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August 12, 2005

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

214531



Re: *Florida East Coast Railway, L.L.C. Abandonment Exemption
in Brevard County, FL (Titusville Branch Line)*
STB Docket No. AB-70 (Sub-No. 5X)

Dear Secretary Williams:

Enclosed for filing on behalf of Florida East Coast Railway, L.L.C. ("FEC") in the above-captioned matter are an original and ten (10) copies of both the public version and the confidential version of FEC's Response to Hust Brothers, Inc.'s Offer of Financial Assistance. The confidential version is filed under seal pursuant to the protective order entered by the Board on July 26, 2005. A diskette containing an electronic version of the Response is also enclosed.

Please acknowledge receipt of this Response by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel. Thank you for your time and attention to this matter.

Sincerely,

ENTERED
Office of Proceedings Matthew J. Warren

Enclosures

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Public Record

214531



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-70 (Sub-No. 5X)

**FLORIDA EAST COAST RAILWAY, L.L.C.
—ABANDONMENT EXEMPTION—
IN BREVARD COUNTY, FL**

**RESPONSE OF FLORIDA EAST COAST RAILWAY
TO HUST BROTHERS, INC.'S
OFFER OF FINANCIAL ASSISTANCE**

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Dated: August 12, 2005

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-70 (Sub-No. 5X)

**FLORIDA EAST COAST RAILWAY, L.L.C.
—ABANDONMENT EXEMPTION—
IN BREVARD COUNTY, FL**

**RESPONSE OF FLORIDA EAST COAST RAILWAY
TO HUST BROTHERS, INC.'S
OFFER OF FINANCIAL ASSISTANCE**

Florida East Coast Railway, L.L.C. ("FEC") submits this response to the Offer of Financial Assistance ("OFA") filed by Hust Brothers, Inc. ("Hust") in the above-captioned proceeding on August 10, 2005 ("Hust OFA"). Hust's OFA purports to offer, pursuant to 49 U.S.C. § 10904(c), to purchase FEC's line of railroad between Milepost TB 0.0 in Titusville and Milepost TB 9.8 in Aurentia, in Brevard County, Florida (the "Titusville Branch"). However, Hust's OFA utterly fails to demonstrate that Hust – a California auto parts dealer – has the capacity to acquire, rehabilitate, and operate a railroad line that has not carried traffic in more than five years. The cost of rehabilitating the line alone is [REDACTED]. Hust's Offer of Financial Assistance should be rejected for that reason alone. Moreover, the circumstances surrounding Hust's filing of an OFA in this proceeding – and similar actions by Hust in other recent abandonment proceedings involving both FEC and other rail carriers – strongly suggest that Hust is not a bona fide offeror to subsidize continued rail service, but is instead filing frivolous OFAs as a means to acquire salvage rights to the lines at issue in those proceedings. Such abuse of the Board's OFA procedures should not be countenanced.

On May 27, 2005, FEC filed a Notice of Exemption, invoking the class exemption set forth at 49 C.F.R. § 1152.50 for the abandonment of the Titusville Branch, over which no local or overhead rail traffic has moved for at least two years. In fact, as FEC's July 14, 2005

response to Hust's request for information about the Titusville Branch indicated, there have been no rail shipments over the Titusville Branch since January 2000, a period of five-and-a-half years, and FEC is not aware of any potential source of future local or overhead traffic for the line. *See* Reply of Florida East Coast Ry. to Hust Bros.' Notice of Intent to File Offer of Financial Assistance at 2 ("Reply"). Despite this fact, and despite being informed that the Titusville Branch – which is in very poor condition and lacks any grade crossing protection devices – would require nearly \$ 6 million in rehabilitation to be restored to serviceable condition, Hust proceeded to file an OFA, vaguely asserting that it “desires to acquire and restore service over abandoned or to be abandoned rail lines.” Hust OFA at 1.

Before accepting Hust's OFA for consideration pursuant to 49 C.F.R. § 1152.27(e)(2) – and subjecting the parties and the Board to time consuming and costly litigation regarding the price for a purchase of the Titusville Branch – the Board first must determine whether Hust has presented a bona fide OFA that satisfies the standards of 49 U.S.C. § 10904(d). *See* 49 C.F.R. § 1152.27(e)(2). The OFA must demonstrate that the offeror is financially responsible enough “to make good on the offer.” STB Docket No. AB-6 (Sub-No. 380X), *Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption in King Cty., WA*, (Aug. 4, 1998). In order to satisfy this standard, an OFA must do more than demonstrate the financial wherewithal to purchase the line being abandoned. Because the “fundamental purpose” of the OFA process is to continue rail service, a bona fide offer “must contemplate continued rail service.” *Id.*; *see* STB Docket No. AB-477 (Sub-No. 2X), *Owensville Terminal Co. – Abandonment Exemption – In Gibson & Posey Ctys., IN*, (Dec. 16, 1997). In other words, a bona fide offeror must show “that it ‘can, and will provide continued rail service.’” I.C.C. Docket No. AB-33 (Sub.-No. 71X), *Union Pac. R.R. Co. – Abandonment Exemption – In Lancaster Cty., NE* (Sept. 28, 1992) (quoting Docket No. AB-167 (Sub. No. 493N), *Conrail Abandonment West 30th Street, NY* (Jan.

13, 1987)). Where, as in the present case, a line proposed for abandonment is not currently in use, the offeror must give “some assurance” both that “shippers are likely to make use of the line if continued service is made available” and that “there is sufficient traffic to enable the operator to fulfill its commitment to provide that service.” STB Docket No. AB-547X, *Roaring Fork R.R. Holding Auth. – Abandonment Exemption – In Garfield, Eagle, and Pitkin Cty., CO*, (May 21, 1999).

Hust’s OFA fails to satisfy the requirements for a bona fide OFA, for several reasons:

First, Hust has completely failed to comply with *Roaring Fork*’s requirement that it show that shippers are “likely to make use of the line” and that there is “sufficient traffic to enable [Hust] to fulfill its commitment to provide . . . service.” Hust’s OFA says nothing at all about what shippers it might serve or what traffic it might carry. Even if Hust had made the effort, it is unlikely that it could have identified any potential shipper located on the Titusville Branch. It has been more than five years since FEC has moved even a single carload of traffic over the Titusville Branch, and FEC is unaware of any source of new local or overhead traffic. Reply at 2. Hust’s OFA fails to explain why it would invest millions of dollars to acquire and operate a line that has no realistic prospect of supporting profitable operations.

Even if it had shippers to serve, Hust does not indicate how it plans to acquire or lease locomotives or rail cars to fulfill its pledge “to . . . restore service” over the Titusville Branch. Hust OFA at 1. While Hust asserts that it is “engaged in a wide range of business ventures,” *id.*, being a rail carrier is not one of them. Indeed, Hust’s primary business appears to be a chain of four auto body parts stores in and around Marysville, California. See www.hust.com. Hust does not give any indication of how it would provide rail service over a nine-mile section of track located thousands of miles from its other business operations. Hust has certainly not shown “that it can, and will provide continued rail service,” *Lancaster Cty.*, and its OFA should be rejected.

Second, Hust has not demonstrated that it is financially capable of acquiring the Titusville Branch, restoring it to a safe and operable condition, and providing rail service over the line. Even if Hust's entirely inadequate estimate of the value of the real estate and track materials constituting the Titusville Branch were accepted – and it should not be – Hust's own submission shows that it lacks the financial resources to restore service over the line.¹ According to Hust's OFA, it has a net worth of [REDACTED]. Hust OFA Ex. A at 3. In order to restore service on the Titusville Branch, Hust must not only acquire the Titusville Branch, it must undertake the substantial task (and expense) of rehabilitating the line for continued rail operations. As explained in FEC's Reply to Hust's Notice of Intent to File an OFA, the Titusville Branch is in very poor condition and in need of substantial track rehabilitation and grade crossing repair. *See* Reply at 2. Indeed, it would cost \$5,170,102 to rehabilitate the Titusville Branch for ongoing rail operations. *See id.* [REDACTED] Hust does not explain how it would pay its proposed purchase price of over \$2.99 million *and* the \$5.7 million required to rehabilitate the line, much less the additional costs associated with acquiring locomotives and rail cars, hiring and training employees and initiating rail service to (non-existent) shippers. In short, Hust's OFA fails to demonstrate that it is financially capable of doing what it supposedly proposes to do.

[PARAGRAPH REDACTED]

Third, Hust's actions in this and other recent line abandonment cases raise serious questions as to whether Hust truly intends to provide rail service over the lines it has offered to purchase. Hust has filed, or has stated an intent to file, at least four OFAs for rail lines located in different areas of the country. In addition to the instant case, last year Hust filed an OFA for a rail line in Mississippi and requested the Board to set terms for a sale, only to reject the Board's terms when Hust's lowball purchase price was rejected. *See* STB Docket No. AB 868-X,

¹ In the event that the Board allows Hust to proceed with its OFA, FEC reserves the right to submit evidence demonstrating that Hust's proposed purchase price is grossly inadequate.

Mississippi Tennessee Holdings, LLC – Abandonment Exemption – In Union Pontotoc & Chickasaw Ctys., MS. On June 28, 2005, Hust filed a notice of intent to file an OFA for a BNSF rail line in New Mexico. *See* STB Docket No. AB-6 (Sub No. 428X), *BNSF Ry. Co. – Abandonment Exemption – In Colfax Cty., NM.* And on June 27, 2005, Hust informed FEC of its intent to file an OFA in another abandonment proceeding pending before the Board. *See* STB Docket No. AB 70 (Sub. No. 4-X), *Florida East Coast Ry., LLC – Abandonment Exemption – In Miami-Dade Cty., FL.*

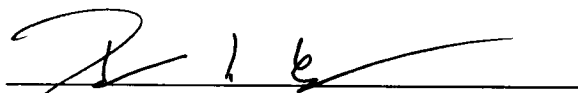
Hust cannot possibly have the financial resources – or the bona fide intent – to acquire and operate all these rail lines. The lines in which Hust has expressed interest are hundreds (and in some cases thousands) of miles apart. None of the lines in question is in the region where Hust’s current business operations are located, and Hust’s OFA submissions do not demonstrate any existing relationship between Hust and any of the communities in which it supposedly desires to enter the railroad business. The FEC lines targeted by Hust have no active rail customers, and little (if any) prospects for future rail traffic. These facts suggest that Hust is not genuinely interested in operating the rail lines that it has targeted, but rather seeks to utilize the OFA process to further other business purposes (e.g. obtaining the salvage from the lines or acquiring rail properties in forced sales at depressed values, with the intent of scrapping the lines after a brief interval).

Indeed, FEC believes that Hust’s sole purpose in filing this and other OFAs is to pressure FEC into awarding it salvage contracts from the lines on a “no-bid” basis. Such abuse of the Board’s OFA procedures should not be permitted. *Cf.* STB Fin. Docket No. 33996, *SF&L Ry., Inc. – Acquisition & Operation Exemption – Toledo, Peoria & Western Ry. Corp. Between La Harpe & Peoria, IL* (Oct. 17, 2002) (“[W]e cannot allow the process to be abused by salvage operators seeking to take over lines for their salvage rather than their operational value . . . and

we will take remedial action . . . where the facts warrant it to maintain the integrity of our practices and procedures.”). FEC and other carriers (and the Board itself) should not be required to incur the time and expense of litigating Hust’s repeated OFA filings, in the absence of a credible showing by Hust that it has a bona fide intent to follow through on its proposals, and the financial means to do so.

For the above reasons, FEC respectfully requests that the Board reject Hust’s OFA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Hynes', is written over a horizontal line.

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