

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

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

**MOTION OF GRAFTON & UPTON
RAILROAD COMPANY TO STRIKE
LETTER OF CERTAIN CITIZENS OF UPTON**

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ENTERED
Office of Proceedings
May 7, 2013
Part of
Public Record

James E. Howard
70 Rancho Road
Carmel Valley, CA 93924
831-659-4112
jim@jehowardlaw.com

Linda J. Morgan
Nossaman, LLP
1666 K Street, N.W.
Suite 500
Washington, DC 20006
202-887-1400

Attorneys for Grafton &
Upton Railroad Co.

Dated: May 7, 2013

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By means on this Motion to Strike, Grafton & Upton Railroad Co. ("G&U") hereby requests the Board to remove from the record in this proceeding a letter dated March 10, 2013 and filed on April 24, 2013 from certain "citizens" of the Town of Upton, Massachusetts ("Upton" or the "Town").¹ As explained below, the letter was filed late and, more importantly, asserts unverified "facts" that are either incorrect or misleading.

BACKGROUND

By decision served on January 24, 2013, the Board instituted a declaratory order proceeding at the request of the Petitioners. The decision directed that G&U's reply and comments from other interested persons would be due by February 25, 2013. G&U filed its reply on February 25, 2013. The Petitioners' response was originally due to be filed

¹ The same letter was actually filed twice--each copy enclosed "petitions" with additional signatures. The two copies of the letter, and the enclosures, will collectively be referred to in this Motion as the "letter".

by March 11, 2013, but, by decision served on March 7, 2013, the filing of the Petitioners' response was deferred pending a decision by the Board on the Petitioners' request for reconsideration of the decision served January 24, 2013 to the extent that the decision denied the Petitioners' request for discovery. On March 5, 2013, G&U filed a timely reply in opposition to the petition for reconsideration.

Subsequently, on April 15, 2013, the Town of Upton Planning Board filed comments. On April 22, 2013, G&U moved to strike the late filed comments of the Planning Board.

Now, even longer after the deadline for comments has passed, the letter has been presented to the Board. The letter states that the signatories are writing as citizens of Upton to support the Petitioners.² More specifically, the letter asserts that the G&U rail yard in Upton is in close proximity to schools, a residential neighborhood and town surface wells. The signatories of the letter further contend that local bylaws and regulations designed to promote the health and safety of inhabitants of Upton have not been applied or enforced at the G&U yard.

ARGUMENT

The letter should be excluded from the record on the grounds that it was filed two months late. As noted above, comments of interested persons were due by February 25, 2013. Even if the Board were to overlook the late filing, however, the letter should be stricken from the record as an attempt to present unverified "facts" that are incorrect or misleading, as described below.

The Board has determined that this proceeding will be conducted under the modified procedure rules. Decision served January 24, 2013 at 3. This means that

² The letter was served on the undersigned counsel for G&U by Diana Del Grosso, one of the Petitioners.

factual assertions must be verified. 49 C.F.R. § 1112.8. The facts set forth in the letter, however, are unverified. More importantly, as explained below, these assertions are simply wrong or at best misleading.³

G&U has been in continuous operation as a rail carrier since 1873. Its operations have included a rail yard that is adjacent to the G&U main line in Upton. The original yard is contiguous to the 33 acre parcel that G&U acquired, pursuant to a long-term lease with an option to purchase, from Upton Development Group in 2008.

This 33 acre parcel, which constitutes the new portion of the G&U yard, was used for industrial purposes for many years prior to its acquisition by G&U and has always been zoned commercial and industrial. Indeed, beginning in the 1920s a portion of the property was used for the operations of a fuel business and subsequently a coal supply business. In addition to storing fuel and coal on the property, it was also used for a sand and gravel operation, involving the excavating and processing of soil, beginning in the mid-1950s. Subsequently, substantially all of the 33 acre parcel was used by the Town of Upton, initially as an open burning landfill and eventually as a municipal solid waste landfill disposal area. In 1978, the landfill was closed, and the Town opened a municipal solid waste transfer station at the property.

As a result of these uses of the property over the years, and in particular its use by the Town for the disposition of municipal solid waste, the Massachusetts Department of Environmental Protection ("DEP") determined that there were various environmental problems that needed remediation. In the spring of 2008, the Town of Upton was afforded the opportunity to purchase the property, but, based upon negative votes of the

³ Signatures for the letter were solicited by an organization known as the Protect Upton Blog (<http://protectupton.blog.com/>), which has published many of the false or misleading statements in order to induce people to sign the letter. It is perhaps not surprising, therefore, that the "facts" are wrong and unverified.

citizens of Upton at the annual Town meeting, the Town declined the opportunity to purchase the property. Thereafter, the property was purchased by the Upton Development Group, which took on the obligation to remediate the environmental problems. As G&U has outlined in prior pleadings in this proceeding (see, for example, G&U Reply dated August 20, 2012, at 3-4), it is anticipated that the property will be fully remediated in accordance with DEP criteria later this year. As a result, any environmental threat to citizens of the Town of Upton caused by prior commercial and industrial uses of the property, including by the Town itself, has been or will be eliminated.

In the letter, the citizens suggest that rail operations at the yard might pollute the Town's water supply. This is false. The yard is not located in an aquifer or protected well zone, and the groundwater from the yard flows in a direction away from any Town water sources. The Board of Health of the Town of Upton has not found any threat to the Town's water as a result of G&U's operation of the yard, and, as noted above, the DEP will have to sign off on the remediation of the property.

The letter also contends that Upton officials have not been given the opportunity to apply local regulations in order to protect the health and safety of the citizens of Upton. Contrary to what the letter suggests, however, G&U has complied with applicable health and safety requirements, and the Board of Health, the police department and the fire department have been satisfied with G&U's compliance. Furthermore, the Board of Selectmen of the Town of Upton, which is the Town agency vested with ultimate authority and responsibility for the protection of the health and safety of citizens, after a thorough review, has elected not to pursue any permitting or preclearance

requirements, based on its conclusion that preemption is applicable. In accordance with the decisions of the Board and the courts concerning preemption, and contrary to the "facts" set forth in the letter, G&U has consistently complied with the substance of local regulations governing health and safety.

CONCLUSION

For the reasons stated above, G&U requests that the Board reject the letter filed by various citizens of the Town of Upton as being late filed and unverified.

Respectfully submitted,

GRAFTON & UPTON
RAILROAD CO.


James E. Howard
70 Rancho Road
Carmel Valley, CA 93924
831-659-4112

Linda J. Morgan
Nossaman, LLP
1666 K Street, N.W.
Suite 500
Washington, DC 20006
202-887-1400

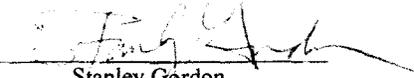
Dated: May 7, 2013

Commonwealth of Massachusetts

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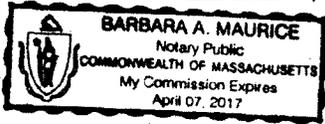
County of Middlesex

Stanley Gordon, being duly sworn, deposes and says that he has read the foregoing Motion, and the facts asserted therein are true as stated.


Stanley Gordon

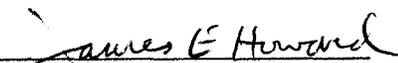
Subscribed and sworn to before me
this 7th day of May, 2013.


Notary Public
My commission expires 4-7-2017



Certificate of Service

I hereby certify that I have served the foregoing motion to strike as of this 7th day of May, 2013 by causing a copy to be sent electronically to Diana Del Grosso, as the person who served the letter described in the foregoing motion, to counsel for the Petitioners, Mark Bobrowski, Blatman, Bobrowski & Mead, LLC, 9 Damonmill Square, Suite 4A4, Concord, Massachusetts 01742 and Fritz Kahn, 1919 M Street, 7th Floor, Washington, DC 20036, and to each other party of record.



James E. Howard