

PLANNING BOARD

Town of Upton



Massachusetts

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1 Main Street, Box 10  
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Honorable Daniel R. Elliott III  
Chairman  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

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ENTERED  
Office of Proceedings  
April 15, 2013  
Part of  
Public Record

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



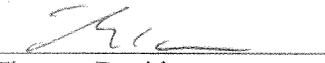
Massachusetts

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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 9<sup>th</sup> day of April 2013.

  
Thomas Davidson  
Upton Planning Board

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Town of Upton



Massachusetts

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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 9<sup>th</sup> day of April 2013.

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

Margaret Carroll  
Upton Planning Board

PLANNING BOARD

Town of Upton



Massachusetts

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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 9<sup>th</sup> day of April 2013.

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

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.<sup>1</sup>
- 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 use<sup>2</sup>, 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.<sup>3</sup>

#### Preemption

Activities that the Surface Transportation Board<sup>4</sup> (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,

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<sup>1</sup> 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>)

<sup>2</sup> 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>).

<sup>3</sup> 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>)

<sup>4</sup> 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.<sup>5</sup>

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.”<sup>6</sup> 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”<sup>7</sup> 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.”<sup>8</sup>

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.

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<sup>5</sup> 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”)

<sup>6</sup> Ibid.

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

<sup>8</sup> 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

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### 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)*.<sup>9</sup>

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

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<sup>9</sup> [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?**  
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independently review these and any other relevant agreements associated with the Maple Avenue facility in their entirety.

In one recent STB Decision<sup>10</sup>, 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

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