landowner brought suit to compel the restoration of the crossings. The court undertook a thorough and scholarly discussion of the law of preemption, including the explicit approval of the Board’s “as applied” test for determining whether reliance on state law should be preempted in order to prevent an undue burden on rail transportation. The court concluded that preemption could not be applied in that case, because, contrary to the record established here, the record in the trial court did not contain evidence that would permit a finding that the crossings created any unusual interference with rail transportation.

Emerson v. Kansas City Southern Railway, 503 F.3d 1126 (10th Cir. 2007), is another decision that is readily distinguishable from the situation of the crossings in Hopedale. In that case, the railroad disposed of old ties generated through maintenance operations and failed to cut vegetation in a drainage ditch adjacent to the rail line. As a result, flooding damaged property of an adjacent landowner. The court held that the acts by the railroad were not “transportation”, so

the principles of express preemption would not apply. The court went on to state, however, that “maintenance is an integral part of running a railroad” and that it was possible that some potential remedies might be preempted, presumably pursuant to an as-applied analysis, if there were a record, which there was not in this case, of unreasonably interfering with rail transportation.

II. The Evidence Presented by GU Shows an Unreasonable Burden on Transportation.

As discussed in the GU Petition and below, the uncontroverted record provided by GU in this matter demonstrates that restoration of the crossings in Hopedale would result in an unreasonable burden on and interference with rail transportation provided by GU. The facts presented in the GU Petition and Mr. DeWaele’s Verified Statement provide a record that demonstrates the urgent need for maintenance to the rail line in the area of the crossings and the closing of the crossings as part of such maintenance. Rather than “vague references” or maintenance actions undertaken by GU “wholly at its own discretion such as running longer trains and installing a switch”, Properties Reply at 7, the actions by GU were based upon safety concerns, operating efficiency and providing rail transportation service in order to meet the needs of its customers.

These maintenance actions, including removal of the crossings, were not “post-hoc attempts to rectify self-created operational hardships”, as argued by Properties. Properties Reply at 8. This contention may be a nice rhetorical flourish, but it ignores the evidence presented by GU concerning the continuing increase in rail traffic on the line, the expansion and upgrading of the track and facilities at the GU yard in Hopedale, which is immediately south of the crossings and, most importantly, the safety hazard created by the previous elevation differences between the line on either side of the bridge and the bridge itself prior to closing the crossings.

The primary reason for closing the crossings was the difference in elevation between the bridge and the track on either side of the bridge. As explained in the Petition and by Mr. DeWaele, the 2.1% downhill grade approaching the bridge from the north and the difference in elevation of the track and the bridge caused locomotives to strike the asphalt in the grade crossings. This, in turn, created the risk of derailments and uncoupling of cars. Elevation of the track on either side of the bridge provides a gradual approach and better alignment of the track for safer movement of trains, but it also means that the crossings could not be kept open. Petition at pages 4-6 and DeWaele Verified Statement at ¶ 5. Closing the crossings and removing the asphalt crossing material also permits GU to more easily perform weekly inspections of the track and ties, including the new switch, in accordance with 49 CFR § 213.4, which requires that the track for 100 feet on each side of the bridge be in Class 1 condition. In response to the evidence presented by GU, Properties has introduced no evidence.

III. Conclusion.

GU has met its burden to demonstrate that preemption should be applied to preclude Properties from pursuing its state court action to compel GU to restore the crossings and for other relief. A decision by the state court sustaining Properties position would result in an unreasonable burden on and interfere with rail transportation that should not be permitted.

Respectfully,

/s/James E. Howard

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

Attorney for Grafton and Upton
Railroad Company

Dated: July 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have as of July 28, 2021 caused a copy of the foregoing “Reply of Grafton and Upton Railroad Company to Reply of Hopedale Properties, LLC to Petition for Declaratory Order” to be served by electronic mail on the following:

David Lurie
Harley Racer
Lurie Friedman LLP
One McKinley Square
Boston, MA 02109
dlurie@luriefriedman.com
hracer@luriefriedman.com

Allison I. Fultz
Kaplan Kirsch & Rockwell LLP
1634 I Street, N.W.
Washington, DC 20006
afultz@kaplankirsch.com