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1919 M Street, NW (7th fl.)
Washington, DC 20036

May 20, 2013

VIA ELECTRONIC FILING

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

Re: Docket No. FD 35652, Diana Del Grosso, et al.
Petition for Declaratory Order

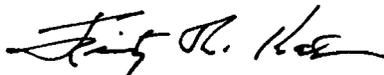
Dear Ms. Brown:

Attached for filing in the subject proceeding is the public version of the Petitioners' Reply to the Reply, filed August 21, 2012, and Supplemental Reply, filed February 25, 2013, by the Grafton & Upton Railroad Company.

If you have any question concerning this filing or if I otherwise can be of assistance, please get back to me.

A copy of this letter and its attachment this day have been served by me upon each party of record by e-mail or prepaid first-class mail.

Sincerely yours,


Fritz R. Kahn

PUBLIC VERSION
SURFACE TRANSPORTATION BOARD

Docket No. FD 35652

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

REPLY OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH
KATHLEEN KELLEY, ANDEW WILKLUND AND RICHARD KOSIBA

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WILKLUND AND RICHARD KOSIBA

Dated: May 20, 2013

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Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund and Richard Kosiba ("Petitioners")¹, pursuant to 49 C.F.R. §1104.13(a) and the Board's Decision, served May 8, 2013, reply to the Reply, filed August 21, 2012, and the Supplemental Reply, filed February 25, 2013, of the Grafton & Upton Railroad Co. ("G&U")², as follows:

G&U for many years has transloaded various commodities at its Upton, Massachusetts, yard, including salt and coal, received by interchange from CSX Transportation, Inc. ("CSXT"), as acknowledged in the Verified Statement of Mr. Jon Delli Priscoli. Priscoli VS, p. 2; Moffett, Supp. V.S., pp. 2-3. Mr. Priscoli had purchased the G&U in 2008 and since then has served as its Chairman and CEO. Before Mr. Priscoli acquired the railroad, G&U in 2004 utilized a noncarrier, Boston Railway

¹ The Board is not an Article III court, and, therefore, contrary to G&U's assertion, Reply, pp.13-14; Supplemental Reply, pp. 25. Petitioners are not required to have "standing" to seek relief from the Board. Cf. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

² This is not a prohibited reply to a reply within the meaning of 49 C.F.R. §1104.13(c) since the Board in its Decision of May 8, 2013, authorized the Petitioners to file their response within ten days' time.

Terminal Company ("BRT"), to transload inbound shipments of steel. G&U contended that BRT was its contractor, acting under its control and supervision, so as to gain for BRT the shelter from local regulation afforded by the preemption provision of 49 U.S.C. §10501(b). The Board disagreed and by its Decision in Docket No. FD 34444, Town of Milford, MA -- Petition for Declaratory Order, served August 12, 2004, held that G&U misapprehended the nature of the preemption provision. The Board noted, "to come within the Board's jurisdiction and the scope of Federal preemption, an activity must be both 'transportation' and 'by rail carrier' under section 10501."³ The Board found:

"GU would transport loaded rail cars to BRT's facility and return empty cars to the CSXT interchange point. BRT, on the other hand, would control the function of unloading the rail cars, handling and (in some cases) fabricating the shipped steel, and then trucking it to customers. In doing this, nothing in the record establishes that BRT would be acting on behalf of GU or that GU would hold out BRT's transloading services as part of the common carrier services that GU offered to the public."

In the meantime, the Board rendered its decision in Docket No. FD 35157, The City of Alexandria, Virginia--Petition for Declaratory Order, served February 17, 2009 ("City of Alexandria"). See, No. 09-1566, Norfolk Southern Railway Company v. City of Alexandria, ___ F.3d ___ (C.A. 4th Cir. 2010). City of Alexandria provided the blueprint to guide the relationship between a railroad and the contractor it engaged to perform the transloading operations on the railroad's behalf so as to enable the contractor to avoid the need for complying with local zoning and similar regulations pursuant to the preemption provision of 49 U.S.C. §10501(b). See Docket No. FD 35299, Borough of

³ See, Docket No. 35057, Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order, served September 26, 2008; Docket No. FD 34192, Hi Tech Trans. LLC -- Petition for Declaratory Order -- Newark, NJ., served August 14, 2003.

Riverdale--Petition for Declaratory Order, served August 5, 2010 ("Borough of Riverdale").⁴

Mr. Priscoli acknowledged that when he acquired the railroad "G&U did not have sufficient personnel or, more importantly, the expertise and experience required to operate a transloading yard that could handle everything from chemicals to wood pellets." Priscoli VS, p. 4, Supp.VS, p. 2; Supplemental Reply, p. 17. Accordingly, Mr. Priscoli entered into discussions with Mr. Ronald Dana, who is the principal of a number of companies which are involved in the transportation business, concentrating primarily in the transportation of bulk commodities and the transfer of bulk commodities between trucks or between trucks and railcars. Priscoli VS, p. 4, Priscoli Supp. VS, p. 2. Mr. Dana created a new company to perform the transloading at Upton, Grafton Upton Railcare, LLC ("GU Railcare"), and it was GU Railcare which entered into the Terminal Transloading Agreement with G&U, backdated as of December 30, 2010. Priscoli VS, p. 3; Dana VS. p. 1; Dana Supp. VS, p. 2.⁵ According to Mr. Stanley Gordon, Vice President of the G&U, the Terminal Transloading Agreement was intended to meet the standards of the City of Alexandria. Gordon VS, pp. 2-3; Reply, pp. 6-7. It is the Terminal Transloading Agreement which defines the relationship between G&U and GU Railcare. Reply, p. 12, Supplemental Reply, pp. 12, 22.

The Terminal Transloading Agreement, pursuant to the terms of Appendix A, applies only to the transloading operations performed by GU Railcare, ostensibly under

⁴ G&U asserts that Petitioners did not exhaust their administrative remedies, Reply, pp. 15-17; Supplemental Reply, pp. 23-25, but G&U fails to indicate which Massachusetts agency is vested with authority to determine whether GU Railcare's transloading service at the Upton Terminal falls within the preemption provision of 49 U.S.C. §10501(b).

⁵ G&U in its Supplemental Reply, p. 15, cites Docket No. FD 32481, GW Switching Services, LP--Operation Exemption--Lines of Southern Pacific Transportation Co., serve August 7, 2001, for the proposition that GU Railcare is not a railroad, but Petitioners never alleged that it was.

the auspices and control of G&U, within the Terminal, the approximately 33-acre site leased by G&U from the Upton Development Group, LLC for 20 years with option to purchase. Priscoli VS, p. 2, Supp. VS, p. 1; Gordon VS, p. 2.. G&U, however, publicizes that it has a 38-acre site located in Upton managed by "one of North America's premier bulk operators", whose company will perform the transloading services there. Petition, vol. 2, p. 81. Presumably transloading services continue to be performed within the G&U's 5-acre Upton yard as they are at the 33-acre Terminal. Neither Mr. Priscoli nor Mr. Dana, however, offers a single word of explanation of how the transloading is handled in the 5-acre G&U Upton yard. In the absence of discovery, pursuant to 49 C.F.R. §1114.21(a), Petitioners -- and, hence, the Board -- have no knowledge whatever as to the relationship between G&U and GU Railcare in the transloading of shipments within G&U's 5-acre Upton yard.

Pursuant to Section 1, A. (i) of the Terminal Transloading Agreement, GU Railcare's obligations to provide transloading and other services are subject to "the Railway's Service Terms and Conditions for Bulk Terminals, dated February ____, 2011, as it may be amended from time to time in the sole discretion of the Railway upon 10 days' prior written notice to Contractor". Presumably the undated document to which reference was made was the 2011 GUBT Services Terms and Guidelines, Petition, vol. 2, pp. 98-115. G&U's President, Mr. Eric Moffett, however, explained that that publication had been cancelled and replaced by G&U Tariff 5000, dated May 1, 2012. Moffett VS pp. 5-6. In turn, after G&U had had the opportunity to study Petitioners' Petition for Declaratory Order, filed August 1, 2012,, and its arguments, G&U replaced G&U Tariff 5000 with G&U Tariff 5000-A, a copy of which was attached to Mr. Moffett

Supplemental Verified Statement. Moffett Supp. VS, p. 4; Gordon VS, p. 4. The Terminal Transloading Agreement, however, was not amended, and, therefore, G&U Tariff 5000-A "may be amended from time to time in the sole discretion of Railway upon 10 days' prior written notice to Contractor." Whether G&U has exercised its retained right in the interval since the January 1, 2013, effective date of G&U Tariff 5000-A and in fact has amended the provisions of the tariff's terms governing GU Railcare's obligations to provide transloading and other services within the Terminal is uncertain. Supplemental Reply, p. 12. In the absence of discovery, pursuant to 49 C.F.R. §1114.21(a), Petitioners -- and, hence, the Board -- have no knowledge how much of the Terminal Transloading Agreement, if indeed any of it, currently governs the relationship between G&U and GU Railcare.

Even if G&U's Tariff 5000-A were left undisturbed by G&U, it would have little or no relevance in the instant proceeding. ICCTA repealed the time honored requirement that railroads publish their rates in tariffs and collect no charges either greater or less than the rates published in their tariffs. as it had appeared at 49 U.S.C. §10761(a). At best, G&U's Tariff 5000-A is an offer to transload commodities in accordance with its terms to be accepted by their shippers. That, however, is a matter of contract law which the Board long has avoided and deemed best left to the courts. See, Docket No. FD 35631, Saratoga and North Creek Railway LLC--Operation Exemption--Tawanus Line, served October 11, 2012; Docket No. 35459, V&S Railway, LLC--Petition for Declaratory Order--Railroad Operations in Hutchinson, Kan., served July 12, 2012; Docket No. 35539, Jie Ao and Xin Zhou--Petition for Declaratory Order, served June 6, 2012.

As Mr. Moffet acknowledged, G&U's Tariff 500-A establishes the maximum charges for the transloading services at the Upton yard. Moffet VS, p. 6, Supp. VS, p. 4; Polselli VS, p. 3. Item 120, Paragraph D, provides, "Unless arrangements to the contrary are made prior to shipment, charges for terminal services described herein will be billed to the shipper or beneficial owner by the Terminal Operator, as the agent for GU." This comports with Section 1. J. of the Terminal Transloading Agreement, which reads:

"On behalf of Railway, Contractor shall send invoices to and collect charges from customer of Railway using services provided by Contractor at the Terminal pursuant to this Agreement. [

]

Who is it at GU Railcare with the authority to negotiate the lower rates to be assessed for G&U's transloading services? Are all of the shippers offered the same discount? Do the discounts offered by GU Railcare depend upon the commodity being transloaded or is it GU Railcare's business relationships with the shippers that is the determinant? How is G&U advised of the transloading charges that GU Railcare has assessed and collected? What is clear, however, it is GU Railcare and not G&U that determines what rates the shippers shall pay for the transloading services performed by GU Railcare at the Upton Terminal. Not only does GU Railcare determine what the shipper shall pay for G&U Railcare's transloading services, GU Railcare bills the shippers and collects the transloading charges. Moffet VS, p. 6, Supp. VS, pp. 3-4; Gordon Supp. VS, p. 2; Polselli VS, p. 3; Reply, pp. 6, 27; Supplemental Reply, pp. 10, 14. In the absence of discovery, pursuant to 49 C.F.R. §1114.21(a), Petitioners -- and, hence, the Board -- cannot know how G&U possibly can claim to have satisfied the City of Alexandria

requirement that "the operator did not set, invoice for, or collect the transloading fees charged the shipper." Borough of Riverdale, p. 5.

Mr. Moffet offers the feeble excuse that G&U does not have the personnel or system in place efficiently to bill and collect for the transloading services. Moffet VS, p. 6. His explanation fails to square with his representation that G&U has always held itself out to the public as having the ability to perform transloading services at the Upton yard as part of its overall transportation services. Moffet VS, p. 1, Supp. VS, pp.3-4. If that were the case, the line haul rate assessed by the originating railroad would cover the cost of G&U's transloading service, and, as the delivering railroad, CSXT, would include the compensation due G&U for its transloading service as part of the division or allowance which CSXT pays G&U as its share of the line haul revenue. Moffet VS, p. 6, Supp. VS, pp. 3-4.

According to Mr. Gordon, G&U compensates GU Railcare for its transloading services. Gordon VS, p. 4, Supp. VS, p. 2; Dana VS, p. 4; Supplemental Reply, p. 9. In his initial Verified Statement, Mr. Gordon cites the "Agreement at p. 8" in support of his assertion. After having had the opportunity to read Petitioners' Motion to Reconsider Petitioners' Request for Discovery, filed February 13, 2013, and its arguments, Mr. Gordon has stricken the reference to the "Agreement at p. 8" from his Supplemental Verified Statement. Section 1, J. of the Terminal Transloading Agreement, which happens to be on page 8 of the Agreement, was quoted in its entirety earlier in this Reply, and it relates solely to how GU Railcare assesses and collects its charges from the shippers of the commodities to be transloaded. As it turns out, Section 2 of the Terminal

Transloading Agreement spells out how GU Railcare is to be compensated for performing the transloading at the Upton Terminal. It reads, as follows:

"Contractor's compensation for services provided hereunder by Contractor and all obligations assumed hereunder by Contractor shall be [

]

The Terminal Transloading Agreement contains not a word describing how G&U pays GU Railcare for rendering the transloading services at the Upton Terminal. Reply, pp. 6, 27. In the absence of discovery, pursuant to 49 C.F.R. §1114.21(a), Petitioners -- and, hence, the Board --- cannot know how G&U possibly can claim to have satisfied the City of Alexandria requirement that "the operator received a fee from the railroad". Borough of Riverdale, p. 5.

Section 1. C. of the Terminal Transloading Agreement includes the authorization of GU Railcare to develop as its own customers G&U customers which will tender traffic for transloading by GU Railcare at the Upton Terminal. The pertinent sentence reads, "Contractor may solicit customers of Railway to use services provided by Contractor at the Terminal, including but not limited to, bagging pellets at the packaging facility located at the Terminal, but such services may be provided only after or before such customer ships a Commodity by rail over the line of Railway," In the absence of discovery, pursuant to 49 C.F.R. §1114.21(a), Petitioners -- and, hence, the Board -- have no way of knowing how G&U rationalizes the foregoing grant of authority in the Terminal Transloading Agreement with the City of Alexandria requirement that "the

operator was contractually barred from marketing the facility". Borough of Riverdale, p. 5.

Section 1. A. (iv) of the Terminal Transloading Agreement, in part, provides, "Contractor shall be responsible for the purchase, maintenance and replacement of all equipment, fuel, lubricant, supplies, depreciation and parts used by Contractor in order to provide the Transfer Process services pursuant to this Agreement". Neither Mr. Priscoli nor Mr. Dana, or for that matter any of the other affiants, offers a single word of explanation of how and from whom GU Railcare procured the pumps, silos, conveyors, bagging machinery and other transloading equipment, to whom at G&U GU Railcare submitted the invoices or who at G&U reimbursed GU Railcare for the amounts it had advanced on G&U's behalf, whether by check, wire transfer or otherwise. In the absence of discovery, pursuant to 49 C.F.R. §1114.21(a), Petitioners -- and, hence, the Board -- have no way of determining how G&U satisfied the City of Alexandria requirement that the transloading "facility. . . was both constructed and owned by the railroad". Borough of Riverdale, p. 5.

Indeed, having acknowledged that when he acquired the railroad G&U had neither the personnel nor the experience required to operate a transloading yard that would handle everything from chemicals to wood pellets, as Mr. Priscoli did, Priscoli VS, p. 4, it is doubtful that the transloading services rendered by GU Railcare were "for and under the auspices and control of Railway at the Terminal", as required by Section 1. A (i) of the Terminal Transloading Agreement. Mr. Michael J. Polselli, New England Manager for the Dana Companies, noted that in July 2012, GU Railcare transloaded 72 inbound tank cars of bulk liquids and six outbound tank cars loaded with bulk liquids.

PolSELLI VS, p. 2. Included among the bulk liquids were bulk liquids classified as hazardous materials, such as flammable solvents UN1933, nitric acid UN2031, phosphorous acid UN3453, styrene UN2055 and alcohols UN1987. The Pipeline and Hazardous Materials Safety Administration ("PHMSA") of the Department of Transportation strictly regulates the transloading of hazardous materials, 49 C.F.R. §174.87. Section 1. D. (iii)-(vi) of the Terminal Transloading Agreement is explicit that it is GU Railcare which is knowledgeable and experienced with respect to the handling of hazardous materials. There is nothing in G&U's Reply or Supplemental Reply to suggest that G&U knows the first thing about the loading or unloading of hazardous materials to or from railroad tank cars. In the absence of discovery, pursuant to 49 C.F.R. §114.21(a), Petitioners -- and, hence, the Board -- have no way of knowing how G&U, ignorant of the regulations of the PHMSA, can possibly supervise and control GU Railcare's transloading of the hazardous materials; how GU Railcare's transloading services can be "for and under the auspices and control" of G&U. Reply, p. 6

In July 2012 there were six inbound covered hopper carload of wood pellets. PolSELLI VS, p. 2. One of the shippers of wood pellets, Viridis Energy, Inc. of Vancouver, BC, in its July 1, 2012, press release described how the company previously had prepared the wooden pellets for retail sale. "Viridis shipped approximately 25,000 tons of its Okanagan brand wood pellets to New England, annually, which were packaged in forty pound heavy duty plastic bags ready for sale." Petition for Declaratory Order, Vol. 2, p. 117. The wood pellets are placed in the 40-pound bags for the convenience of individuals or distributors, such as Home Depot, which then sells them to individuals. Moffett, VS p. 3. Viridis' North American Manager, Mr. Douglas Middleton, in his

Verified Statement, explained, "Until recently, the wood pellets produced in British Columbia were put in 40 pound bags at our plant, placed on pallets, shrink wrapped and then loaded into rail boxcars." Middleton VS, p. 2. By shipping the wood pellets in bulk in a covered hopper car and having GU Railcare perform the transloading and bagging services at the Upton Terminal, Viridis was able to ship approximately 20 more tons of wood pellets than it could ship in a boxcar. Middleton VS, p. 2. The bagging by GU Railcare at the Upton Terminal, however, was no different than the bagging by Viridis at its Vancouver plant. The one was part of the manufacturing process as was the other. Neither falls within the term "transportation" as defined in 49 U.S.C. §10102(9). See, Docket No. 35057, Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order, served September 26, 2008; Docket No. FD 34192, Hi Tech Trans. LLC--Petition for Declaratory Order--Newark, NJ, served August 14, 2003.⁶ After considering the Petitioners' Motion to Reconsider Petitioners' Request for Discovery, filed February 13, 2013, and its arguments, G&U dug up a Mr. Gordon Murray, Executive Director of the Wood Pellet Association of Canada, to try to contradict Mr. Middleton's testimony and to contend that the bagging of wood pellets is not part of the manufacturing process. Murray VS, p. 3. Mr. Murray, however, never spent a day as an employee in a wood pellet manufacturing plant. Murray VS, pp. 1-2.

G&U in its Reply, pp. 20-21, and Supplemental Reply, pp. 3-6, attempts to analogize GU Railcare's bagging of the wood pellets in 40-pound bags for retail sale to the baling and wrapping of solid waste which the Board found to be preempted railroad transportation in Docket No. 34797, New England Transrail, LLC, d/b/a Wilmington &

⁶ Green Mountain Corp. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005), cited by G&U, Reply, p. 18, involved no bagging of the cement or salt following their unloading from the rail cars and temporary storage in silos.

Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--in Wilmington and Woburn, MA, served July 10, 2007. There, however, is a big difference. The bagging and wrapping of solid waste considered in that proceeding were intended to facilitate the solid waste's transportation by the railroad, whereas in the instant proceeding the bagging of the wood pellets followed their transportation by the railroad and was undertaken to facilitate the 40-pound bags' truck transportation, in the case of Viridis principally in vehicles of one or another of Mr. Dana's companies. Middleton VS, p. 3. G&U additionally comes up with the patently absurd statement, "The procedure used to transload and bag pellets is very similar to the procedure used at many railroad yards to transload plastic pellets. Typically, plastic pellets arrive in rail hopper cars and are transferred into bags or boxes for further distribution." Moffet VS, p. 4; Reply, p. 19, fn. 5. Plastic pellets simply are not transloaded by the delivering railroad. To the contrary, the plastic pellets are unloaded directly from the railroad cars into the customer's facility. G&U might have been well advised to have studied the record in Docket No. NOR 42123, M & G Polymers USA, LLC v. CSX Transportation, Inc., before making the outlandish statement that it did.

Attached as Appendix A is the verified statement of Ms. Diana Del Grosso, and she explains quite clearly and without animosity why she believes GU Railcare in performing the transloading at the Upton Terminal is not acting under the supervision and control of the G&U. She supports her assertion with numerous photographs which she has taken, mostly from her home. Ms. Del Grosso does not deserve to be called a disgruntled resident of Upton as G&U's Reply does. Reply, p. 1.

Ms. Del Grosso is not alone in having her doubts about GU Railcare's transloading operations being sheltered from local zoning and other pertinent regulations by the preemption provision of 49 U.S.C. §10501(b). In addition to the other Petitioners, there are dozen of residents of Upton who are concerned about GU Railcare's transloading at the Upton Terminal. Attached as Appendix B is the verified statement of Ms. Vicky S. Markatonis, whose home as adjacent to the Upton Terminal. Among other things, Ms. Markatonis describes her conversation with Mr. Polselli, who claimed that GU Railcare enjoyed the preemptive rights of the G&U and could transport the truckloads of 40-ound bags of wood pellets to the wood pellet facility twenty-four hours a day seven days a week. A copy of a petition by literally dozens of Upton residents is attached as Appendix C.

Attached as Appendix D is a copy of a letter from Upton Building Commissioner Patrick Roche, dated March 6, 2013, expressing his hope that the Board will remove the uncertainty relating to the transloading operations in the Upon Terminal.

A copy of a letter from Mr. Tom Davidson, Chairman of the Town of Upton Planning Board, dated April 9, 2013, is attached as Appendix E. He explains that body's concerns about GU Railcare's transloading operations at the Upton Terminal and the efforts it made to bring the issue to the Board's attention. Nowhere in his letter does Mr. Davidson indicate that the Planning Board is looking for some reason why G&U should not provide transloading services in its yard, as G&U charges in its Reply, p. 2.

WHEREFORE, Petitioners respectfully ask the Board to find that the transloading operations of Grafton Upton Railcare, LLC, at the Upton Terminal of the Grafton &

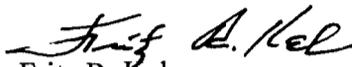
Upton Railroad Company do not come within the preemption provision of 49 U.S.C.
§10501(b).

Respectfully submitted,

DIANA DEL GROSSO, RAY SMITH, JOSEPH
HATCH, KATHLEEN KEEY, ANDREW
WILKLUND AND RICHARD KOSIBA

By their attorneys,

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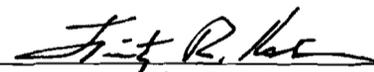

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Dated: May 20, 2013

CERTIFICATE OF SERVICE

I certify that I this day have served a copy the foregoing Reply upon each party of
record either by e-mail or prepaid first-class mail.

Dated at Washington, DC, this 20th day of May 2013.



Fritz R. Kahn

APPENDIX A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35652

**PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF DIANA DEL GROSSO

1. My name is Diana Del Grosso. I reside at 15 Depot Street, Upton, MA, approximately 200 feet from the new wood pellet packaging facility on Maple Avenue. The wood pellet packaging plant is located at the 25 Maple Avenue, Upton MA facility (Facility). I am allowed access to my neighbors' yards where I am able to see and photograph the ongoing transloading and trucking activities at the Facility. I understand that preemption applies when a railroad conducts transloading operations. However, from my personal observations of the Facility, the vast majority of all operations at the Facility involve Dana Company equipment and trucks with markings such as Dana Transport, Suttles and Liquid Transport Corporation (LTC). Almost all of the railcars delivering bulk pellets to the wood pellet packaging plant are marked Dana Railcare. I have never seen any equipment marked GU Railcare, and very infrequently do I even see trucks marked G&U Railroad, as are commonly seen at the G&U railyard in nearby, Grafton MA. When I have seen G&U vehicles, they are on or near the main tracks, not in the transloading area

as many other vehicles are. The G&U states that Dana Company has no “leasehold” or “sublease” agreements; however, in my opinion, the omnipresence of Dana Company at the Facility appears overwhelming for a company who claims to have no investment or stake in this facility. The attached photographs are examples of what I see on a regular basis. See attached pictures, Del Grosso VS, pp 9-26.

2. According to the most recent town Master Plan, only 5.9% of the area of Upton is zoned commercial and industrial. The current town zoning bylaws are fairly stringent regarding industry in order that industrial uses harmonize with residential areas, especially since there are long standing, existing residential areas located in commercial and industrially zoned areas. The 25 Maple Avenue property has previously been used for commercial activities, along with a very small, adjacent portion for railroad service. Previously, nearby residents have not had any significant questions or concerns, nor have they voiced any complaints with the operation of these businesses or the railroad service. The previous business activities being conducted were transparent, harmonious and respectful to residents living nearby; and there were no claims of preemption or attempts to by-pass any laws. There were not, and still are not any issues with the movement of the trains.

3. The wood pellet packaging plant located at the Facility has been a constant source of disharmony and disruption to our neighborhood living environment and quality of life due to the excessive and persistent noise. Even people living in remote surrounding neighborhoods have raised serious concerns to town officials regarding the noise, and as recently as March 2013, have continued to raise these concerns with the Upton Board of

Health. The wood pellet packaging plant runs for approximately 10 - 12 hours almost every weekday. Using noise level readings obtained from the Upton Board of Health, and when calculated in accordance with Massachusetts Department of Environmental Protection (MassDEP) standards, the wood pellet packaging plant noise level measured by the Upton Board of Health at my property was 19 decibels above ambient levels (59 decibels vs. 40 decibels). See attached, Del Grosso VS, pp. 27-28. This level exceeds the town zoning bylaw by more than six times the maximum allowable level of three decibels over ambient at or beyond the property line. This constant noise can clearly be heard inside of our homes with the windows closed. My neighbor has indicated to me that she was informed by Mr. Michael Polselli, Manager of Dana Transport in Grafton, that there are plans to run the wood pellet packaging plant seven days a week, twenty four hours a day and because of railroad preemption, we have no recourse.

4. In May of 2009, while outside in my neighborhood, I had a conversation with an associate of Mr. Jon Delli Priscoli named Ed Coren. I recall him telling me that Mr. Delli Priscoli had recently sent him and several other men to Tennessee to learn how to repair the railroad tracks and install ties. I recall him referring to himself as "Jon's right hand man" and to feel free to ask him any questions and he would get them right to Mr. Delli Priscoli. In the course of our conversation, I stated that I had heard a local abrasives company, Washington Mills, was going to be opening their business down on the Maple Avenue property. His reply was that Washington Mills would never come down here and that it was Dana Suttles who was opening a business down there. When I questioned him as to who they were and what they did, I remember that he appeared flustered and

uncomfortable all of a sudden, and he said that he did not know. I could tell he was uncomfortable but did not understand why. We exchanged pleasantries and I returned to my home.

5. In March of 2009, as work at the 25 Maple Avenue property created extremely dusty conditions, I made three personal phone calls to Mr. Kevin Lobisser, the property owner, and left messages about the possibility of a construction barrier of some type, as a significant amount of large, mature trees had recently been cut down, taking away any barrier we had from the dirt, dust and ash, and exposing us to unhealthy and uncomfortable conditions. My desire was to handle the situation quietly and personally to avoid any adverse and official involvement if it was not necessary, as we were all going to be neighbors. My three messages went un-answered so I contacted the Upton Board of Health who subsequently involved the MassDEP.
6. On March 23, 2009, following my three unanswered phone calls described above, I happened to encounter the property owner, Mr. Kevin Lobisser, and he and I spoke in person at the site. He advised me that it had been the G&U that cut down all of the trees and for me to try to communicate with them. I subsequently sent two letters to the G&U owner requesting trees or a barrier of some sort, but never received any reply.
7. For two years, my neighbors and I repeatedly contacted the local Board of Health, Code Enforcement and the MassDEP requesting help in controlling the excessive dust and ash. For a short time G&U started to use watering trucks, but I have not seen any recently and

we continue to have the same problem. The small berm, shrubs, chain link and barbed wire fence are not sufficient protection. See attached picture, Del Grosso VS, p. 26. The trees were not simply a kind gesture as suggested by the G&U, we pleaded for protection for two years before we got the small berm and shrubs. Even so, the neighborhood felt compelled to thank Mr. Delli Priscoli for this in hopes that we could all work together going forward. We sent a thank you to him soon after the work began.

8. In the summer of 2011, as the trees and fencing were being installed, I had a chance to speak with workers as they were directly outside of mine and my neighbors' homes. Several neighbors spoke with them as well, and it was clear to us that these workers were employed by Dana Company. I recall one particular conversation with a young worker who I believe was a college student. I complimented him on the nice job he and the rest of the men were doing with the trees and asked what landscaping company he worked for. I clearly recall his answer was that he did not work for a landscaping company, he worked for Dana Company on a crew that "goes around setting up their new facilities."
9. As time passed and more questions and concerns arose, I attempted to contact Mr. Michael Polselli, the manager of Dana Transport in Grafton MA, who I understood was the responsible party. Once again, I was hoping to peacefully and personally address our issues without official involvement. My contacts to him (see attached e-mails, Del Grosso VS, pp. 29-30) were met with no response.
10. In August of 2011, the Town of Upton Board of Selectmen established a Railroad Fact

Finding Committee (Committee) after an overwhelming number of residents continued to voice their concerns and questions regarding the Maple Avenue facility.

11. On December 1, 2011, three Committee members, one from the Board of Selectmen, one from the Board of Health and one from the Planning Board, appointed two residents to the Committee. I was not chosen at this time and the Committee proceeded without incident.
12. On December 8, 2011, I was appointed to the Committee after one resident member resigned. I attended my first meeting on December 15, 2011.
13. On December 16, 2011, late in the evening, the day after attending my first Committee meeting, G&U placed an un-postmarked letter in the mailbox outside of my home, warning myself and the other members of the Railroad Fact Finding Committee of their rules concerning the Committee. I subsequently contacted the other members of the Committee and none of them had received a letter in their mailbox as I had. The letter was included in the original Petition (see Vol. 2, Exhibit 23, pp. 82 - 83). Attached is a related newspaper article (see Del Grosso VS, p. 31) and the Committee Chairman's response to the incident (see Del Grosso VS, p. 22).
14. At a Selectmen's meeting on December 20, 2011, it was reported that the G&U owner conveyed his objection with my appointment to the Committee, stating his reason was because I was an abutter. See attached article, Del Grosso VS, p. 31. Please note that the

Board of Health member on the Committee, Mr. Richard Desjardins, is also an abutter to the railroad, but I have not heard the G&U make any issue of that.

15. I have seen and observed, from public ways, the Dana Transport trucking facility in Grafton, located approximately five miles from the Upton Facility and I can confirm that they have no rail access at this location and that this is not a new facility. Offering rail service as an additional service to their customers from that location is not possible.
16. In 2011, an invitation from the National Association of Chemical Distributors (NACD) offered a tour of the “new Dana chemical rail and intermodal facility in Grafton.” See attached, Del Grosso VS, p. 33. Given the fact that there is no Dana chemical rail and intermodal facility in Grafton; the Dana facility in Grafton is not a new facility, and the Dana facility in Grafton has no rail access, I believe the reference to this new Dana chemical rail and intermodal facility was most likely a reference to the Upton Facility at 25 Maple Avenue.
17. All of the photographs set forth and included in this verified statement were taken by me. I used my Nikon 14.1 Megapixel camera with a 21x zoom lens. In my opinion, all of the above-referenced photographs offer a fair and accurate representation of activities and operations in the field.

I, Diana Del Grosso, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file the statement.

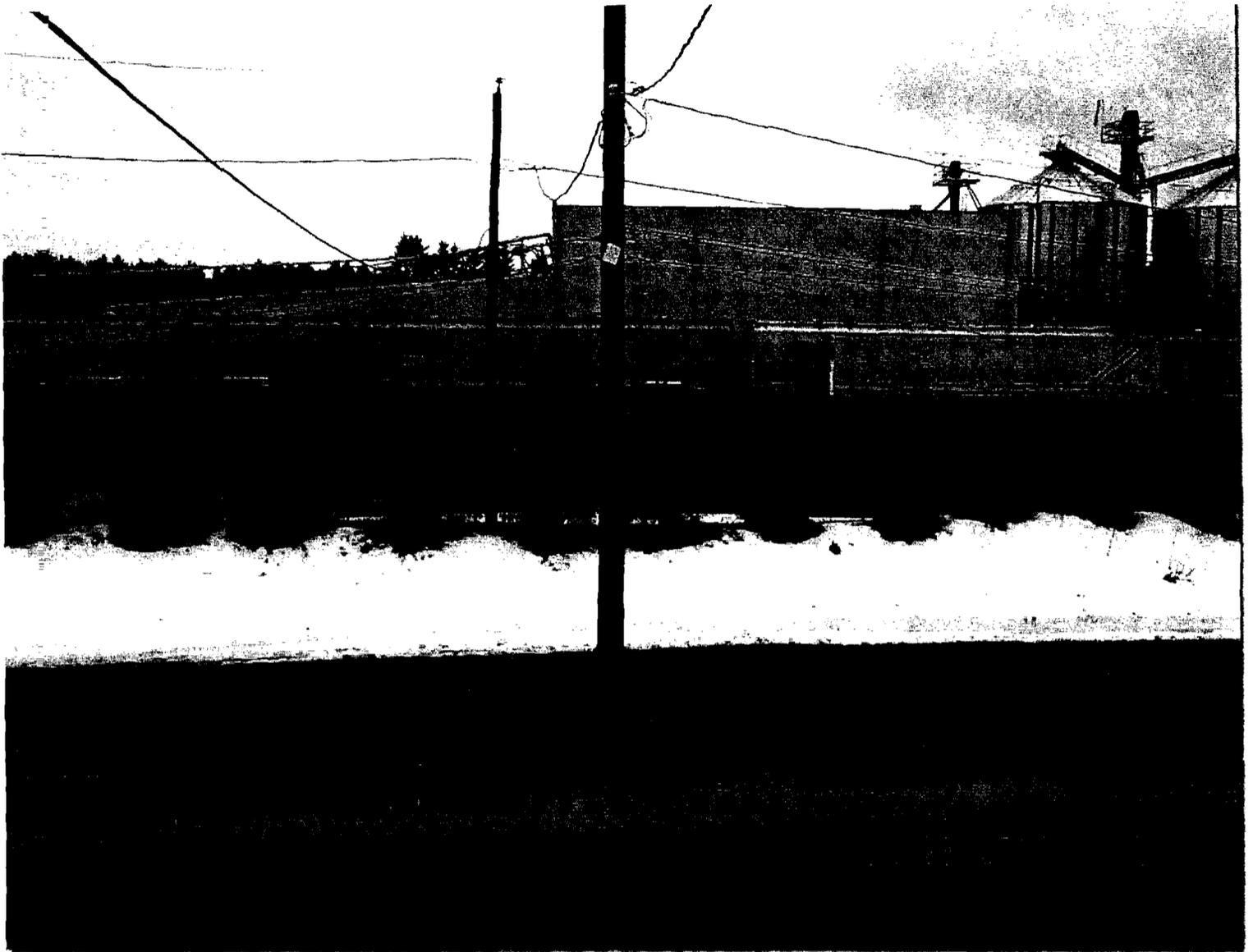
Dated at Upton, MA, this 16th day of May, 2013



Diana Del Grosso

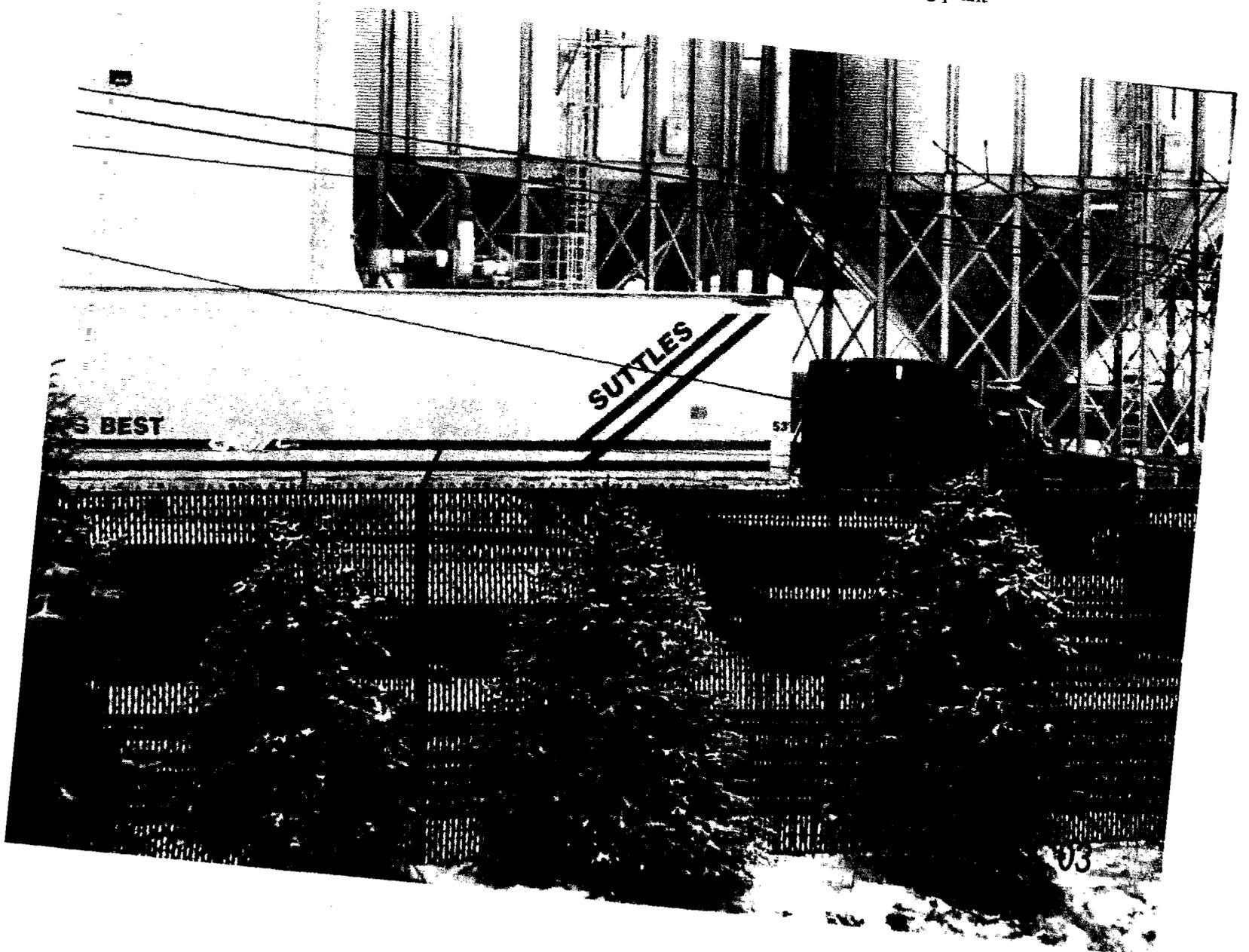
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Suttles and Dana Railcare in front of the wood pellet packaging plant



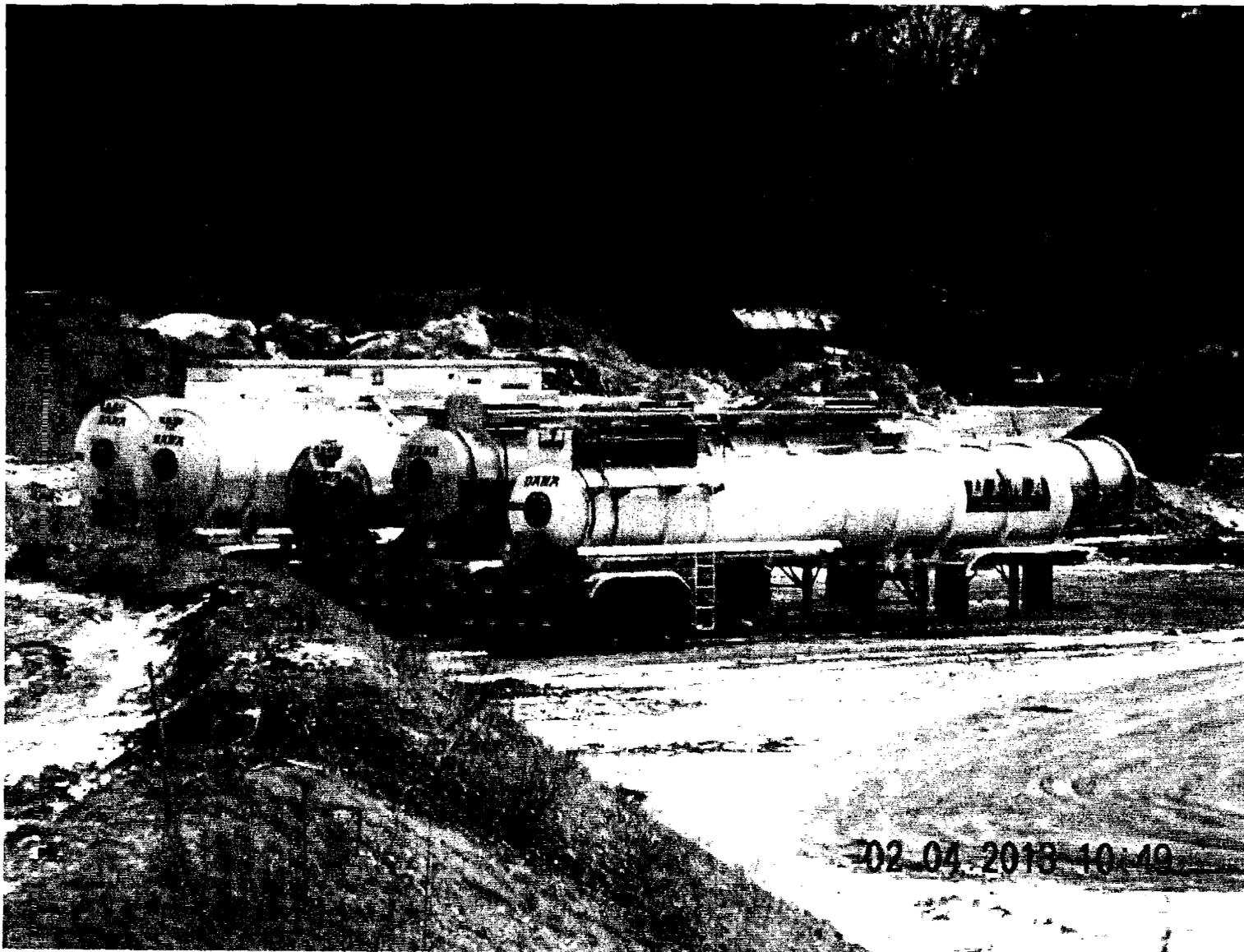
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana Transport and Suttles in front of the wood pellet packaging plant



VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT

Dana truck tankers at the Facility (February 4, 2013)



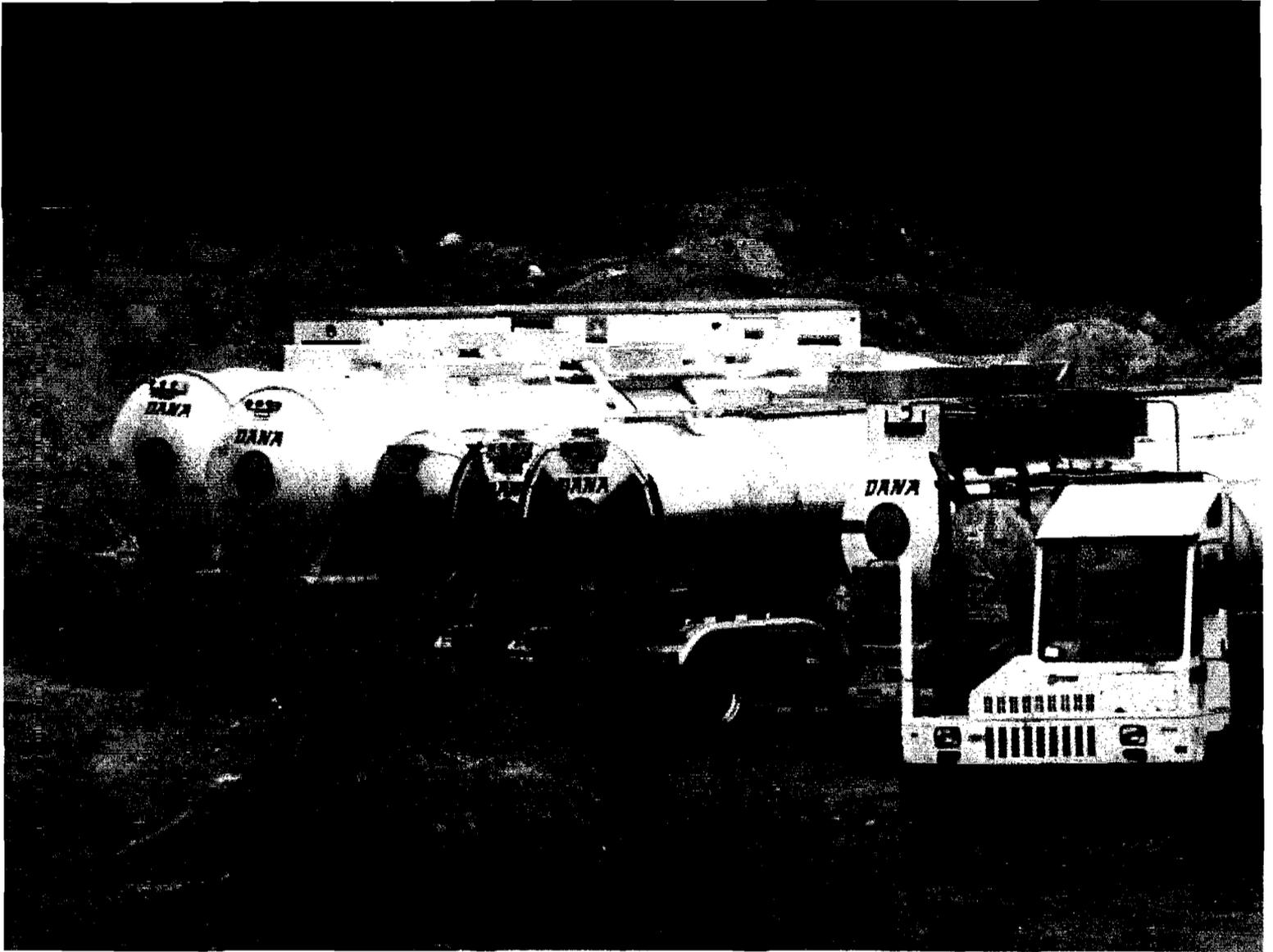
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Facility transload area



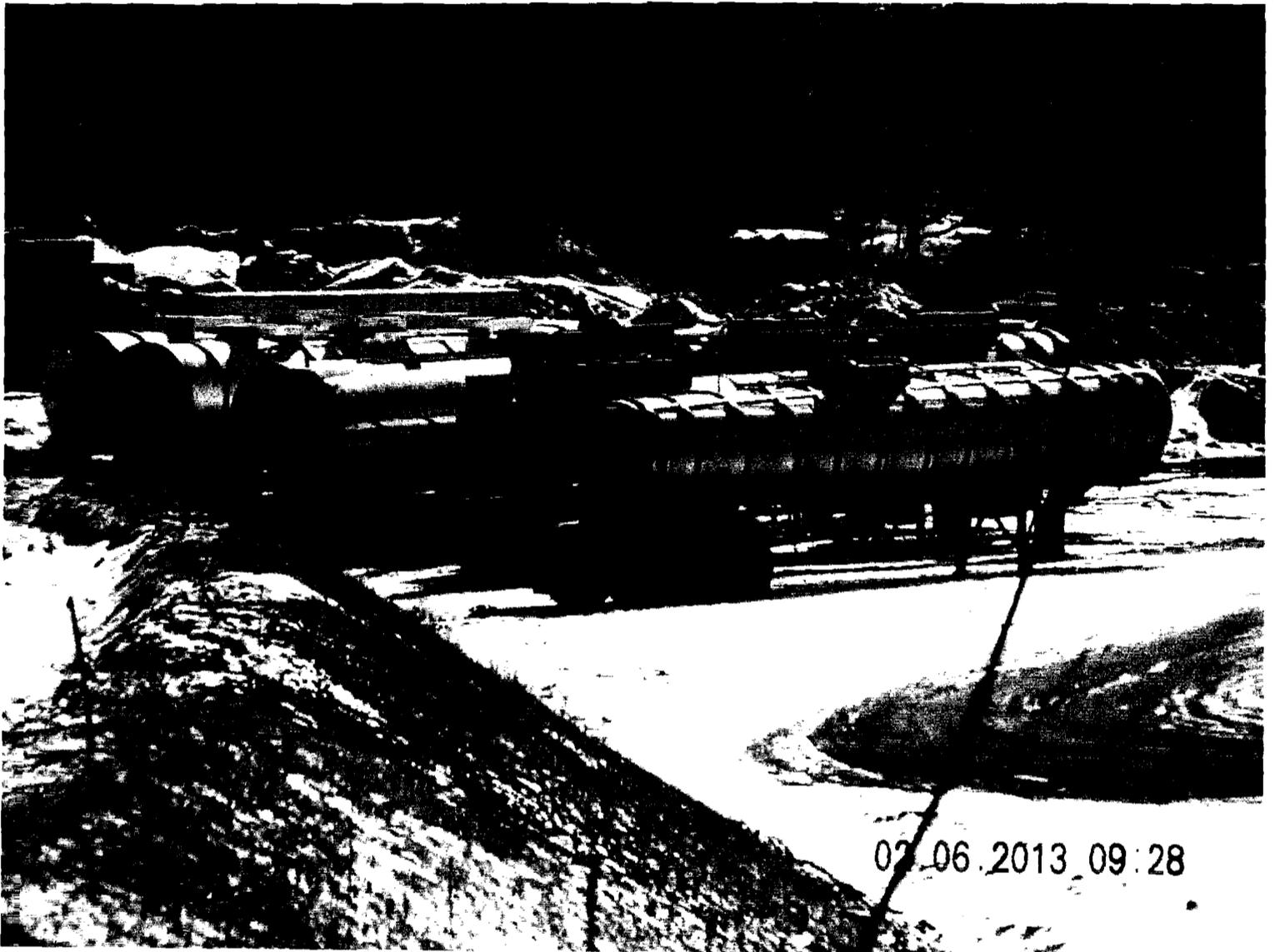
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tankers at the Facility (February 5, 2013)



**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tankers at the Facility (February 6, 2013)



VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT

Dana truck tankers at the Facility (February 12, 2013)



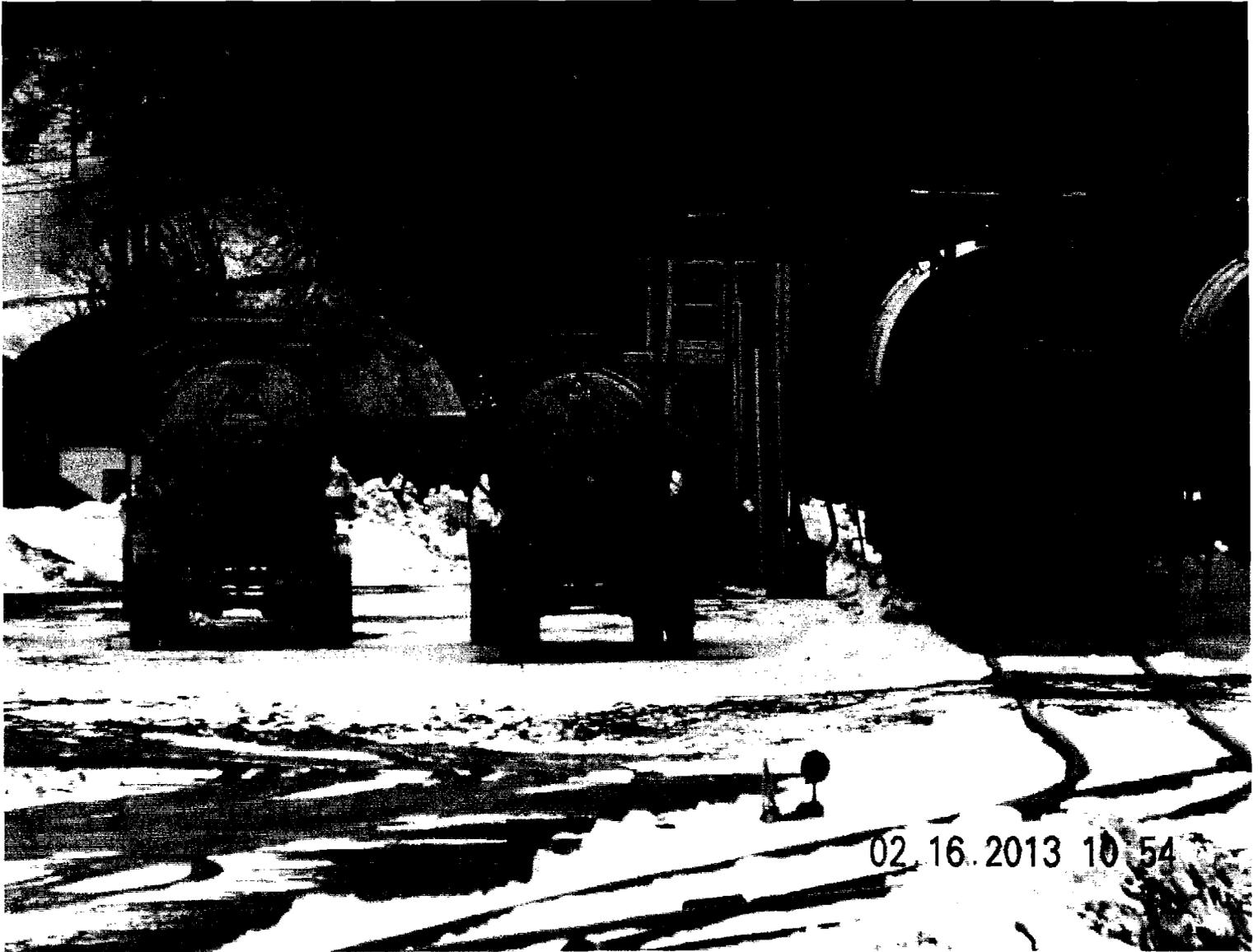
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana and Suttles truck tankers at the Facility (February 15, 2013)



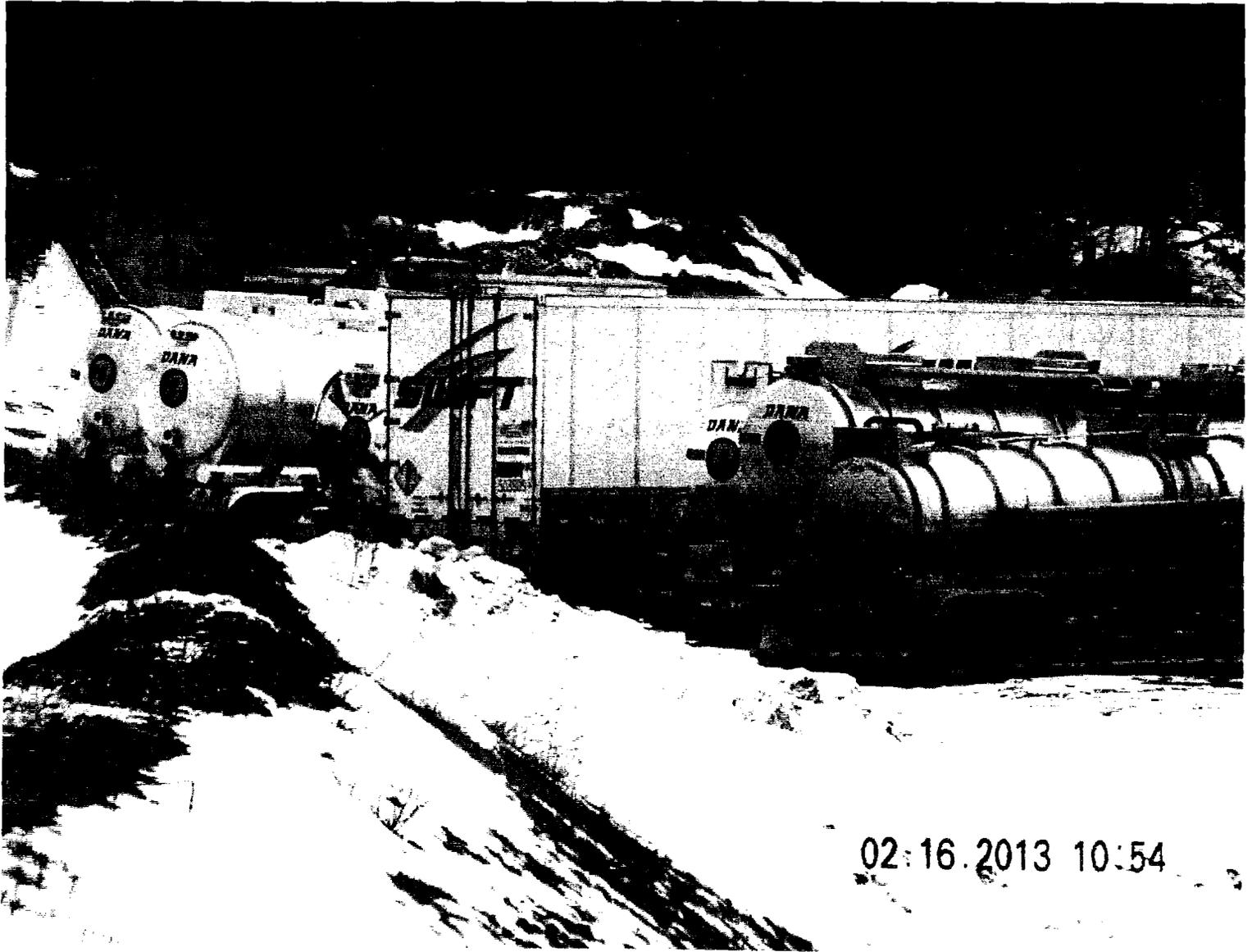
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana and Liquid Transport Corporation truck tankers at the Facility (February 16, 2013)



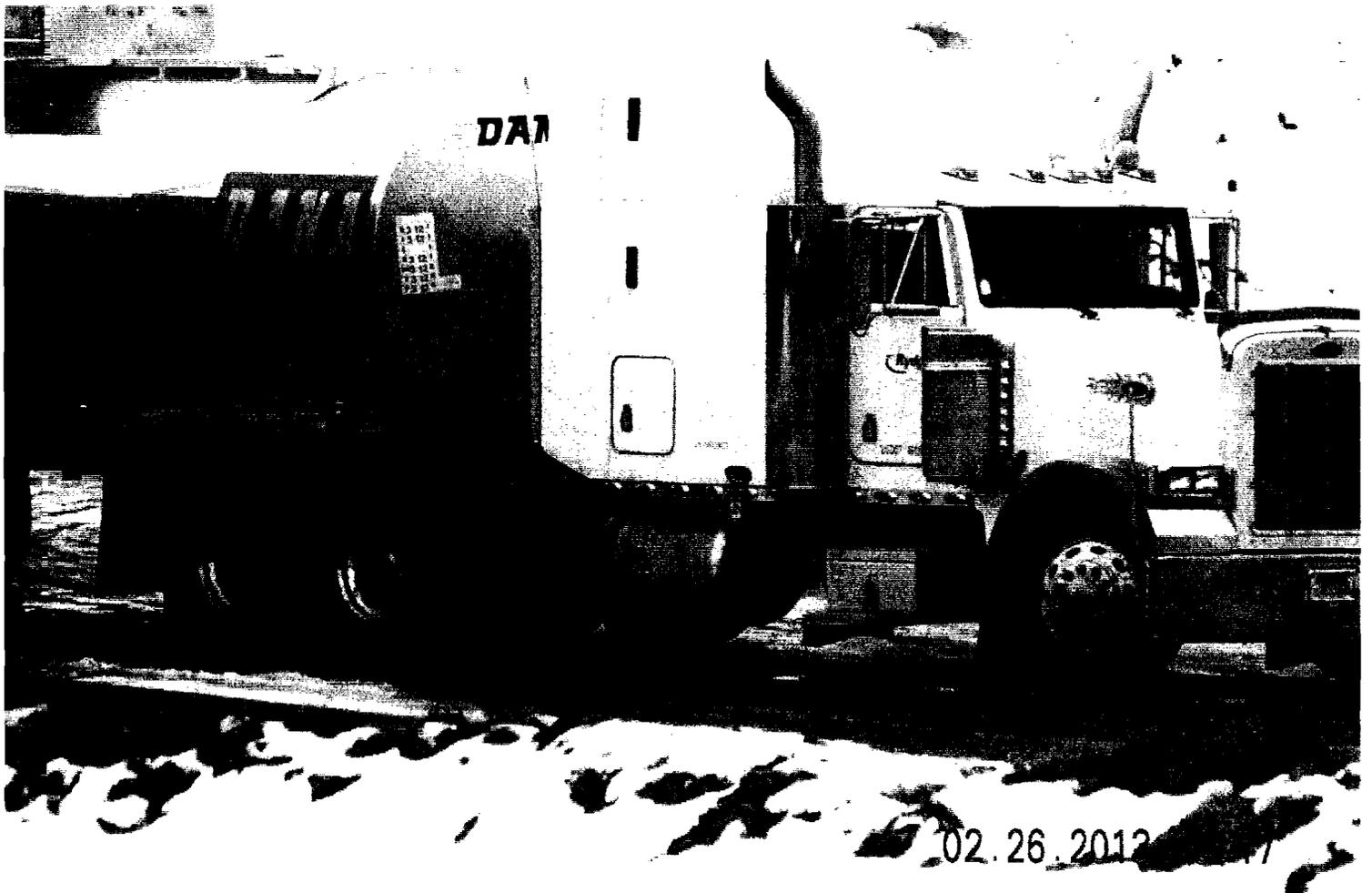
VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT

Dana truck tankers at the Facility (February 16, 2013)



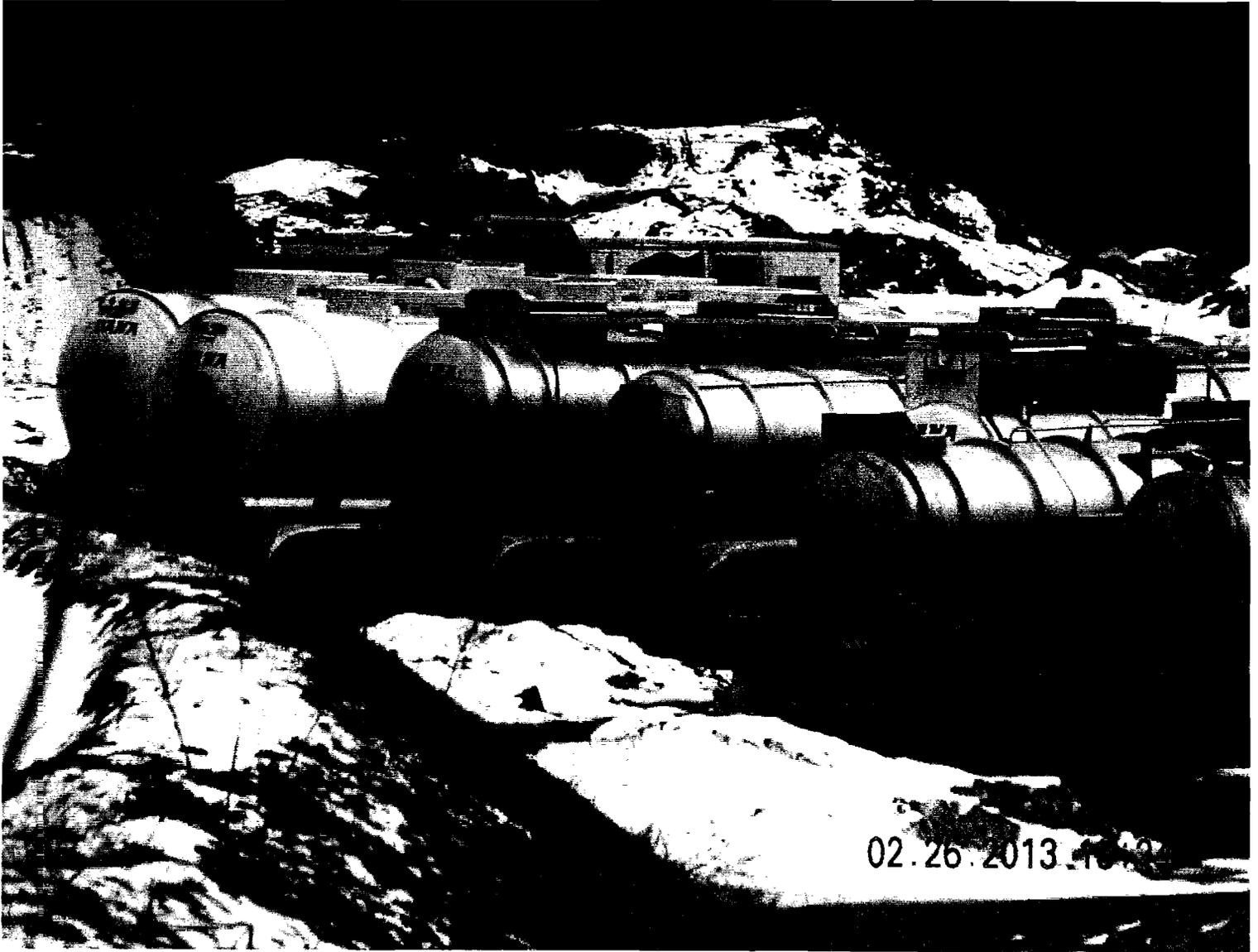
VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT

Dana truck tanker at the Facility (February 26, 2013)



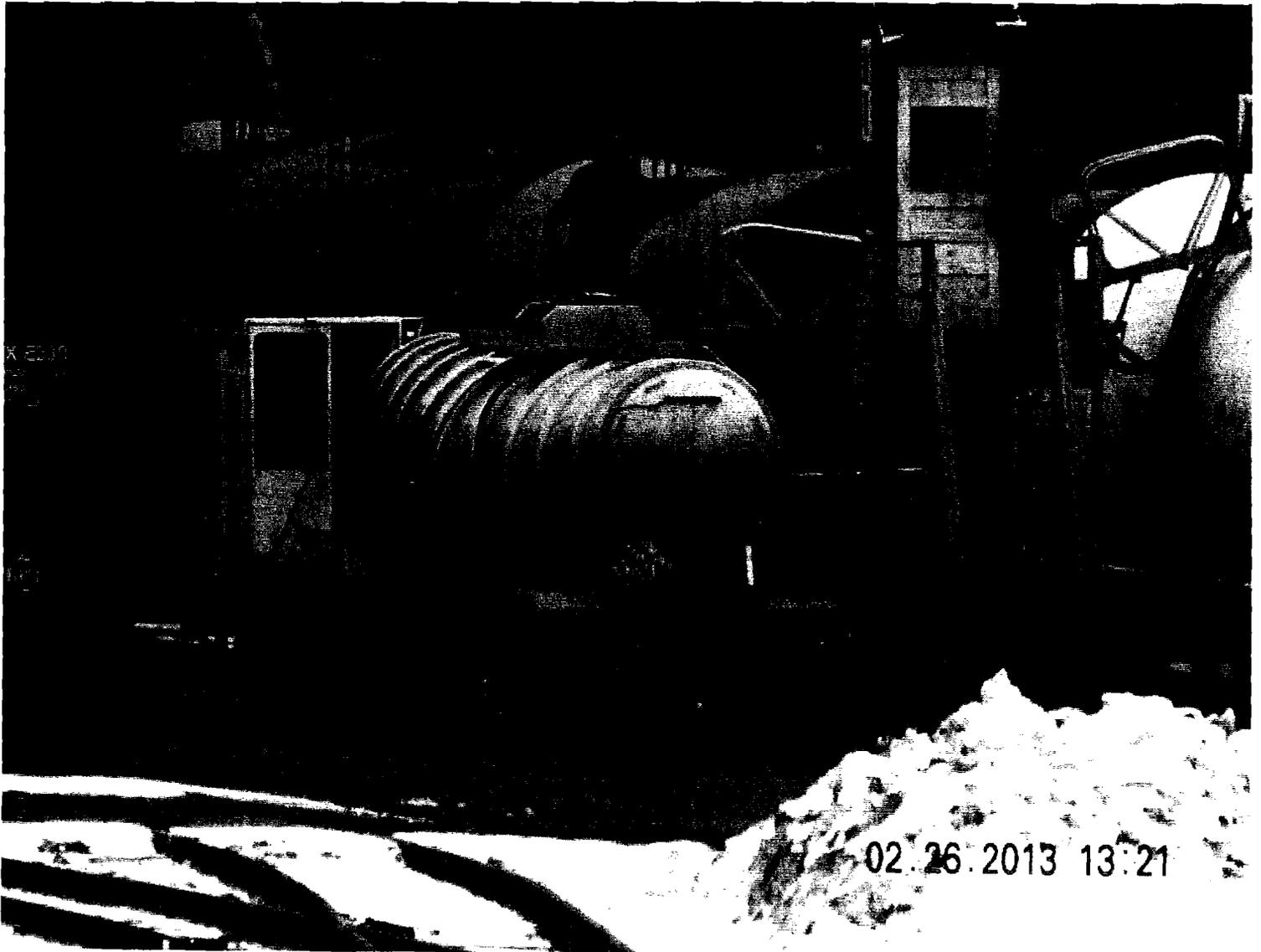
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tankers at the Facility (February 26, 2013)



**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana/Suttles truck tanker transloading at the Facility (February 26, 2013)



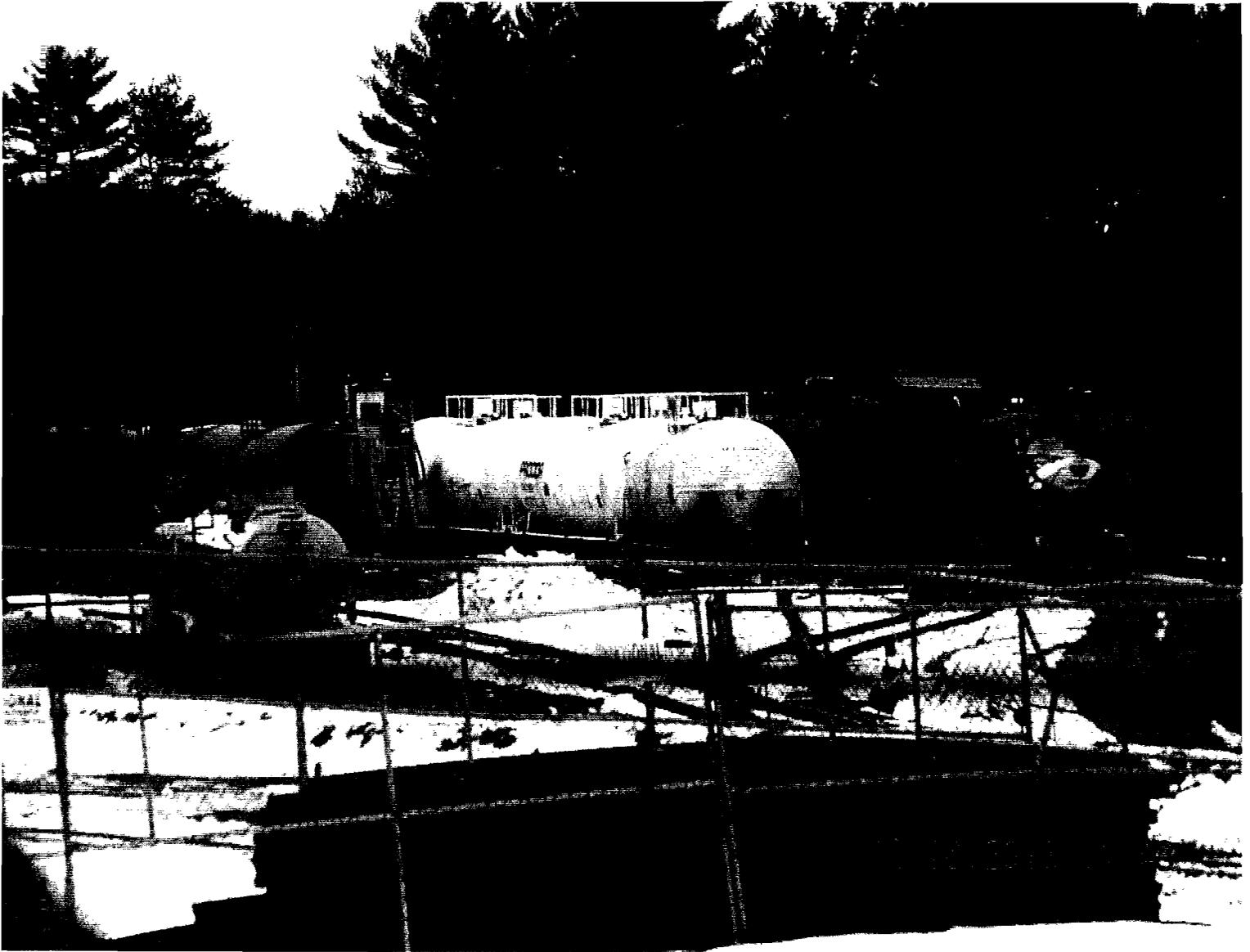
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tanker on a Suttles truck at the Facility (February 26, 2013)



**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tankers at the Facility (February 26, 2013)



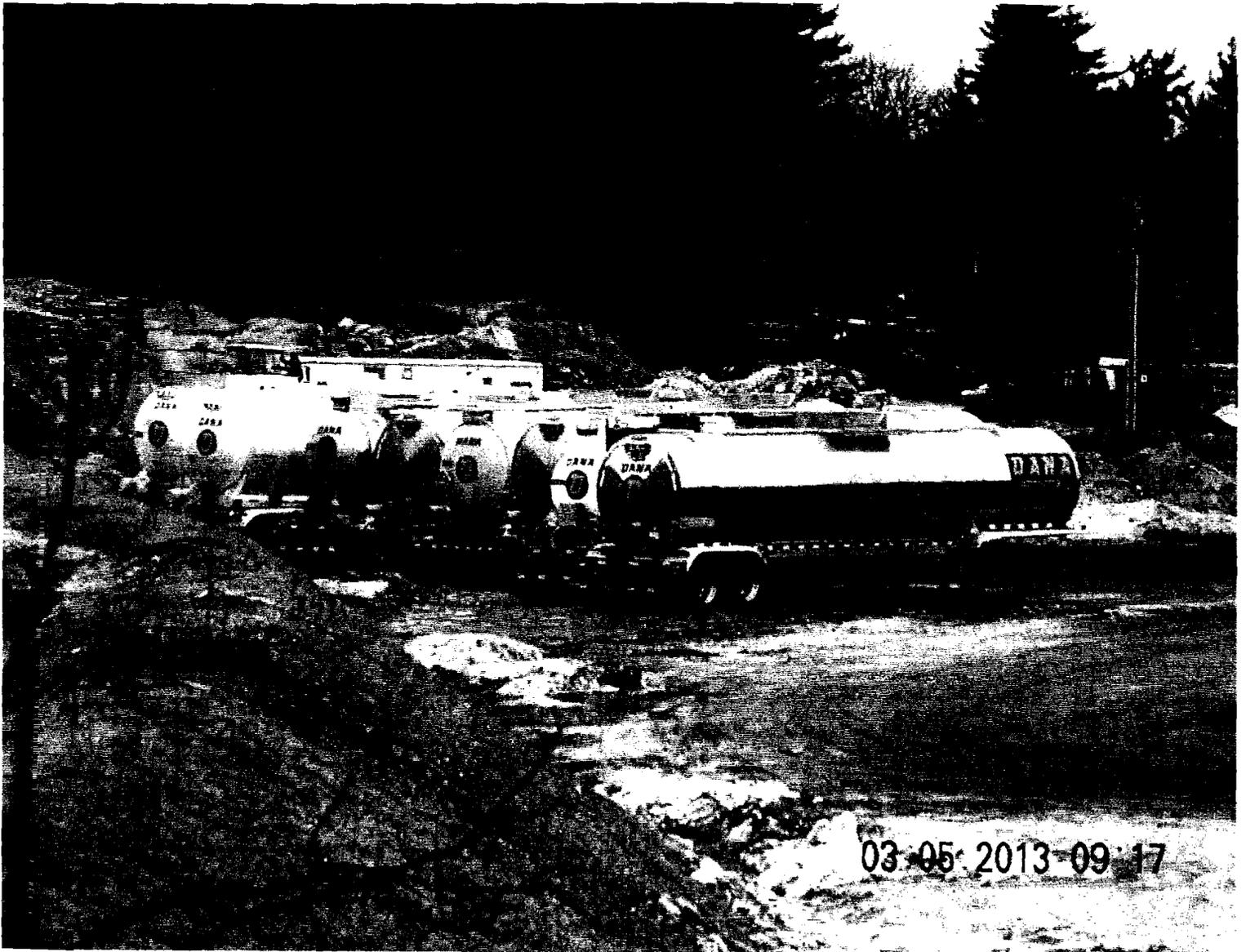
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tankers at the Facility (March 2, 2013)



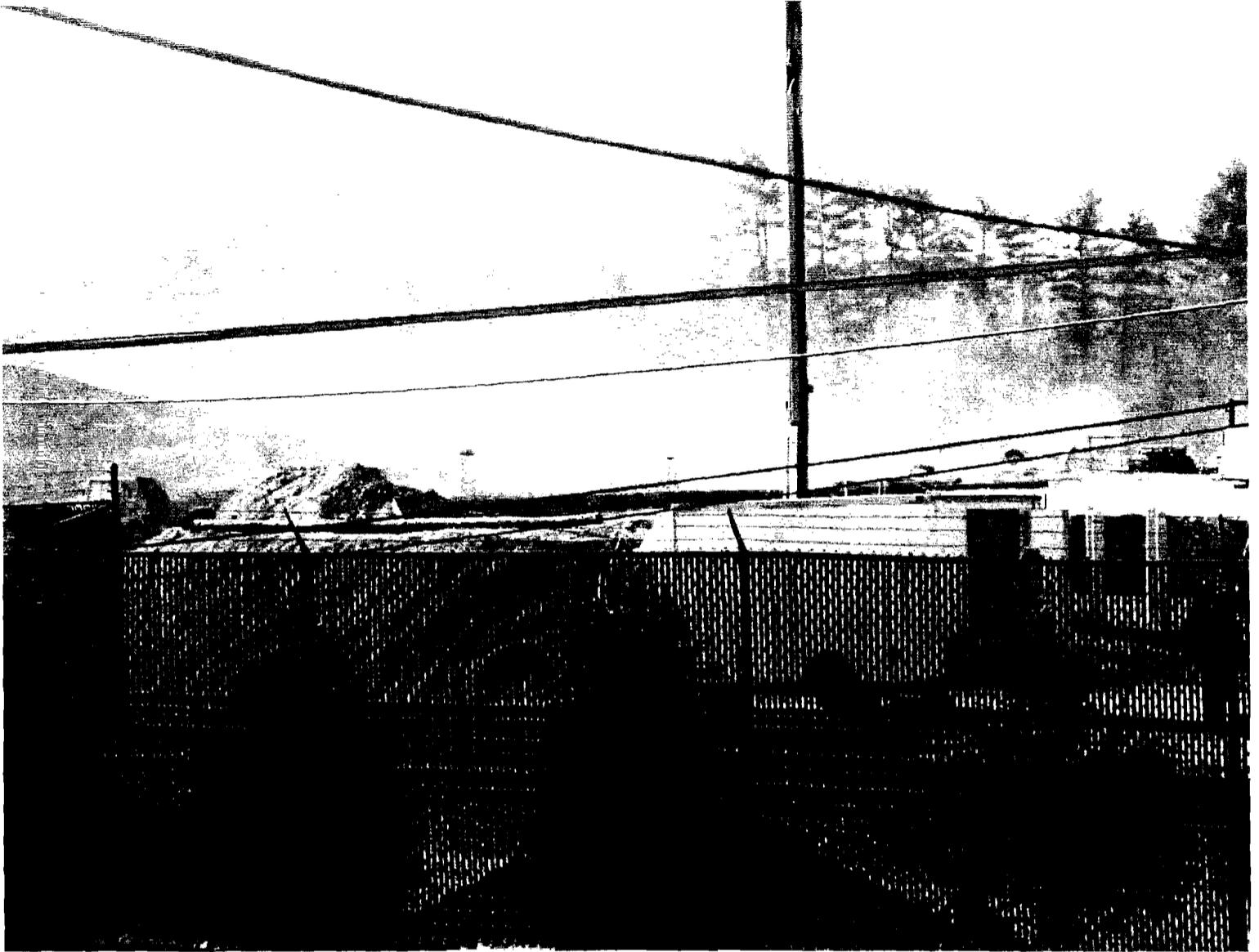
**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dana truck tankers at the Facility (March 5, 2013)



**VERIFIED STATEMENT OF DIANA DEL GROSSO
PHOTO ATTACHMENT**

Dust conditions on Maple Avenue property adversely affecting neighbors.



KID

COMMUNITY NOISE ENFORCEMENT - MANUAL L₉₀ CALCULATION WORKSHEET

Date 11/2/12 Sound Source RAILROAD - P.P. Measurement Location DEPOT ST.
Calibration Times _____ Sampling Interval _____ Start Time 8:35 Finish Time 8:58

Comments _____ L₉₀ Value _____

operational

dBA	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
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L_{max} (Operational)

59 decibels

D.D.

5/16/13

R.D

COMMUNITY NOISE ENFORCEMENT - MANUAL L₉₀ CALCULATION WORKSHEET

Date 5/16/13 Sound Source L Road Measurement Location Depot St
 Calibration Times _____ Sampling Interval _____ Start Time 9:50 AM Finish Time 10:00
 Comments _____ L₉₀ Value _____

dBA	Ambient																								
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L₉₀ (Ambient)

40 decibels

DD

5/16/13

VERIFIED STATEMENT OF DIANA DEL GROSSO - ATTACHMENT

From: Diana
Sent: Sunday, December 04, 2011 11:25 AM
To: MPolselli@DanaCompanies.com
Subject: Upton Pellet Warehouse

Good Morning, Michael

I am writing to inquire about activities on Maple Avenue in the pellet warehouse. It was apparently in operation yesterday, Saturday December 3 and also this morning by 8:00am, Sunday December 4. It is very noisy and seems unfair to the neighbors to have their outdoor environment so disrupted on the weekends. I had the pleasure of speaking with many of your workers on numerous occasions this summer as they were constructing the fencing and planting the trees around our neighborhood. I even supplied them all with Italian Ice on several extremely hot days. I have wanted to commend your company on such wonderful, professional employees and hope you share the same human kindness and integrity as they do. We all understand the need to make a living and are not looking to prevent you from doing so, but within that comes the sincere request to allow us our peace and the gift of relaxation and joy with our lives in our yards and our homes on the weekends.

Thank you very much for your time,

Diana Del Grosso
15 Depot Street
Upton

From: Diana
Sent: Thursday, June 21, 2012 8:53 AM
To: Michael Polselli
Subject: Upton Tankers
Good morning, Mike,

I live on 15 Depot Street in Upton. My elderly neighbor (Earle Crosby) just called me in a panic because a relief valve on a tanker parked in front of his home blew for over 10 minutes. These tankers are parked 30-50 feet from our homes, some closer. I called the EPA and they said that yes, this does let small amounts of chemicals into the air when it happens. These are explosive and dangerous chemicals, as you are aware.

Many of these tankers say Dana Railcare on them, and 2 of them parked about 30 feet from my home, closer to others, have DOT placards of Methyl Cyanide. Will you please park these dangerous chemicals in the back of the property away from our homes? I can't imagine you would like your families to be exposed to this hazard on a daily basis. There seems to be a multitude of tracks on the Maple Ave. property, so I would think that parking these tankers elsewhere is certainly an option. This doesn't seem like too much to ask. As the heat increases for the summer, I imagine the chance of these relief valves blowing would be more common. What if the valve does not work? I imagine faulty valves are not unheard of.

I would appreciate it if you would kindly address the neighborhood's concerns. This neighborhood is full of kind and wonderful people who are not looking for anything but safety and quality of life.

Respectfully,

Diana Del Grosso
15 Depot Street
Upton, MA
508-615-1267



Upton panel blasts railroad

By Morgan Rousseau/Daily News staff

Milford Daily News

Posted Dec 23, 2011 @ 01:29 AM

Last update Dec 23, 2011 @ 10:21 AM

Business News

The Great Gatsby's 5 Top Money Lessons

First-Time Homebuyers Care More About Work, Not Neighborhood

Where (and How) to Get Hired Now at that Summer Job

Suggested Stories

Fifteen arrested by Peds in MetroWest oxoxoxone...

Milford Human Society hosts plant sale

Milford-area police news for Saturday, May 11

From the Web

Matt Kemp's Wonderful Gesture is a Must See MLB.com

Report: Fan chokes on hot dog, diesFox Sports

Man arrested after selling his grandson on...Digital Trends

Sponsored content What's this?

UPTON — The war of words between a local watchdog committee and the owner of the Grafton & Upton Railroad is heating up.

Gary Bohan, chairman of the Railroad Fact Finding Committee, last night blasted railroad management for dropping an unpostmarked letter to the board into the mailbox at member Diana DelGrosso's Depot Street home.

That Dec. 16 letter from railroad President John Delli Priscoli spelled out in unambiguous terms that while the committee is free to keep an eye on railroad operations its members cannot go on Grafton & Upton property or talk to its employees and subcontractors without written permission. Violations, he said, could mean legal action.

In turn, a spokesman for the railroad last night said the company wanted to quickly inform DelGrosso of the company's ground rules after its workers allegedly saw her watching the rail yard from her property through a pair of night vision goggles.

"That's the most ridiculous thing I've ever heard," DelGrosso told the Daily News last night. "It is absolutely, 100 percent not true. I've never even seen night vision goggles."

Railroad spokesman Doug Pizzi said railroad officials thought it "was better safe than sorry" to let her know know the rules.

"We wanted to make sure as a courtesy to her what the rules were going to be, that this was serious issue, so we got her a copy of letter post haste. A number of town employees got it as well," Pizzi said.

According to a copy of the letter provided to the Daily News, the letter was sent to Bohan in care of Town Hall with copies to Town Manager Blythe Robinson, Upton Police Chief Michael Bradley, Upton Fire Chief Aaron Goodale and the Federal Railroad Administration.

Bohan fired back at the railroad in a memo sent to Town Manager Robinson dated yesterday.

"...To have a committee member get singled out and then to have somebody go to their house and wrongfully tamper with their mailbox is completely unacceptable.

There is no room in the committee process for anything that might reasonably be construed as intimidating or threatening and such behavior will not be tolerated," Bohan said.

After the meeting, Del Grosso said her name was handwritten on the envelope, but that she did not see who delivered it.

"I just want to be clear that I did not say who put the letter in my mailbox, just that it was put there," she said.

The fact-finding committee is charged with researching the safety and day-to-day operations of the Maple Avenue rail yard.

Selectmen formed the committee in August in response to public calls for more information on chemicals being handled at the site, its proximity to schools and whether the railroad is federally protected from local inspection, as it claims.

At a selectmen's meeting Tuesday night, Delli Priscoli told selectmen, "I can tell you when I was at the first meeting when (the fact-finding committee) was set up, you said there would be no conflicts on that committee. In any type of public forum, an abutter is a conflict. That's really where I have a real problem."

DelGrosso has steadfastly defended her objectivity and her ability to be a neutral member of the committee.

She told the Daily News last week, "I understand there are concerns of my being an abutter, and there shouldn't be. I am only here to help find facts like the rest of the committee and let the town officials make the determinations."

Morgan Rousseau can be reached at 508-634-7546 or mrousseau@wickedlocal.com.

Comments (32)

Loading comments...

Login or register to post a comment:

Login

Username:

Password:

Forgot password

Login

Register

Email:

First Name:

Last Name:

I agree to the terms of use

I am over 13 years of age

Railroad Fact Finding Committee

Town of Upton



Massachusetts

Date: December 22, 2011

To: Blythe Robinson, Town Manager

From: Gary Bohan

Subject: Mailbox Tampering Incident

This correspondence is to inform you that one of the five members of the Railroad Fact Finding Committee reported an incident last weekend involving an un-postmarked letter from the Grafton & Upton Railroad found in the member's mailbox. The letter had the member's name handwritten on it. None of the other Committee members reported a similar incident.

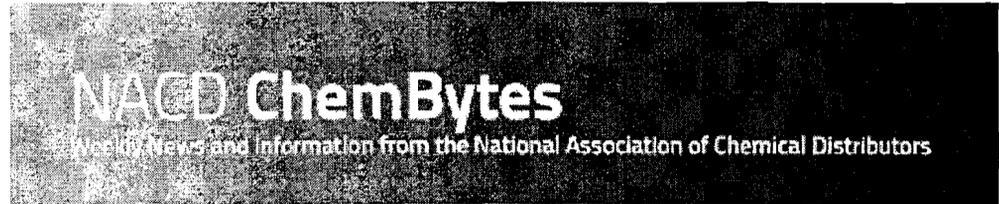
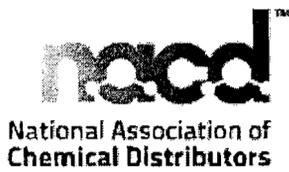
It is the position of the Committee Chair that to have one Committee member get singled out and then to have somebody go to their house and wrongfully tamper with their mailbox is completely unacceptable. There is no room in the Committee process for anything that might reasonably be construed as intimidating or threatening and such behavior will not be tolerated.

Please distribute this correspondence as appropriate.

Sincerely,

A handwritten signature in black ink, appearing to be "G. Bohan", is written over a horizontal line. The signature is stylized and cursive.

Gary Bohan - Chair



Regional Luncheon, July 28, Grafton, Mass.: Hear about the shape of the bulk chemical handling industry

Northeast Regional luncheon July 28 at Highfields Country Club in Grafton, Mass. The presenter will be Mike Polselli, terminal manager at Dana Transport's Grafton location. The discussion will focus on the current status and shape of the bulk chemical handling industry. Those who are interested also will have the opportunity to tour the new Dana chemical rail and intermodal facility in Grafton after the lunch. Email [Sochia Bezas](mailto:Sochia.Bezas@nacd.com) at NACD as soon as you can, indicating who will attend as well as whether you intend to stay for the tour of the Dana rail/intermodal facility.

APPENDIX B

**SURFACE TRANSPORTATION BOARD
Finance Docket No. 35652**

DIANA DEL GROSSO, ET AL. – PETITION FOR DECLARATORY ORDER

Verified Statement of Vicky S. Markantonis

May 16, 2013

I, Vicky S. Markantonis, reside at 14 Depot Street, Upton, MA 01568. I have lived at this address since April 1, 2001.

I have been approached by the owner of the Grafton & Upton Railroad (hereinafter referred to as "GURR") at the end of a Planning Board meeting in 2011 where he emphatically informed me that my house is on his property, namely, my deck is on his property.

After repairs were made to the railroad tracks behind my house, I have come home many times to find tankers containing explosive gases left there for long periods of time. I have contacted the Federal Railroad Authority (hereinafter "FRA") in Washington, D.C. where I was told that cars cannot be left on the tracks for indefinite periods of time. I have found no resolve other than to make these telephone calls to the FRA in Washington, D.C., and usually, on that same day or a few days later, they are removed. The tankers with the explosive gases are usually placed there after complaints are made to other agencies against the railroad by me or other neighbors. The timing is impeccable. My son has asked me over and over again if we are safe or is our house going to explode.

Recently, in January, 2013, I spoke with Michael Polselli, manager of Dana Cos., regarding the noise at the wood pellet facility, when he stated to me that I should never have purchased a house on his property. The wood pellet facility began running at night, and the noise was a constant high pitched noise heard throughout inside my house, and my son and I experienced excruciating headaches. While speaking with Mr. Polselli, he informed me that this was not going to stop, and as they enjoy pre-emptive rights of the railroad, they can continue with no stopping. He told me that eventually they will run 24/7 and possibly holidays.

I have informed the EPA, the DEP of Massachusetts, with no resolve, as they contacted the Upton Board of Health who told these agencies that it is under control – it is not. Eventually they stopped running the wood pellet facility during the night, but it continues during the day, and other neighbors who live further away through small wooded areas and forests, can hear the noise, and find it extremely annoying and irritating. The noise is such that my son could not focus on his school work (at night), and during the day, one cannot be outside enjoying the good weather.

After this same issue came up, I felt threatened and intimidated again and felt that my safety and that of my son's (a minor) to be at risk. I called the Chairman of the Board of Selectmen, Kenneth Picard, and informed him that I took this as a threatening statement, and did not know what to do. I was advised by Mr. Picard to call the Upton Police if I felt threatened.

In the days to follow, I called the Town Assessor's office regarding the property lines issue. I received a call from Glen Fowler who informed me that the plot plan filed with the Town of Upton upon my purchase of my home is correct, and that my deck is not on the railroad's property, as both the owner of GURR and Mr. Polselli affirmed it was. Mr. Fowler also informed me that he did not see why the railroad would assert that my deck is on their property, as he said it was close, but not on it, and any plot plan they have should be the same as that filed with the Town of Upton.

I have felt intimidated as there were other events such as when a seismograph was placed a few feet from the side of my house on my property without my knowledge or permission. Later I learned they were blasting with dynamite behind my home on the railroad property, which abuts my home. I left for work and contacted the Upton Police Dept. on the morning I noticed it. The Upton Police called me (they were at my house) and told me that the railroad could do whatever they want and I had no say.

I, Vicky S. Markantonis, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file the statement.

Dated at Upton, MA, this 16th day of May, 2013.



Vicky S. Markantonis

APPENDIX C

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. : 35652

**PETITION OF DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

We, the undersigned and fellow citizens of the Town of Upton, Massachusetts, fully support the above-named petitioners and their "Petition for Declaratory Order" with the Surface Transportation Board. We share in the petitioners desire to remove the uncertainty and controversy surrounding the ongoing railyard activities at 25 Maple Street, Upton MA.

We are deeply concerned that our town local bylaws and regulations, enacted to promote the general welfare of the Town of Upton and to protect the health and safety of its inhabitants, have not been applied or enforced at this railyard and we respectfully await a decision from the Surface Transportation Board regarding this important matter.

	Signature	Printed Name	Street Address	Town
1	<i>Jim Brigham</i>	Jim BRIGHAM	9 Florence Cir	Upton
2	<i>Dawn Olsen</i>	Dawn OLSEN	3 Florence	Upton
3	<i>Kristine Mespelli</i>	Kristine Mespelli	4 Florence	Upton
4	<i>Christina Mospelli</i>	Christina Mospelli	4 Florence Circle	Upton
5	<i>Elise Teasdale</i>	Elise Teasdale	6 Florence Cir	Upton
6	<i>Amy Griswold</i>	AMY GRISWOLD	13 Florence Cir	Upton
7	<i>Pam Oglesby</i>	Pam Oglesby	15 Florence Cir	Upton
8	<i>Camille Hamlet</i>	Camille Hamlet	11 Florence Cir	Upton
9	<i>Chatham Y. Flynn</i>	Chatham Y. Flynn	19 Florence cir	Upton
10	<i>Richard O'Hare</i>	Richard O'Hare	17 Florence cir	Upton
11	<i>Dana Aniello</i>	Dana M. Aniello	23 FLORENCE CIR	UPTON
12	<i>Frank Aniello</i>	Frank Aniello	23 Florence Cir	Upton
13	<i>EMcManus</i>	EMcManus	33 Florence Cir	Upton
14	<i>Dawn O'Sullivan</i>	Dawn O'Sullivan	38 Florence Cir	Upton
15	<i>Charles R. Julian</i>	CHARLES R. JULIAN	36 FLORENCE CIRCLE	UPTON
16	<i>Kerrie Julian</i>	Kerrie Julian	36 Florence Circle	Upton
17	<i>Paul Bernier</i>	Paul Bernier	34 Florence Cir	Upton
18	<i>Mary Elaine Bernier</i>	Mary Elaine Bernier	34 Florence Circle	Upton
19	<i>Ten Antonelli</i>	Ten Antonelli	26 Florence Cir	Upton
20	<i>David Antonelli</i>	David Antonelli	26 Florence Cir	Upton

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

**PETITION OF DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
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	Signature	Printed Name	Street Address	Town
1		Debra Hunker	11 Orchard St	Upton
2		T. Vanstette	118 Chestnut St	Upton
3		Pamela S Lucas	27 1/2 North St	Upton
4		Christopher M. Lucas	242 North St	Upton
5		David Paul	6 Nathaniel Way	Upton
6		Nicole Kelleher	5 Merriam Way	Upton
7		Michele B Craemer	17 Henry's Path	Upton
8		Sue Mainho	84 Milford St	Upton
9		Chris Charron	11 Tyler Rd	Upton
10		KATHAN MILLER	23 MERRIAN WAY	Upton
11		Alan Loyce	59 Walnut St	Upton
12		Joseph W. Romano	3 Fieldstone DR	Upton
13		William Applegate	11 Sadler Rd.	Upton
14		Heather Applegate	11 Sadler Rd	Upton
15		MARY ROBINSON	10 Sadler Rd	Upton
16		ERIC ROBINSON	10 Sadler Road	Upton
17		Frank Sanchez	32 Grove St	Upton
18		DAVID DeMARZO	11 MISCOC Hill Rd	Upton
19		Shawn DeMarzo	11 Miscoc Hill Rd.	Upton
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	Signature	Printed Name	Street Address	Town
1		Ronald Chapentier	70 Main St	Upton
2		MICHAEL GELS	43 MAIN ST	UPTON
3		Johnna Gorman	56 School St	UPTON
4		Jen Derocher	57 Prospect St	UPTON
5		David Derocher	57 Prospect St	UPTON
6		Sabrina Sanchez	32 Grove St	Upton
7		Patricia Binaco	12 Fieldston.	UPTON
8		HOLLY JOHNSON	132 GLEN AVE	UPTON
9		Jill Matthews	10 Warren Rd	Upton
10		Robert Matthews	10 Warren Rd	Upton
11		Elizabeth Gorman	15 Church St	Upton
12		David E. Harrison	27 Saffin St	UPTON
13		Vicky S. Markantonis	14 Depot St	UPTON
14		Steven P. Smith Jr	28 Pleasant St	UPTON
15		Michael B. Dean	100B High St.	Upton
16		Kevin McLaughlin	31 Main St	Upton
17		David HATSTAT	39 BROOKS ST.	UPTON
18		Adam Dixon	34 Pleasant St	Upton
19		John Capisgrenu	15 North St	Upton
20		John MacLachlan	337 Main St	Upton

BEFORE THE
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	Signature	Printed Name	Street Address	Town
1		ROSARIO DELGADO-LEAN	166 Mechanic St	Upton
2		Eric Brockett	166 Mechanic St	Upton
3		Debra S. Ternove	167 Mechanic St.	Upton
4		Jessica Kasite	136 Glenview St	Upton
5		Dana Aniello	23 FLORENCE	UPTON
6		Brenda VanKleeck	41 School St.	Upton
7		KENNETH VAN KLEECK	41 School St	UPTON
8		Kate Hawkins	165 Main St	UPTON
9		John Hawkins	165 Main St.	Upton
10		Christine Sifstera	76 Main St.	Upton
11		Kathryn Maloney	4 Bouthiette Ln	Upton
12		Charles J. Maloney Jr	4 Bouthiette Ln	Upton
13		Alison Aller	15 Station St.	Upton
14		BRUCE AUER	15 STATION ST.	UPTON
15		Laura Knowles	17 Nelson St	Upton
16		Arthur Knowles	17 Nelson St	Upton
17		Patricia Giglio	84 Mechanic St	Upton
18		Chris Giglio	84 MECHANIC ST.	Upton
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**BEFORE THE
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	Signature	Printed Name	Street Address	Town
1		Paul Capalucci	10 Pond St	Upton
2		Kara Capalucci	10 Pond St	Upton
3		Janet Murphy	8 Joseph Drive	Upton
4		Leonard Kierstead	204 East St.	Upton
5		Diane Kierstead	204 East St	"
6		Susan Wilkinson	8 Pond Street	Upton
7		DAVID Wilkinson	8 Pond Street	Upton
8		Kathleen Bern	2 Victoria Dr	Upton
9		Christine McEvoy	21 Glen Ave	Upton
10		Michael McEvoy	21 Glen Ave	Upton
11		Stacie Galuck	30 River St	Upton
12		Susan McKenna	138 Warren St	Upton
13		Sean McKenna	138 Warren St	Upton
14		Michael Campbell	24 Christian Hill	Upton
15		Dennis Condit	9 Bretton Rd	Upton
16		Pamela J. Smith	28 Pleasant Street	Upton
17		Kenneth Curley	62 Knowlton Cir.	Upton
18		Pamela Colwell	111 Crockett Rd	Upton
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	Signature	Printed Name	Street Address	Town
1	<i>Chris Lazar</i>	Chris Lazar	10 Rockdale Hill Cir	Upton
2	<i>Water B. Winchenbach Jr.</i>	WATER B. WINCHENBACH JR	24 RIVER STREET	UPTON
3	<i>Anna E. Winchenbach</i>	Anna Winchenbach	24 River Street	Upton
4	<i>Maria Farragher</i>	Maria Farragher	24 River St	Upton
5	<i>Peter O. Long</i>	Peter Long	11 Rockdale Hill Circle	Upton
6	<i>Clint Moyer</i>	Clint Moyer	5 Stagecoach Rd	Upton
7	<i>Lorraine Long</i>	Lorraine Long	11 Rockdale Hill Circle	Upton
8	<i>Christie Moyer</i>	Christie Moyer	5 STAGECOACH rd	Upton
9	<i>Greg Lazar</i>	Greg Lazar	10 Rockdale Hill Circle	Upton
10	<i>Susan E. Pelland</i>	Susan E. Pelland	4 Rockdale Hill Circle	Upton
11	<i>L. Christie Maloney</i>	L. Christie Maloney	4 Stagecoach Rd. Upton	Upton
12	<i>Michael Maloney</i>	Michael Maloney	4 Stagecoach Rd. Upton	Upton
13	<i>Patricia A. Mucci</i>	Patricia A. Mucci	2 Reservoir Ln Upton	Upton
14	<i>Norma Drumme</i>	Norma Drumme	1 Stagecoach Rd. Upton	Upton
15	<i>Robert Drumme</i>	Robert Drumme	1 Stagecoach Rd. Upton	Upton
16	<i>Laura Nadolski</i>	Laura Nadolski	73 Hartford Ave S Upton	Upton
17	<i>David Nadolski</i>	David Nadolski	73 Hartford Ave So	Upton
18	<i>Robin Jokela</i>	Robin Jokela	141 Glen Ave	Upton
19	<i>Donna Hall</i>	Donna Hall	67 Hartford Ave S	Upton

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	Signature	Printed Name	Street Address	Town
1		Jennifer Davis	1 Nelson unit B	Upton
2		Robert Nicoll	1 Nelson unit B	Upton
3		Jeannette H. DAVIS	1 Nelson St., Unit C	Upton
4		Naomi Dishington	141 Hopkinton Rd.	Upton
5		Naomi Dishington	141 Hopkinton Rd	Upton
6		Lisa M. Sebastiano	18 Rockdale Hill Cir	Upton
7		Carolyn Harp	14 School St.	Upton
8		David Seligman	14 School St.	Upton
9		Joan Stenakian	18 Maple Ave	Upton
10		Wendy Rowland	84 Elm Street	Upton
11		Dana Crevling	128 Glen Ave	Upton
12		Steven Bost	7 WEA MAN ST	Upton
13		Penny Bentley	6 Baton Rd	Upton
14		James Richards	52 South SE	Upton
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	Signature	Printed Name	Street Address	Town
1	<i>Brian Clark</i>	Brian Clark	47 Maple Av	Upton
2	<i>Maria Castaldi</i>	MARIA CASTALDI	110 MENDON ST	UPTON
3	<i>John Nealley</i>	John Nealley	84 PROSPECT	UPTON
4	<i>John Nealley</i>	JOHN NEALLEY	16 FOWLER ST.	UPTON
5	<i>Earl L Crosby</i>	EARL L. CROSBY	18 Triam St	Upton
6	<i>Sylvia R. Crosby</i>	Sylvia R. Crosby	15 FARM ST.	UPTON
7	<i>Elizabeth Fournier</i>	Elizabeth Fournier	31 Fiske Ave	Upton
8	<i>Ray Fournier</i>	RAY FOURNIER	31 Fiske Ave	Upton
9	<i>Scott Evans</i>	SCOTT EVANS	29 Fiske Ave	Upton
10	<i>Leigh Ann Evans</i>	Leigh-Ann EVANS	29 Fiske Ave	Upton
11	<i>Michael David</i>	Michael David	122 Fowler St	Upton
12	<i>Barbara Davidson</i>	Barbara Davidson	122 Fowler St	Upton
13	<i>Ben Keeler</i>	BEN KEELER	91 HARTFORD AV SO.	UPTON
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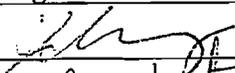
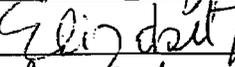
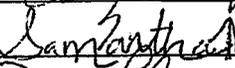
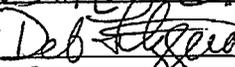
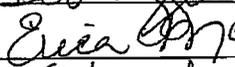
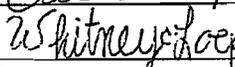
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	Signature	Printed Name	Street Address	Town
1		Christopher K. Murphy	7 Warren St.	Upton MA
2		Elizabeth Towne	7 Warren St	Upton
3		Samantha Murphy	7 Warren St.	Upton
4		Deb Fitzgerald	68 Grafton Rd	Upton
5		Erica McNeil	10 B Church St.	Upton
6		Whitney C. Loeper	18 Nelson St	Upton
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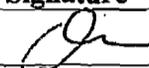
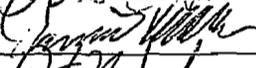
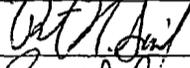
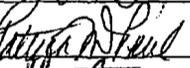
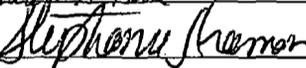
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	Signature	Printed Name	Street Address	Town
1		David Hunter	11 Orchard St	Upton
2		Shelly Adler	20 Juniper Rd.	Upton.
3		Daniel Kelleher	5 Merriman Way	Upton
4		Rob Siegel	33 Dairy Dr.	Upton
5		Patricia Paul	5 Nathaniel Way	Upton
6		Stephanie Freeman	4 Nathaniel Way	Upton
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	Signature	Printed Name	Street Address	Town
1	<i>Stephen R. Matera</i>	STEPHEN R. MATERIA	8 GREEN LANE	UPTON
2	<i>Theresa Matera</i>	THERESA MATERIA	8 GREEN LANE	UPTON
3	<i>Stephen J. Matera</i>	Stephen J. Matera	8 Green Lane	Upton
4	<i>Christophe Peterson</i>	Christophe Peterson	3 Stearns Road	Upton
5	<i>Cowie Peterson</i>	COWIE PETERSON	3 Stearns Road	Upton
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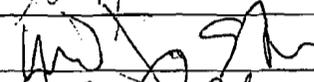
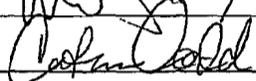
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	Signature	Printed Name	Street Address	Town
1		William Taylor	211 North St	Upton
2		MARCELLE A STASA	211 NORTH ST	UPTON
3		Catherine Dodd	33 Mechanic St	Upton
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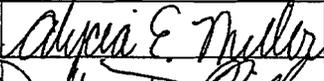
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	Signature	Printed Name	Street Address	Town
1		ALYCIA E MILLER	64 WARREN ST	UPTON
2		JONATHAN D. MILLER	64 WARREN STREET	UPTON
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

**PETITION OF DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

We, the undersigned and fellow citizens of the Town of Upton, Massachusetts, fully support the above-named petitioners and their "Petition for Declaratory Order" with the Surface Transportation Board. We share in the petitioners desire to remove the uncertainty and controversy surrounding the ongoing railyard activities at 25 Maple Street, Upton MA.

We are deeply concerned that our town local bylaws and regulations, enacted to promote the general welfare of the Town of Upton and to protect the health and safety of its inhabitants, have not been applied or enforced at this railyard and we respectfully await a decision from the Surface Transportation Board regarding this important matter.

	Signature	Printed Name	Street Address	Town
1	<i>Carlos Burgos</i>	Carlos E Burgos	2 GROVE ST	UPTON
2	<i>Gay Hebert</i>	Gay Hebert	82 ELM Street	Upton
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APPENDIX D

DEPARTMENT OF CODE ENFORCEMENT

Town of Upton



Massachusetts

Inspector of Buildings
Patrick H. Roche
1 Main Street – Box 16
Upton, Massachusetts 01568

Administrative Assistant
Diane C. Judd
Tel: 508-529-2633 Fax: 508-529-4732
djudd@upton.ma.us

March 6, 2013

Cynthia T. Brown
Chief Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

RE: Diana Del Grosso, et al. – Petition for Declaratory Order; Finance Docket No. 35652

Dear Ms. Brown:

I am writing to lend my support to the actions of the petitioners in the above referenced proceeding. I fully support their decision to petition the Surface Transportation Board to remove the uncertainty regarding the applicability of local bylaws and regulations in relation to the activities and uses associated with the Grafton and Upton Railroad railyard located at 25 Maple Avenue. We appreciate the Board's assistance and diligent efforts in ruling on what has become a controversial issue in our town.

The Code Enforcement Department of Upton has always maintained the highest regard for the health, safety and welfare of our community and its citizens. A ruling from the Board would greatly assist us in appropriately applying and enforcing the Town's local bylaws and regulations.

Thank you for your time and attention this proceeding.

Sincerely,

A handwritten signature in cursive script that reads "Patrick Roche".

Patrick Roche
Upton Building Commissioner
Code Enforcement Department

DEPARTMENT OF CODE ENFORCEMENT

Town of Upton



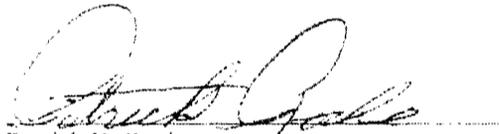
Massachusetts

Inspector of Buildings
Patrick H. Roche
1 Main Street – Box 16
Upton, Massachusetts 01568

Administrative Assistant
Diane C. Judd
Tel: 508-529-2633 Fax: 508-529-4732
djudd@upton.ma.us

I, Patrick Roche, declare under penalty of perjury that the foregoing letter, dated March 6, 2013, is true and correct. Further, I certify that I am qualified and authorized to file this letter.

Dated at the Town of Upton, MA, this 19th day of March 2013.


Patrick H. Roche

APPENDIX E

PLANNING BOARD

Town of Upton



Massachusetts

E-Mail: planningboard@upton.ma.us
Phone: (508) 529-1008

1 Main Street, Box 10
Upton, Massachusetts 01568

Honorable Daniel R. Elliott III
Chairman
Surface Transportation Board
395 E Street SW
Washington, DC 20423

April 9, 2013

Re: STB Finance Docket 35652, Diana Del Grosso, et al. - Petition for Declaratory Order

Dear Chairman Elliott:

This letter is in reference to the above-captioned matter with regard to the Town of Upton Planning Board, a duly constituted and elected municipal agency of the Town charged with making careful studies of the resources, possibilities and needs of the Town as well as making plans for the development of the Town.

The Planning Board fully supports the ongoing efforts of the STB to remove the controversy and uncertainty regarding the degree to which, if any, preemption of local regulations applies at the 25 Maple Avenue facility (Upton Facility) associated with the Grafton & Upton Railroad (G&U).

During Planning Board public meetings, the board learned of community concerns regarding the activities at the Upton Facility. These concerns extended well beyond the seven petitioners in the above-captioned matter. Indeed, informational meetings on this topic generated large audiences and citizens have continued to ask the Planning Board whether activities at the Upton Facility are preempted from local regulations.

The Planning Board twice attempted to bring this matter before the Surface Transportation Board (STB) in order to address the issue of preemption. In both cases, the Planning Board was denied access to counsel as explained herein.

A brief historical perspective is worth noting. As construction activities at the Upton Facility were underway, the Planning Board started to receive citizen inquiries. However, the board was unable to provide any comment since G&U had previously not met with the board or provided the board with any plans or documentation. Finally, in July 2011, with construction well underway, G&U representatives briefly met with the Planning Board to inform the board of their claim that all activities at the Upton Facility were preempted from local regulations.

The Planning Board requested supporting documentation from G&U, specifically with regard to The Dana Companies' involvement at the Upton Facility as well as the wood pellet packaging plant located within the Upton Facility. The Planning Board was subsequently provided with correspondence from G&U counsel. The board later determined the information provided was deficient and did not adequately address the board's concerns.

Re: STB Finance Docket 35652, Diana Del Grosso, et al. - Petition for Declaratory Order

In October 2011, by a vote of 3-0, the Planning Board decided to seek a ruling from the STB regarding the Upton Facility by engaging the services of an attorney, independent of Town Counsel, and by appropriating money from the Planning Board operating budget. The Planning Board was denied such access to counsel as the board was informed shortly thereafter by the Town Manager that the Planning Board did not have the authority to hire special counsel without the authority of the Board of Selectmen.

Following that, by a vote of 3-0, the Planning Board decided to seek a ruling from the STB regarding the Upton Facility by engaging the services of an attorney, independent of Town Counsel, on a pro bono basis. The Planning Board was denied such access to counsel as the board was informed by the Town Manager that the Planning Board did not have the authority to retain counsel (pro bono or otherwise) without the authority of the Board of Selectmen.

During this same approximate time period, there was also a town Railroad Fact Finding Committee established by the Upton Board of Selectmen that studied the issue of preemption at the Upton Facility. The committee met regularly for approximately six months.

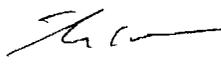
Shortly after the committee was established, G&U issued a correspondence which stated that: "The Committee cannot and will not speak to, interview, question, telephone, or communicate with anybody from the G&U, or any of its subcontractors, including...Dana Transport..." G&U warned the committee that failure to abide by such notice would result in "the filing of all appropriate legal action(s) against each such transgressor(s) individually, including a damages claim..." The committee and G&U had no direct correspondence with one another throughout the duration of the committee process.

Ultimately the committee issued a report that included two differing viewpoints regarding preemption. In that report, the Planning Board committee representative co-authored a viewpoint (attached) stating that the wood pellet packaging plant located at the Upton Facility would likely not be considered preempted if the issue was brought before the STB.

That same report viewpoint stated that additional information (document discovery) would be required for the STB to determine the preemptive status of the other activities at the Upton Facility. The mention of document discovery is timely given that this very issue is currently before the STB in the above-captioned matter and given that outward appearances continue to suggest a large Dana Companies presence at the Upton Facility.

In conclusion, we recognize and fully support the need for the STB to remove the controversy and uncertainty associated with the Upton Facility. We thank you for your consideration.

Sincerely,

Tom Davidson 
Chair
Town of Upton Planning Board

Enclosures

copies:

Honorable Ann Begemann - Vice Chairman

Honorable Francis P. Mulvey – Commissioner

PLANNING BOARD

Town of Upton

E-Mail: planningboard@upton.ma.us
Phone: (508) 529-1008

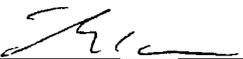


Massachusetts

1 Main Street, Box 10
Upton, Massachusetts 01568

I, Thomas Davidson, declare under penalty of perjury that the foregoing letter, dated April 9, 2013 is true and correct. Further, I certify that I am qualified and certified to file this letter.

Dated at the Town of Upton, MA this 9th day of April 2013.



Thomas Davidson
Upton Planning Board

PLANNING BOARD

Town of Upton



Massachusetts

E-Mail: planningboard@upton.ma.us
Phone: (508) 529-1008

1 Main Street, Box 10
Upton, Massachusetts 01568

I, Margaret Carroll, declare under penalty of perjury that the foregoing letter, dated April 9, 2013 is true and correct. Further, I certify that I am qualified and certified to file this letter.

Dated at the Town of Upton, MA this 9th day of April 2013.

A handwritten signature in cursive script, appearing to read "M. Carroll", is written over a horizontal line.

Margaret Carroll
Upton Planning Board

PLANNING BOARD

Town of Upton



Massachusetts

E-Mail: planningboard@upton.ma.us
Phone: (508) 529-1008

1 Main Street, Box 10
Upton, Massachusetts 01568

I, Gary Bohan, declare under penalty of perjury that the foregoing letter, dated April 9, 2013 is true and correct. Further, I certify that I am qualified and certified to file this letter.

Dated at the Town of Upton, MA this 9th day of April 2013.

A handwritten signature in black ink, appearing to read "Gary Bohan".

Gary Bohan
Upton Planning Board

Town of Upton, MA

Railroad Fact Finding Committee

Is the G&U Maple Avenue Facility Preempted From Local Regulations? Committee Viewpoint #2 – (Submitted by Bill Taylor and Gary Bohan)

Background

The activities at the Maple Avenue facility are believed to be:

1. The transfer of bulk liquids from rail tank cars to truck tank trailers, and
2. Wood pellet packaging.

Per the Grafton and Upton Railroad (G&U), the activities conducted in the wood pellet packaging facility are:

- Removing wood dust by means of vacuuming and screening prior to bagging.¹
- Bagging the wood pellets in 40-pound bags

Each of these wood pellet packaging processes is part of the standard process of manufacturing wood pellets for retail sale and residential use², which consists of: grinding the wood used to make the pellets to a uniform size, making the pellets using a mill, cooling the pellets, cleaning the pellets by removing the fines, using the fines in the pellet making process, bagging the pellets in 40-pound bags, palletizing the bags, and shipping the palletized bags to distributors and retailers by truck or rail. Virtually all wood pellet manufacturers that sell pellets for retail sale and residential-use sell bagged pellets to distributors and retailers. Forty-pound bags are the industry standard.³

Preemption

Activities that the Surface Transportation Board⁴ (STB) or a Federal court consider “transportation by rail carrier” come within the scope of Federal law that preempts these activities from local zoning, health and wetlands laws and regulations; including permitting requirements that could be used to deny a railroad’s ability to conduct rail operations. The term “transportation” has been defined broadly to include all of the related facilities and services related to the movement of property by rail, including receipt, delivery, transfer-in-transit,

¹ Wood pellet manufacturers screen and vacuum wood pellets prior to bagging to clean them of small particles and wood dust, which are known as fines. Fines are removed to improve the quality of the wood pellets as the fines can clog the device in a pellet stove that feeds the pellets from the pellet hopper to the combustion chamber. Fines content is one of the criteria used to grade wood pellets. Under the pellet fuel standards established by the Pellet Fuels Institute, an industry trade association, fines, which is any material that passes through a 1/8” screen, cannot exceed .5% by weight in order to meet their specifications for Standard and Premium grade pellets. (<http://pelletheat.org/wp-content/uploads/2011/11/PFI-Standard-Specification-November-2011.pdf>)

² The description of the wood pellet manufacturing process is based on descriptions of the process by wood pellet and wood pellet manufacturing equipment manufacturers. Okanagan Pellet Company’s description of the process is a good example. (<http://www.okanaganpellets.com/process.php>).

³ The EPA’s Burn Wise Pellet Stove Fact Sheet states “Pellets are normally sold in 40-lb bags, though other sizes are available.” (<http://www.epa.gov/burnwise/pdfs/PelletStoveFS08-04-11.pdf>)

⁴ The Surface Transportation Board (STB) has jurisdiction over railroads.

Town of Upton, MA Railroad Fact Finding Committee

Is the G&U Maple Avenue Facility Preempted From Local Regulations? Committee Viewpoint #2 – (Submitted by Bill Taylor and Gary Bohan)

storage and handling of property. A rail carrier is an entity that provides common carrier railroad transportation for compensation, either directly or through a third party under its control.

Whether or not the STB or a Federal court considers an activity “transportation by rail carrier” is a case-by-case, fact-specific determination. The activity must be both “transportation” and conducted by or under the auspices of a “rail carrier” to qualify for preemption of local laws and regulations. If an interested party with standing believes that preemption is being wrongfully claimed and activities do not qualify for preemption, it can ask the STB to issue a Declaratory Order addressing whether a particular activity constitutes “transportation by rail carrier.” Parties can also go to Federal court to have the issue resolved. It is worth noting that the STB and Federal courts have never reached a different conclusion regarding the preemption for particular activities.

Some of the things the STB and Federal courts have considered in determining whether an activity is transportation are whether or not an activity is integrally related to transportation or serves to facilitate the movement of property by rail (including transferring property to and from other forms of transport) and whether or not an activity serves a purpose other than transportation.⁵

In one declaratory order the STB commented that “intermodal transloading operations and activities involving loading and unloading materials from rail cars and temporary storage of materials are part of rail transportation.”⁶ In another declaratory order, it commented that “manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction and are not subject to federal preemption”⁷ and “if [the facility in question] is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation.”⁸

Some of the things the STB and Federal courts have considered in determining whether or not an activity is being conducted by or under the auspices of a rail carrier are whether or not: (1) the rail carrier owns (or leases) the land and built the loading/unloading facilities, (2) shippers pay the rail carrier to load their freight, and (3) the rail carrier does not disclaim liability for the loading process.

⁵ New England Transrail, LLC - Construction, Acquisition and Operation Exemption, STB Finance Docket No. 34797 provides a good example of reasoning the STB has applied to this determination. (“NE Transrail”)

⁶ Ibid.

⁷ Borough of Riverdale – Petition for Declaratory Order, STB Finance Docket 33466 (“Riverdale”)

⁸ Ibid.

Town of Upton, MA

Railroad Fact Finding Committee

Is the G&U Maple Avenue Facility Preempted From Local Regulations? Committee Viewpoint #2 – (Submitted by Bill Taylor and Gary Bohan)

Only the STB or a Federal court can determine whether or not an activity is “transportation by rail carrier” and, as such, whether or not an activity qualifies for preemption. All the Railroad Fact Finding Committee can do is make a judgment about how the STB or a Federal court might rule based on the statutory definitions of “transportation” and “rail carrier” and previous STB and Federal court rulings. The following summarizes how we think the STB might rule on the activities conducted at the Maple Avenue facility.

Do we believe the STB would determine that the bulk liquid transfer and wood pellet packaging activities conducted at the Maple Avenue facility are “transportation” activities?

We believe the STB would very likely consider the transfer of bulk liquids from rail tank cars to truck tank trailers “transportation” as these are delivery and handling activities directly related to the movement of property by rail. The transfer of the bulk liquids is being done for the sole purpose of transporting the bulk liquids. In addition, there have been several instances where the STB and Federal courts have determined that similar activities are “transportation.” This activity seems to fit into the definition of what is typically referred to as “transloading.”

We believe the STB would likely not consider the wood pellet cleaning and bagging activities “transportation” activities as they are not being conducted to facilitate transportation, they are being conducted as part of a production process. The cleaning and bagging activities are processing activities that have more in common with the manufacturing and production activities that the STB has held are not within its jurisdiction and not subject to preemption.

We believe the STB would likely consider the wood pellet cleaning activity unrelated to transportation, as this activity seems to be a production process. Cleaning the wood pellets by removing the fines is intended to improve the overall quality of the wood pellets. It does not serve a transportation purpose.

It is necessary to determine why the bagging of wood pellets is being done in order to decide whether the STB would likely consider it a transportation activity. We believe that the bagging of wood pellets is a production activity and not a transportation activity. Packaging (especially for liquids, powders and granules that must be contained to be sold) is an integral part of products manufactured for retail sale. In order to sell these types of products at stores, the manufacturers must sell them in packages. Thus, the production process is not complete until the products are packaged. The product, until packaged, may be considered a work-in-progress. These products are being packaged so that the product can be sold in stores.

In these instances, the package is not intended to facilitate transportation, but rather, is intended to make it convenient to purchase the product at a store and convenient for an individual to carry, store and use the product. That’s why Poland Spring sells 16-ounce bottles of water, Pillsbury sells 5-pound bags of flour, and wood pellet manufacturers sell 40-pound bags of wood pellets. The packaging is an integral part of the finished good, so packaging is an

Last Updated: May 4, 2012

Town of Upton, MA Railroad Fact Finding Committee

Is the G&U Maple Avenue Facility Preempted From Local Regulations? Committee Viewpoint #2 – (Submitted by Bill Taylor and Gary Bohan)

integral part of their production process. Therefore, we believe the STB would likely determine that the wood pellet packaging facility at Maple Avenue is a production activity, not a transportation activity.

We believe the wood pellets manufacturers using the Maple Avenue packaging facility have chosen to outsource part of their manufacturing process. In fact, one of the wood pellet manufacturers using the Maple Avenue facility referred to the arrangement at Maple Avenue as transferring its operations to the Northeast and noted that the arrangement increased its *production capacity (emphasis added)*.⁹

In conclusion, we believe the STB would likely not view the cleaning and bagging activities as transportation activities, as they are not being done to facilitate transportation. Instead, we believe the STB would likely view these activities as “manufacturing activities ... not integrally related to the provision of interstate rail service” and, as such, “not subject to our jurisdiction and ... not subject to federal preemption.”

Do we think the STB would determine that the bulk liquid transloading and/or wood pellet packaging activities are being conducted by “rail carrier” (by or under the auspices of the G&U)?

In order to qualify for preemption of local laws and regulations an activity not only has to be “rail transportation” it must be conducted by or under the auspices of a “rail carrier.” This section addresses whether we believe the STB would determine that the bulk liquid transloading or pellet packaging activities conducted at the Maple Avenue facility are being conducted by or under the auspices of the G&U.

G&U has told the town that the bulk liquid transloading and wood pellet packaging activities are being conducted on its behalf by Grafton Upton Rail Care (“GU Rail Care”), an affiliate of a group of companies referred to as the Dana Companies, and that the Maple Avenue land is leased from the Upton Development Group. In August of 2011, G&U provided the Town with a summary of the contract between G&U and GU Rail Care that they believe shows that GU Rail Care is performing those activities on behalf of G&U and with a summary of a lease between G&U and Upton Development Group (UDG) that they believe shows that G&U has full control of the Maple Avenue yard. G&U concluded that under these agreements the bulk liquid transloading and wood pellet packaging activities are being conducted by or on behalf of G&U.

While we agree that the terms of the agreements as summarized by G&U are consistent with their conclusion that the bulk liquid transloading and wood pellet packaging activities are being conducted by or under the auspices of G&U, we believe that it would be prudent and reasonable not to solely rely on the summary of the agreements provided by G&U, but to

⁹ [Reference 021 - Viridis Energy Company press release dated December 30, 2011](#)

Town of Upton, MA
Railroad Fact Finding Committee

Is the G&U Maple Avenue Facility Preempted From Local Regulations?
Committee Viewpoint #2 – (Submitted by Bill Taylor and Gary Bohan)

independently review these and any other relevant agreements associated with the Maple Avenue facility in their entirety.

In one recent STB Decision¹⁰, the STB reasoned that: “While the Operations Agreement includes a statement providing that [the railroad] “shall control all aspects of the Facility’s transloading operations,” the agreement, when considered in its entirety, shows that [the railroad] has essentially no involvement in the operations at the facility.”

Without being able to independently review all of the relevant agreements in their entirety, we do not know if the STB would determine if the bulk liquid transloading and wood pellet packaging activities at Maple Avenue are being conducted by or under the auspices of G&U. However, per the STB, if a Petition for Declaratory Order was filed, the Petitioner could file a discovery request to try to obtain documents which would then allow for a thorough review of all relevant agreements so that a proper determination could be made.

Respectfully,

Bill Taylor
Gary Bohan

¹⁰ Town of Babylon and Pinelawn Cemetery – Petition For Declaratory Order, STB Finance Docket No. 35057 (STB served February 1, 2008 and September 26, 2008)

Railroad Fact Finding Committee

Town of Upton



Massachusetts

Date: December 22, 2011

To: Blythe Robinson, Town Manager

From: Gary Bohan

Subject: Mailbox Tampering Incident

This correspondence is to inform you that one of the five members of the Railroad Fact Finding Committee reported an incident last weekend involving an un-postmarked letter from the Grafton & Upton Railroad found in the member's mailbox. The letter had the member's name handwritten on it. None of the other Committee members reported a similar incident.

It is the position of the Committee Chair that to have one Committee member get singled out and then to have somebody go to their house and wrongfully tamper with their mailbox is completely unacceptable. There is no room in the Committee process for anything that might reasonably be construed as intimidating or threatening and such behavior will not be tolerated.

Please distribute this correspondence as appropriate.

Sincerely,

A handwritten signature in black ink, appearing to be "G. Bohan", written over a horizontal line.

Gary Bohan - Chair

Grafton & Upton Railroad Company

929 Boston Post Road East
Marlborough, MA 01752
508-481-6095 * Fax 508-460-0578
E-mail: jon@firstcolonydeb.com

December 16, 2011

**SENT BY FIRST CLASS MAIL &
CERTIFIED MAIL RETURN RECEIPT REQUESTED:**

The Railroad Fact Finding Committee
Town of Upton
1 Main Street
Upton, MA 01569
Attention: Mr. Gary Bohan, Chairman

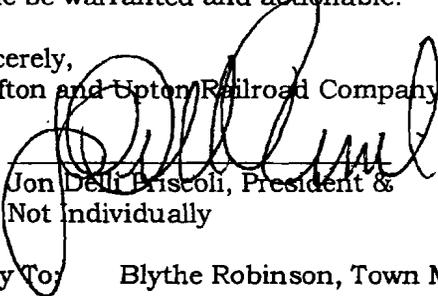
Dear Mr. Bohan & Committee Members:

This letter is being written and directed to you on behalf of the Grafton & Upton Railroad ("G&U") to put you on notice of the following:

1. All of the property of the G&U, including the West Upton Rail Yard at Maple Avenue, and all rights of ways(s) and land appurtenant thereto is private property and at no time are you or your agents allowed at or upon the property of the G&U, without the express written consent of the G&U, and
2. The G&U is an active railroad, and at no time are you to take any steps and/or actions that interfere, affect, or the G&U's daily business of interstate transportation.
3. The Committee cannot and will not speak to, interview, question, telephone or communicate with anybody from the G&U, or any of its subcontractors, including but not limited to Grafton & Upton Railcare, LLC, Dana Transport, First Colony Development Co., Inc. and all of their employees and all other companies and individuals working for or on behalf of the G&U.

Although we know that you will all abide by this notice; should you fail to abide by the same, each and every member of the Railroad Fact finding Committee is put on notice that any trespass and/or interference with the daily business of the G&U will be considered either an unreasonable interference with the advantageous business relationship(s) of the G&U and will result in the filing of all appropriate legal action(s) against each such transgressor(s) individually, including a damages claim, should the same be warranted and actionable.

Sincerely,
Grafton and Upton Railroad Company

By: 
Jon Dell Bristol, President &
Not Individually

Copy To: Blythe Robinson, Town Manager
Upton Fire Chief
Upton Police Chief
Federal Railroad Administration