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Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: **Docket No. AB-55 (Sub-No. 779X), CSX Transportation, Inc.—Abandonment
Exemption—in Trumbull County, OH**

Dear Ms. Brown,

Enclosed for efilng is CSX Transportation, Inc.'s Motion to Reject or in the Alternate
Reply to Appeal.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,

Louis E. Gitomer

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-55 (SUB-NO. 779X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION— IN TRUMBULL
COUNTY, OHIO

CSX TRANSPORTATION, INC. MOTION TO REJECT OR IN THE ALTERNATIVE REPLY
TO APPEAL

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INC.

Dated: July 23, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-55 (SUB-NO. 775X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION— IN TRUMBULL
COUNTY, OHIO

CSX TRANSPORTATION, INC. MOTION TO REJECT OR IN TH ALTERNATIVE REPLY
TO APPEAL

CSX Transportation, Inc. (“CSXT”), pursuant to 49 C.F.R. § 1152.27, respectfully moves the Surface Transportation Board (the “Board”) to reject the late filed and incomplete Offer of Financial Assistance (the “OFA”) submitted by BDM Warren Steel Holdings LLC (the “BDM”) on July 10, 2018, for failing to comply with the requirements of 49 C.F.R. §1152.27(c)(2). In the alternative, CSXT respectfully requests that if the Board treats the OFA as an appeal of the decision of the Acting Director of the Office of Proceedings (the “Acting Director”)¹, that the appeal be denied.

BACKGROUND

On May 10, 2018, CSXT filed a Notice of Exemption seeking to abandon an approximately 13.9-mile rail line on its Newton Falls Subdivision, between railroad milepost BGA 86.1 and railroad milepost BGA 100.00, Trumbull County, OH (the “Line”) that had not been requested to provide rail service for over two years. The Board served and published in the Federal Register a notice of exemption.²

¹ *CSX Transportation, Inc.—Abandonment Exemption—in Trumbull County, Ohio*, Docket No. 55 (Sub-No. 779X) (served July 6, 2018) (the “July 6 Decision”).

² *CSX Transportation, Inc.—Abandonment Exemption—in Trumbull County, Ohio*, Docket No. 55 (Sub-No. 779X)

The rules at 49 C.F.R. § 1152.27(c)(2)(1) specifically provide that “a formal expression of their intent to file an offer of financial assistance” (the “Formal Expression”) demonstrating that they are “preliminarily financially responsible” must be filed “no later than 10 days after the Federal Register publication,” which in this proceeding was June 8, 2018.³

As relevant here, on June 11, 2018, BDM late-filed a Formal Expression that did not meet the requirements of 49 C.F.R. § 1152.27(c)(1)(iv)(E) and (2)(i). BDM supplemented the Formal Expression on June 14, 2018. The Acting Director found that BDM made the required showing of preliminary financial responsibility and automatically stayed the effective date of the exemption until July 9, 2018, but did not extend the deadline for filing an OFA or a request to toll the period for filing an OFA.⁴

The OFA was required to be filed “no later than 30 days after the Federal Register publication,” 49 C.F.R. § 1152.27(2)(ii)(B), which was June 29, 2018 in this proceeding. In the *July 6 Decision*, which imposed trail use, public use, and historic conditions, the Acting Director stated:

While the filing of the notice of intent extended the effective date of the notice of exemption by 10 days, the deadline for filing an OFA was not affected and remained June 29, 2018 (30 days from the publication of the notice of exemption). 49 C.F.R. § 1152.27(b)(2)(ii). An OFA was not filed by BDM by the June 29, 2018 deadline, see 49 C.F.R. § 1152.27(c)(2)(ii)(B), nor did BDM petition to toll the OFA deadline as permitted under 49 C.F.R. § 1152.27(c)(2)(ii)(C).

On July 10, 2018, BDM submitted the OFA and a brief letter (the “Letter”). The Letter

(served May 30, 2018) (the “*May 30 Decision*”).

³ See 49 C.F.R. § 1152.25(d)(4) requiring offers of financial assistance “be filed on or before their statutory or regulatory due date.”

⁴ *CSX Transportation, Inc.—Abandonment Exemption—in Trumbull County, Ohio*, Docket No. 55 (Sub-No. 779X) (served June 21, 2018).

stated that CSXT has not provided information BDM requested on June 11, 2017.⁵ However, BDM fails to mention that it did not inquire about the information it sought from CSXT until Saturday July 7, 2018, after the *July 6* decision was served. CSXT was in the process of gathering the available and relevant information, but there was nothing that prevented BDM from contacting CSXT earlier, obtaining its own real estate appraisal (the deeds are matters of public record and readily available to BDM) or an updated track and material valuation. In letter accompanying the OFA, BDM claims that it “received confusing information concerning the deadline for submittal of its Offer of Financial assistance and was unaware of the June 29, 2018 deadline until it discovered the decision of the Board on July 6, 2018” Letter at 1. BDM does not indicate the source of the “confusing information” and it certainly was not CSXT. BDM also claims support from Trumbull County, even though Trumbull County did not file a document confirming BDM’s assertion or a statement withdrawing its request to acquire the Line for interim trail use/rail banking.

The OFA provides the identity of the Line, the purchase price it is offering, closing terms, and a purported demonstration of financial responsibility. See 49 C.F.R. § 1152.27(c)(2)(iii) and .(c)(1)(iv). However, the OFA does not prove that 10% of the proposed purchase price has been placed in escrow, that there is a continued need for rail service, BDM’s mailing address, phone number, and email, and a description of BDM including its state of organization and its ownership. 49 C.F.R. § 1152.27(c)(1)(iv)(D, E, and F).

Support for the OFA was filed by the Mahoning Valley Economic Development Corporation (“MVEDC”) requesting leniency for the late filing based on economic value and

⁵ CSXT is not required to provide most of the information requested by BDM. See BDM letter dated June 8, 2018 paragraphs numbered 3, 5, and 6.

“two potential economic development projects.” MVEDC provides no further details.⁶ Support was also provided for an extension by the Youngstown/Warren Regional Chamber (“YWRC”) because “it was BDM’s understanding that they filed an offer of financial assistance on June 11th, 2018.” YWRC went on to say that the Board should “provide leniency based on the economic value that rail brings to our community.” YWRC also pointed out that the CSXT line “runs parallel to a Norfolk Southern line presenting dual access to two Class I provider.” And that “two industrial attraction opportunities... require dual rail service that may result.”

ARGUMENT

Motion to Reject. CSXT contends that there are two reasons to reject BDM’s purported OFA. First, the OFA was late filed. Second, the OFA does not contain the information required by 49 C.F.R. § 1152.27(c)(1)(iv).

The OFA was required to be filed by June 29, 2018. BDM did not file the OFA until July 11, 2018. The Acting Director correctly concluded that an OFA was not filed. BDM claims that it “received confusing information.” But, BDM did not identify who provided the misleading information. The Board’s rules are clear that an offer of financial assistance must be filed no later than 30 days after Federal Register publication. 49 C.F.R. § 1152.27(b)(2)(ii). The Board presumes that offerors will likely file on time.⁷

MVEDC and YWRC both ask for leniency because of “economic value.” YWRC provides some color to its argument by pointing out that there is a parallel NSR line and preserving the Line will provide dual access. YWRC does not provide justification for the late filing, but does demonstrate no need for the rail service provided by the Line.

⁶ MVEDC claims that it owns two short line railroads. CSXT has reviewed the Board’s records and finds no pleadings requesting or decisions granting or exempting the control of more than one carrier by MVEDC.

⁷ *Norfolk Southern Railway Company-Abandonment Exemption-in Roanoke, Va.*, Docket No. AB 290 (Sub-No. 389X) slip op. at 3 (served May 5, 2017).

CSXT requests that the Board reject the OFA as late filed.

The OFA also fails to provide the information required in the rules.

BDM does not demonstrate financial responsibility as required by 49 C.F.R.

1152.27(c)(1)(iv)(B). In the OFA, on the unnumbered fourth page, BDM states that “it previously provided banking information verifying the availability of funds in excess of the purchase price.”

There are several problems here. BDM relies on the NOI and does not provide proof of financial responsibility. Even if use of the prior proffer of financial responsibility were proper, which it is not, the document in BDM’s supplemental filing on June 14, 2018 titled Activity – Deposit Accounts is only for the period between June 1, 2018 and June 13, 2018. There is no indication of the current status of the account⁸, much less in the future. 49 C.F.R. § 1152.27(c)(1)(iv)(B).

BDM has not demonstrated that it has placed 10% of the preliminary financial responsibility amount in escrow as required by 49 C.F.R. § 1152.27(c)(1)(iv)(D).

BDM has not shown a need for continued rail service. There are no active shippers on the Line and have not been for over two years. BDM has not demonstrated that operations are feasible. And in the coup de grace to the required need for rail service is the statement by YWRC that the Line is parallel to a NSR rail line and would provide dual rail service to shippers. 49 C.F.R. § 1152.27(c)(1)(iv)(E).

BDM is at best a mystery entity. It has not provided its mailing address, phone number or an email address as required by 49 C.F.R. § 1152.27(c)(1)(iv)(F). In addition, BDM has not identified its state of organization and description of ownership as required by 49 C.F.R.

§ 1152.27(c)(1)(iv)(G).

Finally, BDM values the Line based solely on its value of the track and materials. As the

⁸ *CSX Transportation, Inc.-Abandonment Exemption-in Clark, Floyd, Lawrence, Orange, & Washington Counties, Ind.*, Docket No. AB 55 (Sub-No. 775X) slp op. at 1 (served February 14, 2018).

Board well knows, real estate can comprise a significant portion of the value of a railroad line. CSXT has completed a preliminary real estate netliquidation analysis and determined that it is likely that over 75% of the Line is owned in fee simple by CSXT and has a net liquidation value of approximately \$1,500,000. Even accepting the value of the track and materials provided by BDM, the minimum net liquidation value of the Line would exceed \$2,200,000, far more than BDM has shown it had available over one month ago.

CSXT has demonstrated that BDM late-filed the OFA and that the OFA has failed to provide five of the seven requirements for an OFA. For these reasons, CSXT respectfully requests the Board to reject BDM's OFA.

REPLY TO APPEAL

As cited above, in the July Decision, the Acting Director concluded, based on the record before the Board, that An OFA was not filed by BDM by the June 29, 2018 deadline, nor did BDM petition to toll the OFA deadline as permitted under. The Acting Director did not find that a "responsibly responsible person had offered financial assistance." 49 C.F.R. § 1152.27(e)(2). Appeals of the Acting Director's decision will be acted upon by the Board. *Id.* The "Board considers whether the Director made the correct decision, given the circumstances permitted."⁹

The OFA does not demonstrate that the Acting Director made an incorrect decision given the circumstances.

It is clear that BDM did not file an offer of financial assistance by the regulatory deadline, nor did BDM file a request to toll the time period for filing an offer of financial assistance. The Acting Director acted appropriately in not postponing the abandonment to permit the offer of financial assistance to proceed, based on the record before him. The OFA

⁹ *Union Pacific Railroad Company-Abandonment and Discontinuance of Service Exemption-in Cerro Gordo County, Iowa*, Docket No. AB 33 (Sub-No. 327X), slip op. at 3 (served January 26, 2018).

itself is so defective and not in compliance with the Board's rules that it does not demonstrate that the Acting Director made an incorrect decision. As explained above, the OFA does not provide the information required by the regulations, and, indeed, does not address four of the informational requirements.

CSXT respectfully requests that the Board affirm the Acting Director's decision.

CONCLUSION

BDM has not submitted a timely and complete offer of financial assistance. BDM has not demonstrated that the Acting Director's decision was not correct based on the circumstances at the time it was made, and even if it had been based on the OFA that was filed.

CSXT respectfully requests the Board to reject the defective FOA and affirm the Acting Director's decision.

Respectfully submitted,

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Dated: July 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Motion to Reject or in the Alternative Reply to Appeal to be served upon all parties of record by electronic service.

Louis E. Gitomer

Louis E. Gitomer
June 23, 2018