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December 5, 2013

VIA ELECTRONIC FILING

235147

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

ENTERED
Office of Proceedings
December 5, 2013
Part of the Public Record

Re: Docket No. FD 35779, Grafton & Upton Railroad Company
--Petition for Declaratory Order

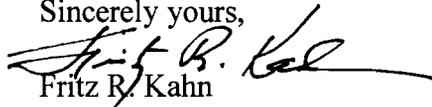
Dear Ms. Brown:

Attached is the Comment of the Town of Grafton, Massachusetts, pertaining to the pleading entitled "Reply of Grafton & Upton Railroad Company to Request to Dismiss Petition" filed by the Grafton & Upton Railroad Company on November 19, 2013

I certify that I this day have served a copy of this letter and its attachment upon each party of record via e-mail.

If you have any question concerning this letter or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

cc: James E. Howard, Esq.
Linda J. Morgan, Esq.
Keith T. Borman, Esq.
Paul R. Hitchcock, Esq.

SURFACE TRANSPORTATION BOARD

Docket No FD 35779

GRAFTON & UPTON RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER

COMMENT
OF
THE TOWN OF GRAFTON, MASSACHUSETTS

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THE TOWN OF GRAFTON, MASSACHUSETTS

Dated: December 5, 2013

SURFACE TRANSPORTATION BOARD

Docket No FD 35779

GRAFTON & UPTON RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER

COMMENT
OF
THE TOWN OF GRAFTON, MASSACHUSETTS

Respondent, The Town of Grafton, Massachusetts (“Grafton”), offers the following comment in response to the pleading of the Grafton & Upton Railroad Company (“G&U”), entitled “Reply of Grafton & Upton Railroad Company to Request to Dismiss Petition,” filed November 19, 2013:

One would think that a party which has been a litigant before the Board with the frequency of G&U¹ would be familiar with the agency’s rules. A cardinal rule is 49 C.F.R. §1104.13(c), which disallows the filing of a reply to a reply. Yet that is exactly what G&U did. G&U sought to institute the subject proceeding by filing a Petition for Declaratory Order on October 25, 2013. Grafton filed its Reply on November 7, 2013. Thereafter, on November 19, 2013, G&U filed its Rely to Grafton’s Reply. *See, e.g.*, Docket No. FD 33905, Lackawanna County Railroad Authority—Acquisition Exemption—F&L Realty, Inc. (“A reply to a reply under our rules at 49 CFR 1104.13(c) is impermissible.”); Docket No. NOR 41989, Potomac Electric Power Company v. CSX

¹ Docket No. FD 3444, Town of Milford, MA—Petition for Declaratory Order; Docket No. FD 35652, Diana Del Grosso, etc.-Petition for Declaratory Order; Docket No. FD 35752, Grafton & Upton Railroad Company Petition for Declaratory Order.

Transportation, Inc., served June 27, 1997 (“Under our rules at 49 CFR 1104.13(c), replies to replies are prohibited.”); Docket No. NOR 41192, The TJX Companies, Inc.—Petition for Declaratory Order, served January 6, 1998 (“A reply to a reply is not permitted under our rules of procedure. 49 CFR 1104.13(c).”).

The Board has a narrow exception, and will entertain a reply to a reply when the pleading will aid the agency in having an adequate record and no prejudice is shown. Docket No. FD 34364, Vermont Railway, Inc.—Petition for Declaratory Order, served January 5, 2005 (“In the interest of having a complete record and because no party will be prejudiced . . . the additional pleadings will be accepted.”); Docket No. FD 34425, City of Lincoln—Petition for Declaratory Order, served December 3, 2003 (“The motion to strike the second letter, which was submitted as a formal pleading, will be denied in the interest of having a complete record (and because allowing the letter into the record will not cause undue delay.”); Docket No. NOR 42078, Norfolk Southern Railway Company—Petition for Declaratory Order—Interchange with Reading Blue Mountain & Northern Railroad Company, served April 29, 2003 (“In the interest of having a complete evidentiary record, we will accept and consider both pleadings. Moreover, neither party will be prejudiced by such action.”). That exception is not applicable here.

G&U’s Reply to Grafton’s Reply adds nothing of substance to the record in the subject proceeding. In its Petition for Declaratory Order, filed October 25, 2013, G&U sought a determination by the Board that its construction by G&U of additional yard and storage tracks adjacent to its main line in North Grafton come within the preemption provisions of 49 U.S.C. § 10501(b). In his Verified Statement attached to G&U’s Reply to Grafton’s Reply, G&U’s local counsel, John A. Mavricos, Esq., contends that Grafton

was aware of G&U's plans for re-grading the five-acre site before Grafton maintains that that it did. What difference does that make? Further, in his Verified Statement, Mr. Mavricos contends that G&U submitted the requested information about the effect of the earth removal in the face of threatened legal action by the Grafton Board of Selectmen, rather than voluntarily as alleged by Grafton's Town Counsel. Again, what difference does that make? What is significant is that neither in its pleading nor in Mr. Mavricos' Verified Statement does G&U deny that Grafton's Town Counsel by telephone call to Mr. Mavricos on October 18, 2013, informed Mr. Mavricos that Grafton was taking no action against the railroad. Moreover, neither in its pleading nor in Mr. Mavricos' Verified Statement does G&U deny that the October 23, 2013, edition of The Grafton News quoted Grafton's Town Counsel as stating: "It does not appear at this time that the Town has grounds for a cease-and-desist [against G&U's earth moving operations in North Grafton]." The article additionally stated, "'Preemption applies on the railroad property', said Kremer, because of the transportation use." Two days later, on October 25, 2013, G&U filed its Petition for Declaratory Order.

Since the Town was clearly not seeking to interfere with the G&U's operations at this site, G&U's Reply to Grafton's Reply adds nothing of substance to the evidentiary record and was obviously filed only for the purpose of prejudicing the Board against Grafton, which was responsibly seeking only information from the railroad. *See* Docket No. FD 35459, V&S Railway, LLC—Petition for Declaratory Order—Railroad Operations in Hutchinson, Kan., served July 12, 2012 ("The Board's rules do not permit a reply to a reply. Respondents have not provided sufficient reason for the Board to make an exception to this rule."); Docket No. FD 34319, Consolidated Rail Corporation—

Declaratory Order Proceeding, served October 10, 2003 (“A ‘reply to reply’ is not normally allowed, see 49 CFR 1104.13(c), and there appears to be no reason to make an exception for [railroad’s] reply, which adds to the record nothing of any significance.”); Docket No. FD 28905 (Sub No. 27), CSX Corporation—Control—Chessie System, Inc., served July 15, 1997 (“Under 49 CFR 1104.13(c), replies to replies are prohibited. This prohibition may be waived upon a showing of good cause, but the [petitioners] have not shown good cause here because they have not explained why the additional argument could not have been submitted in their original petition.”).

The Board is empowered to render a declaratory order to terminate a controversy or remove uncertainty. Docket No. FD 35701, Norfolk Southern Railway Company—Petition for Declaratory Order, served November 4, 2013 (“Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory Order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order [citations omitted].”); Docket No. FD 35504, Union Pacific Railroad Company—Petition for Declaratory Order, served April 30, 2013 (“Under the Administrative Procedure Act, 5 U.S.C. § 554(e), and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion to determine whether to issue a declaratory order [citations omitted].”); Docket No. FD 34776, National Solid Waste Management Association, et al.—Petition for Declaratory Order, served March 10, 2006 (“Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order [citations omitted].”).

G&U's Petition for Declaratory Order and Grafton's Reply rendered it evident that there is no controversy or dispute between the parties nor is there any uncertainty about the applicability of the preemption provisions of 49 U.S.C. § 10501(b) which required resolution by Board. G&U sought a determination by the Board that its clearance of the North Grafton site should not be interfered with by Grafton because it came within the preemption provisions of 49 U.S.C. § 10501(b), and Grafton expressed its agreement. G&U's Petition for Declaratory Order should accordingly be denied or dismissed as moot. Docket No. FD 35517, CF Industries v. Indiana & Ohio Railway, Point Comfort and Northern Railway, and the Michigan Shore Railroad—Petition for Declaratory Order, served June 21, 2013 (“[W]hether these tariff provisions are invalid and unenforceable no longer presents an active case or controversy for the Board to resolve. Therefore, [the railroad’s] petition for declaratory order will be denied as moot [footnote and citations omitted].”); Docket No. FD 35387, Ag Processing Inc a Cooperative—Petition for Declaratory Order, served May 9, 2012 (“We dismiss this petition without prejudice.”); Docket No. 34776, National Solid Waste Management Association, et al.—Petition for Declaratory Order, served March 10, 2006, supra (“There is no active case or controversy for the Board to resolve. . . [P]etitioner’s request here – to declare that previous activities at the site do not constitute rail transportation and are not integrally related to rail transportation – is moot.”).

Consistent with the forgoing line of Board decisions, Grafton in its Reply of November 7, 2013, simply concluded its pleading by asking that “the instant Petition should be dismissed as moot.” Grafton’s prayer for relief did not render its Reply “a motion to dismiss the Petition, which entitles G&U to reply,” as G&U cynically

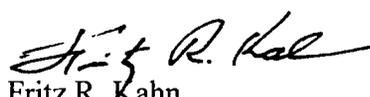
contends. Quite simply, G&U's Reply to Grafton's Reply is impermissible and should be rejected, and its Petition for Declaratory Order should be dismissed as moot.

Respectfully submitted,

THE TOWN OF GRAFTON, MASSACHUSETTS

By its attorneys,

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Dated: December 5, 2013

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Comment by e-mailing a copy of it to each party or record.

Dated at Washington, DC this 5th day of December, 2013.



Fritz R. Kahn