

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

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**MOTION OF GRAFTON & UPTON
RAILROAD COMPANY TO STRIKE
LETTER OF UPTON PLANNING BOARD**

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Dated: April 22, 2013

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LETTER OF UPTON PLANNING BOARD**

By means of this Motion to Strike, Grafton & Upton Railroad Co. ("G&U") hereby requests the Surface Transportation Board (the "STB", "agency" or "Board") to remove from the record in this proceeding a letter dated April 9, 2013 and filed on April 15, 2013 (the "letter") from the Planning Board of the Town of Upton, Massachusetts ("Planning Board"). The letter was filed late and, more importantly, does not provide any new information that advances the resolution of the issues in this proceeding.

BACKGROUND

As the agency is aware, by decision served on January 25, 2013, it instituted a declaratory order proceeding in this matter at the request of the Petitioners. That decision ordered 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 by March 11, 2013, but, by decision served on March 7, 2013, the filing of the Petitioners' response was deferred pending an agency decision on their petition for reconsideration of the decision served January 24, 2013, which denied their request for discovery. On March 5, 2012, G&U filed a timely reply in opposition to that petition for reconsideration.

In its letter, the Planning Board makes several points. It states that it fully supports the ongoing effort of the STB to resolve the issues raised in the declaratory order proceeding. The Planning Board also describes the history of its attempts to retain counsel and bring these issues before the STB and acknowledges the conclusion of the Board of Selectmen of the Town of Upton that the Planning Board did not have the right to retain counsel and pursue these issues, particularly when the Board of Selectmen had decided that preemption applied and no such action was warranted. Finally, the Planning Board appears in its letter to support the idea that discovery, which is the issue raised by the petition for reconsideration, is necessary.

ARGUMENT

If the letter filed by the Planning Board is intended to be a comment from an interested person in the declaratory order proceeding, it has been filed too late. As noted above, comments of interested persons were due by February 25, 2013. If the letter is intended to address or support the petition for reconsideration, it is also too late. The Board's rules required any such filings to be made by March 5, 2013. Even if the late filing of the letter were overlooked, however, it is not at all clear, as explained below, that the Planning Board has the authority to submit the letter in the first instance, and the

letter in any event does not add any new information to the record. Accordingly, the letter should be rejected as an unauthorized and superfluous filing.

The letter is duplicative of what is already in the record in several respects. First of all, the letter supports the action of the STB to institute a declaratory order proceeding. The agency, however, has already taken this action.

In addition, the history of the disagreement between the Planning Board and the Board of Selectmen is already well chronicled in the record. G&U described the disagreement in its reply (at pages 9-11) dated August 20, 2012 and the accompanying Verified Statement of John Delli Priscoli (at pages 6-7). Several of the documents submitted by the Petitioners with their initial filing in this proceeding are letters--one from town counsel to the Board of Selectmen (Petitioners' Exhibit 30) and the other from the Town Manager to the Planning Board (Petitioners' Exhibit 34)--explaining that the Board of Selectmen, and not the Planning Board, was the exclusive elected body that could decide whether to retain counsel in order to pursue a declaratory order from the STB. Based upon this correspondence, it appears that the Planning Board has no authority to submit the letter. Furthermore, the railroad fact finding committee created by the Board of Selectmen, which is referenced in the letter, issued a 180 page report, only a small excerpt of which is attached to the letter¹, that addresses the disagreement between the Planning Board and the Board of Selectmen. The recitation of the disagreement in the letter is, consequently, entirely superfluous.

¹ The entire report has been available on the Town's website--www.upton.ma.us--since May 2012, or several months prior to the filing by the Petitioners of their petition for a declaratory order. Because the excerpt attached to the letter did not include the view expressed by the two other members of the committee, who concluded that preemption applied, the letter is incomplete and misleading and should be rejected on that basis as well.

Finally, the letter and the excerpt attached to the letter suggest that discovery, and more precisely a review of two confidential documents that were summarized by G&U but not provided to the railroad fact finding committee (i.e., the Terminal Transloading Agreement, pursuant to which a subcontractor performs transloading services, and the Lease Agreement, pursuant to which G&U controls the yard), would be helpful to resolve the question whether transloading at the G&U yard in Upton is being performed by or under the auspices of G&U. The Planning Board concludes in its letter that its "mention of document discovery is timely given that this very issue is currently before the STB." While apparently a belated attempt to support the Petitioners' petition for reconsideration of the agency's decision not to allow discovery, the letter does not add anything new to the debate. Indeed, the petition for reconsideration and the reply in opposition filed by G&U discuss in detail the issues that the STB needs to take into account in order to decide whether discovery should be permitted. Furthermore, now that G&U has provided to counsel for the Petitioners fully unredacted versions of the two agreements, there is no need for the discovery that the Planning Board has suggested.²

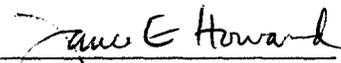
² The Planning Board seems to contend, relying on an unidentified piece of "correspondence", that G&U did not cooperate with the fact-finding committee or provide answers or information to the fact-finding committee. This charge is patently false. G&U answered the questions put to it by the committee, and this is abundantly clear from a review of the committee's report.

CONCLUSION

For the reasons stated above, G&U requests that the STB reject the letter filed by the Upton Planning Board on April 15, 2013.

Respectfully submitted,

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Dated: April 22, 2013

Certificate of Service

I hereby certify that I have served the foregoing motion to strike as of this 22nd day of April, 2013 by causing a copy to be sent electronically to the Planning Board of the Town of Upton 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