

July 18, 2023

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July 18, 2023
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Submitted via e-filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

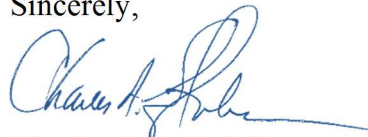
Re: *Grafton and Upton Railroad Company – Petition for Declaratory Order*, STB
Docket No. FD 36696

Dear Ms. Brown:

I am attaching for e-filing the Motion of the Town of Hopedale, Massachusetts to Supplement the Record in the above-captioned proceeding.

Please do not hesitate to contact me with any questions.

Sincerely,



Charles A. Spitulnik
Counsel for the Town of Hopedale, Massachusetts

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**PETITION OF THE TOWN OF HOPEDALE, MASSACHUSETTS
TO SUPPLEMENT THE RECORD**

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Counsel for the Town of Hopedale, Massachusetts

Dated: July 18, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36696

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

**PETITION OF THE TOWN OF HOPEDALE, MASSACHUSETTS
TO SUPPLEMENT THE RECORD**

The Town of Hopedale (“Town” or “Hopedale”), pursuant to 49 C.F.R. § 1117.1, respectfully petitions the Board to supplement the record in this proceeding by submitting an Affidavit of Jon Delli Priscoli dated June 2, 2023 (“JDP 6/2 Aff.”), submitted to the Superior Court of Massachusetts, Suffolk County on July 10, 2023, in the case of *Milanoski v. Delli Priscoli*, C.A. No. 2384CV00071-BLS2. A copy of the Affidavit is attached hereto as Exhibit 1.

INTRODUCTION

On April 14, 2023, Grafton & Upton Railroad Company (“GURR”) asked the Board for a declaratory order, on an expedited basis, that Hopedale was preempted from acquiring 130.18 acres of forestland (the “Forestland”) in Hopedale because GURR had plans to build a transload facility on the Forestland. Relying on the Verified Statement of its owner and Chief Executive Officer, Mr. John Delli Priscoli, GURR claimed that GURR was ready to begin construction immediately and that Hopedale’s claim to own the property was the only impediment to construction.

In direct contradiction of that position, Mr. Delli Priscoli wrote in his Affidavit on June 2, 2023, that the plans GURR submitted to this Board are “not workable since slope issues make

track installation impractical.” JDP 6/2 Aff. ¶ 7. GURR’s owner and CEO now agrees with Hopedale’s position, as stated at pages 22-25 of its Reply, that the steep slope of the property makes it impossible for GURR to use the property for the purported transload facility. There is now no legitimate dispute that GURR cannot build its proposed transload facility, that there is no *bona fide* plan for a new transload facility in Hopedale, and that GURR’s Petition should be denied.

Because the JDP 6/2 Affidavit provides evidence that is relevant to a central issue in this Proceeding and materially influences the outcome of the proceeding by undercutting the primary basis for invoking the Board’s jurisdiction, the Board should allow Hopedale to supplement the record with the JDP 6/2 Affidavit in further support of opposition to the Petition.

ARGUMENT

The Board has generally considered whether to allow supplementation of the record based on the relevance and materiality of the proffered material. *See R.J. Corman R.R. Co./Allentown Lines, Inc. – Abandonment Exemption – In Lehigh County, PA*, Dckt No. AB 550 (Sub-No. 3X), Slip Op. at 1-2 (STB Served Nov. 25, 2015). Similarly, in rate cases, the Board has held that supplementation is appropriate where “the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case.” *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Dckt. NOR 42121, Slip Op. at 4 (STB Served July 24, 2015) (quoting *Duke Energy Corp. v. CSX Transp., Inc.*, NOR 42070, Slip Op. at 4 (STB served Mar. 25, 2003)). As detailed below, Hopedale easily meets that standard.

This proceeding arises from a dispute over the ownership of 130.18 acres of land in Hopedale certified as forestland under Massachusetts General Laws Chapter 61. Hopedale’s position is that Chapter 61 gives Hopedale a right of first refusal to acquire the property, meaning

that GURR should have never obtained an interest in the property. Alternatively, even if GURR lawfully obtained title, Hopedale seeks to acquire the property through eminent domain. Under either approach, Hopedale does *not* seek to acquire title to land GURR currently uses for its railroad and transloading operations.

GURR claims that Hopedale is preempted from acquiring the Forestland because GURR claims it has plans to build a large transload facility on the property. Petition at 2. That purported future transload facility is the *only* railroad use GURR claims for the Forestland and the *only* basis for claiming the protections of preemption.

The only evidence of GURR's claimed plan to build a transload facility is the Verified Statement of Jon Delli Priscoli dated April 13, 2023, attached as Exhibit 1 to GURR's Petition. In paragraphs 18-23 of the Verified Statement, Mr. Delli Priscoli described GURR's plans for the proposed facility. To define the nature of the proposed facility, Mr. Delli Priscoli specifically referred to a "Site Layout Plan" set out at paragraph 28 of Mr. Michael Milanoski's July 28, 2022 affidavit submitted in the U.S. District Court for the District of Massachusetts and attached as Exhibit 4 to GURR's Petition.

At pages 22-25 of its Reply, Hopedale showed that the facility proposed on the Site Layout Plan is unbuildable due to the steeply sloped nature of the property (13% on average with areas exceeding a 20% slope), the lack of space to accommodate trucks, and the inability to regrade the property. Hopedale supported its argument with an affidavit from Mr. Sean Reardon, an engineer who analyzed GURR's plans and found them impractical and unworkable. *See* Reply, Ex. 8.

Mr. Delli Priscoli's June 2 Affidavit directly contradicts his April 13 Verified Statement and provides even further evidence that GURR's purported plans are not workable or achievable. At paragraph 7 of the JDP 6/2 Affidavit, Mr. Delli Priscoli now attests that:

In review of the West Street project, I have determined that Milanoski's plan for the site was not workable since slope issues make track installation impractical. Moreover, Milanoski's decision to clearcut trees at the West Street site is now the focus of potential wetland violation investigations by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers.

JDP 6/2 Aff. ¶ 7 (Ex. 1).

In language that almost exactly copies Hopedale's Reply and Mr. Reardon's conclusions, Mr. Delli Priscoli now admits that the plan he presented to the Board as the *sole* basis for preemption is "not workable" because the steep slopes "make track installation impractical." He further discloses that GURR's tree-clearing activities have triggered investigations by the U.S. EPA and the Army Corps of Engineers, casting further doubt on GURR's legal ability to make railroad use of the Forestland. Finally, the June 2 Affidavit describes how the internecine litigation between Mr. Milanoski and Mr. Delli Priscoli has impaired GURR's ability to obtain financing for *any* railroad project, much less pursue a hastily thrown together and admittedly unworkable transload facility on the Forestland.

The JDP 6/2 Affidavit is an admission that GURR does not have a *bona fide* workable plan to use the Forestland for a railroad purpose and that GURR is therefore not entitled to the protections of preemption pursuant to 49 U.S.C § 10501. *See Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009) ("interference with rail transportation must always be demonstrated" to invoke preemption); *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 85 (2012) (collecting cases for the rule that ICCTA focuses on regulations that restrict the operation of a railroad, while it permits laws with a more "remote or incidental" effect). Similarly, the absence of a *bona fide* plan for the railroad use of the Forestland means that Hopedale is not preempted from acquiring the Forestland by eminent domain. *See Franks Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010) (ICCTA preempts eminent domain only when

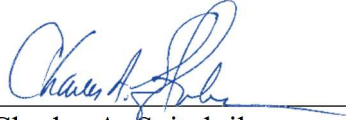
it would “have the effect of unreasonably burdening or interfering with rail transportation.”; *Bayou Dechene Reservoir Comm’n v. Union Pac. R.R Corp.*, Case No. 09-0429, 2009 WL 1604658, *2 (W.D. La. June 8, 2009) (collecting decisions from courts and the STB for this standard). Instead, “interference with rail transportation must always be demonstrated.” *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009). For all of the reasons Hopedale sets forth in pages 22-28 of its Reply, the JDP 6/2 Affidavit shows that GURR is not entitled to the relief it seeks from the Board and that its Petition is meritless.

It is difficult to conceive of evidence that could be more appropriate for supplementation. The JDP 6/2 Affidavit is an admission that the primary basis for invoking the Board’s jurisdiction no longer holds true. It clearly is relevant to a central issue in the proceeding and will materially influence the final outcome. Moreover, the JDP 6/2 Affidavit calls into question the credibility of GURR’s Petition in its entirety, particularly given that GURR has not made any effort to withdraw or amend its Petition in the six or more weeks that have elapsed since Mr. Delli Priscoli, the owner and chief operating officer of GURR, signed the Affidavit. Hopedale respectfully submits that the Board should accept this supplemental evidence, consider the JDP 6/2 Affidavit, and deny the Petition.

CONCLUSION

For the foregoing reasons, the Town of Hopedale respectfully requests the Board to allow Hopedale to supplement the record in this proceeding with the Affidavit of Mr. Jon Delli Priscoli dated June 2, 2023, and attached as Exhibit 1 in further support of the arguments Hopedale made in its Reply to the Petition.

Respectfully submitted,



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Dated: July 18, 2023

CERTIFICATE OF SERVICE

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

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Charles A. Spitulnik

Dated: July 18, 2023

EXHIBIT 1

Affidavit of Mr. Jon Delli Priscoli dated June 2, 2023

3. This Court's preliminary injunction of February 2nd has proven to be overbroad in its sweeping scope, barring me or my agents from selling, transferring or encumbering any interest

or portion of any interest owned by me or by any entity owned or controlled by me, not only in the railroad assets that were subject to a letter of intent with Milanoski and DeWaele, but to other assets as well. No exception was listed for expenditures made in the ordinary course of the Railroad's business. No exception was made to allow financing for needed capital improvements. No explanation was provided as to why the injunction went beyond assets in dispute in this litigation. And no bond was required to protect me from the potential negative consequences of the injunction.

4. First, the preliminary injunction is unsecured. Adherence to the terms of the current preliminary injunction will cause the Grafton and Upton Railroad to sustain substantial damages and will threaten its ability to continue operations. Financing must be secured so that capital improvements in its tracks and terminal facilities can be made, aged equipment can be replaced, and settlement of the ongoing litigation with the town of Hopedale must be explored.

5. My review of track update and maintenance requirements, the financial commitments of the railroad, ongoing litigation with abutters, and other operational matters require restructuring of property ownership. These needed upgrades require Grafton & Upton's immediate attention.

6. The Grafton & Upton Railroad owns property on West Street, Hopedale, MA where Milanoski planned to build a significant transloading facility. The town of Hopedale sought to acquire the property through eminent domain. That suit was stayed in favor of a U.S. Surface Transportation Board proceeding that currently is underway. *See Grafton & Upton Railroad V. V, Town of Hopedale*, ___F. Supp. 2d ___, 2023 WL 2761205 (D. Mass. March 31, 2023) (Burroughs, J); *Reilly v. Town of Hopedale*, 2023 WL 237559, 206 N.E.3d 572 (Mass. App. Ct. March 7, 2023).

7. In review of the West Street project, I have determined that Milanoski's plan for the site was not workable since slope issues make track installation impractical. Moreover, Milanoski's decision to clearcut trees at the West Street site is now the focus of potential wetland violation investigations by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers.

8. I would like the railroad to reopen settlement negotiations with the Town of Hopedale and other interested parties immediately to explore resolution of all West Street disputes, which ultimately may require a transfer of some land as part of a settlement. The current injunction does not allow any settlement negotiations much less allow the transfer of some property in the West Street location to resolve the various suits.

9. The Milanoski-ordered clearcutting at the West Street site has resulted in significant attorney and expert costs accrued by the Grafton & Upton Railroad, as will the anticipated compliance orders from the EPA. Bank financing, with the security interests that normally are integral to such financing, would not be allowed under the present Order on the preliminary injunction.

10. I have received a report from RJ Corman Railroad Services of Nicholasville, Kentucky that indicates that it is imperative for safety and increased commercial operations that Grafton & Upton's main line rails and ties be upgraded from Light Rail ASCE 85 lb. per yard to Heavy Rail 115 lb. per yard. Financing must be arranged by Grafton & Upton to finance this essential project, which is estimated to cost in excess of \$10 million. The current injunction bars the acquisition of financing for this needed project. Given the many months period required for a project of this nature to ramp up, with acquisition of replacement rails and other supplies, and

arrangements for needed equipment and contractor personnel, there is a pressing need to get this project started now, for both safety and expanded operational reasons.

11. The Grafton & Upton transfer facility in Hopedale, MA must have track added, and an additional storage installed. The likely costs of these upgrades, approximately \$7 million, must be financed. Additionally, the Milford yard needs to have additional tracks installed to properly service the transloading needs of the existing and potential customers.

12. Two train engines need to be replaced; the lease for one is expiring and the other is presently out of service and in need of extensive repairs. There are various other pieces of equipment that need repair. The current injunction bars financing for these expenditures.

13. Other equipment nearing the end of their useful life needs to be replaced and/or are no longer of importance to the operation; the railroad needs to be able to make reasonable business decisions and be free to decide when to sell and when to buy.

14. Currently a glass recycler which leases a building at our Fitzgerald Drive, Hopedale location would like to purchase the building. The cost of the building may be approximately \$10 million which would help pay for the needed track repairs. The sale of the building is currently blocked by the preliminary injunction.

15. The existing propane transloading arrangements at the Grafton facility need to be modified to allow the Grafton & Upton Railroad to receive investment capital to be used to upgrade the railyards and related infrastructure.

16. After Mr. Milanoski was suspended, we conducted a forensic examination of computer equipment and discovered that he had deleted various documents from the Grafton & Upton server, including documents contemporaneously created around the time of the Restated Letter of Intent in which Milanoski and DeWaele valued the Company in the range of \$69,020,000-

\$114,631,050, substantially less than the \$42,930,000 fair market valuation these fiduciaries provided to me. See Attachment A, one of several documents that Milanoski created and subsequently deleted which discloses Milanoski's and DeWaele's actual valuation of the transaction.

17. I understand why the Court would enjoin me from selling my shares in the Grafton & Upton Railroad while this dispute is pending, but the current order goes well beyond preservation of the Railroad stock ownership and actually prevents the Railroad from taking the economic steps needed to remain viable and to continue to make upgrades to the tracks, related infrastructure and equipment.

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Signed under the pains and penalties of perjury.

Dated: June 2, 2023



Jon Deli Priscoli

6/2/23