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January 31, 2023

VIA E-FILING

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

Re: Flats Industrial Railroad Company – Abandonment Exemption – In
Cleveland, OH AB-1327X

Dear Ms. Brown:

Flats Industrial Inc., a Delaware corporation doing business as Flats Industrial Railroad Company (“FIR”), is hereby providing Comments in Response to Werner G. Smith, Inc.’s (“WGS”) Offer of Financial Assistance, which was filed on January 29, 2023. If there are any questions about this matter, please contact me directly, either by telephone: 202-663-7823 or by e-mail: wmullins@bakerandmiller.com. If I am unavailable, you may contact Crystal Zorbaugh at 202-663-7831 or via email at czorbaugh@bakerandmiller.com.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins
Attorney for Flats Industrial Inc., a Delaware corporation
doing business as Flats Industrial Railroad Company

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1327X

**FLATS INDUSTRIAL RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN CLEVELAND, OHIO**

**COMMENTS IN RESPONSE TO WERNER G. SMITH, INC.'S
OFFER OF FINANCIAL ASSISTANCE**

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January 31, 2023

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Delaware corporation doing business as
Flats Industrial Railroad Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1327X

**FLATS INDUSTRIAL RAILROAD COMPANY
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OFFER OF FINANCIAL ASSISTANCE**

BACKGROUND

As the Surface Transportation Board (the “Board”) is aware, on November 10, 2022, pursuant to 49 C.F.R. §1152.27 and the Board’s decision served October 31, 2022,¹ Werner G. Smith, Inc. (“WGS”) filed a formal expression of its intent to file an Offer of Financial Assistance (“OFA”) to subsidize a portion of the Flats Industrial Inc. d/b/a Flats Industrial Railroad Company (“FIR”) rail line² from the connection point with Norfolk Southern Railway Company (“NSR”) at Milepost 11.85 to the WGS facility, approximately 1.20 miles (the “Line”).³ On November 22, 2022, WGS filed a petition to toll the OFA filing deadline, stating

¹ Notice of the exemption was served and published in the Federal Register on October 31, 2022 (87 Fed. Reg. 65,640). A corrected notice of exemption was served and published on November 8, 2022 (87 Fed. Reg. 67,532).

² On October 11, 2022, FIR filed a verified notice of exemption to abandon rail service over an approximately 1.85-mile-long rail line, extending from Milepost 10 to Milepost 11.85 (near West 41st Street) in Cleveland, Ohio (the “FIR Line”), which as the Board noted “constitutes FIR’s entire railroad system.” See Flats Industrial Inc. D/B/A Flats Industrial Railroad Company—Abandonment Exemption—In Cleveland, Ohio, AB 1327X (STB served November 29, 2022) (“November 29th Decision”).

³ WGS proposing to subsidize operations over only a portion of the Line would in effect force FIR to retain in operation the entire Line. For rail operations to work, FIR would have to maintain the 0.65 mile section that WGS is not willing to subsidize. Doing so would require FIR

that FIR required additional time to gather the information WGS had requested under 49 C.F.R. §1152.27(a).⁴ FIR did not oppose WGS's request, and the Board tolled the OFA filing deadline until January 29, 2023, and postponed the effective date of the exemption until February 8, 2023.⁵

FIR provided WGS and the Board with the information required by 49 C.F.R. §1152.27(a) on January 19, 2023 ("FIR's January 19th Filing").⁶ As FIR noted in its January 19th filing, FIR, a family-owned company with only one part-time employee remaining, retained the services of Mr. Bruce Carswell "to gather as much of the required information as possible, to analyze the material, and to develop the required subsidy amount and rehabilitation costs."⁷ FIR's January 19th Filing provided WGS and the Board, the estimated annual subsidy, the Curriculum Vitae of Mr. Carswell, and Supporting Information and Workpapers.⁸

to bear costs associated with serving non-existent shippers. While this is a subsidy and not an offer to purchase, WGS's offer to only subsidize 1.20 miles instead of the entire 1.85 miles is a form of selective parceling. Precedent is clear that the selective parceling approach to an OFA is not appropriate and also constitutes grounds for rejecting the OFA. See Consol. Rail Corp.—Aban. Exemption—in Phila., Pa., AB 167 (Sub-No. 1191X), slip op. at 4 (STB served Mar. 14, 2012). See also Great Redwood Trail Agency – Abandonment Exemption – In Mendocino, Trinity, and Humboldt Counties, CAL., AB-1305X (STB served Oct. 21, 2022). Selective parceling is even more egregious here, given that the traffic proposed for continued operation is specious at best.

⁴ See Flats Industrial, AB 1327X (STB served November 22, 2022).

⁵ Id.

⁶ See Flats Industrial, AB 1327X (STB served January 19, 2023).

⁷ Id. at p. 4.

⁸ Pursuant to a protective order, FIR filed both a Public and a Highly Confidential Version of its January 19th Filing. The Highly Confidential version was transmitted via file share to WGS's Counsel, Justin J. Marks, after receipt of Mr. Marks undertaking by FIR's counsel, Crystal M. Zorbaugh. See Flats Industrial, AB 1327X, Exhibit A and Exhibit B (STB served November 10, 2022).

On January 29, 2023, WGS filed its Offer of Financial Assistance to subsidize the approximately 1.20-mile segment of the FIR Line. WGS, in its OFA, fails to carry its burden of proof to demonstrate that it is financially responsible to pay the required subsidy. Indeed, while WGS questions FIR's net liquidations values ("NLV"), WGS, despite being the party with the burden of proof, has presented no evidence regarding what they believe the proper NLV values should be. WGS has not offered to pay any return on invested capital as required by the rules. In fact, WGS has failed to comply at all with the requirements of 49 CFR 1152.36. This alone justifies rejecting WGS's subsidy request.

WGS has also failed to show that there is a continued need for rail service as required by case law and STB regulations. Indeed, not one shipper has supported WGS's subsidy request. Furthermore, although WGS claims it needs service, WGS has not shipped over the Line for more than two years and has failed to demonstrate that any receiver, customer, or client desires to ship to WGS via rail over FIR.

In short, WGS's OFA does not satisfy the standards of 49 C.F.R. §1152.27 for purposes of instituting negotiations. They failed to comply with the subsidy regulations. They failed to show that they are financially responsible party. They failed to show continued shipper need. As such, the Board should reject the OFA and allow FIR to proceed towards consummation of its previously granted abandonment authority.

ARGUMENT

As the offeror of financial assistance, WGS must first demonstrate that it is "financially

responsible”⁹ to subsidize the rehabilitation costs and operations¹⁰ for one year.¹¹ WGS must also provide the Board with assurances that its OFA is for the purpose of providing freight rail service over the Line. See R.J. Corman Railroad Property, LLC—Abandonment Exemption—In Scott, Campbell, and Anderson Counties, Tenn., AB 1296X (STB served June 26, 2020) (Board rejected the OFA solely based on the offeror’s failure to “demonstrate a need for continued rail service sufficient to warrant permitting a forced sale of the Line through the OFA process.”) As described below, WGS fails to demonstrate its financial responsibility to rehabilitate and subsidize operations over the Line for one year and fails to demonstrate a continued need for rail service. For the foregoing reasons, FIR respectfully requests that the Board reject WGS’s OFA, which proposes to subsidize approximately 1.20 miles of the 1.85-mile Line.

I. WGS Fails to Demonstrate Financial Responsibility

When submitting an OFA, the offeror must demonstrate full financial responsibility and the Board has the long-established “authority to reject an OFA when an offeror fails to demonstrate its ability to provide rail service as part of the Board’s determination of financial responsibility at the offer stage.” See Offers of Financial Assistance, EP 729 at p. 12 (STB served June 29, 2017) (“Ex Parte 729”); citing Consolidated Rail Corp.— Abandonment Exemption—In Philadelphia, Pennsylvania., AB 167 (Sub-No. 1191X) et al., slip op. at 8 (STB served Oct. 26, 2012) (affirming Director’s decision to reject an OFA because the offeror did not have funds to both acquire the line and to rehabilitate the line and install safety equipment.) In Ex Parte 729, the Board adopted changes to its rules pertaining to Offers of Financial Assistance.

⁹ See 49 C.F.R. §1152.27(c)(1)(iv)(B).

¹⁰ See 49 C.F.R. §1152.27(a)(3).

¹¹ See 49 U.S.C.S. § (f)(4)(B).

Since this rulemaking, which was effective July 29, 2017, there have been three OFA cases before the Board, and in two of the cases, the Board rejected the OFA based on its determination of financial responsibility. See CSX Transportation, Inc.—Abandonment Exemption—In Trumbull County, Ohio, AB 55 (Sub-No. 779X) (STB served August 30, 2018) (Board rejected the OFA as the offeror failed to demonstrate that it has placed the 10% of the preliminary financial responsibility amount in escrow); see also Great Redwood Trail Agency—Abandonment Exemption—In Mendocino, Trinity, and Humboldt Counties, Cal.; In the Matter of an Offer of Financial Assistance, AB 1305X (STB served October 21, 2022) (Board rejected the OFA as the offeror “failed to demonstrate that it is financially responsible to acquire, operate, and maintain [a] 13-mile rail segment.”) Here, WGS, which bears the burden of proof in its OFA,¹² has likewise failed to demonstrate that it is financially responsible to subsidize the rehabilitation and continued operation of the Line.

As stated above, FIR retained the services of Mr. Carswell who, based upon the information available and applying that information in accordance with 49 CFR 1152.36, estimated that the annual subsidy amount would be \$3,420,938.13. Mr. Carswell’s estimated annual subsidy considers the realistic avoidable costs for rehabilitation, maintenance, and operating costs and a return on invested capital.

In contrast, WGS didn’t even attempt to comply with 49 CFR 1152.36. WGS presented no evidence on the value of the property. Did not calculate a net liquidation value. Did not

¹² See Trinidad Railway, Inc.—Abandonment Exemption—Las Animas County, CO In the Matter of a Request to Set Terms and Conditions, AB-573X (April 16, 2002). (“Placing the burden of proof on the offeror is particularly appropriate in an OFA context, which involves an involuntary taking of property, because the offeror may withdraw its offer if it considers the price set by the agency to be too high, but the rail carrier must sell its line to the offeror at that price even if it considers the price to be too low.”)

calculate a return on that invested property and capital. WGS ignored almost all of 49 CFR 1152.36 despite the regulation specifically saying that “[t]he following information . . . shall also be used by an offeror of financial assistance to formulate a Proposed Subsidy Payment.” The failure to comply with the required information is grounds alone to reject the OFA.

WGS also failed to comply with 49 CFR 1152.27(c)(1)(iv)(C) ((C) (explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under paragraph (a)(1) of this section). WGS presented no evidence to explain the difference between their subsidy calculation and FIR’s calculation. WGS merely claims that FIR’s valuations are too high but presents no evidence as to why; yet WGS has the burden of proof to establish why its offer of subsidy is more reasonable than FIR’s.

WGS merely calculated what they thought their projected revenues would be, minus their projected variable costs, and then estimated an annual subsidy of \$64,000; however, the regulations require more. Failing to follow the regulations, WGS’s subsidy should not be considered a reasonable offer by the Board. See Union Pacific, AB-33 (Sub-No. 132X) at 2 (STB served April 6, 1999) (“An OFA to acquire a line for continued rail service need not be detailed, but an offeror must show that is financially responsible *and* that the offer is reasonable.”) (Emphasis added); citing Conrail Abandonments Under NERSA, 365 I.C.C. 472 (ICC served November 25, 1981).

While WGS has filed an OFA and appears to have complied with 49 C.F.R. §1152.27(c)(1)(iv)(D) by placing \$720, which is \$240 greater than 10 percent of WGS’s

calculated preliminary financial responsibility,¹³ into escrow with PNC Bank,¹⁴ WGS falls woefully short of having sufficient funds to cover the estimated annual subsidy of \$3,420,938.13 for rehabilitation and the initial year of operation. WGS's entire case for financial responsibility rests on its "Profit and Loss Statement – Reporting a Net Income of \$878,808.70 for January 1 – November 10, 2022, and a PNC Bank Line of Credit for \$50,000,"¹⁵ both of which demonstrate that WGS does not have sufficient funds to sustain FIR's estimated annual subsidy of \$3,420,938.13 for one year. The PNC Bank Line of Credit ("LOC") is also not current, dated June 12, 2019, and appears to be a Small Business Administration loan, which are not periodically reviewed by issuing banks as the loan carries a federal guarantee of payment. As WGS did not provide a letter with a current date from PNC Bank attesting to the status of the LOC, it cannot be verified whether this LOC is still available and should not be considered by the Board as evidence of WGS's financial responsibility.

While WGS has provided its Profit & Loss ("P&L") statement to demonstrate sufficient funds,¹⁶ it has failed to provide a balance sheet, statement of cash flow, or working capital document, which would demonstrate its actual profitability. Further WGS has failed to provide information as to the nature or term of contract(s) that may exist regarding the revenue generated

¹³ Under 49 C.F.R. §1152.27(c)(1)(ii), if the offeror "seeks to subsidize, the preliminary financial responsibility amount shall be \$4,000 (representing a standard annual per-mile maintenance cost) times the number of miles of track.

¹⁴"The offeror must demonstrate that the offeror has placed in escrow with a reputable financial institution funds equaling 10% of the preliminary financial responsibility amount calculated pursuant to paragraph (c)(1)(ii) of this section. See 49 C.F.R. §1152.27(c)(1)(iv)(D). See also Flats Industrial, AB 1327X, Exhibit C (STB served November 29, 2022) (WGS OFA).

¹⁵ See WGS OFA at p. 3.

¹⁶ WGS has shown funds sufficient to cover revenues minus variable costs, but it did not show sufficient funds to address rehabilitation costs or net liquidation value and return on NLV as required by the regulations. See WGS OFA, Exhibit A.

by the sale of refined products or show how Costs of Goods Sold (“COGS”) are calculated at current market prices. If, in fact, WGS is using historic COGS, then it may be operating at a loss if COGS are adjusted to current market . Indeed, it is likely that their “profit” is overstated. In short, WGS’s financial statements provided do not accurately reflect the profitability of WGS and are misleading for the purpose of determining the financial viability of its operations. Thus, without documentation beyond its P&L statement, WGS cannot demonstrate profitability (if any) and can clearly not take on the estimated annual subsidy of \$3,420,938.13 for rehabilitation costs and the initial year of operation of the Line.

As noted, other than questioning FIR’s values, WGS has failed to explain why its subsidy offer is more reasonable than FIR. It’s analysis also fails to apply the information provided by FIR¹⁷ to correctly to determine (1) the valuation of FIR’s property, including a return on invested capital; or the (2) the necessary and extensive rehabilitation that it would take to rehabilitate the Line to Federal Railroad Administration (“FRA”) class 1 safety standards.

(a) WGS failed to provide any evidence of its own calculations of NLV, and therefore has no basis to explain the disparity between FIR’s estimated subsidy and its own.

WGS fails to provide any evidence to rebut FIR’s NLV estimate for rail and rail materials or to rebut FIR’s land value.¹⁸ FIR’s evidence complied with 49 C.F.R. §1152.27(a)(3) as FIR’s

¹⁷ In an exemption proceeding, the data to be provided must at a minimum include the carrier’s estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to point of sale or point of storage for relay use), and, if an offer of subsidy is contemplated, an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213).

¹⁸ WGS also fails to provide in its subsidy calculation any return on FIR’s NLV as required by 49 CFR 1152.36. Yet, WGS’s consultants, both Mr. Brown and Mr. Berish have made offers to purchase FIR. See Exhibit A. Just taking Mr. Brown’s offer of \$1.6 million and applying the industry cost of capital to that amount, requires WGS to provide FIR with a subsidy amount of

NLV estimate was based on supporting data “reflecting available real estate appraisals” and “assessments of the quality and quantity of track materials.” WGS, rather than address the disparity between its estimated subsidy FIR’s estimated subsidy and WGS’s estimate (which should include an explanation as to how WGS’s NLV component is calculated as required by regulation),¹⁹ argues that FIR’s methodology is flawed and asserts without concrete evidence or supporting real estate appraisals²⁰ that the “FIR Line bisects an area of diverse uses.”²¹

The only evidence presented to rebut FIR’s opinion and evidence on land values is that the the property taxes are low and thus show that the land is not as valuable as FIR says it is.²² Of course the property taxes are low now. Those tax assessments are not based upon the highest and best use, but rather on the existing use as a railroad. In contrast to WGS’s lack of evidence to rebut FIR’s land values, FIR through evaluation of the ‘available real estate comparable transactions,’ found clear evidence that showed that the highest and best use for the land is commercial development and based its land value on that use. This also based on the City of Cleveland’s vision for the city as the plan for the area, inclusive of FIR’s property, is for commercial and residential development.²³ By not even calculating a NLV (which include rail

\$169,920. This would be in addition to the WGS offered subsidy amount. Taken together, this would require WGS to subsidize FIR at \$229,920 per year. WGS has nowhere shown that it has the financial resources to cover even this minimum subsidy amount.

¹⁹ See 49 C.F.R. §1152.27(c)(iv)(C).

²⁰ WGS states that, “time did not permit WGS to engage a real estate expert to provide an alternative valuation of the subsidy of the FIR Line;” however, WGS could have retained a real estate expert at the time it filed its OFA and engaged their services after FIR provided the required information.

²¹ See WGS OFA at p. 6.

²² Id. at p. 7.

²³ See Vision for the Valley Report, p. 213, available at <https://visionforthevalleycycle.com/final-report/>.

assets, non-rail assets, and land values), WGS clearly fails to show how its “offer of subsidy...is calculated as required by 49 C.F.R. §1152.27(c)(iv)(C)” and §1152.36. Without such calculations, WGS has failed to show that its offer is reasonable and has failed to explain the disparity between its offer and FIR’s estimates.²⁴

(b) WGS’s fails to explain the disparity between FIR’s rehabilitation costs and its own rehabilitation costs, which are not expressly stated.

Similarly, in attempting to refute FIR’s estimate of the necessary and extensive rehabilitation, WGS again presents no apparent calculations for its estimated subsidy as WGS does not provide its own figure for rehabilitation costs.²⁵ In arguing that FIR’s rehabilitation costs are too high, WGS completely misses the boat as to the statutory requirements of a subsidy offer when submitting an OFA. See 49 C.F.R. §1152.27(a)(3) ([A]n applicant “must provide... the Board...if an offer of subsidy is contemplated an estimate of the cost of rehabilitation the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213);” see also GS Roofing Products Company, Inc. et al. v. Arkansas Midland Railroad and Pinsly Railroad Company, Inc., NOR 41230 at FN 18 (STB served March 11, 1997) (“class 1 standards, because they represent the FRA’s minimum safety levels, are the standards generally used to compute rehabilitation costs in abandonment cases”). Here, FIR provided its estimate of rehabilitation costs to bring the FIR Line to class 1 safety standards. WGS, however, ignores this statutory requirement by not addressing whether rehabilitation costs are needed to bring the Line to class 1 safety standards. As WGS ignores the statutory requirements with respect to rehabilitation costs, the Board should reject WGS’s estimated subsidy and its OFA.

²⁴ WGS also fails to use, or address in its OFA, the revenue and cost data to formulate a proposed subsidy payment. See 49 C.F.R. § 1152.36.

²⁵ See WGS OFA at p. 12.

In addition, WGS does not take into consideration the condition of the FIR Line when making its argument that FIR's rehabilitation costs are too high. Rather, WGS simply states that, "[i]n the opinion of Railmark and Resourceful Rail, the FIR Line is not in need of \$353,571.47."²⁶ WGS makes this assertion based on the "knowledge and experience in and around the FIR Line"²⁷ of Railmark²⁸ and Resourceful Rail and not the actual condition of the FIR Line. FIR provided WGS the inventory reports upon, and the photographs, which Mr. Carwsell relied upon, were publicly available.²⁹

While WGS choose not to provide its own estimate of rehabilitation costs or explain the the disparity with FIR's estimate, as required, an estimate by Resourceful Rail concerning "repairs to operate" is buried within its Exhibit B.³⁰ This estimate of \$20,000 for "repairs to operate" is very low given that taking the FIR Line to Class I standards would likely not only require tie replacement but also surfacing and spot ballast work to address fouled ballast, which is often an area where rail lines of limited mileage fall short of FRA requirements. Thus, WGS fails to take into consideration the condition of the FIR Line; fails to comply with the statutory requirements; and fails to show the disparity between costs for rehabilitation costs.

²⁶ Id.

²⁷ Id.

²⁸ Railmark is FIR's largest source of income but is also an entity that has never demonstrated, via a bona fide contractual offer, a need for FIR's services. FIR's Pro Forma revenue for 2023 stems from two sources: (1) Railmark and (2) WGS, who has been unable to find any rail-served customers for more than two years.

²⁹ The "photographs" Mr. Carswell relied upon were Google Maps and Google Earth. As these are publicly available materials, FIR was not required to produce them.

³⁰ Steve Berish, President of Resourceful rail, states "I will add that from my own assessment, the railroad requires less than \$20,000 in repairs to operate." See WGS OFA, Exhibit B.

Notwithstanding WGS's failure to address the disparity between the two estimated subsidies, WGS's objection to FIR's inclusion of track and land outside of the proposed OFA segment (which WGS has inappropriately segmented by not including an essential part of the line)³¹ is without merit. WGS cannot offer to subsidize continued rail service, and then not attempt to seek revenue from other potential shippers desiring rail service by truncating the FIR Line. To put it simply, if it only subsidizes its portion of the FIR Line to the connection with NSR, then other potential customers may not be able to use the FIR Line for continued rail service. This clearly puts into question WGS's motivations behind its offer to subsidize. See Roaring Fork Railroad Holding Authority – Abandonment Exemption— In Garfield, Eagle, and Pitkin Counties, CO, AB 547X at 4 (STB served May 21, 1999), aff'd Kulmer v. STB, 236 F. 3d 1255, 1256-57 (10th Cir. 2001) (“The OFA process is designed for the purpose of continuing to provide freight rail service and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when the continuation of service is not likely.”)

Even on its merits, WGS's revenue and costs estimates, overstate revenues, and understate costs. WGS's analysis shows car storage as a revenue source. But without the yard to the east/north of the WGS facility, which is not included in WGS's subsidy request, it is unclear how WGS will generate this revenue as interchange yard tracks typically cannot be used for static car storage purposes per interchange agreements with Class I railroads. WGS's costs projections also fall short with respect to labor as it proposes to use two part-time employees,

³¹ See WGS OFA, Section C(1)(a) (“this method includes in its evaluation, the segment of rail line north of the WGS facility and outside of the WGS proposed subsidy”; see also Id., Section (C)(1)(b). (“This figure is too high because in FIR's analysis of rehabilitation cost, FIR does not state which segments of the line require rehabilitation, if any. Considering FIR's incorporation of track segments outside of the WGS subsidy offer, it is reasonable to infer that track rehabilitation costs are also applied beyond the WGS subsidy segments.”)

working 140 hours per month in total, to do all the track, locomotive, and car repair. Given the current extremely tight labor market in the rail space, both the wage rate used (\$25 per hour based on dividing \$3,500 of estimated monthly wages by 140 hours) and the assumption of minimal hours do not comport with the current state of the freight rail industry.

As FIR's estimated subsidy complies with Board requirements. In contrast, WGS has failed to adequately show the disparity between estimates, has completely ignored the requirements of 49 CFR 1152.36, has nowhere shown that it has sufficient financial resources to cover anywhere near WGS's subsidy estimate, and has failed to substantiate its rehabilitation costs (or show that it has the revenues to pay for the rehabilitation costs), WGS's subsidy cannot be considered reasonable. As such, the Board should reject WGS's OFA.

II. WGS does not identify potential customers in its OFA and fails to demonstrate that there is a continued need for rail service on the Line.

WGS does not identify potential customers in its OFA and presents only expectations for the need for the continuation of rail service through references to unverifiable negotiations. WGS clearly fails to demonstrate a need for rail service on the Line.³² See R.J. Corman, AB 1296X (STB served June 26, 2020) ("R.J. Corman I") (Board rejected OFA solely on grounds that the record lacked specific information demonstrating rail need "such as statements from potential users of the Line explaining their intent to use freight rail service in the foreseeable future or the actual volume of shipments they anticipate making."). WGS plainly does not satisfy the standards in R.J. Corman I for demonstrating rail need as it fails to provide specific information demonstrating rail need. In fact, in its OFA, WGS does not reference customer support, customer

³² See R.J. Corman, AB 1296X (STB served September 22, 2020) ("Among the requirements [to submit an OFA], an offeror must demonstrate that there is a continued need for rail service on the line, or portion of line, in question.")

contracts, or even identify one potential or current customer. WGS claims that it “is in negotiations to ship 44 cars per years and is pursuing another opportunity to ship an additional 14,”³³ but where is the supporting evidence of these negotiations or the references to statements from potential WGS customers in its OFA? It is non-existent.

WGS’s lack of evidence also does not satisfy the Board’s 2017 rulemaking, which made clear that offers “must make a strong showing of need” and “will be required to show specific and concrete evidence of a continued need for rail service to make the showing required by this rule.” See Offers of Financial Assistance, EP 729 at p. 14-15. There is no concrete evidence here, nor is there evidence based on WGS’s past carload data or demand for freight services, as discussed more extensively below in Section III. See, e.g., R.J. Corman I (the Board, in support of a finding that the offeror failed to demonstrate a need for continued rail service, stated “[f]or example there is no explanation of why “loggers from the region” or the “importer of foreign wood” have not used freight rail in the past seven years and what would cause them to start using such service.”) Like the facts in R.J. Corman I, WGS has not had the need to serve customers over rail since 2017,³⁴ and even then, that need was minimal and limited to one carload per FIR’s records.

FIR is incredulous as to the reason for WGS’s sudden and unexpected need to serve customers over the Line and finds the language in two of WGS’s support statements misleading when WGS cannot even produce evidence of customers wanting or needing rail service:

³³ Id.

³⁴ FIR has presented evidence that over the past two years, there have been no active or potential customers on the Line, including WGS, which has not made an actionable demand for rail service from FIR since 2017. Of note, FIR’s last active customer was Grain Craft, which due to unfavorable conditions, decided to terminate mill operations in April 2020. See Flats Industrial, AB 1327X (STB served October 11, 2022).

Most importantly, it is my understanding that many vendors depend on Werner G. Smith, Inc. to ship their products by short line rail. They cannot afford to have this rail line abandoned and would not be able to further grow and develop their business, that has been in their family for generations. I believe that abandoning this rail line could have a serious impact on not only various local manufacturing companies, but on the city of Cleveland as a whole.³⁵

It is doubtful that State Representatives Thomas F. Patton and Martin J. Skindell as well as State Senate Minority Leader Nickie J. Antonio made these statements without misrepresentations from WGS. As WGS has clearly failed to demonstrate the need for continued rail service (past or present) and cannot even identify one customer or provide evidence on which to base its assertion that it “sees new opportunities that require rail service,”³⁶ the Board should not find a demonstrated need for continued rail service and reject WGS’s OFA.

III. WGS has demonstrated a pattern of overstating anticipated rail need (and carloads) to governmental entities and as such the Board should carefully evaluate any claims for a legitimate continued need for rail service.

The Board should note that WGS has a history of overpromising, underdelivering, and misrepresenting customer demand for rail service. This is best demonstrated by WGS’s communication and business relations with the Ohio Rail Development Commission (“ORDC”). In 2016, WGS’s receipt of \$30,000.00 in grant funds for its Spur Rehabilitation Project towards an estimated project cost of \$354,000.00,³⁷ was based on what appears to be WGS’s misleading traffic projections. According to WGS’s application, signed and submitted by Peter S. Meckes, President & CEO of WGS, the Spur Rehabilitation Project included updating (1) the existing rail system spurs; (2) construction of a new loader/unloader on-site; (3) fencing around the spur; (4)

³⁵ See WGS OFA, Exhibit C

³⁶ See WGS OFA at p. 12.

³⁷ See Exhibit B - WGS Application to ORDC for Grant or Loan Funding; see also WGS OFA, Section E (WGS states a different total project investment of \$146,923.71).

the installation of four 20K gallon tanks to be located next to the railroad spur; and (5) the annual leasing cost of 3 tanker cars annually.³⁸ In its grant application, WGS stated that:

Werner G. Smith intends to increase the number of distribution partners of our company to increase our market penetration statewide, nationally and globally. Werner G. Smith, Inc.'s rail system project will increase traffic on the short line with an estimated 25-30 carloads in a 12 month period is anticipated. The ability to once again use the rail system for transportation of our products and materials will allow our company to receive/send an increase of over 1 million pounds a month and triple our production capability.³⁹

While WGS's vision in its Grant application is commendable, its execution of increasing rail-served customers following the rehabilitation of its rail spur was ultimately unsuccessful and as described below, appears to ultimately be misleading to the ORDC concerning customer generation and inaccurate with respect to carload reports.⁴⁰ Albeit a different venue, WGS continues to make unreliable promises to the Board in this proceeding.

In WGS's grant application, Mr. Meckes projected a substantial anticipated need of "25-30 carloads in a 12 month period;"⁴¹ however, WGS reported at most two carloads generated annually over seven years.⁴² Still, during this period, WGS repeatedly reported to the ORDC active customer interest and ongoing negotiations with customers for rail service. In 2017, for example, Beth Ann Kamara, CFO of WGS, noted "we are actively working on customer tank

³⁸ See Exhibit B.

³⁹ Id.

⁴⁰ See Exhibit C - WGS Jobs & Carload Reports. Similarly, WGS made a job creation commitment of 5 created, 13 retained. This was fulfilled in 2016 with WGS reporting 19 employees but subsequent Job & Carload employment numbers show that the commitment to create 5 jobs was never fully realized based on a total expected job count of 18: 2017 (17), 2018 (13), 2019 (13), 2020 (16), and 2021 (14). Year (total employees).

⁴¹ See Exhibit B.

⁴² In the 2017 and 2020 Jobs & Carloads Report submitted to the ORDC, WGS reported that it had generated two carloads. See Exhibit C.

wagon traffic, as this is the first full year in operation, we are very excited and trying to generate that in our customers.”⁴³ In 2018, however, WGS reported zero carloads generated and clearly did not generate excitement for rail-served operations for its customers. Still Ms. Kamara, in her 2018 report, expressed optimism for 2019 to the ORDC, when she stated:

WGS is very close to closing a few negotiations/contracts so we can utilize the line. Until the contracts are final both employment and rail traffic will be low. We are excited to use the rail line & hope 2019 will be the year!”⁴⁴

In 2019, Ms. Kamara reported that “[i]n Nov-Dec 2019 we finally received commitment from our customer that they will be buying consistently” and that this commitment “took 2.5yrs of discussion.”⁴⁵ Clearly, WGS did not even come close to the projected demand stated in its application and it took 2.5 years of discussion for WGS to even obtain one potential rail-served customer, which is longer than the proposed subsidy period.

Further, WGS provides no explanation in its OFA as to why its anticipated need of “25-30 carloads in a 12 month period”⁴⁶ did not materialize in its OFA other than “once WGS completed these improvements, vendor and customer need for rail service felll.”⁴⁷ If the Board grants the OFA by WGS, and WGS made a similar statement during the initial subsidy period, then FIR would expect that the Board would consider WGS’s actions as misrepresenting its assertions.⁴⁸ However, as described in FN 40, the Board has established, in recent case law,

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ See WGS OFA at p. 11.

⁴⁸ The requirements in R.J. Corman I of the offeror either showing shipper support or actual volumes of shipments projected clearly anticipates and prevents such a scenario from occurring.

safeguards to prevent such a scenario. Thus, any assertions of the anticipated continued need for rail service by WGS in its OFA should not be taken at face value by the Board.

Moreover, WGS's assertion in its OFA of anticipated rail need should not be given merit by the Board as WGS appears to have inaccurately represented carloads to the ORDC after being awarded grant funds from the State of Ohio. FIR's records for WGS indicate that 1 tank car was delivered in 2017, 6 cars in 2015, and 24 cars in 2014. WGS reported to the ORDC that it generated two carloads in both 2017 and 2020.⁴⁹ This is perplexing to FIR as to *how or even why* WGS reported that it generated an additional carload in 2017 and two carloads in 2020 when FIR only serviced one WGS carload in 2017 and has no record of ever servicing WGS in 2020⁵⁰ or of WGS even approaching FIR to demand service. Analogous to many WGS statements, WGS's 2017 and 2020 Jobs & Carloads reports to the ORDC not only appear inaccurate but completely unverifiable.

IV. WGS was afforded adequate time to prepare its OFA, and the Board should not factor in the allegedly limited time that WGS had to prepare its OFA.

Lastly, WGS was afforded adequate time to prepare its OFA, and the Board should not factor in the allegedly limited time that WGS had to prepare its OFA when evaluating WGS's OFA. WGS states that, "[t]he Board should consider the reasonableness of WGS's OFA in the context of WGS having just ten days from receipt of the FIR information for Subsidy until the January 29, 2023 due date." First, there is no regulation that states FIR had to produce its information in 60 days⁵¹ as the "60 days rule" applies to the longest time the abandonment can

⁴⁹ See Exhibit C.

⁵⁰ As stated above, FIR's last and only customer in 2020, Grain Craft, terminated its operations in April 2020.

⁵¹ See 49 C.F.R. §1152.27(c)(2)(ii)(D).

be extended after the applicant advises the Board that “additional time is needed to develop the information required.”⁵² Second, FIR provided its information on Day 50 giving WGS the same amount of time (10 days) that it would have to file an OFA in an exemption proceeding.⁵³

Moreover, the Board should not factor in the allegedly misidentified confidentiality classification as WGS correctly noted⁵⁴ Exhibit 2 was classified as “Confidential” in FIR’s pleading.⁵⁵ Exhibit 2 was also correctly identified by forty-five (45) placeholders in the Public Version of the filing as “Confidential,”⁵⁶ and a simple comparison could have provided WGS’s counsel, Mr. Marks, the information he needed. It is unclear why, if Mr. Marks had limited time, in his opinion, for expert review and to submit the OFA, he would wait until January 27, 2023, to seek clarification with respect to confidentiality. That this left the “WGS client team with only two days to access and review Exhibit 2” is an absurdity given that this was merely clerical error in FIR’s pleadings that could have been clarified on the night Mr. Marks received the pleading filed under seal. Accordingly, these two factors allegedly contributing to a limited timeframe for WGS to prepare its OFA should not be considered by the Board when evaluating WGS’s OFA.

As discussed above, through its communication and business relations with the ORDC, WGS has demonstrated what appears to be a pattern of overstating anticipated rail need (and carloads) to an Ohio governmental agency. One possible takeaway is that WGS will willingly provide misrepresentations to get its desired outcome. Accordingly, FIR requests that the Board carefully scrutinize WGS’s statement of a continued need for rail service, which is a requirement

⁵² Id.

⁵³ See 49 C.F.R. §1152.27(c)(2)(iii)(B).

⁵⁴ See WGS OFA at p. 10.

⁵⁵ See Flats Industrial, AB 1327X at p. 6 (STB served January 19, 2023).

⁵⁶ Id. at pp. 12-56.

for the Board to grant an OFA. The Board would be well within its right to evaluate the legitimacy of any proposed continued need against WGS's prior misleading assertions and inaccurate reports to the ORDC.

CONCLUSION

WGS has failed to establish that its subsidy offer is even remotely reasonable. In fact, it has completely failed to comply with almost all of the regulatory requirements applicable to a party who desires to file a subsidy. It has not complied with 49 CFR 1152.36. It has not provided any NLV calculation or offered to pay a return on FIR's invested capital. Despite being the party with the burden of proof, it has presented no evidence to explain the disparity between FIR's estimate and WGS's estimate as required by 49 CFR 1152.27(c)(1)(iv)(C). And even if WGS were to be given the complete benefit of the doubt, it has not shown that it has the financial ability to subsidize rehabilitation and continued operations of the Line. Finally, WGS has failed to demonstrate shipper need for continued rail service. Because WGS has failed to meet its burden to show that it is (1) financially responsible and (2) a legitimate continued need for rail service exists, FIR respectfully requests that the Board reject the OFA and allow FIR to proceed toward the consummation of the abandonment authority granted.

Respectfully Submitted,

/s/ ***William A. Mullins***

William A. Mullins
Attorney for Flats Industrial Inc., a Delaware
corporation doing business as Flats Industrial
Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Flats Industrial Inc., a Delaware corporation doing business as Flats Industrial Railroad Company Comments in Response to Werner G. Smith, Inc.'s ("WGS") Offer of Financial Assistance in the above-captioned proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 31st day of January, on all Parties of Record.

/s/ **William A. Mullins**

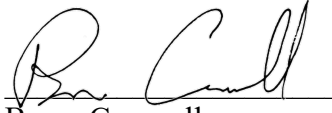
William A. Mullins

Attorney for Flats Industrial Inc., a Delaware corporation
doing business as Flats Industrial Railroad Company

Verification of Bruce Carswell

I, Bruce Carswell, verify under penalty of perjury that I am Principal of Lone Star Rail Solutions, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on January 31, 2022

A handwritten signature in black ink, appearing to read "Bruce Carswell", written over a horizontal line.

Bruce Carswell
Principal, Lone Star Rail Solutions, LLC

Verification of Eugene J. Fattore

I, Eugene J. Fattore, verify under penalty of perjury that I am Managing Director of Riverside Management Group, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on January 31, 2022

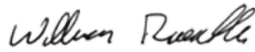
A handwritten signature in dark ink, appearing to read "Eugene J. Fattore", written over a horizontal line.

Eugene J. Fattore
Managing Director, Riverside Management Group

Verification of Will Raedle

I, Will Raedle, verify under penalty of perjury that I am Managing Director of Riverside Management Group, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on January 31, 2022

A handwritten signature in cursive script, appearing to read "Will Raedle", positioned above a horizontal line.

Will Raedle
Managing Director, Riverside Management Group

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1327X

**FLATS INDUSTRIAL RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN CLEVELAND, OHIO**

**COMMENTS IN RESPONSE TO WERNER G. SMITH, INC.'S
OFFER OF FINANCIAL ASSISTANCE**

Exhibit A

Offer Letters From Allen Brown and Steve Berish

From: Allen Brown [abrown@railmark.com]
Sent: Monday, January 16, 2023 12:03 PM
To: WillRaedle
Subject: [External] Offer To Purchase Lower 2 Miles of Flats Railroad

Will,

As discussed last week, Railmark Industrial Railway Inc., a wholly-owned subsidiary of Railmark Holdings, Inc., would like to submit a cash offer for the remaining Flats Industrial Railroad trackage and property beginning at Carter Road to the Norfolk Southern interchange – a mainline distance of approximately 1.87 miles. In addition Railmark would like to purchase (as is-where is) the remaining locomotive and remaining tools needed to maintain the railroad – in other words, all remaining personal property located at your facility on Columbus Street.

Railmark is offering a **cash price of \$1,600,000**. It is only subject to an inspection of the remaining personal property / tools located at Columbus Street and a confirmation to the exact boundaries of the property being conveyed. Railmark based its bid on public documents and we believe we are close. I have personally been involved in numerous similar transactions in my career and promise to make this a simple and quick process. We are well aware of all the steps. Railmark's intended use is to operate these approximate two miles as a Class III (shortline) common carrier railroad.

We realize that the property is currently the subject of an abandonment filing with the STB. We also understand that the STB would require a statutory 30 day period to rule and authorize the return of the property to a short line railroad. Therefore to speed up the process and provide your group with complete assurances, Railmark would be agreeable to depositing the entire amount in escrow with your STB attorney in Washington DC so that the moment the STB ruling returns, they can provide you with the proceeds. Through my experience, STB filings by law are standard so I would be agreeable to having your STB attorney prepare, file and coordinate Railmark's filings with your filings to expedite the process. Railmark, of course, would be responsible for its legal costs in this respect.

If this offer is acceptable Railmark is prepared to provide a written Letter of Offer and once terms are agreed to and signed, we would remit a cash deposit. Railmark is familiar with all of the legal documents needed to transfer railroad property. We would be glad to initiate the first draft of an Asset Purchase Agreement upon acceptance of our Offer Letter.

Please share this with your shareholders. Thank you, in advance , for your time and consideration. I would appreciate an email response that you have received this email.

Sincerely,

B. Allen Brown II, President & CEO
Railmark Holdings and Subsidiaries

(270) 477-7000, Corporate Office
(812) 454-2350, Sales & Marketing Direct
(309) 370-5160, Cell
www.railmark.com
Delivering a "NEW TRAIN of THOUGHT" since 1998

William Raedle
Managing Director
Riverside Management Group
55 Post Road West, Suite 200
Westport, CT 06880
Tel: 646-456-4922
email: wraedle@rmginvestments.com
www.rmginvestments.com

Riverside Management Group is a merchant banking boutique. BCW Securities LLC (Member FINRA/SIPC) is a wholly-owned subsidiary of Riverside Management Group. Securities may be offered through BCW Securities LLC. This e-mail, including attachments, may include confidential and/or proprietary information and may be used only by the person or entity to which it is addressed. If the reader of this e-mail is not the intended recipient or his or her authorized agent, the reader is hereby notified that any dissemination, distribution or copying of this e-mail is prohibited. If you have received this e-mail in error, please notify the sender by replying to this message and delete this e-mail immediately. This e-mail is also subject to review by BCW Securities LLC management and Compliance and, therefore, should not be considered private communication.**



DAVENPORT INDUSTRIAL RAILROAD (DIR)

Main Office: 6521 Old State Rd., Edinboro, PA 16412

Yard Office: 2701 Enterprise Way, Davenport, IA 52806

July 29, 2020

Dear Will,

Per our conversation on Friday, please find below a slightly expanded version of my original email detailing what FIR assets DIR is interested in purchasing.

The first asset is the physical property from the NS interchange, the south end of the railroad, all the way north to a point to be determined beneath the Carnegie Ave. bridge in DK Yard. We're proposing to divide the DK Yard parcel at [this spot](#) in a line running east-west. All property south of this line would be DIR's and everything north would be FIR. Putting the property line at this spot would ensure DIR would have enough land to build a rail spur, should the need arise, to service the "Carter Inland LLC" parcel to the west of DK Yard, which is believed to be the front for Great Lakes Brewing Co.

Taking over the southern portion of the railroad would mean DIR would take over the legal obligation of maintaining rail service to Werner G. Smith, Inc. and FIR as a company would be free of the obligation to operate the railroad. Upon purchasing this property, DIR would replace FIR as the legal railroad operator and with a single legal filing with the STB that could be made by DIR's attorneys, FIR's obligation would cease. DIR would also want to lease the rest of DK Yard (the northern portion) from FIR for use until FIR sells the property, however we would have no intentions of ever operating over the bridge.

Other assets DIR is interested in include both of the FIR locomotives, 1202 and 1222. At the moment, Patrick and I have a tentative agreement in place for the purchase of 1202, which includes about \$20,000 down with the balance paid out over the next several months. This tentative agreement is predicated on an upcoming electrical inspection by DIR's locomotive electrician and final agreement of the DIR partners. For 1222, DIR would propose a similar arrangement with a similar down payment, but with regular monthly payments spread out over a few years due to 1222 being worth substantially more than 1202.

As is the case with 1202, the goal would be to establish a price for 1222 and negotiate a price slightly more than what DIR perceives the locomotive to be worth, so as to compensate FIR for financing the purchase. (Why deal with the bank when the extra income could go to FIR?) This arrangement would create monthly income for FIR, however if DIR needs to seek traditional financing, we will.

DIR is also interested in the tools and office contents after FIR ceases operations. This may also include the FIR Chevy pickup, however, I believe a current FIR employee has indicated he wishes to purchase it. Purchasing these assets would save FIR the expense in cleaning up and disposing of or selling the items piecemeal.

Please let me know if you have any questions about what I have detailed here. DIR is ready to discuss any or all of the above-mentioned assets in earnest when FIR decides how they would like to proceed, and we look forward to hearing back soon.

Sincerely,

Steve Berish

Member Representative, Davenport Industrial Railroad (DIR)

(440) 668-7808, steve@davenporttrail.com

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1327X

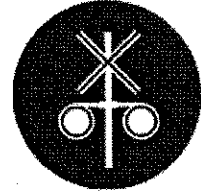
**FLATS INDUSTRIAL RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN CLEVELAND, OHIO**

**COMMENTS IN RESPONSE TO WERNER G. SMITH, INC.'S
OFFER OF FINANCIAL ASSISTANCE**

Exhibit B

WGS Application to ORDC for Grant or Loan Funding

OHIO RAIL DEVELOPMENT COMMISSION



Application for Grant or Loan Funding

Page 1 of 3

Fill out all of the requested information below.

Applicant Information:

Legal Name:	Werner G. Smith, Inc.
Street Address:	1730 Train Avenue
City, State, Zip Code:	Cleveland, Ohio 44113
County:	Cuyahoga
Contact Person & Title:	Peter S. Meckes, President & CEO
Telephone Number:	(216) 861-3676

Project Information:

Project Description/Scope:

Incorporated in 1950, Werner G. Smith Inc. has grown into a multi-million dollar enterprise. With our current operations, Werner G. Smith, Inc. is capable of producing over a million pounds of product a month in combined oxidized and polymerized products. The company produces biodegradable, biosustainable, and biorenewable additives most commonly used in machining and metal working, cleaners, personal care products and coatings and paint. Our ingredients are from earth-friendly sources and have been since 1950. Our products are sold across the world. With support from the Ohio Rail Development Commission, Werner G. Smith, Inc. is seeking the ability to expand our market penetration capacity by redeveloping the rail car access at our plant. The existing rail ties on our campus were used historically to transport our products to our customers and also to receive our base additives such as unprocessed vegetable and fish oils from our suppliers. Since 2015, Werner G. Smith, Inc. has been planning and implementing a \$1 million strategic infrastructure improvement plan. Creating the ability to begin transportation using the rail system is an infrastructure improvement vital to the future success of our company. Over time, the existing rail ties have become unusable due to a lack of usage, as Werner G. Smith, Inc. began using alternative methods of product transportation. Support for our project would include the renovation of the existing rail ties and spurs, moving an existing loader/unloader to the site of the rail car stop from a current location on our campus, and connecting a storage tank to the loader/unloader to allow the products to be easily moved into our warehouse for processing.

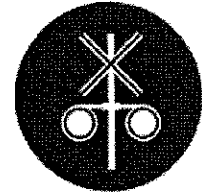
Cost (total project cost and requested funding amount):

The total cost of the project is estimated at: \$354,000 and includes:

- Updating the existing rail system spurs located behind our campus including surveying (\$109K);
- Constructing a new loader/unloader on-site (\$25K);
- Fencing around the rail spur (1/4 of the total cost of the fencing for Werner G. Smith, Inc.'s property boundaries being installed and updated) (\$10K);
- The installation of four 20K gallon tanks to be located next to the railroad spur (\$185K); and;
- The annual leasing cost of 3 tanker railroad cars annually (\$25K per year).

Our request for grant support to the Ohio Rail Development Commission is \$30,000. Werner G. Smith, Inc., is currently exploring loan funding opportunities to support our overall infrastructure development project but is not seeking a loan with this request at this time.

OHIO RAIL DEVELOPMENT COMMISSION



Application for Grant or Loan Funding

Page 2 of 3

Benefits of the project to Ohio (see attached page for guidance):

The benefits of our project to Ohio include an opportunity to drive business growth, job creation and retention and creating a fast, frequent and reliable rail network connecting Ohio to the national transportation system. With the completion of the rail system project, Werner G. Smith, Inc. will retain the existing full-time staff of 13 and be able to create an additional 5 positions to support the increased customer demand. In addition, Werner G. Smith intends to increase the number of distribution partners of our company to increase our market penetration statewide, nationally and globally. Werner G. Smith, Inc.'s rail system project will increase traffic on the short line with an estimated 25-30 carloads in a 12 month period is anticipated. The ability to once again use the rail system for transportation of our products and materials will allow our company to receive/send an increase of over 1 million pounds a month and triple our production capability. Our company is currently working with our local small business association, COSE, the OhioMeansJobs system, the city of Cleveland's Offices of Sustainability, Economic Development, and Equal Employment Opportunity Commission and Cuyahoga County's Economic Development Office. Our campus upgrades outside of the railroad project are budgeted for over a million dollars in upgrades over the next two years.

*****WE WILL CALL YOU TO DISCUSS THE PROJECT AND SCHEDULE A SITE VISIT.*****

Electronic Signature:

Peter S. Meckes, President & CEO

Your typed name constitutes an electronic signature and serves as sufficient authorization for ORDC to use the above information in the ways necessary to develop funding strategies for the described project. As an authorized agent of the applicant, I hereby submit this project application. I understand that any false statement in this application may prevent the applicant from receiving State of Ohio funds. I understand that additional information will be requested. I also understand that this document in no way constitutes a commitment of funds by the State of Ohio, ORDC, or any of its funding programs.

Once completed, press Submit or save and email this form to Megan McClory at megan.mcclory@dot.state.oh.us.

You will be contacted shortly by ORDC staff to further discuss the project described above.

****ORDC agrees not to disclose any confidential information provided by the applicant to any third parties except to its loan review consultant, DiPerna & Company, LLC, for the purpose of evaluating and assessing the application or if its disclosure is required by law, rule or regulation.****

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1327X

**FLATS INDUSTRIAL RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN CLEVELAND, OHIO**

**COMMENTS IN RESPONSE TO WERNER G. SMITH, INC.'S
OFFER OF FINANCIAL ASSISTANCE**

Exhibit C

WGS Jobs & Carload Reports

✓ 2016-21 1

**OHIO RAIL DEVELOPMENT COMMISSION
CALENDAR YEAR 2016 JOBS & CARLOAD REPORT**

Instructions: The Ohio Rail Development Commission (ORDC) contractually obligates some recipients of State of Ohio grant funds to commit to the creation and/or retention of specified numbers of Ohio jobs as well as the generation of a specified number of annual rail carloadings within a specified timeframe. Your organization received an ORDC grant or loan and is required to complete this "Jobs & Carloads" report. The form must be signed by your Chief Executive Officer, or your Chief Financial Officer, or a person in an equivalent position. The reporting period is from January 1, 2016 to December 31, 2016. Please return the form to: ORDC, Mail Stop #3140, 1980 West Broad Street, Columbus, Ohio, 43223, ATTENTION: Julianne Kaercher. If you have any questions, please contact Ms. Kaercher at 614-728-9497.

DESCRIPTION OF GRANT IN QUESTION:

Grantee Responsible to ORDC for Jobs & Carloads:	Werner G. Smith, Inc.
Company/Entity Creating Jobs & Carloads:	Werner G. Smith, Inc.
Project Description:	\$30,000 Grant
Job Creation Commitment:	5 Created, 13 Retained
Carload Commitment:	N/A

COMPANY PERFORMANCE DURING CALENDAR YEAR 2016: (To be filled out by grantee)

Current Employment at Company: as of 12-31-2016 19
Number of Carloads Generated by Company in 2016 0

IF APPLICABLE, EXPLANATION OF WHY JOB AND/OR CARLOAD COMMITMENTS NOT MET: (Responder may use spaces below or attach explanations.)

The rail Spur was completed in 2016 and inspected 21 Nov 2016 by Lou Janna 30
Our Customers, interested in Rail, have not yet placed their orders.
We expect orders in 2017.

CERTIFICATION BY CEO, CFO, or EQUIVALENT:

I certify that the information provided in this Jobs & Carload Report is accurate:

Beth Ann Komara
Signature

8 JAN 17
Date

Beth Ann Komara
Typed Name & Title
CFO
Werner G. Smith, Inc.

216-861-3676
Telephone #

PERSON REPORTING:

Beth Ann Komara
Signature

8 JAN 2017
Date

Beth Ann Komara
Typed Name & Title
CFO
Werner G. Smith, Inc.

216-861-3676
Telephone #

✓ 13

**OHIO RAIL DEVELOPMENT COMMISSION
CALENDAR YEAR 2017 JOBS & CARLOAD REPORT**

Instructions: The Ohio Rail Development Commission (ORDC) contractually obligates some recipients of State of Ohio grant funds to commit to the creation and/or retention of specified numbers of Ohio jobs as well as the generation of a specified number of annual rail carloadings within a specified timeframe. Your organization received an ORDC grant or loan and is required to complete this "Jobs & Carloads" report. The form must be signed by your Chief Executive Officer, Chief Financial Officer, or a person in an equivalent position. The reporting period is from January 1, 2017 to December 31, 2017. Please return the form to: ORDC, Mail Stop #3140, 1980 West Broad Street, Columbus, Ohio, 43223, ATTENTION: Julianne Finnegan. If you have any questions, please contact Ms. Finnegan at 614-728-9497.

DESCRIPTION OF GRANT IN QUESTION:

Grantee Responsible to ORDC for Jobs & Carloads:	Werner G. Smith
Project Description:	Werner G. Smith Co. Spur Rehab
Job Creation Commitment:	18
Carload Commitment:	N/A

COMPANY PERFORMANCE DURING CALENDAR YEAR 2017: (To be filled out by grantee)

Current Employment at Company:
Number of Carloads Generated by Company in 2017

17
2

IF APPLICABLE, EXPLANATION OF WHY JOB AND/OR CARLOAD COMMITMENTS NOT MET: (Responder may use spaces below or attach explanations.)

We had 2 retirements in 2017. Once sales increases with Vank traffic load count will also increase.

We are actively working on Customer Vank wagon traffic, as this is the first full year in operation, we are busy with and trying to generate

CERTIFICATION BY CEO, CFO, or EQUIVALENT: *that in our customers*
I certify that the information provided in this Jobs & Carload Report is accurate:

Beth Ann Komara, CFO
Signature

31 Jan 2018
Date

Beth Ann Komara, CFO
Typed Name & Title *Werner G. Smith Inc.*

216-861-3676
Telephone #

PERSON REPORTING:

Beth Ann Komara, CFO
Signature

31 JAN 2018
Date

Beth Ann Komara, CFO
Typed Name & Title *Werner G. Smith, Inc*

216-861-3676
Telephone #

✓

**OHIO RAIL DEVELOPMENT COMMISSION
CALENDAR YEAR 2018 JOBS & CARLOAD REPORT**

Instructions: The Ohio Rail Development Commission (ORDC) contractually obligates some recipients of State of Ohio grant funds to commit to the creation and/or retention of specified numbers of Ohio jobs as well as the generation of a specified number of annual rail carloadings within a specified timeframe. Your organization received an ORDC grant or loan and is required to complete this "Jobs & Carloads" report. The form must be signed by your Chief Executive Officer, Chief Financial Officer, or a person in an equivalent position. The reporting period is from January 1, 2018 to December 31, 2018. Please return the form to: ORDC, Mail Stop #3140, 1980 West Broad Street, Columbus, Ohio, 43223, ATTENTION: Joshua Skaggs. If you have any questions, please contact Mr. Skaggs at 614-644-0272 or Joshua.Skaggs@dot.ohio.gov.

DESCRIPTION OF GRANT IN QUESTION:

Grantee Responsible to ORDC for Jobs & Carloads:	Werner G. Smith
Project Description:	Werner G. Smith Co. Spur Rehab
Job Creation Commitment:	18
Carload Commitment:	0

COMPANY PERFORMANCE DURING CALENDAR YEAR 2018: (To be filled out by grantee)

Current Employment at Company:	<u>13</u>
Number of Carloads Generated by Company in 2018	<u>0</u>

IF APPLICABLE, EXPLANATION OF WHY JOB AND/OR CARLOAD COMMITMENTS NOT MET: (Responder may use spaces below or attach explanations.)

This is WGS 2nd full year of rail. Development of the model with our customers is a long trip. WGS is very close to closing a few negotiations/contracts so we can utilize the line. Until the contracts are final both employment and rail traffic will be low. We are excited to use the rail line & hope 2019 will be the year!

CERTIFICATION BY CEO, CFO, or EQUIVALENT:

I certify that the information provided in this Jobs & Carload Report is accurate:

Beth Ann Komara
Signature

28 Jan 2019
Date

BETH ANN KOMARA, CFO
Typed Name & Title

216-861-3676
Telephone #

Werner G. Smith, Inc

PERSON REPORTING:

Beth Ann Komara
Signature

28 Jan 2019
Date

BETH ANN KOMARA
Typed Name & Title

216-861-3676
Telephone #

*CFO
Werner G. Smith, Inc*

✓

OHIO RAIL DEVELOPMENT COMMISSION CALENDAR YEAR 2019 JOBS & CARLOAD REPORT

Instructions: The Ohio Rail Development Commission (ORDC) contractually obligates some recipients of State of Ohio grant funds to commit to the creation and/or retention of specified numbers of Ohio jobs as well as the generation of a specified number of annual rail carloadings within a specified timeframe. Your organization received an ORDC grant or loan and is required to complete this "Jobs & Carloads" report. The form must be signed by your Chief Executive Officer, Chief Financial Officer, or a person in an equivalent position. The reporting period is from January 1, 2019 to December 31, 2019. Please return the form to: ORDC, Mail Stop #3140, 1980 West Broad Street, Columbus, Ohio, 43223, ATTENTION: Joshua Skaggs. If you have any questions, please contact Mr. Skaggs at 614-644-0272 or Joshua.Skaggs@dot.ohio.gov.

DESCRIPTION OF GRANT IN QUESTION:

Grantee Responsible to ORDC for Jobs & Carloads:	Werner G. Smith
Project Description:	Werner G. Smith Co. Spur Rehab
Job Creation Commitment:	18
Carload Commitment:	0

COMPANY PERFORMANCE DURING CALENDAR YEAR 2019: (To be filled out by grantee)

Current Employment at Company: 13
Number of Carloads Generated by Company in 2019: 0

IF APPLICABLE, EXPLANATION OF WHY JOB AND/OR CARLOAD COMMITMENTS NOT MET: (Responder may use spaces below or attach explanations.)

This is WGS 3rd year with rail capabilities. In Nov-Dec 2019 we finally received commitment from our customer that they will be buying consistently. WGS received a rail car on 27 JAN 2020. This took 2.5 yrs of discussion.

Once volume increases, employment will go. It is our prediction that 2020 will be the beginning!

CERTIFICATION BY CEO, CFO, or EQUIVALENT:

I certify that the information provided in this Jobs & Carload Report is accurate:

Beth Ann Komara
Signature

2 February 2020
Date

Beth Ann Komara, CFO Werner G Smith, Inc
Typed Name & Title

216-861-3676
Telephone #

PERSON REPORTING:

Beth Ann Komara
Signature

2 Feb 2020
Date

Beth Ann Komara, CFO Werner G Smith, Inc.
Typed Name & Title

216-861-3676
Telephone #

**OHIO RAIL DEVELOPMENT COMMISSION
CALENDAR YEAR 2020 JOBS & CARLOAD REPORT**

Instructions: The Ohio Rail Development Commission (ORDC) contractually obligates some recipients of State of Ohio grant funds to commit to the creation and/or retention of specified numbers of Ohio jobs as well as the generation of a specified number of annual rail car loadings within a specified timeframe. Your organization received an ORDC grant or loan and is required to complete this "Jobs & Carloads" report. The form must be signed by your Chief Executive Officer, Chief Financial Officer, or a person in an equivalent position. The reporting period is from January 1, 2020 to December 31, 2020. Please return the form to: ORDC, Mail Stop #3140, 1980 West Broad Street, Columbus, Ohio, 43223, ATTENTION: Wende Jourdan. If you have any questions, please contact Mrs. Jourdan at 614-728-9497 or Wende.Jourdan@dot.ohio.gov.

DESCRIPTION OF GRANT IN QUESTION:

Grantee Responsible to ORDC for Jobs & Carloads:	Werner G. Smith
Project Description:	Werner G. Smith Co. Spur Rehab
Job Creation Commitment:	18
Carload Commitment:	0

COMPANY PERFORMANCE DURING CALENDAR YEAR 2020: (To be filled out by grantee)

Current Employment at Company:
Number of Carloads Generated by Company in 2020

16 in 2020
2

IF APPLICABLE, EXPLANATION OF WHY JOB AND/OR CARLOAD COMMITMENTS NOT MET: (Responder may use spaces below or attach explanations.)

COVID-19 set the company back on hiring. A year
hiring extension is needed as COVID 19 continues to
stress operations.

CERTIFICATION BY CEO, CFO, or EQUIVALENT:

I certify that the information provided in this Jobs & Carload Report is accurate:

Beth Ann Komara
Signature

11/11/2021
Date

Beth Ann Komara, CFO
Typed Name & Title

(216) 861-3676
Telephone #

PERSON REPORTING:

Beth Ann Komara
Signature

11/10/2021
Date

Beth Ann Komara, CFO
Typed Name & Title

(216) 861-3676
Telephone #
bakomara@wernergsmithinc.com

**OHIO RAIL DEVELOPMENT COMMISSION
CALENDAR YEAR 2021 JOBS & CARLOAD REPORT**

Instructions: The Ohio Rail Development Commission (ORDC) contractually obligates some recipients of State of Ohio grant funds to commit to the creation and/or retention of specified numbers of Ohio jobs as well as the generation of a specified number of annual rail car loadings within a specified timeframe. Your organization received an ORDC grant or loan and is required to complete this "Jobs & Carloads" report. The form must be signed by your Chief Executive Officer, Chief Financial Officer, or a person in an equivalent position. The reporting period is from January 1, 2021 to December 31, 2021. Please return the form to: ORDC, Mail Stop #3140, 1980 West Broad Street, Columbus, Ohio, 43223, ATTENTION: Alyssa Bey or by email to Alyssa.Bey@dot.ohio.gov. If you have any questions, please contact Ms. Bey at 614-466-7102 or the above email.

DESCRIPTION OF GRANT IN QUESTION:

Grantee Responsible to ORDC for Jobs & Carloads: Werner G. Smith
Project Description: Werner G. Smith Co. Spur Rehab
Job Creation Commitment: 18
Carload Commitment:

COMPANY PERFORMANCE DURING CALENDAR YEAR 2021: (To be filled out by grantee)

Current Employment at Company:
Number of Carloads Generated by Company in 2021

14
0

IF APPLICABLE, EXPLANATION OF WHY JOB AND/OR CARLOAD COMMITMENTS

NOT MET: (Responder may use spaces below or attach explanations.)

Supply, Logistics & COVID issue continue to stretch the operations

Also, Flats Industrial Railroad no longer servicing area. Working with owners to find buyer as business in 2022 is projected to use rail.

CERTIFICATION BY CEO, CFO, or EQUIVALENT:

I certify that the information provided in this Jobs & Carload Report is accurate:

Beth Ann Komara
Signature

3 Feb 2022
Date

Beth Ann Komara, CFO
Typed Name & Title

216-861-3676
Telephone #

PERSON REPORTING:

Beth Ann Komara
Signature

3 Feb 2022
Date

Beth Ann Komara, CFO
Typed Name & Title

216-861-3676
Telephone #