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February 2, 2023

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

Re: Flats Industrial Inc. d/b/a Flats Industrial Railroad Company-Abandonment
Exemption-in Cleveland, Ohio
Surface Transportation Board Docket No. AB 1327X

Dear Ms. Brown:

Please find the enclosed Reply of Werner G. Smith, Inc. ("WGS") to the Flats Industrial Railroad Company Comments in Response to the WGS Offer of Financial Assistance.

If there are any questions pertaining to this filing, please let me know.

Sincerely,

A handwritten signature in blue ink that reads 'Justin J. Marks'.

Justin J. Marks
Counsel to Werner G. Smith, Inc.

cc: Parties of Record

Enclosure

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1327X

FLATS INDUSTRIAL INC. D/B/A FLATS INDUSTRIAL RAILROAD COMPANY
- ABANDONMENT EXEMPTION –
IN CLEVELAND, OHIO

WERNER G. SMITH, INC. OFFER OF FINANCIAL ASSISTANCE

REPLY TO FLATS INDUSTRIAL RAILROAD RESPONSE

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Counsel for Werner G. Smith, Inc.

Dated: February 2, 2023

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1327X

FLATS INDUSTRIAL INC. D/B/A FLATS INDUSTRIAL RAILROAD COMPANY
- ABANDONMENT EXEMPTION –
IN CLEVELAND, OHIO

WERNER G. SMITH, INC. OFFER OF FINANCIAL ASSISTANCE

REPLY TO FLATS INDUSTRIAL RAILROAD RESPONSE

Werner G. Smith, Inc. (“WGS”) hereby files this reply to the Flats Industrial Inc. d/b/a Flats Industrial Railroad Company Comments in Response (“FIR Response”) to the WGS Offer of Financial Assistance (“OFA”). WGS submitted its OFA to subsidize FIR’s operations for a portion of the line subject to abandonment on January 29, 2023, in accordance with the Board’s November 29, 2022 decision.

WGS respectfully requests that the Board reject the FIR Response. The Board’s regulations do not provide a procedural schedule establishing comments to respond to an OFA.¹ If the Board accepts the FIR Response, then WGS respectfully requests leave to file this reply in the interest of compiling a complete record.²

¹ *Conrail Abandonment of the Weehawken Branch – In Hudson County, NJ* STB Docket No. AB 167 (Sub-No. 766N) *et al.*, slip op. at 3 (served Feb. 16, 2001) (“The Board’s regulations do not provide for replies to OFAs. Because reasonableness and financial responsibility determination must be made within 5 days of the date an OFA is filed, they are usually based on the offer alone.”).

² *American Rocky Mountaineer, LLC – Petition for exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 36468, slip op. at 3 n.3 (served May 28, 2021).

1. The Board's regulations permit an OFA to subsidize a portion of a line to be abandoned.

FIR asserts that the WGS OFA to subsidize a portion of the line to be abandoned is impermissible parceling of a rail line.³ Under the Board's requirements for the Contents of an Offer, the offeror is required to "identify the line, or the portion of the line, in question."⁴ WGS has identified the portion of the FIR line that it seeks to subsidize for continued rail service. "Parceling" does not refer to an offer to subsidize a segment of the rail line to be abandoned, it refers to an OFA that seeks to acquire only a narrower portion of a right-of-way.⁵ Board precedent supports an OFA over a shorter segment of a line to be abandoned.⁶

2. WGS demonstrated that it has the financial resources to cover its proposed subsidy.

FIR incorrectly argues that WGS is required to show sufficient funds to pay FIR's estimate of annual subsidy.⁷ The Board has stated that to "demonstrate financial responsibility, the offeror must have, or within a reasonable time obtain, the financial resources to fulfill proposed contractual obligations."⁸ The "proposed contractual obligations" does not refer to the FIR's subsidy amount, it refers to the offeror's proposal.⁹ Here, WGS has provided documents to demonstrate that it can cover its proposed \$64,000 subsidy OFA.

³ FIR Response at 3 n.3.

⁴ 49 C.F.R. §1152.27(c)(1)(iv)(A) (emphasis added).

⁵ *Great Redwood Trail Agency Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, Cal. In the Matter of An Offer of Financial Assistance*, STB Docket No. AB 1305X, slip op. at 3-4 (served Oct. 21, 2022).

⁶ *Fillmore Western Railway Co. – Abandonment Exemption – in Fillmore County, NE In the Matter of an Offer of Financial Assistance*, STB Docket No. AB 492 (Sub-No. 2x).

⁷ FIR Response at 9.

⁸ *Great Redwood Trail Agency Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, Cal. In the Matter of An Offer of Financial Assistance*, STB Docket No. AB 1305X, slip op. at 2 (served Oct. 21, 2022).

⁹ *Id.* at 3 (Offeror did not have the financial resources to cover costs in its proposed OFA); *See also CSX Transp., Inc. Abandonment Exemption in Allegan County, MI In the Matter of an Offer of Financial Assistance*, STB Docket No. AB 55, slip op. at (Sub-No. 619X) (Offeror submitted financial information "to cover the proposed price.").

3. WGS is filing this OFA to subsidize rail service for its use of the Rail Line.

FIR criticizes WGS's demonstration of continued need for rail service.¹⁰ Under section 1152.27(c)(1)(iv)(E), an OFA is to include a demonstration of continued need for rail service "on the line, or portion of the line, in question." The regulations provide that an OFA may include examples such as "demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need)."

Here WGS, as the receiver on this line has offered as a demonstration of need for rail service that it invested approximately \$110,000 into its rail spur for continued rail service and that it continues to see customers interested in shipping by rail to WGS's facility.

4. The standard for acceptance of an OFA for subsidy is reasonableness and financial responsibility.

FIR states that WGS bears the "burden of proof to establish why its offer of subsidy is more reasonable than FIR's."¹¹ But, FIR confuses the initial reasonableness and financial responsibility burden on WGS when submitting its OFA for a subsidy with the burden imposed under 49 C.F.R. §1152.27(h) for requests to the Board to establish conditions and compensation. It is only under section 1152.27(h) that a party requesting the Board to establish conditions and compensation bears the burden of proof "as to all issues in dispute."¹²

Here, the correct standard is that an offeror "must show that it is financially responsible and that the offer is reasonable." *Union Pac. R.R. Co. – Abandonment – In Polk County, IA In*

¹⁰ FIR Response at 15.

¹¹ FIR Response at 8.

¹² 49 C.F.R. §1152.27(h)(3). *See also Trinidad Railway, Inc. – Abandonment Exemption – in Las Animas County, CO In the Matter of a Request to Set Terms and Conditions*, STB Docket No. AB 573X, slip op 4 (served April 17, 2002)("In proceedings to set conditions, the burden of proof as to compensation is on the offeror."(emphasis added)).

the Matter of an Offer of Financial Assistance, STB Docket No. AB-33 (Sub-No. 170) (served Jan. 30, 2002). Since WGS has filed this OFA for the Board to initiate negotiations between the parties, and not to set conditions, the burden on WGS is to show that its offer for subsidy is reasonable. WGS has met its burden in the OFA that was submitted.

CONCLUSION

Based on the foregoing and on the OFA, WGS respectfully requests that the Board find the WGS offer to be reasonable and WGS to be financially responsible. Upon such finding, the Board should institute negotiations.

Respectfully submitted,



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Counsel for Werner G. Smith, Inc.

Dated: February 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2023, I served a copy of the foregoing
Reply via email on the parties of record in this proceeding.

Counsel for Flats Industrial Inc., d/b/a Flats Industrial Railroad Company:

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