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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS
TO MOTION TO STRIKE**

ENTERED
Office of Proceedings
May 18, 2023
Part of
Public Record

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Dated: May 18, 2023

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Less than an hour before filing its Motion to Strike, the Grafton and Upton Railroad (“GURR”) was before a judge of the Massachusetts Land Court, in a case involving whether the Town of Hopedale is the true owner of 130.18 acres of protected forest land at issue in this case (the “Forestland”). GURR and Hopedale were there, along with a group of Hopedale residents supporting Hopedale’s efforts, because the Massachusetts Appeals Court remanded the case for further consideration by the Land Court. In the same decision, the Appeals Court affirmed a Superior Court judge who found, in part, that GURR had acted in “flagrant violation” of state law in obtaining control of the Forestland and that Hopedale could continue to enforce its statutory rights to obtain the Forestland. Hopedale is actively asserting these state law property rights.

GURR argues that none of this is relevant. Not only that, GURR argues that Hopedale cannot even mention these proceedings to the Board. But if Hopedale is successful in the state court property dispute, GURR will not own the property at all and therefore cannot claim that the Interstate Commerce Commission Termination Act (“ICCTA”) preemption even applies in this case. And if this Board were to issue an order about preemption of eminent domain, it would be an unnecessary use of resources if Hopedale owns the property without having to use its eminent domain powers.

Nothing in the Board's April 28, 2023 Order partially granting the Town of Hopedale's Request for an Extension of Time to Respond ("Decision") prevents Hopedale from presenting this Board with the facts that relate directly to the relief requested by GURR in this proceeding. To the contrary, as Hopedale's May 11, 2023 Response to Petition for Declaratory Order ("Response") makes clear, the existence of a dispute under state law over ownership of property is not only relevant in a Board proceeding, but such a dispute suggests that there may be no dispute at all for the Board to address, thus requiring the Board to refrain from deciding a preemption dispute until the underlying property dispute is resolved. Moreover, Hopedale does not ask the Board to resolve the state property law issue; only to defer addressing GURR's preemption claim until the state court resolves the issue. Obviously, it is relevant and necessary that Hopedale describe those proceedings so the Board has the full facts on which to make a decision. GURR's Motion to Strike is baseless and should be denied.

ARGUMENT

GURR claims that the Board's decision on Hopedale's Request for Extension somehow prevents Hopedale from being able to even mention the state law property issues in this case. Not so. The Board merely decided that Hopedale did not need as much time as requested because the Board "has no authority to resolve state property law issues." Decision at 2. It did not preclude any discussion of an ongoing litigation in state court over ownership of the Forestland.

Hopedale is not asking, and has never asked, the Board to resolve the state law property issues. Hopedale is asking the Board to defer addressing preemption issues until the state courts decide whether GURR owns the property in the first place. The Board has repeatedly recognized that ownership is a threshold issue in preemption cases, and that those issues need to be determined in state court first. Response at 18. Hopedale's position is simply that the Board should follow its

precedent and either dismiss or stay this proceeding pending the outcome of the active state court proceeding, the very existence of which GURR wants this Board to ignore.

In an attempt to downplay the significance of the ongoing state court action, GURR refers to the state court action as “an **alleged** state law property dispute” (emphasis added). Motion at 5. However, there is nothing “alleged” about it. There is, in fact, a case before the Massachusetts Land Court, *Town of Hopedale v. Grafton & Upton Railroad Co.*, Case No. 20 Misc. 000467 (DRR), on remand from the Massachusetts Appeals Court in *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367 (2023), in which GURR is an active participant and which will determine which party, GURR or Hopedale, owns the Forestland. See Response at 13. The Massachusetts Appeals Court affirmed the Superior Court decision that GURR obtained control of the Forestland through a “flagrant violation” of state law and Hopedale has filed multiple motions in the Land Court to gain its rightful ownership of the property. Determining which party actually and *legally* owns the land in question is a threshold issue in any argument claiming preemption under ICCTA and it is certainly relevant for the Board to know who owns the land and to know about ongoing litigation regarding ownership of the land.

Similarly, GURR misrepresents Hopedale’s exercise of its eminent domain authority as a tacit admission that GURR owns the Forestland, in a further attempt to minimize the effect of the state court proceedings. This is also not true. GURR does not, and cannot, point to any legal support for this argument; Hopedale pursued an alternative method to seek ownership, which operates in parallel to its attempts to enforce its statutory right to the property through the pending state court litigation. As Hopedale explained in its Response, it filed the eminent domain action when it appeared that it could not get relief in state court based on Massachusetts General Law Chapter 61 (“Chapter 61”). If Hopedale is successful in vindicating its Chapter 61 rights, its

eminent domain action, and therefore GURR's preemption petition, would, as GURR admits, "not be necessary" because it would be settled as a matter of state law that GURR does not own the property. Motion at 4.

GURR wants desperately for the Board to view this as a "straightforward" preemption case, invoking the District Court's decision directing GURR to file its Petition for Declaratory Order with the STB "to address questions related to federal preemption that were at issue in pending federal litigation." Motion at 3. The District Court did not discuss the ongoing state court property disputes because none of those questions were briefed and none would have been appropriate for that court to decide. Here, however, those questions *are* relevant because Board precedent is clear that it will not exercise its discretion to open a declaratory order proceeding when ownership of the property is in dispute. *See* Response at 15-20 (discussing cases). Moreover, the District Court's order to GURR cannot allow the Board to ignore the facts of this case, or the Board's precedent requiring the Board to defer adjudicating this preemption issue until the state law property matters have been addressed in state court. GURR's Motion to Strike is an attempt to simply do away with facts and law that stand in its way.

Finally, GURR attempts to argue the merits of its request for expedited treatment by arguing that delay has imposed costs and that the standstill agreement is terminable on 30 days' notice. *See* Motion at 7-8. Aside from being an improper argument on the merits in the Motion to Strike, the argument misses the point. Hopedale acknowledges that the agreement is terminable with 30 days' notice. But GURR has not given that notice and is not moving forward with any railroad construction for reasons other than Hopedale's actions, including its own internal battles. *See* Response at 13-14. There is no reason to expedite this proceeding, and every reason to stay the proceeding while the Massachusetts state courts decide who owns the Forestland.

CONCLUSION

For the foregoing reasons, the Town of Hopedale respectfully requests the Board to dismiss the Motion to Strike in its entirety.

Respectfully submitted,



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Dated: May 18, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have on the 18th of May, 2023, caused to be served a copy of the foregoing REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS TO MOTION TO STRIKE upon the following parties of record in this proceeding by email:

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Dated: May 18, 2023