

301307

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings
November 23, 2020
Part of
Public Record

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

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

Attorney for Grafton and
Upton Railroad Company

Dated: November 22, 2020

FILED
November 23, 2020
SURFACE TRANSPORTATION
BOARD

FEE RECEIVED
November 23, 2020
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

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

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 the Town of Hopedale (the “Town” or “Hopedale”) to prevent GU from using its property located in Hopedale for purposes of rail transportation. As explained below, construction of additional tracks and rail transportation facilities is critical in order to support the existing and future operations of GU. Hopedale is attempting to use state and local law in a lawsuit initiated by the Town in state court in Massachusetts not only in order to block such use by GU but also to take the property from GU. This blatant attempt by Hopedale to interfere with rail transportation 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 small yard at Hopedale where GU transloads cement, sheet rock and several other commodities. See accompanying Verified Statement of Michael R. Milanoski (“Milanoski VS”) at ¶¶ 2-3.

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. Milanoski VS at ¶ 4.

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. Milanoski VS at ¶ 5.

The continuous growth in business has led GU to look for property along its right-of-way in order to expand its yard capacity and ability to handle the new business expeditiously. In 2018, GU initiated discussions with the owner of a 155 acre parcel of real estate located at 364

West Street in Hopedale. The property is zoned industrial, bisected by the GU right-of-way and would make an ideal location for a much-needed expansion of GU's existing yard in Hopedale. The property could be used for additional yard and side tracks and for car storage and switching. Such additional property could also be used for transloading facilities, for which there is a demand, equipment maintenance and other activities essential to the functioning and support of rail operations generally. *Milanoski VS* at ¶¶ 6-7.

The negotiations with the owner of the 364 West Street were initially unsuccessful in reaching an agreement. As an alternative means to acquire the property, GU turned to Massachusetts statutes that permit railroads to acquire land for rail transportation purposes. MGL c. 160, § 83 provides in relevant part that if a railroad requires land for any of the purposes specified in MGL c. 160 § 78 and is unable to obtain the property by agreement with the owner, the railroad may apply to the Department of Public Utilities ("DPU"), which after notice and hearing can authorize the taking of the property by the railroad by eminent domain. MGL c. 160 § 78 authorizes a railroad to purchase land that may be "reasonably necessary" for the "proper construction and security" and the "convenient operation" of the railroad, including a variety of specified purposes, such as "one or more new tracks adjacent to other land occupied by it by a track or tracks already in use, and for the purpose of cuttings, embankments, for procuring stone and gravel, and for stations, car houses, round houses, freight houses, yards, docks, wharves, elevators and other structures". *Milanoski VS* at ¶ 8.

The DPU proceeding was initiated by GU on March 15, 2019. A number of interested persons, including the Town, asked the DPU for leave to intervene or to participate in the proceeding. In support of intervention, Hopedale contended that GU had not presented sufficiently specific plans for its use of the 155 acre parcel. The Town also expressed a desire to

maintain town park and trail lands and suggested, without support, that GU's acquisition of the property "may" pose risks to the Town's water supply. Significantly, the Town never contended that GU could not acquire the property and use it for rail transportation purposes or that the Town itself could acquire the property. While the DPU reached decisions in February, 2020 concerning the parties that would be permitted to participate, the DPU has yet to address the merits of GU's petition. *Milanoski VS* at ¶¶ 8-9.

Beginning in 2019 and continuing through October, 2020, GU representatives had numerous conversations with the Town to discuss a public-private partnership pursuant to which Hopedale would forego the exercise of the right of first refusal. For its part, GU indicated a willingness to carve off a portion of the 155 acre parcel and convey it to Hopedale to enable the Town to increase the size of its park land and to pay for infrastructure improvements to the Town's existing park land. GU also offered to take steps to protect well sites in order to address a concern expressed by the Hopedale Water and Sewer Commission. In short, GU made it clear to Hopedale that GU was willing to take steps to mitigate reasonable concerns expressed by Hopedale and that GU recognized its obligation to comply with generally applicable health and safety regulations in connection with its use of the property. *Milanoski VS* at ¶¶ 10-11.

While GU and the Town continued to discuss a public-private partnership, GU and the property owner resumed negotiations in an effort to agree on the terms of a private sale. As of June 27, 2020, the trustee of the realty trust that owned the property entered into an agreement with a realty trust that was indirectly controlled by GU for the purchase and sale of the 155 acre parcel. Because approximately 130 acres of the property was classified as forest land pursuant to MGL c. 61 (the "Chapter 61 Property"), the owner gave notice to Hopedale of the intention to sell the Chapter 61 Property to be used for rail transportation purposes. *Milanoski VS* at ¶ 9.

Chapter 61 is a state tax statute that provides for lower taxation rate for forest land. According to that provision, when land classified under Chapter 61 is converted, or sold with the intent to convert, from forestry use to a different use, the local taxing authority acquires a right of first refusal to purchase the land. While it was not entirely clear whether, in the circumstances presented here, notice to the Town of the transfer of ownership and change in use would be required, the owner provided notice which, if effective, afforded Hopedale a right of first refusal, exercisable within 120 days, to purchase the Chapter 61 Property. The Notice stated that the proposed use of the property was to provide “additional yard and track space in order to support the current and anticipated increase in rail traffic of [GU’s] transloading operations”. On August 19, 2020, the Town advised the owner that, in the view of the Town, the notice was defective. Milanoski VS at ¶ 9.

On October 7, 2020, the trustee of the trust that owned the property advised Hopedale of the withdrawal of the notice of intent to sell the Chapter 61 Property. GU and the trust agreed to transfer ownership of the Chapter 61 Property by means of the beneficiaries of the trust selling their beneficial interest to GU, which was accomplished on October 12, 2020. On October 12, the owner also conveyed by quitclaim deed to GU the 25 acre portion of the property that was not subject to Chapter 61. The owner of GU and the president of GU became the new trustees of the trust that owns the Chapter 61 Property. As a result of these transactions, GU now owns the beneficial interest in the trust, which holds legal title to the Chapter 61 Property, thereby effectively gaining control of the Chapter 61 Property. Milanoski VS at ¶ 12.

By letter dated November 2, 2020, Hopedale advised the trustees of the trust that the Town had decided to exercise the right of first refusal to acquire the Chapter 61 Property while also simultaneously acknowledging that the trust “retains legal title to the [Chapter 61 Property]

at issue”. In addition, the Town’s governing body, the Board of Selectmen, voted in favor of using eminent domain in order to acquire the 25 acre portion of the property owned in fee by GU. *Milanoski VS* at ¶¶ 13-14.

Hopedale has followed up by filing a complaint on October 28, 2020 in the Land Court Department, which is part of the trial court system in Massachusetts, against the trust and GU asking for various forms of declaratory and injunctive relief. Hopedale alleged that it held an option to purchase the Chapter 61 Property and asked the court to prohibit GU from taking any actions or engaging in any activities with respect to the Chapter 61 Property that would convert the use of the property from the Chapter 61 forestry designation. Hopedale has also requested the court to order specific performance requiring GU to convey the Chapter 61 Property to Hopedale.

GU has opposed the Town’s request for such injunctive relief and has urged the state court to allow the Board to decide whether such relief is preempted. The Town’s request for such injunctive relief is scheduled to be heard by the court on November 23, 2020.

ARGUMENT

GU is the owner of the Chapter 61 Property. Such ownership is clear based upon the assignment of the beneficial interest by the prior owner to GU. Hopedale has acknowledged GU’s ownership of the Chapter 61 Property in an amended complaint filed on November 2, 2020: “[GU] now owns the controlling beneficial interest in the Trust, which holds legal title to the Chapter 61 Land” and “the Trust’s assignment of 100% of its beneficial interest to [GU] was equivalent to a transfer of title to the Chapter 61 Land”. Amended Complaint at ¶¶ 31 and 43.

As demonstrated below, the Town’s reliance in the state court proceedings on Chapter 61 should be preempted for two reasons. First, the Town’s efforts to prevent GU from using the

Chapter 61 Property for rail transportation purposes amount to an attempt to impose preclearance or permitting requirements that would deny or unreasonably delay GU's ability to conduct rail transportation operations and, consequently, are categorically preempted. Second, reliance on Chapter 61 and state court proceedings to compel a conveyance of real estate owned by GU is tantamount to an attempted eminent domain taking that cannot be permitted, because it would unreasonably burden and interfere with rail transportation and interstate commerce.

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 Hopedale concerning GU's right to use and continue to own the Chapter 61 Property for rail transportation purposes. The Board should issue the requested declaratory order to remove the uncertainty.

II. This is an Appropriate Case to Apply Preemption.

Since the enactment of the Interstate Commerce Commission Termination Act, the Board and the courts have considered the preemption provisions set forth at Section 10501(b) on many occasions so that the contours of preemption are now well defined. The Board's jurisdiction over "transportation by rail carriers" is exclusive. The threshold inquiry for the application of preemption is whether that "transportation" is being or will be provided by a "rail carrier".

There is no question that GU is a rail carrier that currently provides transportation and will provide transportation services by using the Chapter 61 Property in the manner described above. "Transportation" is broadly defined by statute as including any "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail

regardless of ownership or an agreement concerning use” and “services related to that movement”. 49 U.S.C. § 10102(9). The term “railroad” is also expansively defined as including “a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation”. 49 U.S.C. § 10102(6)(C). The acquisition and use of property for purposes of constructing and operating additional tracks and facilities clearly comes within the meaning of “rail transportation”.

As the Board is well aware, preemption applies equally to rail transportation activities over which the Board has jurisdiction even though it does not exercise direct licensing authority. In particular, preemption applies to the acquisition, construction or operation of facilities, such as yards and sidetracks that are ancillary or adjacent to a rail carrier’s line and therefore do not require Board authorization, by reason of 49 U.S.C. § 10906, for the construction or operation of such facilities. Attempts by state or local authorities to regulate such facilities have been preempted. *Borough of Riverdale—New York, Susquehanna and Western Railway*, 4 S.T.B. 380, 387-88 (1999); *Friends of the Aquifer*, Docket No. FD 33966, decision served August 15, 2001 (“this broad statutory preemption applies to the construction of ancillary facilities under section 10906, even though we lack licensing authority over such projects”); *Grafton & Upton Railroad Company--Petition for Declaratory Order*, Docket No. FD 35779, decision served January 27, 2014 (“*GU 2014 Decision*”) and decisions cited therein.

III. Chapter 61 is Preempted as an Attempt to Impose a Preclearance Condition.

Section 10501 precludes states or local authorities from intruding into matters that are directly regulated by the Board, such as rail services or construction. Section 10501 also prevents the use of state or local law to impose requirements that could be used to deny a rail carrier the ability to conduct rail operations. Consequently state and local permitting or

preclearance regulations are categorically preempted as to any transportation facilities that are integral to the provision of rail transportation. *GU 2014 Decision*; *Green Mountain Railroad v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting requirements were preempted because otherwise the locality could delay the process indefinitely or deny the carrier the right to construct facilities or conduct operations); *Boston and Maine Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order*, Docket No. FD 35749, decision served July 19, 2013 (requirements that by their nature could be used to deny a railroad the ability to conduct rail operations are preempted).

A review of the facts relating to this Petition leads to the conclusion that the attempt by Hopedale to prevent GU from constructing additional tracks and facilities at the Chapter 61 Property is categorically preempted. Clearly, GU is a rail carrier providing transportation services subject to the jurisdiction of the STB. GU intends to use the Land for the construction of sidetracks and additional yard tracks and other facilities in order to meet the increased traffic demands that GU has experienced over the last several years and the growth that is expected in the future. The Chapter 61 Property, the tracks and the other facilities constitute “transportation”. Consequently, GU is a rail carrier providing rail transportation, and the only remaining question is whether the efforts of Hopedale are preempted.

The Board’s discussion and rationale in *GU 2014 Decision* are instructive. In that matter, GU asked the Board to issue a declaratory order to the effect that state and local permitting and preclearance regulations were preempted in connection with GU’s construction of additional yard and storage tracks on a 5 acre parcel of property located in the Town of Grafton, Massachusetts. GU acquired the 5 acre parcel, which is located along the right-of-way, in order to provide additional yard and track space to relieve congestion at the interchange between GU

and CSX in North Grafton. The Town of Grafton threatened to seek injunctive relief in order to block the construction of the new yard, arguing not only that local permitting regulations had not been met but also that the construction and use of the property by GU would pose a risk to the town's water supply.

The Board concluded that the regulations and permitting requirements relied upon by the Town of Grafton were categorically preempted in connection with GU's construction and operation of the yard. The Board acknowledged the town's ability to request information from GU concerning the project, so long as such requests did not unreasonably burden interstate commerce or hold up or defeat GU's right to construct and operate the yard. The Board noted that GU had adequately addressed the town's purported concern about potential impacts on the water supply.

As in the earlier matter involving the Town of Grafton, Hopedale is relying on state and local regulations and litigation in order to prevent GU from constructing and operating new tracks and rail facilities. Consequently, Hopedale's actions are categorically preempted.

IV. The Town's Attempt to Use Eminent Domain is Preempted.

By means of its state court action in reliance on Chapter 61, the Town is trying to acquire title to the Chapter 61 Property from GU. This effort is tantamount to an attempted eminent domain taking, which in these circumstances is preempted. Even more clearly, the threat by Hopedale to take the 25 acre parcel, which is not subject to Chapter 61, by eminent domain is preempted.

The Board and courts have decided numerous cases involving attempts by state or local authorities to acquire or use railroad property by means of eminent domain. While certain takings of railroad property would not be preempted if they did not interfere with or impede rail

operations, attempts by state or local authorities to take rail property for another use that would unreasonably burden or interfere with present or future rail use are preempted. *Union Pacific Railroad Company v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) (a proposed condemnation for a permanent easement over the railroad's right-of-way was preempted); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (the proposed use of eminent domain to acquire a 20 foot strip of railroad right-of-way that had the potential to interfere with the storage of materials moved by the rail was preempted); *Norfolk Southern Railway—Petition for Declaratory Order*, Docket No. FD 35196, decision served March 1, 2010 (attempted condemnation of property that the railroad was not actively using was preempted because the proposed condemnation would unreasonably interfere with the railroad's future plans); *14550 Ltd.--Petition for Declaratory Order*, Docket No. FD 35788, decision served June 5, 2014 (claims of adverse possession and a prescriptive easement were preempted).

In order to determine whether a proposed acquisition of rail property by a state or local authority is preempted, the Board undertakes a fact specific analysis as to whether the proposed condemnation would prevent or unduly interfere with railroad operations or interstate commerce. The analysis takes into account not only the railroad's current use of the property but also future plans for use. *Tri-City Railroad Company--Petition for Declaratory Order*, Docket No. FD 35915, decision served September 14, 2016.

Hopedale acknowledges that GU owns the Chapter 61 Property. In order to block GU's use of the property for rail transportation purposes and to acquire the Chapter 61 Property itself, Hopedale has relied on a right of first refusal provided pursuant to Chapter 61. While Hopedale is not attempting to proceed on the basis of an express eminent domain statute, the intended

effect of exercising a right of first refusal to acquire the property owned by GU is tantamount to an effort to use eminent domain.

As demonstrated above, wresting the Chapter 61 Property and the 25 acre parcel not subject to Chapter 61 from GU's ownership would prevent or unduly interfere with rail operations and unreasonably burden interstate commerce. If deprived of ownership and the right to use these properties, GU will be severely handicapped in its ability to meet the demands of its current and anticipated new customers. This is a classic case for the application of preemption to protect rail transportation that is subject to the exclusive jurisdiction of the Board.

V. This Matter is Ripe for Decision by the Board.

It may be anticipated that Hopedale will oppose this Petition by arguing that there is a state law property issue that should be resolved by the Massachusetts court before the Board considers the merits of the Petition. More specifically, Hopedale may contend that there is some question concerning Chapter 61 or GU's acquisition or ownership of the property that needs to be decided under state law prior to any resolution of the preemption issues.

Any such contention by Hopedale should be summarily rejected. Hopedale has admitted that GU is the owner of the Chapter 61 Property. Indeed, the entire premise of the relief requested by Hopedale in the state court, i.e. reliance on Chapter 61 as the basis for an injunction preventing GU from changing the use of the property and specific performance requiring GU to convey the property to Hopedale, is based on GU's ownership and intended use of the property for rail transportation purposes. Hopedale has acknowledged GU's ownership, and the intended change of use by GU to rail transportation is a matter within the exclusive jurisdiction of the Board. It is not a matter of state property law.

The Board should proceed immediately to address the preemption issues even if there may be some question whether the Town has a valid, enforceable right of first refusal. As demonstrated above, the Town admits that GU owns or controls the Chapter 61 Property, and, as the Board knows, the definition of “transportation” includes property and facilities “regardless of ownership or an agreement concerning use”. There is an existing controversy that should be resolved now by recognizing that preemption prevents Hopedale from attempting to use Chapter 61, whatever the status of any right of first refusal or any other arguments based on state or local law that Hopedale may advance in order to attempt to deny GU the right to use the property for rail transportation purposes. Indeed, given the Town’s approach thus far, further attempts to block GU’s use of the property can be anticipated and should be resolved now by the entry of a declaratory order preempting such attempts.

CONCLUSION

For the reasons outlined above, the attempt by the Town to use state law to prevent GU from constructing and using new transportation facilities on the Chapter 61 Property amounts to an attempt to impose a preapproval requirement that is categorically preempted. Furthermore, the Town’s effort to convert Chapter 61 into an eminent domain statute to take GU property is also preempted as imposing an unreasonable burden on rail transportation. Consequently, the

Board should grant the Petition and enter a declaratory order to the effect that the actions by Hopedale are preempt.

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: November 22, 2020

VERIFICATION

I, Michael R. Milanoski, president of Grafton and Upton Railroad Company, hereby verify under the penalty of perjury that to the best of my knowledge the facts set forth in the foregoing Verified Petition for Declaratory Order are true and correct. Furthermore, I certify that I am qualified and authorized to make such verification on behalf of Grafton and Upton Railroad Company.

Executed this 22nd day of November, 2020.



Michael R. Milanonski

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

**VERIFIED STATEMENT OF
MICHAEL R. MILANONSKI**

1. My name is Michael R. Milanowski, and I am the President of Grafton and Upton Railroad Company ("GU"). I have held this position for the last three years. I am familiar with the Petition for Declaratory Order being filed simultaneously on behalf of GU, and I am also familiar with the business and operations of GU and the matters referred to in the Petition and this Verified Statement.

2. GU was incorporated in 1873 in Massachusetts, and it has been in continuous operation since that time. The line of railroad owned by GU extends for approximately 16.5 miles between a connection at North Grafton, Massachusetts with the CSX mainline through Massachusetts and Milford, Massachusetts.

3. Over the last 10 years, GU has invested a substantial amount of capital in order to rehabilitate and upgrade its line. In addition, GU has been very active in promoting and growing its transloading business. There is a substantial demand for transloading services for commodities that can be shipped to Eastern Massachusetts by rail and transloaded into trucks for final delivery. GU has built a transload facility in Upton that handles a variety of chemicals and

other bulk commodities. In addition, GU has built and operates a facility in North Grafton for the delivery of liquid propane by rail and transloading the propane to trucks for distribution. GU also has a small yard in Hopedale, Massachusetts that can handle the transloading of cement, sheet rock and other commodities.

4. As a result of GU's investment and the demand for transloading services, GU's business has grown significantly. In 2010, GU interchanged approximately 200 cars with CSX in North Grafton, and by 2019 the number of carloads interchanged had grown to approximately 3000. Continued steady growth is expected in the future, and the projections for 2021 indicate that the number of carloads will be approximately 3500.

5. GU has recently entered into an STB authorized transaction with CSX pursuant to which GU will lease and operate an 8.4 mile CSX line between the terminus of the line owned by GU in Milford and Franklin, Massachusetts, where GU will have a second interchange with CSX. Rail traffic will be received from CSX in Franklin and moved over the newly leased line and the existing GU line to the CSX-GU interchange in North Grafton. This transaction is expected to produce a minimum of an additional 400 new carloads annually of traffic moving over the GU line.

6. The continuous increase in business has required GU to identify parcels of real estate located along the right-of-way in order to expand its facilities. In addition to the expansion of the yards in North Grafton and Upton, GU acquired a five-acre parcel of real estate in North Grafton in order to build additional yard tracks. Even with this expansion, GU has continued to have a pressing need for additional yard space for tracks and facilities.

7. Beginning in 2018, GU entered into discussions with the owner of a 155 acre parcel of real estate located at 364 West Street in Hopedale (the "Town" or "Hopedale"). The property is

zoned industrial, bisected by the GU right-of-way and would make an ideal location in order to expand GU's existing small yard in Hopedale as well as to accommodate additional business, such as the new traffic that will be generated by the lease from CSX of the CSX line Milford and Franklin. The property could be used to build additional yard and sidetracks to be used for switching and car storage. The property could also be used for additional transloading facilities, equipment maintenance and other activities essential to the functioning and support of rail operations generally.

8. Discussions with the owner of the property at 364 West Street did not initially result in an agreement. As an alternative means to acquire the property, GU filed a petition in March, 2019 with the Massachusetts Department of Public Utilities ("DPU") asking for authorization to acquire the property by eminent domain. Massachusetts law permits the DPU to enable railroads that are unable to obtain needed property by private agreement to acquire land that may be reasonably necessary for the proper and convenient operation of the railroad, including the construction of tracks and facilities. The Town intervened in the DPU proceedings and contended that GU had not presented sufficiently detailed plans of its rail transportation use of the property and that it had some concern about the potential effect of rail use on the Town's water supply. Hopedale never suggested in the DPU proceedings that there was any theory by which GU could be prevented from acquiring and using the property for rail transportation purposes.

9. By the summer of 2020, the DPU proceedings had not made any substantive progress due in part to the impact of the coronavirus pandemic. GU and the owner of 364 West Street resumed their discussions concerning a purchase and sale of the property. As of June 27, 2020, the owner of the property, which was a trust, agreed to sell the property to a trust that was

controlled by Jon Delli Priscoli, the sole owner of GU. Approximately 130 acres of the property had been classified as forest land pursuant to Chapter 61 of the Massachusetts statutes (the “Chapter 61 Property”), which provides that the owner should give notice to the Town of the intention to sell the property and convert its use to something other than forestry. The owner gave such notice to the Town, which then had 120 days to exercise a right of first refusal to acquire the Chapter 61 Property. The notice also indicated that the sale would involve a change of use of the property from forestry to rail transportation. Hopedale responded by advising the owner that the notice was defective.

10. Beginning in 2019 and continuing through October, 2020, I engaged in numerous discussions with the two members of the Hopedale Board of Selectmen, the governing body for the Town. We discussed a public-private partnership pursuant to which Hopedale would not exercise any right of first refusal and GU would take various steps to satisfy goals of the Selectmen. Specifically, GU indicated a willingness to convey a portion of the property to Hopedale in order to enable the Town to increase its park land and to pay for infrastructure improvements to the Town’s existing park land. GU also agreed to take steps to protect well sites in order to address a concern expressed by the Hopedale Water and Sewer Commission.

11. As the Board is aware, GU has been a party to several proceedings before the Board in which the Board has determined that preemption would preclude actions based on state or local regulations that would interfere with or prevent GU’s ability to provide rail transportation. As result of these proceedings, GU is acutely aware of its obligation to comply with reasonable health and safety regulations in connection with projects that have been preempted. GU has made it clear to Hopedale that GU will construct and operate facilities on the 155 acre parcel in compliance with such health and safety regulations and that GU will take reasonable steps, as it

has in Upton and North Grafton, to mitigate concerns expressed by the Town. By the end of September, 2020, however, Hopedale had not agreed to any public-private partnership and had not waived or attempted to exercise any right of first refusal.

12. In light of the absence of progress in the DPU proceedings and the inability to reach any agreement with the Town, GU and the owner of the 155 acre parcel reached an agreement for the purchase and sale of the property. On October 7, 2020, the owner advised Hopedale that it was withdrawing the earlier notice of intent to sell the Chapter 61 Property, which the Town had earlier considered to be ineffective. On October 12, 2020, the owner of the property conveyed the fee interest in the 25 acre portion directly to GU by quitclaim deed. In addition, the owner of 100% of the beneficial interest of the trust assigned the entire beneficial interest in the Chapter 61 Property to GU. In connection with these transactions, Mr. Delli Priscoli and I became the trustees of the trust that owns the Chapter 61 Property. As a result, GU now controls the Chapter 61 Property.

13. On October 28, 2020, the Town filed a complaint in the Land Court Department of the trial court in Massachusetts asking for declaratory and injunctive relief that would, if granted, prevent GU from using the Chapter 61 Property for rail purposes and also required GU to convey the property to Hopedale. As of November 2, 2020, the Town gave notice that it was attempting to exercise a right to purchase the Chapter 61 Property. GU has opposed Hopedale's requested relief and has urged the trial court to allow the Board to decide the preemption question before trying to resolve the issues raised by the Town's complaint. A hearing is scheduled for November 23, 2020.

14. On October 30, 2020 the Selectmen of Hopedale voted to attempt to acquire, by eminent domain, the 25 acre parcel that is owned in fee by GU and not subject to Chapter 61.

There is no apparent basis for Hopedale to seize what is clearly property owned by GU and intended to be used for rail transportation purposes.

15. The inability to use the 155 acre property, including the Chapter 61 Property, for rail transportation purposes would severely hamper GU's ability to meet the demands of rail customers and to continue to provide efficient service. As described above, GU has a critical need to expand its track and rail facilities and the property in Hopedale appears to be the only location along the GU right-of-way that would meet GU's needs. GU remains committed to conducting the construction and operation on the property in accordance with relevant and reasonable health and safety regulations, and GU continues to be hopeful that the Town will decide to resume conversations concerning a public-private partnership.

VERIFICATION

I, Michael R. Milanoski, president of Grafton and Upton Railroad Company, verify under penalty of perjury that the facts set forth in the foregoing Verified Statement are true and correct. Furthermore, I certify that I am qualified and authorized to verify the foregoing document and cause it to be filed.

Executed on November 22, 2020



Michael R. Milanoski