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SERVICE DATE – FEBRUARY 3, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1327X

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

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: February 3, 2023

Flats Industrial Inc. d/b/a Flats Industrial Railroad Company (FIR), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon approximately 1.85 miles of rail line, extending from milepost 10 to milepost 11.85, near West 41st Street in Cleveland, Ohio (the Line), which constitutes FIR’s entire railroad system. Notice of the exemption was served and published in the Federal Register on October 31, 2022 (87 Fed. Reg. 65,640).¹

The exemption was scheduled to become effective on November 30, 2022, but a formal expression of intent to file an offer of financial assistance (OFA) was timely filed by Werner G. Smith, Inc. (WGS), to subsidize rail service over a portion of the Line. The filing of the notice of intent automatically stayed the effective date of the exemption until December 10, 2022.² On November 29, 2022, in response to WGS’s request for a 60-day extension of the OFA deadline, that deadline was extended to January 29, 2023.

On January 30, 2023, WGS filed an OFA to subsidize a portion of the Line,³ from the connection point with Norfolk Southern Railway Company at milepost 11.85 to the WGS facility, located near Abbey Avenue, a distance of approximately 1.2 miles. WGS offers to subsidize rail service on that 1.2-mile portion for \$64,000 per year. (OFA 3.) WGS explains that it solicited cost assessments from two experienced rail companies, Railmark Rail Services, Inc. (Railmark), and Resourceful Rail, LLC (Resourceful Rail), which have knowledge and interest in operating a portion of the Line serving the WGS facility. (Id. at 8.)

¹ A corrected notice was served and published on November 8, 2022 (87 Fed. Reg. 67,532).

² See 49 C.F.R. § 1152.27(c)(2)(i).

³ As the OFA deadline was inadvertently extended to January 29, a Sunday, the January 30 OFA (and a correction, filed the same day, which added page numbers) will be accepted. All citations to the OFA in this decision are to the corrected version.

An OFA to subsidize rail service need not be detailed, but an offeror must show that the offeror is financially responsible and that the offer is reasonable. See, e.g., St. Lawrence & Atl. R.R.—Discontinuance of Serv. Exemption—in Cumberland Cnty., Me., AB 1117X, slip op. at 1 (STB served Nov. 10, 2014). WGS has submitted evidence demonstrating that it has financial resources to subsidize rail service for \$64,000 per year. Accordingly, WGS is found to be financially responsible.

Consistent with 49 U.S.C. § 10904(c) and 49 C.F.R. § 1152.27(c)(1)(iv)(C), WGS acknowledges that its offer to subsidize service for \$64,000 per year is less than FIR's estimated subsidy of \$3,420,938.13 per year. (OFA 4.) However, WGS argues that FIR's estimated subsidy is too high because it covers the entire Line, rather than the portion WGS is offering to subsidize, and because it inflates FIR's costs, specifically its rehabilitation costs of \$353,571.41 and the net liquidation value of \$25,479,439.61 for the Line. (See id. at 4-7.) According to WGS, Railmark and Resourceful Rail concluded that the Line was not in need of significant rehabilitation.⁴ (See id. at 9.)

On January 31, 2023, FIR replied to WGS's OFA, urging the Board to reject the OFA.⁵ The Board's regulations do not provide for consideration of replies to OFAs. Because the determination whether to institute negotiations must be made within five days of the OFA's submission, it is usually made on the basis of the offer alone. See SWKR Operating Co.—Aban. Exemption—in Cochise Cnty., Ariz., AB 441 (Sub. No. 2X) (STB served Apr. 4, 1997). While there is a disparity between the estimates provided by FIR and WGS, such an inconsistency between the parties' positions can be addressed during negotiations for setting the final terms and conditions of the subsidy. As required, WGS has provided an explanation for the disparity between its proposed subsidy and FIR's estimated subsidy. See Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino & Riverside Cntys., Cal., AB 1022 (Sub-No. 1X) (STB served July 29, 2009).

Because WGS is financially responsible and has offered financial assistance to subsidize service, the effective date of the exemption authorizing the abandonment will be postponed.

The Board's regulations contemplate that the carrier and a financially responsible person will reach an agreement setting the terms and conditions of the subsidy. If they do not, either party may request the Board to do so. 49 C.F.R. § 1152.27(g). Any person filing a request to set terms and conditions must pay the requisite filing fee, set forth at 49 C.F.R. § 1002.2(f)(26), which is currently \$29,200.

Appeals to this decision are governed by 49 C.F.R. § 1011.2(a)(7). Any appeal must be filed by February 13, 2023, and will be heard by the entire Board.

⁴ Resourceful Rail estimates the portion of the railroad at issue requires less than \$20,000 in repairs to operate. (See OFA, Ex. B.)

⁵ On February 2, 2023, WGS filed a reply to FIR's reply.

It is ordered:

1. The effective date of the exemption is postponed, and the exemption is partially revoked, to permit the OFA process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27 to proceed.

2. If WGS and FIR enter into a subsidy agreement, they shall so notify the Board by March 1, 2023. If WGS and FIR cannot agree on the subsidy price, either party may request the Board to establish the terms and conditions of the subsidy on or before March 1, 2023. If no agreement is reached and no request is submitted by that date, the Board will serve a decision vacating this decision and allowing the abandonment exemption to become effective.

3. This decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.