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BY E-FILING

Cynthia Brown
Chief Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
August 30, 2024
Part of
Public Record

RE: EP 775, Growth in the Freight Rail Industry

Motion to Late File Testimony by Grafton and Upton Railroad Company

Dear Ms. Brown:

To the extent necessary, Grafton and Upton Railroad Company (“GURR”) petitions for leave to file testimony in the above-captioned proceeding. GURR’s decision to file testimony arose after reading the comments submitted by the Association of American Railroads (“AAR”). GURR’s testimony will further analyze the AAR’s discussion around the regulatory environment to promote growth in freight rail. Acceptance of GURR’s testimony will not cause harm to any other party given the time between the August 30, 2024, deadline for hearing testimony¹ and the hearing on September 16 and 17, 2024, and the fact that GURR does not seek time at the hearing.

Sincerely yours,

/s/ John M. Scheib

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Grafton and Upton Railroad Company

¹ S.T.B. Decision, Growth in the Freight Rail Industry, Docket No. EP 775, Aug. 23, 2024.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 775

GROWTH IN THE FREIGHT RAIL INDUSTRY

I am Jon Delli Priscoli, President of Grafton and Upton Railroad Company (“GURR”). GURR submits these comments in this proceeding to emphasize the obstacles from the regulatory environment to growth in the rail industry that a small railroad like GURR faces regularly and to offer constructive ideas about ways in which the Board can help.

I. GURR Has a Record of Growth and Is a Success Story.

The Surface Transportation Board is preparing to hold a hearing on growth in the rail industry. The testimony that has been streaming in tells a story of an industry that wants to grow and that has many success stories. *See e.g.*, Comments from the American Short Line and Regional R.R. Assoc., EP 775 at 4-10 (STB filed Aug. 16, 2024). GURR is no different.

GURR is an industrious and entrepreneurial Class III rail carrier that has been in operation to serve customers since its incorporation in 1873. GURR owns and operates a 16.5-mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts, and Milford, Massachusetts. GURR also operates a CSX-owned 8.4-mile extension of GURR’s original line between Milford and Franklin. GURR has experienced significant freight rail growth in recent years. In 2008, GURR handled approximately 40 rail carloads, but by 2020 the number of cars was approximately 3,000 (more than 70 times the volume in 12 years). Since 2008, GURR’s year-over-year growth has averaged between 10 and 15 percent per year, and recent years have been no exception as GURR has attracted new

customers and increased demand for rail freight services with new products. Over the last 10 years, GURR has invested millions of dollars to meet current and anticipated future business opportunities where GURR competes head-to-head with long-haul trucking, but more is needed.

II. There Are Obstacles to Growth of Freight Rail.

Despite GURR's record of success, GURR submits these comments to highlight one element of the story that is largely unaddressed by other commenters – obstacles to growth. The Association of American Railroads (“AAR”) touches upon this issue briefly. Comments of the Association of American Railroads, *Growth in the Freight Rail Industry*, Ex Parte 775, at 7-11 (STB filed Aug. 16, 2024). Specifically, the AAR notes that “a policy and regulatory environment that increases investment risk and stifles innovation impedes growth; however, an environment that provides regulatory balance and certainty can foster innovation and growth. This is an area where the Board can help.” *Id.* at 8. GURR agrees.

There are two elements of the regulatory environment to which GURR calls attention. The first is NIMBY-ism and the second is the need for timely resolution of matters involving rail growth projects.

Since 2020, GURR has been working on a project to build a new transload facility in Hopedale, Massachusetts, the most recent history of which is recounted well in the Board's decision.¹ That project would take thousands of trucks off the highway and allow GURR to better serve existing customers and service new customers. However, to-date, the project has been substantially delayed due to local government actions. Indeed, GURR has now missed

¹ Petition of Grafton and Upton Railroad Company for Declaratory Order, *Grafton and Upton Railroad Company –Petition for Declaratory Order*, Docket No. 36696 (STB decided Nov. 14, 2023). More prior history is recounted in *Grafton and Upton Railroad Company – Petition for Declaratory Order*, FD 36464 (filed November 23, 2020);

multiple construction seasons due to these delays and has had to redesign the project to respond to changes in financing markets. Unfortunately, that project is still not complete.

A. NIMBY-ism Can Undermine Freight Rail Growth Projects.

One element of the regulatory environment is what is commonly called NIMBY-ism or “not in my backyard.” These opponents to freight rail “find freight operations to be degrading to their community character. This “NIMBY-ism” translates into “local action, often in the form of political opposition in public forums such as town meetings” and into local attempts to regulate rail projects out of existence.² NIMBY-ism over the years has hampered GURR’s growth efforts.

There is an inherent tension between the desire of railroads to grow and to meet the goals of the National Transportation Policy and the anti-development motivations of sometimes influential residents of the localities in which railroads operate. However, 49 U.S.C. 10501(b) should play an important role to protect railroads and their growth projects from NIMBY-ism. That provision provides that the Board’s jurisdiction over rail transportation is exclusive. Courts have interpreted it to be among the broadest preemption provisions that Congress has enacted. Therefore, it should allow for swift resolution of most NIMBY-ism delays to railroad growth projects.

B. Untimely Decisions Have Real-World Consequences on Rail Growth Projects.

A second element is just a legal maxim – “justice delayed is justice denied.” When NIMBY-ism arises, from which 49 U.S.C. 10501(b) is supposed to protect interstate commerce

² See Alexander R. Train, *Short Line Railroads and Municipal Land Use Planning, Policy, and Regulation*, at 16 (2015), available at https://web.archive.org/web/20170717130926id_/http://scholarworks.umass.edu:80/cgi/viewcontent.cgi?article=1227&context=masters_theses_2.

and railroads, resolutions must be timely. There are real-world consequences to delays in resolving disputes from missing construction seasons to changing financing options, and more. These consequences are more acute for small railroads like GURR.

For instance, as mentioned above, GURR has been working to construct a rail transload facility in Hopedale, Massachusetts to serve customers and grow traffic since 2020. However, the Town of Hopedale continues to obstruct the project – taking actions that were found to be preempted. A Federal District Court referred to the Board a question of whether a localities actions were preempted by 49 U.S.C. 10501(b).³ That Court had found that GURR was likely to succeed on the merits of the preemption question that it referred to the Board.

Given the straightforward nature of the facts related to the town’s planned eminent domain and other local regulatory actions and preemption, GURR had sought expedited consideration. GURR made the point that “expedited consideration will help GURR bring benefits to rail customers in a timely fashion by fully utilizing the rapidly approaching construction season in Massachusetts.”⁴ In addition, GURR noted that it had secured financing that undue delay could jeopardize.⁵ Even without expedited consideration, under the Board’s rules a reply to GURR’s petition was due within 20 days, which should have completed the record for decision. But there were 13 filings by the parties; six filings by the locality (in addition to its reply to the petition and including a “reply to a reply”) to which GURR had to respond. Thankfully, the Board rejected the locality’s request to hold the matter in abeyance.

³ This is but one example in which GURR has been involved. As the Board is aware, there have been others. *Petition of Grafton and Upton R.R. Co. for Declaratory Order*, FD 36518 (STB filed May 13, 2021).

⁴ Motion for Expedited Consideration of Grafton and Upton Railroad Company, *Grafton and Upton Railroad Company –Petition for Declaratory Order*, Docket No. 36696 at 3 (STB filed Apr. 14, 2023).

⁵ *Id.* at 4.

The Board issued a decision approximately seven months after the filing of the petition for a declaratory order. *Grafton and Upton Railroad Company –Petition for Declaratory Order*, Docket No. 36696 (STB decided Nov. 14, 2023). That decision was unequivocal that the actions by the locality were preempted – as the Court had foreshadowed when it ruled that GURR was likely to succeed on the merits. But, that months long process resulted in GURR missing the construction season and financing rates changed substantially. The delays from local action since 2020 resulted in even more changed conditions, as the Board noted. *Id.* at 8-9 (noting GURR’s concern “about the cost of remediating the slope issues” and that GURR “concluded that although the facility could be built according to the August 1, 2022, plan, the large scale of the plan may not be necessary or cost-effective at this time given current economic conditions.”).

The delays to this single example of a freight rail growth project do not end there. Hopedale and NIMBY interests continue to take actions to prevent the transloading facility that GURR seeks to construct to support rail customers and to grow rail freight. Those actions are now back before the Board in Docket No. 36464, which is awaiting Board action. Meanwhile, another construction season is coming to a close in Massachusetts.

To be clear, GURR is not saying that a party should not “have their day in court” to raise legitimate issues. But there is a clear benefit to localities or elected representatives to respond to NIMBY-ism by taking actions that are pre-empted. It is sometimes easier for them to tell their constituents that they acted and then later blame someone else when Section 10501(b) is ultimately enforced. In other cases, delay is the goal in and of itself in the hopes that a railroad will give up, the project will become too costly to pencil out financially, or financing for the project will dry up.

GURR’s point is that when that happens, a prompt resolution is necessary so that freight rail growth projects can move forward expeditiously to serve customers and benefit the American economy. Regulatory processes should be as streamlined as much as practicable in light of the scope of the legitimate issues raised, briefing schedules adhered to, and decisions issued promptly to avoid unnecessarily delaying a worthy rail transportation project. The benefits include (1) that less capital is wasted on litigation and available to small railroads like GURR to complete infrastructure projects that benefit customers, rail freight, and the economy; (2) uncertainty, which has a cost, is removed quickly; and (3) most importantly, projects that promote growth in freight rail, take trucks off highways, and provide environmental benefits associated with freight rail move forward expeditiously.

GURR is not the only party concerned about the uncertainty, costs (litigation, financing, etc.), and lost time that results from regulatory delay. Other parties have made this point to the Board recently as well. *See e.g.*, Letter of North America Freight Car Assoc. et al, STB Docket Nos. NOR 42144, NOR 42150, NOR 42152, and NOR 42153 (STB filed Dec. 22, 2023); Letter of Canadian National Ry. Co. and Grand Trunk Corp, *Canadian Nat’l Ry. Co. and Grand Trunk Corp – Control – Iowa N. Ry. Co.*, FD 36744 (STB filed June 18, 2024).

GURR is not able to complete a study of which cases have been pending at the STB for a particular period of time, but offers one suggestion. “What gets measured gets done.” So, one constructive suggestion would be that the Board voluntarily include on its website a list of cases (or motions within cases) pending for more than three months. This report would be a supplement to the Board’s congressionally-required quarterly reporting that is available at <https://www.stb.gov/about-stb/agency-materials/stb-reauthorization-reports/>.

III. Conclusion.

GURR appreciates the Board's time and consideration of these issues that can adversely affect rail growth projects. GURR remains committed to its rail transportation transload project to serve customers and is hopeful to move forward soon. Although we have used examples from GURR's experience, those examples are to assist the Board in understanding the real-world consequences to freight rail growth projects generally from a regulatory environment of delay.

Respectfully submitted,

/s/ John Deli Priscoli

Jon Deli Priscoli