

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35652

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DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH,  
CHERYL HATCH, KATHLEEN KELLY, ANDREW  
WILKLUND, AND RICHARD KOSIBA--  
PETITION FOR DECLARATORY ORDER

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**REPLY OF GRAFTON & UPTON  
RAILROAD COMPANY IN OPPOSITION TO  
PETITION FOR RECONSIDERATION**

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Dated: March 5, 2013

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On February 13, 2013, the Petitioners filed a Petition for Reconsideration asserting that the decision of the Board served on January 24, 2013 (the "January 24 Decision"), to the extent that it denied the Petitioners' request for discovery, involved material error and would be affected materially because of "new evidence".<sup>1</sup> The Petitioners ask the Board to reconsider the January 24 Decision and to permit discovery. Grafton & Upton Railroad Co. ("G&U") hereby opposes the Petition. As demonstrated below, there is no material error, and there is no new evidence warranting discovery. The Board properly exercised its discretionary authority in determining that discovery is not necessary.

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<sup>1</sup> The January 24 Decision was issued by the Director of the Office of Proceedings pursuant to authority delegated by the Board. Appeals from such decisions must be filed within 10 days. 49 C.F.R. § 1011.7(a)(2)(vi) and 49 C.F.R. §1011.2(a)(7).

## PROCEDURAL BACKGROUND

In the Petition for Declaratory Order, which was filed as of August 1, 2012, the Petitioners alleged that they had not seen any documents relating to the transloading facility in Upton and that they were "seeking discovery" in order to "determine the real relationship between the G&U and the Dana Companies". Petition for Declaratory Order at 26.<sup>2</sup> The Petitioners expressed the view that "G&U is used by the Dana Companies to facilitate its trucking and other businesses." Petition for Declaratory Order at 27.

In the January 24 Decision, the Board noted that the Petitioners were requesting discovery in order to obtain "documents that would help to ascertain the degree of control G&U has over the transloading or performing services at the Upton facility." In its opposition to the request for the institution of a declaratory order proceeding filed on August 21, 2012, G&U requested that, if the Board instituted such a proceeding, G&U also be afforded an opportunity to undertake discovery.

The Board treated both parties equally and denied both parties' requests for discovery as being unnecessary. The Board observed that the Petitioners would have access to the confidential versions of the Terminal Transloading Agreement between G&U and Grafton Upton Rail Care, the transloading subcontractor, and the Lease Agreement between G&U and the owner of the property in Upton, implying that access to the unredacted versions of these agreements would provide the Petitioners with the

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<sup>2</sup> The document requests attached to the Petition for Declaratory Order as Exhibit A ask for documents not only from G&U but also from First Colony Group and from the Dana Companies. Of course, document requests can be directed only to a party. 49 C.F.R. § 1114.30. First Colony Group was not alleged to be, and is not, a party in connection with the Petition for Declaratory Order. Petition for Declaratory Order at 3-5. Furthermore, the Dana Companies filed a Motion to Dismiss for Lack of Jurisdiction on August 20, 2012 on the grounds that they are not proper parties in this proceeding. This Motion remains outstanding.

information required to assess the degree of control exercised by G&U over the transloading contractor.<sup>3</sup>

Pursuant to the January 24 Decision, G&U filed public versions of the Terminal Transloading Agreement and the Lease Agreement on January 31, 2013. An unredacted "confidential" version of the Terminal Transloading Agreement and an unredacted "highly confidential" version of the Lease<sup>4</sup> were provided to both counsel for the Petitioners on February 12, 2013, the same day that counsel for the Petitioners submitted their signed undertakings as required by the protective order entered by the Board on January 24, 2013. A copy of the "confidential" version of the Terminal Transloading Agreement was provided to one of the Petitioners, Ms. Del Grosso, on February 26, 2013, the same day that she submitted a signed undertaking.

The Petitioners filed their Petition for Reconsideration on February 13, 2013, claiming that they had not yet seen the unredacted agreements notwithstanding the production of the documents by G&U on February 12, 2013. G&U followed the procedural schedule established by the Board in its January 24 Decision and timely filed a Supplemental Reply on February 25, 2013. Petitioners' rebuttal is currently due on March 11, 2013.<sup>5</sup>

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<sup>3</sup> The Petitioners do not contend in the Petition for Reconsideration that discovery is needed on the other issue raised in the Petition for Declaratory Order, which is whether the bagging of wood pellets is part of transportation or manufacturing that is not part of transportation.

<sup>4</sup> With the filing on January 31, 2013 of public versions of the Terminal Transloading Agreement and Lease Agreement, G&U also submitted additional justification, as requested by the Board, for the treatment of the Lease as a highly confidential document. On March 1, 2013, the Board issued a decision confirming that the Lease Agreement was properly classified as highly confidential.

<sup>5</sup> On February 28, 2013, the Petitioners filed a Petition for Postponement seeking to extend the due date for their rebuttal because of the pendency of the Petition for Reconsideration. On March 1, 2013, G&U filed a reply in opposition to the request for a postponement.

## ARGUMENT

### I. There Has Been No Material Error.

The Petitioners claim that the Board committed material error by stating that it did not typically order discovery in declaratory order proceedings. A fair reading of the January 24 Decision is that this rationale--that discovery is not typically ordered in declaratory order proceedings--was limited to the request of G&U as the respondent and did not purport to apply to the Petitioners' request for discovery. The reason articulated by the Board for denying the Petitioners' request was that they now have access to the documents that would answer the questions they had raised in the Petition concerning the relationship between G&U and Grafton Upton Rail Care. In other words, the Board recognized that G&U would be providing the documents and information that the Petitioners identified as essential in order to justify their request for discovery.

The Petitioners have cited several decisions for the proposition that in other declaratory order proceedings the Board has routinely allowed discovery. The decisions, however, do not support the proposition. Two of the decisions involved motions to compel discovery rather than the question whether discovery is generally permitted in declaratory order proceedings. Springfield Terminal Railway Co.--Petition for Declaratory Order--Reasonableness of Demurrage Charges, STB Docket No. NOR 42108, decision served June 16, 2010; Denver & Rio Grande Railway Historical Foundation D/B/A Denver & Rio Grande Railroad, L.L.C.--Petition for Declaratory Order, STB Finance Docket No. 35496, decision served April 30, 2012. Indeed, the Board observed in another case cited by the Petitioners that "Board action is required on

discovery matters only when a party files a motion to compel discovery that another party has refused to provide." North San Diego County Transit Development Board--Petition for Declaratory Order, STB Finance Docket No. 34111, decision served August 21, 2002. In another decision, there was no discussion of discovery whatsoever. East West Resort Transportation, LLC, and TMS, LLC D/B/A Colorado Mountain Express--Petition for Declaratory Order--Motor Carrier Transportation of Passengers in Colorado, STB Docket No. MC-F-21008, decision served March 21, 2005.

Other decisions, which were not cited by the Petitioners, demonstrate that the Board has not permitted discovery in declaratory order cases, particularly when the issues are primarily legal in nature or when the record is adequate to decide the issues without discovery. Norfolk Southern Railway Co.--Petition for Declaratory Order, STB Finance Docket No. 35701, decision served December 12, 2012; Maryland Transit Administration--Petition for Declaratory Order, STB Finance Docket No. 34975, decision served September 19, 2008 ("The Board generally does not order discovery in declaratory order proceedings where the dispute involves a legal issue and where the record is sufficient to resolve the controversy without discovery."); Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order, STB Finance Docket No. 35057, decision served February 1, 2008, slip op. at 4 n. 4 (because the record was sufficient to determine whether the contractor's transloading operations were subject to the Board's jurisdiction, discovery was unnecessary). In this proceeding, as described more fully below, the record is adequate, without discovery, to resolve an issue that is largely legal in nature: whether the transloading services provided by Grafton Upton Rail Care are performed under the auspices and control of G&U based upon an application of the facts,

which are either not in dispute or resolvable on the existing record, to the legal test developed by the Board in the Alexandria and Babylon proceedings, which are discussed in detail in G&U's Supplemental Reply filed on February 25, 2013, involving transloading by subcontractors of a rail carrier.

It is not surprising that the Board exercises discretion whether to permit discovery in declaratory order proceedings. The Petitioners argue that 49 C.F.R. § 1114.21 allows parties to obtain discovery "in every Board proceeding" other than certain specified proceedings. Petition for Reconsideration at 2. At the time of the filing of a petition requesting the institution of a declaratory order proceeding, however, it is not clear whether the Board will actually decide to institute such a proceeding. Consequently, until such time as the Board does in fact institute a declaratory order proceeding, there is no "proceeding" within the meaning of 49 C.F.R. § 1114.21. The exercise of discretion by the Board in response to any discovery requests can, as a practical matter, occur, as it did in this case, only at the time that the Board decides to institute a declaratory order proceeding. To permit discovery to occur prior to the institution of a declaratory order proceeding would be a waste of time and expense in the event that no declaratory order proceeding were instituted.

The Board has discretion with respect to the creation and control of the record in any proceeding and, in particular, in a declaratory order proceeding. The goal is to have a record that enables the Board to decide the issues raised in the proceeding. In this case, the Board has concluded that it will have a record that is sufficient without discovery. This conclusion is confirmed by the Board's decision to use the modified procedure, which by definition is a streamlined method of handling proceedings premised on the

idea that factual issues may be resolved by written submissions. Having requested permission to conduct discovery and having received the Board's answer, the Petitioners should not now be permitted to second-guess the exercise of discretion by the Board.

By any reasonable measure, the Board already has, or will have with the filing by the Petitioners of their rebuttal statement on March 11, 2013, a complete record upon which to decide whether to grant or deny the Petition. The Petitioners filed approximately 175 pages of argument, verified statements and exhibits with their initial Petition, and in the January 24 Decision the Board exercised its discretion to waive one of its regulations (49 C.F.R. § 1104.13(c)) and accepted the Petitioners' reply to G&U's reply, comprising another 90 pages of argument, verified statements and exhibits. In order to prepare its Petition, the Petitioners had access to several hundred pages of documents, including many documents provided by G&U in response to questions posed by the Town of Upton, compiled by the Town in its fact finding exercise that led the Town to conclude that preemption applied and that it should not seek to regulate the activities at G&U's yard in Upton. G&U Reply filed on August 21, 2012 at 10-11. Furthermore, G&U has filed over 200 pages of argument, verified statements and exhibits addressing the issues raised by the Petitioners, including information in anticipation of issues that the Petitioners are likely to raise in their rebuttal filing on March 11, 2013, all in an effort to provide the Board with a complete record. The Board, which was fully cognizant of the voluminous record being compiled, properly exercised its discretionary authority in concluding that no discovery is necessary.

## II. There is No New Evidence that Justifies Discovery.

As an additional ground for the Petition for Reconsideration, the Petitioners contend that there is "new evidence that raises significant questions regarding the G&U." The purported "new evidence" is the pendency of certain litigation brought by the Town of Grafton, Massachusetts against G&U in the Federal District Court for the District of Massachusetts. As explained below, the Grafton litigation does not constitute "new evidence", is not probative of any of the issues in this case and certainly does not justify discovery.

As attachments to their Petition for Reconsideration, the Petitioners have provided several agreements between G&U and other entities that have an interest in the propane transloading facility that G&U is in the process of constructing in Grafton. In addition, the Petitioners have selectively filed one pleading submitted by the Town of Grafton in the litigation, but not the rest of the pleadings. Presumably, the Petitioners intend to file additional parts of the record in the Grafton litigation and to offer arguments based upon such record. Pleadings and exhibits in another case, however, do not constitute "new evidence" for purposes of this proceeding.<sup>6</sup>

Furthermore, the pleadings in the Grafton litigation have no relevance to the issues in this proceeding. The Petitioners do not even contend that the Grafton litigation involves Grafton Upton Rail Care or any of the other Dana Companies or that any information or documents produced in the Grafton litigation relates directly to the relationship between G&U and Grafton Upton Rail Care or any of the activities at the Upton yard that are the subject of this proceeding. The transloading contractor and the

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<sup>6</sup> Rather, such pleadings and exhibits constitute hearsay that is not admissible as evidence in this proceeding. See 49 C.F.R. § 1114.1.

other parties to the agreements in the Grafton litigation are completely different than and unrelated to Grafton Upton Rail Care or any of the other Dana Companies. The facility in Grafton has been partially constructed, but not completed, and is not in operation, while the yard in Upton has been in operation for several years. The Town of Upton extensively reviewed the operations at the yard in Upton and concluded that such operations preempted the application of state and local regulation. The Town of Grafton, claiming that it did not have sufficient time to complete an analysis of the applicability of preemption, decided instead to attempt to exercise local regulation. G&U is opposing the local regulation by Grafton on the grounds of preemption and has vigorously contested the factual assertions and arguments offered by Grafton in the litigation.<sup>7</sup> The decision of the court is pending.

Given these differences between the facts and circumstances in Upton as compared to Grafton, the record in the Grafton litigation simply has no probative evidentiary value for purposes of resolving the issues in the proceeding before the Board. The pendency of the Grafton litigation is simply not "new evidence" that warrants reconsideration of the Board's decision not to permit discovery.

As described above, the Petitioners have the unredacted versions of the Terminal Transloading Agreement and the Lease Agreement. These documents were provided to counsel for the Petitioners on February 12, 2013, the same day that they were requested by counsel for the Petitioners and the day before the filing of the Petition for

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<sup>7</sup> As described in foot note 9, page 21 of G&U's Supplemental Reply filed on February 25, 2013, the record in the Grafton litigation is extensive. In a 4 day trial, there were 10 witnesses and 30 exhibits totaling approximately 600 pages. G&U submitted 153 proposed findings of fact, separate proposed conclusions of law and approximately 100 pages of post trial briefing.

Reconsideration.<sup>8</sup> These are the documents upon which G&U relies to show that the transloading at Upton is being performed under the auspices and control of G&U. The Petitioners have the ability right now, without any additional discovery, to make arguments about the degree of control exercised by G&U and whether the relationship between G&U and Grafton Upton Rail Care comes within the scope of other arrangements that the Board has previously determined to trigger the applicability of preemption.

Furthermore, to the extent that the questions and arguments of the Petitioners, both those already stated and those to be anticipated, are not completely resolved by reference to the two relevant agreements, G&U has provided answers and information through the verified statements that it has filed. For example, G&U has explained how transloading charges are fixed by G&U and assessed to customers. Petition for Reconsideration at 6; G&U Supplemental Reply at 9-10, 13-14. G&U has explained that Grafton Upton Rail Care does not pay G&U for use of the yard, but rather G&U pays Grafton Upton Rail Care for performing the transloading services. Petition for Reconsideration at 6; G&U Supplemental Reply at 9. G&U has explained the insurance and indemnification provisions that are part of the Terminal Transloading Agreement, and counsel for the Petitioners now have an unredacted version of the Terminal Transloading Agreement, which sets forth the terms and conditions of the indemnification and insurance provisions. Petition for Reconsideration at 6; G&U Supplemental Reply at 11.

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<sup>8</sup> Counsel for the Petitioners could have received the documents as early as January 25, 2013 if they had submitted the required undertakings as soon as the Board entered the protective order on January 24, 2013.

The Petitioners pose the following as the "key question": How was it possible for G&U, "a small independent short line railroad" to install transloading facilities in both Upton and Grafton "without financial assistance"? Petition for Reconsideration at 6-7. The Petitioners would apparently have the Board infer that G&U and the Dana Companies are attempting to disguise a Dana enterprise as a G&U rail transloading facility.

The Petitioners' contentions and questioning are pure speculation that miss the real point--whether the transloading is being performed under the auspices and control of G&U. The Terminal Transloading Agreement defines the relationship between G&U, as the long-term lessee of the land and operator of the railroad yard, and Grafton Upton Rail Care, as the transloading subcontractor. The question whether the transloading is performed under the auspices and control of G&U can and should be answered by means of a review of the terms and conditions of the Terminal Transloading Agreement, and the parties conduct in connection with the implementation of the Agreement, not on the basis of speculation and innuendo or unrelated litigation.

As described by G&U in its Reply and Supplemental Reply, the relationship of the parties and the operation of the yard compel the conclusion, based upon criteria previously established by the Board, that Grafton Upton Rail Care is performing transloading services at Upton under the auspices and control of G&U. The parties' relationships and the operation of the yard do not support the conclusion that the facility is an independent business enterprise of the Dana Companies; rather, the record compels the conclusion that the facility in Upton is a G&U transloading yard. Perhaps more

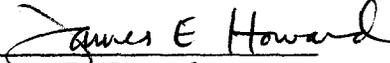
importantly for purposes of deciding the Petition for Reconsideration, the record before the Board is adequate right now, without any discovery, to decide the issues.

CONCLUSION

The Board made the right decision initially by denying the Petitioners' request for discovery. There was no material error, and there is no new evidence justifying discovery. If, however, the Board decides to grant the Petition for Reconsideration and to permit discovery, then the Board should allow discovery by both parties and should either require Petitioners to submit a new opening statement, and give G&U an opportunity to reply, or permit supplemental pleadings by the Petitioners and then G&U.

Respectfully submitted,

GRAFTON & UPTON  
RAILROAD CO.

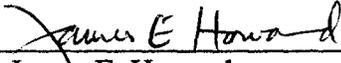
  
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Dated: March 5, 2013

Certificate of Service

I hereby certify that I have served the foregoing Supplemental Reply as of this 5th day of March, 2013 by causing a copy to be sent electronically to counsel for the Petitioners, Mark Bobrowski, Blatman, Bobrowski & Mead, LLC, 9 Damonmill Square, Suite 4A4, Concord, Massachusetts 01742 and Fritz Kahn, 1919 M Street, 7th Floor, Washington, DC 20036, and to each other party of record.

  
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James E. Howard