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February 23, 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 Inc. d/b/a Flats Industrial Railroad Company Appeal of the Decision by the Director of the Office of Proceedings.

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

REPLY TO APPEAL OF DECISION OF DIRECTOR OF
PROCEEDINGS SERVED FEBRUARY 3, 2023

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Dated: February 23, 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

REPLY TO APPEAL OF DECISION OF DIRECTOR OF
PROCEEDINGS SERVED FEBRUARY 3, 2023

Werner G. Smith, Inc. (“WGS”) hereby files this reply to the Flats Industrial Inc. d/b/a Flats Industrial Railroad Company Appeal of the Decision by the Director of the Office of Proceedings (“FIR Appeal”). WGS filed and served its Offer of Financial Assistance (“OFA”) to subsidize FIR’s operations for a portion of the line subject to abandonment on Sunday, January 29, 2023, in accordance with the Board’s November 29, 2022 decision.¹

On February 3, 2023, the Director of the Office of Proceedings issued an order postponing and partially revoking the effective date of the FIR abandonment exemption to permit the OFA process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27 to proceed (“Director’s Decision”). In the decision, the Director concluded WGS to be financially responsible, that the WGS OFA was reasonable, and that WGS explained the disparity between the its proposed subsidy and the FIR estimated subsidy.²

¹ The WGS OFA was timely filed as shown by the attached Exhibit A January 29, 2023 auto-response generated by the Board’s filing system acknowledging receipt of the WGS filing. The Director’s Decision, as defined below, indicates that because January 29 was a Sunday, January 30 was also an acceptable due date.

² *Flats Industrial Inc. D/B/A Flats Industrial Railroad Company – Abandonment Exemption – in Cleveland, Ohio In the Matter of an Offer of Financial Assistance*, STB Docket No. AB 1327X slip op. at 2 (Feb. 3, 2023)(“Director’s Decision”).

WGS files this reply to the FIR Appeal under 49 C.F.R. § 1011.2(a)(7). WGS respectfully requests that the Board reject the FIR Appeal because the Director made the correct decision, given the circumstances presented.

I. The Legal Standard for an Appeal under 49 C.F.R. §1011.2(a)(7) is whether the Director Made the Correct Decision, Given the Circumstances

Under 49 C.F.R. sections 1152.27(e)(1) and 1011.7(a), the Director of the Office of Proceedings is delegated authority to “make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations.” An offeror is required to set forth its offer according to 49 C.F.R. § 1152.27(c)(1)(iv). The standard for considering appeal of the Director’s Decision is “whether the Director made the correct decision, given the circumstances presented.”³

II. Argument

The Director’s decision to postpone and partially revoke the effective date of the FIR abandonment exemption to permit the parties to negotiate a subsidy is correct considering the circumstances.

A. The Director did not err in accepting the WGS demonstration of need for continued rail service.

FIR argues that the Director erred in not rejecting the WGS OFA to subsidize continued rail service stating that WGS did not establish a continued need for rail service by a shipper.⁴ In the FIR Appeal, FIR states, “WGS is a receiver not a shipper.”⁵ FIR is correct. WGS is a receiver.

³ *Union Pacific R.R. Co. – Abandonment and Discontinuance of Service Exemption – In Cerro Gordo County, Iowa* STB Docket No. AB 33 (Sub-No. 327X), slip op. at 3 (served Jan. 26, 2018).

⁴ FIR Appeal at 5.

⁵ FIR Appeal at 6.

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.” This section further provides 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).” (Emphasis added).

Here WGS, as the receiver on this line, has demonstrated a need for rail service. WGS’s primary demonstration of its continued need for rail service is its investment in rail improvements to facilitate receipt of rail service. WGS invested approximately \$116,900 of its own funds, combined with the ORDC grant of \$30,000, that resulted in rail improvements to the WGS rail spur, rail concrete pad, and pump.⁶ WGS also explained in its OFA and its Notice of Intent to File an OFA that it has been in negotiations with shippers to switch from tank trucks to rail cars for transportation of products to WGS.

Under these circumstances and in consideration of section 1152.27(c)(1)(iv)(E), the Director did not err in accepting the demonstration of WGS as a receiver on the line of its continued need for rail service.

B. *The Director did not err in accepting the WGS OFA because WGS demonstrated that its offer is reasonable.*

FIR criticizes the Director for accepting the WGS OFA arguing that the WGS OFA did not comply with the Board’s regulations.⁷ In the Director’s Decision, the Director concluded that the WGS OFA is consistent with 49 U.S.C. §10904(c) and 49 C.F.R. § 1152.27(c)(1)(iv)(c) because WGS provided an explanation for the disparity between the FIR estimated subsidy and the WGS

⁶ WGS OFA at 12

⁷ FIR Appeal at 8.

proposal.⁸ FIR's appeal does not demonstrate that the Director erred in making her decision under the circumstances of the WGS OFA.

A "financial assistance offer need not be detailed," but the offeror "must show that it is financially responsible and that the offer is reasonable."⁹ The Director has discretion to determine if an offer is reasonable. Reasonableness is weighed within the context of the Board's liberal interpretation of the requirements of 49 U.S.C. § 10904 in favor of continued rail service and considering that an offeror's request to institute negotiations "establishes no rights or obligation on the parties, nor does it prejudice the merits of potential disparate property valuations."¹⁰

The Director will determine an offer to be reasonable if an offeror's subsidy explains why the subsidy figures of the railroad are too high and its figure should be considered.¹¹ Reasonableness is not established by a strict formula and the Board (and its predecessor, the Interstate Commerce Commission) have deemed various offers to be reasonable for the purpose of initiating negotiations to include:

- the difference between the revenues attributable to the line and the avoidable cost of providing freight service on the line, plus a reasonable return on the value of the line;¹²
- an offeror's computation of an abandoning carrier's opportunity costs;¹³

⁸ Director's Decision at 2.

⁹ *Union Pac. R.R. Co. – Abandonment – In Polk Cnty, IA In the Matter of an Offer of Financial Assistance*, STB Docket No. AB-33 (Sub-No. 170)(served Jan. 30, 2002)(appeal granted on behalf of the offeror in a decision served Mar. 22, 2002)("MAR OFA").

¹⁰ *CSX Transportation Inc.-Abandonment-in Fayette Cnty., Pa, & Monongalia & Preston Ctys., WV Offer of Fin. Assistance*, STB Docket No. AB-55, 1992 WL 206401, at *1 (served Aug. 28, 1992).

¹¹ *Conrail Abandonments Under Nersa*, 365 I.C.C. 472, 476 (I.C.C. 1981).

¹² *Wyoming & Colorado R.R. Co., Inc.--Abandonment Exemption--Jackson Cnty., Co in the Matter of an Offer of Fin. Assistance*, ICC Docket No. AB-307, 1995 WL 369481, at *1 (served June 22, 1995).

¹³ *Illinois Cent. R.R. Co.--Abandonment Exemption--in Perry Cnty., Il*, ICC Docket No. AB-43, 1994 WL 508793, at *2 (ICC Sept. 19, 1994)("citing *CSX Transportation, Inc.-Abandonment*

- an offeror's offer that is less than a salvage offer or sale agreement;¹⁴ and
- an offeror's guarantee of a minimum traffic level.¹⁵

The Director's Decision correctly decided the WGS offer to be reasonable, because WGS explained why FIR's subsidy figures are too high and the WGS figures should be considered. The Director's Decision did not adopt the WGS reasoning and it was not required to do so. The Director merely had to determine if WGS explained why the FIR figures are too high and its figures should be considered. As the Director explained, any inconsistency between the parties can be addressed during negotiations.¹⁶

Here, WGS demonstrated that FIR's subsidy figures were inflated because FIR included within its subsidy a segment of rail line that WGS did not seek to subsidize.¹⁷ In addition, the WGS offer criticized the method by which FIR developed its property valuation.¹⁸ WGS also criticized FIR's methodology for its rehabilitation costs by utilizing railroad professionals that WGS views as having greater knowledge of the FIR line than that of the FIR expert.¹⁹

Once WGS demonstrated that FIR's subsidy calculation was too high, WGS could not reasonably rely on the subsidy figures provided by FIR to develop the WGS OFA. For this reason, WGS developed its proposed subsidy through cost estimates of companies with railroad

Exemption Fayette and Nicholas Counties, WV, ICC Docket No. AB-55 (Sub- No. 25OX), (ICC served Oct. 20, 1988 and Jan. 10, 1988").

¹⁴ *St. Louis SW. Ry. Co.--Abandonment Exemption--in Hunt & Collin Ctys., Tx*, ICC Docket No. AB-39, 1994 WL 613370, at *2 (served Nov. 8, 1994).

¹⁵ *Conrail Abandonment of the S. Bound Brook Industrial Track in Middlesex and Somerset Counties, NJ In the Matter of an Offer of Financial Assistance*, ICC Docket No. AB 167 (Sub-No. 1028N), 1988 WL 226151 *1 (decided Mar. 24, 1988).

¹⁶ Director's Decision at 2.

¹⁷ WGS OFA at 4-6.

¹⁸ *Id.*

¹⁹ *Id.* at 9.

experience specific to Cleveland and that understand how to operate a short line railroad.²⁰ These companies provided WGS with projected cost estimates for operations on FIR to provide WGS an understanding of the expenses and revenue associated with the operation of a rail line like the FIR line to be abandoned. These cost estimates that WGS used to formulate its OFA, submitted as Exhibit B, incorporate revenues and avoidable costs, as well as hypothetical track lease payments to FIR for FIR to recognize a return. Because the WGS methodology for developing its OFA was reasonable, the Director was correct to accept the WGS OFA for the purposes of establishing a negotiation period.

FIR argues that the Director erred because the WGS offer did not comply with the Board's regulations at 49 C.F.R. § 1152.36. However, the standard that an offer must meet is found at 49 C.F.R. § 1152.27(c)(1)(iv)(A)-(H), not section 1152.36. In addition, the Director is only to determine if an offer is reasonable, and the offeror is financially responsible. The Board does not define the reasonableness of an offer by its adherence to section 1152.36.

Section 1152.36 applies to a request to establish conditions and compensation for financial assistance under section 1152.27(h) and not for initial offers under section 1152.27(c). The Board requires an offer in a proceeding to establish conditions and compensation to submit its evidence under section 1152.36 for subsidies, so that the Board may “determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line.”²¹

²⁰ *Id.* at 8-9.

²¹ 49 C.F.R. § 1152.27(h)(5); *See ex. Conrail Abandonment of the S. Bound Brook Indus. Track in Middlesex & Somerset Ctys., NJ in the Matter of A Request to Set Terms & Conditions*, ICC Docket No. AB-167, 1988 WL 225120, at *5 (decided Nov. 30, 1988).

Section 1152.36 reflects the Board’s standard under 1152.27(h)(5). It does not reflect the Board’s standards for the reasonableness of an offer submitted under section 1152.27(c)(1)(iv)(A)-(H). For this reason, the Director did not err in accepting the WGS OFA to allow negotiations between FIR and WGS because, given the circumstances, the Director was able to conclude the WGS OFA to be reasonable.

C. *The Director did not err in finding that WGS has the financial resources to cover its proposed subsidy.*

FIR incorrectly argues that the director erred in finding WGS to be financially responsible.²² Under section 1152.27(c)(1)(iv)(B), an offer must:

Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations. Examples of documentation the Board will accept as evidence of financial responsibility include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments, and evidence of adequate insurance or ability to obtain adequate insurance. (Emphasis added).

The “proposed contractual obligations” refers to the offeror’s proposal.²³

The Director did not err in finding WGS to be financially responsible because the profit and loss statement provided by WGS on its own demonstrates that WGS’s Net Income is sufficient to meet the WGS proposed contractual obligation under the WGS OFA.

²² FIR Appeal at 14.

²³ *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 Allegany 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.”).

D. *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.²⁴ 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."²⁵ 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.²⁶ Board precedent supports an OFA over a shorter segment of a line to be abandoned.²⁷

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²⁴ FIR Appeal at 17-18.

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

²⁶ *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).

²⁷ *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)(Aug 31, 2001).

III. CONCLUSION

WGS respectfully requests the Board reject the FIR Appeal because, under the circumstances the Director did not err in finding WGS to be financially responsible and its OFA to be reasonable.

Respectfully submitted,



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Counsel for Werner G. Smith, Inc.

Dated: February 23, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2023, I served a copy of the foregoing
Reply via email on the parties of record in this proceeding.

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Exhibit A

Marks, Justin J.

From: eservice@stb.gov
Sent: Sunday, January 29, 2023 11:50 PM
To: Marks, Justin J.
Subject: Acknowledgement of formal filing

[External Message]

Thank you for your submission in docket number(s) AB_1327_X. Submissions that will appear on the Surface Transportation Board's website will be posted after they are processed during regular business hours. If you have any questions, please contact us at (202) 245-0350.