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August 18, 2011

Mark R. Reich
Kopelman and Paige
101 Arch Street
12th Floor
Boston, MA 02110

Dear Mark:

Pursuant to your request on behalf of the Board of Selectmen of the Town of Upton, I am writing to address certain issues raised by the Upton Planning Board concerning the rail transportation operations conducted by Grafton & Upton Railroad Co. ("G&U") at its yard in Upton. Specifically, the Planning Board has inquired generally about the arrangements by which G&U controls and conducts transloading activities at the yard. In addition, the Planning Board has requested information concerning the transloading of wood pellets. For the reasons outlined below, regulation by the Town with respect to the G&U transloading operations is federally preempted.

Your memorandum of June 18, 2009 provides an excellent discussion of the principles of preemption and their applicability in various situations. As we know from numerous decisions of the Surface Transportation Board and a number of courts, and as you concluded in your memorandum, preemption of local regulation occurs when rail transportation is being provided by or under the auspices of a rail carrier. Furthermore, as noted in your memorandum, transloading from rail cars to trucks constitutes rail transportation.

Ownership and Control of the Yard

As explained to the Planning Board at a recent meeting, and as disclosed to the Board of Selectmen two years ago, G&U leases the yard at Upton from the existing record owner, Upton Development Group, LLC. Jon Delli Priscoli, the owner of G&U, owns one third of the membership interests in Upton Development Group. The lease provides that G&U has full control over the yard, including the right to use the yard for rail operations and all other lawful purposes. Additionally, G&U has the right to construct improvements and to make alterations to the yard without any consent or approval of Upton Development Group, as well as having the obligation to pay all real estate taxes and utilities and to maintain insurance coverage on the yard. The Notice of Lease dated June 15, 2009 and recorded on June 16, 2009 in Book 44425, Page 159

recites that the lease has a term running in favor of G&U from July 15, 2008 through June 30, 2020 and grants to G&U an option to purchase the yard.

The history of the property explains in large part the current status of its ownership and control. As you know, the property was formerly used by the Town as a landfill. The Town had an opportunity to purchase the property several years ago, but it declined to do so. Upton Development Group acquired the property subject to an obligation to remediate certain environmental problems, which it has been diligently fulfilling. G&U has chosen not to exercise its option to purchase the yard until the remediation actions have been completed by Upton Development Group. In any event, as explained above, G&U has full control of the yard and the right to use the yard for rail transportation purposes. Indeed, the yard comes squarely within the statutory definition of "transportation". 49 U.S.C. 10102(9) ("transportation" includes (A) a . . . property, facility . . . related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use").

Transloading Generally at Upton

All of the transloading activities at Upton Yard are performed by Grafton Upton Railcare, LLC (the "contractor"), an affiliate of the Dana companies, subject to the control of G&U and in accordance with a Terminal Transloading Agreement dated December 30, 2010. Dana is an experienced and widely respected group of companies that concentrate primarily in the business of motor carrier transportation and transloading. The Agreement states that the contractor will provide transloading services "for and under the auspices and control" of G&U. Although the Agreement is confidential, G&U and the contractor have agreed that the enclosed summary of the terms and conditions of the Agreement may be disclosed to you and the Board of Selectmen and Planning Board for purposes of answering the questions raised by the Planning Board.

The form and provisions of the Agreement are based upon the agreement used by Norfolk Southern in The City of Alexandria, VA--Petition for Declaratory Order, STB Finance Docket No. 35157, decision served February 17, 2009, which is one of the decisions apparently relied upon by the Planning Board. The G&U Agreement goes even farther than the Norfolk Southern agreement, however, in order to meet the requirements of preemption. For example, the G&U Agreement explicitly prohibits the contractor from conducting any independent business activities at the yard and expressly ensures that the shippers availing themselves of transloading services are customers of the railroad and are charged for the transloading services in accordance with G&U's tariff.

Wood Pellets

The Agreement refers explicitly to the handling of wood pellets as part of the transloading services to be provided at the Upton Yard. Wood pellet producers have found it more economical and efficient to ship pellets in bulk rail cars, rather than to use trucks or attempt to ship bagged pellets in boxcars. At the present time, G&U has 3

customers that send bulk rail cars, each of which contains approximately 100 tons of pellets, to Upton for transloading.

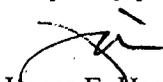
The only market--or end users--for wood pellets are residential customers, who burn the pellets in stoves for heat and who are obviously unable to take delivery of rail carloads of pellets. In order to deliver wood pellets, therefore, it is necessary to transfer the pellets from bulk rail cars into 40 pound bags that can be delivered to wholesalers or retailers by truck. Consequently, in order to meet the needs of its customers, G&U has arranged, through its contractor, to remove the pellets from the rail cars, put the pellets in bags and load the bags onto pallets that can be further distributed by flatbed truck. It is necessary to palletize the bags so that they do not break during the movement by truck.

As described above, G&U is "handling" wood pellets as part of the transportation service it provides to any customer wants to avail itself of such services. "Transportation" includes services related to the movement of property by rail, "including receipt, delivery, . . . transfer in transit, . . . storage, handling and interchange of . . . property." 49 U.S.C. 10102(9)(B). These services and the related charges are described in G&U's tariff. Bagging the pellets is an integral--indeed an essential--part of the transloading process required by the customer. Without bagging, it would be impossible to complete the transportation service. Significantly, the bagging process does not include any processing, fabrication or manufacturing that changes the nature or form of the pellets or that produces any byproducts.

The transloading of wood pellets at Upton is, therefore, substantially different than the "fabrication work" performed by a non-railroad entity for its own account in a case decided by the STB and 2004. Town of Milford, MA--Petition for Declaratory Order, STB Finance Docket No. 34444, decision served August 11, 2004. To the contrary, the pellet transloading activities are similar to the baling and wrapping of construction and demolition debris, which the STB determined to be an integral part of rail transportation and beyond local regulation as a result of preemption in New England Trans rail, LLC, d/b/a Wilmington & Woburn Terminal Ry.--Construction, Acquisition and Operation Exemption--In Wilmington and Woburn, MA, STB Finance Docket No. 34797, decision served July 10, 2007.

I hope that the foregoing explanation adequately addresses the questions of the Planning Board and, more importantly, leads them to share our conclusion that the transloading at G&U's Upton Yard is not subject to local regulation. Please let me know if you have any additional questions or need any further information.

Very truly yours,


James E. Howard

Enclosure
cc: Jon Delli Priscoli

Summary of Terms and Conditions of Terminal Transloading
Agreement dated December 30, 2010 between Grafton & Upton
Railroad Company and Grafton Upton Railcare LLC

1. Grafton Upton Railcare LLC ("Contractor") agrees to provide transloading services "for and under the auspices and control" of Grafton & Upton Railroad Co. ("G&U"), including the bagging of wood pellets, at the G&U rail yard in Upton.
2. The agreement applies to any commodities handled by rail to or from the yard in the sole discretion of G&U.
3. Contractor performs all necessary transloading services, including providing equipment and employees necessary for transloading and arranging for motor carriers.
4. Contractor bills and collects for the transloading services from G&U's customers as the agent for G&U. The amounts invoiced for the transloading services are set forth in G&U's tariff.
5. Contractor is prohibited from using the yard for purposes of any activities other than transloading for G&U customers, including a prohibition against conducting any independent business for contractor's own account.
6. Contractor may deal only with rail customers of G&U, i.e. customers that require a rail movement prior or subsequent to transloading services at the yard.
7. The agreement has a 2 year term, but G&U may terminate the agreement for any reason on 60 days' notice.
8. G&U is entitled to use the entire yard at any time for any purpose in its sole discretion so long as such use does not unreasonably interfere with the transloading activities.