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ENTERED
Office of Proceedings
February 13, 2023
Part of
Public Record

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February 13, 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"), hereby appeals a decision of Office of Proceedings Director, served February 3, 2023. Pursuant to 49 C.F.R. § 1002.2(61)(i), a \$350.00 filing fee has been paid via Pay.gov. 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

FILED
February 13, 2023
SURFACE
TRANSPORTATION BOARD
Enclosures

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

FEE RECEIVED
February 13, 2023
SURFACE

TRANSPORTATION BOARD

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

AB-1327X

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

**APPEAL OF DECISION OF DIRECTOR OF
PROCEEDINGS SERVED FEBRUARY 3, 2023**

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February 13, 2023

**Attorneys for Flats Industrial Inc., a
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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**APPEAL OF DECISION OF DIRECTOR OF
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BACKGROUND

On January 30, 2023, Werner G. Smith, Inc. (“WGS”) filed its Offer of Financial Assistance (“OFA”) to subsidize a portion of the Flats Industrial Inc. d/b/a Flats Industrial Railroad Company (“FIR”) rail line from the connection point with Norfolk Southern Railway Company (“NSR”) at Milepost 11.85 to the WGS facility, approximately 1.20 miles (the “Line”). On February 3, 2023, the Director’s order (hereinafter “OFA Decision” or “Director’s Decision”) permitted the OFA process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27 to proceed¹ and postponed the effective date of the exemption.² Pursuant to 49 C.F.R. § 1152.27(e)(2) and 49 C.F.R. § 1011.2(a)(7), FIR hereby appeals the Director’s Decision.

ARGUMENT

The authority to determine initially whether OFAs satisfy the statutory standards of 49 U.S.C. § 10904(d) is delegated to the Director under 49 C.F.R. § 1011.7(a)(2)(ii). Appeals of the

¹ The complete background of the AB 1327X proceeding is known to the Board and outlined in the OFA Decision at p. 1.

² See OFA Decision at p. 3.

Director's decisions are governed by 49 C.F.R. § 1011.7(a)(2)(ii) and § 1011.2(a)(7),³ and "the Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director evaluating OFAs."⁴

The standard the Board should apply in deciding this is appeal is whether the Director made a correct decision given the facts. See R.J. Corman II at p. 3; citing CSXT Transp. Inc. – Aban. Exemption – in Pinellas Cnty., Fla., AB 55 (Sub-No. 794X) ("When reviewing appeals of a Director's initial decision under 49 C.F.R. § 1011.2(a), the Board has previously stated that it considers whether the Director made the correct decision, given the circumstances presented." As described below, given the circumstances presented, the Director did not make the correct decision, in permitting the OFA process to proceed.⁵

The Director's decision should be reversed for the following reasons: (1) Contrary to precedent, WGS's did not demonstrate a continued need for rail service and the Director's Order did not address this issue; (2) WGS's did not comply with the regulations requiring it to explain the disparity between its estimated subsidy and FIR's; an issue which the Director's Order did not even mention or address; (3) WGS did not demonstrate that it has sufficient funds to

³ See R.J. Corman Railroad Property, LLC—Abandonment Exemption—In Scott, Campbell, and Anderson Counties, Tenn., AB 1296X, FN 5 (STB served September 22, 2020) ("R.J. Corman II") (Director noted that when appealing the Director's decision to reject an OFA, the offeror "incorrectly cites the decisional standard at 49 C.F.R. § 1011.6(b), which governs appeals of Director's orders pursuant to a different delegation of authority.")

⁴ See Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cty., N.J., AB 290 (Sub-No. 306X) (STB served November 2, 2015) (collectively the "Harsimus Abandonment Proceeding").

⁵ See OFA Decision at p. 3.

subsidize FIR's operations as opposed to operations by proposed shortlines;⁶ and (4) the OFA appears to have been late filed, which justifies rejection. The OFA Decision does not conclude, or even discuss, that WGS failed to comply with almost all the regulatory requirements applicable to a party who desires to file a subsidy or the financial resources necessary to subsidize FIR's operations. As such, FIR respectfully requests that the Board grant FIR's appeal, reject WGS's OFA, and vacate the OFA Decision to the extent necessary to permit the abandonment exemption in this proceeding to take effect immediately.

I. WGS Did Not Establish That There Is A Continued Need For Rail Service By A Shipper

The Director erred by not rejecting the OFA based on WGS's failure to demonstrate a continued need for rail service on the Line, and as such the OFA Decision is inconsistent with prior precedent. See Harsimus Abandonment Proceeding at p. 2 ("The OFA process is designed for the purpose of providing continued rail service. The Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in providing rail service or *there is no likelihood of future traffic.*") (*Emphasis supplied*); see also R.J. Corman, AB 1296X (STB served June 26, 2020) ("R.J. Corman I") (Director 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.").

⁶ The Director's Order appears to confuse the issue. The decision claims that WGS has sufficient financial resources, but this decision appears to be based upon the costs associated with potential shortline operators and not the costs that it would take for FIR to continue to operate. Yet, a subsidy is based upon the costs associated with the incumbent railroad and no other railroad. Indeed, as discussed later, WGS did not even present any evidence explaining why their costs equate the FIR costs or to explain the disparity between WGS's figures and FIR's.

WGS plainly does not show that there is a ‘likelihood of future traffic’ as WGS, in its OFA, does not even identify one potential or current customer and presents only expectations for the need for the continuation of rail service through references to unverifiable negotiations. Here, WGS offers two non-committal and wholly aspirational statements to support its purported continued need for rail service: (1) WGS sees new opportunities that require rail service and (2) WGS sees value in continued rail service.⁷ WGS is a receiver not a shipper and totally fails to demonstrate that actual shippers intend to ship over the Line, which is required for WGS to substantiate the “likelihood of future traffic.” Given these circumstances presented and consistent with prior precedent, the correct decision would have been for the Director to reject WGS’s OFA based upon WGS’s failure to demonstrate a need for rail service on the Line—the purpose behind the OFA process.⁸

In R.J. Corman I, the Director rejected the OFA 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.” See R.J. Corman I at p. 3.; 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) (Director rejected an OFA that included evidence that the offeror had entered into an agreement with a shipper located on the 13-mile rail segment on both compensation and volume of traffic to be shipped by rail annually.”). WGS plainly does not satisfy the standards in R.J. Corman I as it fails to provide specific information demonstrating rail need and provides even less evidence

⁷ See Flats Industrial, AB 1327X, p. 13 (STB served January 30, 2023) (“WGS OFA”).

⁸ See Harsimus Abandonment Proceeding at p. 2.

than the offerors OFA in Great Redwood Trail Agency, where the Director rejected the OFA even though there was a shipper agreement.

Here there is no shipper agreement and WGS does not reference customer support 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,”⁹ but fails to provide any supporting evidence of these negotiations or the references to statements from potential WGS customers in its OFA. There is not one actual shipper who pays the freight providing a letter, statement, contract, evidence, etc.. that a shipper needs FIR to retain rail services to WGS.

There is simply no “concrete evidence” in WGS’s OFA, nor is there evidence based on WGS’s past carload data or demand for freight services.¹⁰ The OFA is completely contrary to the purposes and policies behind the recent changes to the Board’s OFA rules. Those rules made it clear that an offeror must provide concrete evidence of shipper need, which WGS’s OFA failed to do. See Offers of Financial Assistance, EP 729 at p. 14-15 (The Board’s 2017 rulemaking made clear that offerors “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 also 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.”)

⁹ See WGS OFA at p. 13.

¹⁰ WGS reported at most two carloads generated annually over seven years. See Flats Industrial, AB 1327X, Exhibit C (STB served January 31, 2023).

Like the facts in R.J. Corman I, WGS has not had the need to serve customers over rail since 2017,¹¹ and even then, that need was minimal and limited to one carload per FIR's records.¹² Thus, the Director's Decision to permit the OFA process to continue, given the circumstance presented, is not the correct decision because it is contrary to precedent that has rejected OFAs solely based on the offeror's failure to demonstrate a continued need for rail service and more importantly it is wholly inconsistent with the 2017 Board revisions to the OFA process.

II. The OFA Did Failed To Comply With The Regulations

Even though the Director accepted the OFA, she did so even though WGS failed to explain the disparity between its offer and the FIR subsidy amount; failed to comply with 49 CFR 1152.36; failed to provide any estimate of net liquidation value; failed to provide a return on capital in its subsidy calculation as it was required to do; and failed to adequately explain the difference between its rehabilitation amount and that calculated by FIR's expert. For these reasons, the Director should not have accepted the OFA.

First, the OFA Decision states that “[a]s required, WGS has provided an explanation of the disparity between its proposed subsidy and FIR's estimated subsidy.”¹³ But this is not true. The Director notes in the OFA Decision that “there is a disparity between the estimates provided by FIR and WGS, [and] such an inconsistency between the parties' positions can be addressed

¹¹ 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).

¹² See Flats Industrial, AB 1327X, p. 16 (STB served January 31, 2023).

¹³ See OFA Decision at p. 3.

during negotiations for setting the final terms and conditions of the subsidy,”¹⁴ There is no analysis of why there is a disparity because WGS didn’t provide one. Nor did the Director issue a well-reasoned decision that sets out the WGS argument, the FIR argument, and then explains why the WGS offer can still go forward. Instead, the Director is pushing the process back to the parties to hopefully work it out during negotiations. That is not the standard.

The Director ignores the regulatory requirement that WGS was required in its OFA to provide an explanation of the disparity between its proposed subsidy and FIR’s estimated subsidy. WGS did not, despite the unambiguous language of the regulation stating the OFA proponent must “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 and how the offer of subsidy or purchase is calculated.”). See 49 C.F.R. § 1152.27(c)(1)(iv)(C). The Director’ Decision, completely ignores that WGS presented no evidence to explain the difference between its subsidy calculation and FIR’s calculation. WGS merely claims that FIR’s valuations are too high but presents no calculations of its own proposed subsidy to demonstrate why its subsidy offer is more reasonable than FIR’s. 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.”); citing Conrail Abandonments Under NERSA, 365 I.C.C. 472 (ICC served November 25, 1981). WGS’s offer was not reasonable.

WGS’s overt non-compliance with the statutory requirements should have been acknowledged by the Director as grounds for rejecting the OFA. Instead, the OFA Decision merely restates WGS’s argument that FIR’s costs used to calculate its estimated subsidy are

¹⁴ Id.

inflated because it covers the entire FIR rail Line.¹⁵ Yet even though it had all available information to it to calculate what the FIR subsidy would be for just the portion that WGS seeks, it did not. WGS did not explain why or how its “less than the whole line” version differs from the FIR “whole line” analysis or show how its offer would have differed from FIR’s evidence for less than the whole line.

Here, as further explained below the Director simply gives WGS a “pass” from compliance with the major statutory and regulatory requirements related to filing an OFA, without adequate justification. If the Board allows the Directors Decision to stand then this would set a dangerous precedent as it goes against STB regulations.¹⁶

FIR’s information provided to WGS complied with the standard set by the Board for applicants in an OFA proceeding,¹⁷ and with the requirements of 49 CFR 1152.36. FIR’s analysis included breakdowns of variable costs, maintenance costs, an NLV calculation for both the rail assets and the right-of-way, including “available real estate appraisals” and “assessments of the quality and quantity of track materials.” FIR’s estimate included a return on invested

¹⁵ “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 Flats Industrial, AB 1327X (STB served February 3, 2023) slip op at p. 2.

¹⁶ See 49 C.F.R. § 1152.27(c)(1)(iv)(C)

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).” See 49 C.F.R. § 1152.27(a)(1)(3).

capital. In other words, FIR's subsidy amount was in complete compliance with the regulation. See 49 C.F.R. § 1152.36 ("Such information, form and methodology [including NLV which is used to calculate a return on value] shall... be used by an offeror of financial assistance to formulate a Proposed Subsidy Payment (§ 1152.27)."). The form within 49 C.F.R. § 1152.36 includes calculations for revenues attributable, avoidable costs, subsidization costs, and return on value in order to calculate the estimate subsidy.¹⁸

In contrast, WGS's offer includes none of this evidence. WGS did not even attempt to comply with the regulation. Rather, as acknowledged by the Director,¹⁹ WGS merely attacks FIR's estimated subsidy on the basis that because FIR's estimated subsidy is for the entire FIR rail Line,²⁰ FIR's costs are inflated, "specifically [FIR's] rehabilitation costs of \$353,571.41 and the net liquidation value of \$25,479,439.61 for the Line."²¹ WGS had the available information to make its subsidy calculation for less than the whole Line and to explain how that subsidy calculation differed from FIR's, but it didn't.²² Simply saying "here's our subsidy amount" based upon opinions from two experts is not compliance with 49 CFR 1152.36. Indeed, without calculating an NLV and providing its own estimates of NLV, and then adding in a return on

¹⁸ See 49 C.F.R. § 1152.36

¹⁹ See OFA Decision at p. 2.

²⁰ FIR has calculated the effect on its estimated subsidy if it were evaluated based on WGS's segmentation of the Line and determined that it would only reduce its estimated subsidy to \$2,471,665.63. Nevertheless, FIR stands by its statement in its January 31st filing that WGS's segmentation is inappropriate. See Flats Industrial, AB 1327X (STB served January 31, 2023) ("WGS has inappropriately segmented FIR's rail line by not including an essential part of the line. 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.").

²¹ See OFA Decision at p. 2.

²² FIR provided WGS and the Director with the required information and all of the back-up data on how it was calculated on January 19, 2023. See Flats Industrial, AB 1327X, p. 3 (STB served January 19, 2023).

invested capital as required, how can WGS calculate its own estimated subsidy consistent with the regulations? It simply cannot.²³

Furthermore, the WGS subsidy amount itself is based upon a faulty premise. WGS has offered to subsidize rehabilitation costs and operations for one year. But its subsidy amount was based upon what two shortline operators said it would cost for them to operate the Line and for them to make repairs to operate. And even then the estimate did not account for NLV or a return on invested capital. The operating subsidy was based upon a variable cost basis, which is not what the regulation requires.

The Director accepted this analysis; however, the proper analysis in the event of an OFA subsidy is not what it would cost for some other operator to operate on a variable cost basis, but rather, what is the proper subsidy amount to subsidize FIR operations. See Offers of Financial Assistance, EP 729 at p. 14 (STB served September 30, 2016) (“The situation described... is one of an OFA subsidy, rather than a purchase, in which an existing carrier would continue operation of a line subsidized by an OFA, and would retain the common carrier obligation.”). This statement made by the Board in EP 729, recognizes Congress intent that in the case of a subsidy, the existing carrier (FIR) continues operations and retains the common carrier obligation. From the decision it appears the Director may not have understood the line of demarcation. In the OFA Decision, the Director quotes from WGS’s OFA, but does not correct the inaccuracy or address the motivations behind two other operators having an interest in operating a portion of the Line or explain why a non-compliant subsidy amount based upon subsidizing someone’s else

²³ As discussed further below, what evidence WGS did supply for its subsidy amount was based upon their estimates of what it would take for them to operate the Line using a shortline operator and included only variable costs. This is not the correct calculation and was not in compliance with the rules.

operations (the shortlines) should be accepted. There is no place for interest from other operators in this proceeding as operations under an OFA subsidy are performed by the incumbent railroad. This is yet another reason why the offer should have been rejected.

Moreover, the Director's Decision fails to even discuss that WGS's rehabilitation costs do not adhere to 49 C.F.R. § 1152.36, which states that subsidization costs rehabilitation "shall be computed in accordance with § 1152.32(m):"²⁴

"For subsidy purposes rehabilitation costs shall not be included unless: (i) [t]he tracks fail to meet minimum Federal Railroad Administrative class 1 safety standards (49 CFR part 213), in which case the railroad will furnish, with the abandonment application, a detailed estimate of the costs to rehabilitate the track to the minimum level; or (ii) [t]he potential subsidizer requests a level of service which requires expenditures for rehabilitation."²⁵

FIR, in accordance with 49 C.F.R. § 1152.32(m) and 49 C.F.R. § 1152.27(a)(1)(3), provided an estimate of rehabilitation costs to bring the Line to Federal Rail Administration ("FRA") class 1 safety standards. Whereas WGS's estimated subsidy presumably includes \$20,000 for "repairs to operate."²⁶ The standard is not what it would take to repair the Line so that one (presumably the shortline) can "operate", but rather, the standard is what it would take to repair the Line to a FRA Class I safety standard.²⁷ The Director ignores this distinction completely. The proposed subsidy is for FIR to be operator and what it would take to bring the

²⁴ See 49 C.F.R. § 1152.36, FN 1.

²⁵ See 49 C.F.R. § 1152.32(m)(iii)(2).

²⁶ WGS's estimated rehabilitation costs were not stated overtly within its OFA but were buried within Exhibit B – Railroad Operating Costs Assessments. See WGS OFA, Exhibit B (Steve Berish, President of Resourceful Rail LLC, stated, "I will also add from my own assessment, the railroad requires less than \$20,000 in repairs to operate.").

²⁷ An applicant "must provide...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 C.F.R. § 1152.27(a)(1)(3).

line to Class I FRA safety status, therefore, based upon the best evidence in the record, the Director erred in not accepting the rehabilitation costs of \$353,571.41 that FIR submitted.

The factors above, whether individually standing alone or collectively, were enough to disqualify the OFA as failing to comply with the regulations.²⁸ The regulations require more than what WGS provided in its OFA, and, given the circumstances presented, the Director did not make the correct decision in permitting the OFA process to continue.

III. WGA Also Failed To Show Financial Responsibility

Even if one assumes that all that WGS had to do was to provide a flat out estimate of their subsidy and their rehabilitations costs “as necessary to operate,” WGS still did not show that they were a financially responsible party to be able to even afford their own low-ball and non-regulatory compliant subsidy. Their financial information is useless to determine net income and revenue as one does not know the revenue generated by the sale of refined products or show how Costs of Goods Sold (“COGS”) are calculated at current market prices. With the information provided in its OFA, WGS cannot demonstrate, or even guess, how much revenue they would have to demonstrate profitability. Moreover, WGS failed to provide a balance sheet, statement of cash flow, or working capital document, which could have provided a more accurate picture of its financial ability to have sufficient funds to subsidize an OFA. WGS did meet the minimum requirement to deposit 10% of their low ball and unsupported offer, but without additional pertinent financial documentation beyond P&L statement, there was no means by which the Director could conclude that WGS could even afford their own \$64,000 number

²⁸ The Board has previously rejected OFAs for not complying with less rigorous regulations. 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).

(again, not based upon subsidizing FIR but rather their estimates subsidize a shortline operation and only enough to cover variable costs and repairs to operate). WGS did provide a PNC Bank Line of Credit (“LOC”) for \$50,000, but its LOC is 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. Thus, without 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 have been considered by the Director as evidence of WGS’s financial responsibility. The Board has rejected other OFAs that provided more information than what WGS has provided. See Great Redwood Trail Agency, AB 1305X at p. 3 (Board rejected the OFA even though offeror had submitted a financial statement; bank confirmation of funds equivalent to its estimated subsidy; and a letter explaining its accounting practices).

WGS cannot demonstrate profitability (if any). Additionally, without a current bank statement or confirmation that the LOC is still valid and current, WGS has not shown that they could even pay its own non-regulatory compliant estimated annual subsidy of \$64,000.00 for rehabilitation costs and the initial year of operation of the Line.²⁹ The Director provided no reasonable or rational explanation as to why she accepted that they were a financial responsible party and her decision was not reasonable.

²⁹One wonders whether WGS is even a going concern. The record reflects that WGS is relying on an unverified and unsubstantiated LOC and relied on government grants to build its rail yard and facilities – all based upon the promise that WGS was just on the cusp of landing rail business – rail business that never materialized. Indeed, over the past seven years, they have only received one rail car. Does WGS ever put any skin in the game? And now, based upon the same illusory statements and promises of imaginary shippers who, once again according to WGS, are just on the cusp of shipping to the WGS facility, WGS would like the Director and this Board to believe there is shipper need and that they are a financially responsible party. They did not meet these standards and it was error for the Director to find that they did.

IV. The OFA May Have Been Late Filed And If So, It Should Be Rejected

WGS's OFA was due January 29, 2023 (see November 29th Decision); however, the Director Decision claims that the OFA was filed on January 30, but then excuses that action by claiming the Director's earlier decision setting the January 29 date was in error.³⁰ The Director was not in error to set January 29 as the deadline. The regulations clearly provide that if a railroad cannot provide the required information to the offeror in time for the offeror to meet the OFA deadlines, a party can request an extension of time to provide the information and for the offer to be filed. This extension of time cannot be more than 60 days. See 49 CFR § 1152.27. The 60 days fell on a Sunday.

Under normal Board rules, if a filing deadline falls on a weekend, the filing is due the following business day. See 49 C.F.R. § 1104.7 (providing that computed periods of time that end on a weekend or holiday will run to the next business day). But the OFA rules are different. Under the OFA rules, if the OFA is due on a weekend, it must be filed on or before that date. See 49 C.F.R. § 1152.25(d)(4) (stating "[o]ffers of financial assistance made pursuant to § 1152.27(c) must be filed on or before their statutory or regulatory due date as computed in paragraph (d)(2) of this section, regardless of whether that date is a Saturday, Sunday, or a legal holiday in the District of Columbia"). As such, the OFA was due on January 29, even though that fell on the weekend. Under long standing precedent, if the OFA was filed on January 30, it was late-filed and should not have been accepted. See Consol. Rail Corp.—Aban. Exemption—in Philadelphia, PA, AB 167 (Sub-No. 1191X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Philadelphia, PA, AB 55 (Sub-No. 710X); Norfolk S. Ry.—Discontinuance of

³⁰ See Flats Industrial, AB 1327X, FN 3 (STB served February 3, 2023) ("OFA Decision") ("As the OFA deadline was inadvertently extended to January 29, a Sunday, the January 30 OFA... will be accepted.")

Serv. Exemption—in Philadelphia, PA, AB 290 (Sub-No. 552X); In the Matter of an Offer of Financial Assistance (STB served October 14, 2012) (Board affirmed on Appeal that the Director’s decision to reject the OFA on the grounds that it was late-filed and lacked merit). WGS’s OFA was due January 29. If it was filed on January 30,³¹ it was not timely filed in accordance with the regulations and should have been rejected.³²

V. The Proposal To Only Partially Subsidize FIR Would Result In A Taking Of FIR’s Property Without Just Compensation

As noted by Mr. Carswell, WGS’s proposal to subsidize operations over only a portion of the Line would not work operationally. For FIR (and remember that it is FIR’s operations that must be subsidized, not some shortline carrier’s) to continue to operate to/from the WGS facility, FIR would have to operate over the entire Line. FIR could not consummate its abandonment of the portion that WGS does not seek to subsidize and still operate the railroad. As Mr. Carswell has noted, to serve WGS, FIR would have to retain the 0.65-mile section that WGS is not willing to subsidize. It is precisely because of such results that in OFAs to purchase, offerors are not allowed to selectively pick and choose what parcels can be acquired and which ones can be abandoned.³³ While this is a subsidy and not an offer to purchase, the principle is the same:

³¹ To be fair to WGS’s counsel, this counsel was served a copy of the offer on the evening of the 29th. This counsel has no information to determine whether WGS’s counsel also filed a copy at the STB on that evening. If he did, and the STB simply got it wrong when they treated the filing as being filed on January 30, then there is no issue.

³² The Director’s statement that the “OFA deadline was inadvertently extended to January 29, a Sunday” shows an unexplained deviancy from the OFA process. See Great Redwood Trail Agency, AB-1305X (STB served Oct. 18, 2022) (After receiving a letter from offeror’s counsel that the Board’s website incorrectly indicated the OFA was filed on Monday October 17, 2022, the Director changed the record to reflect that the filing was timely filed on Saturday October 15, 2022).

³³ Selective parceling is not appropriate and constitutes grounds for rejecting an OFA. See Consol. Rail Corp.—Aban. Exemption—in Phila., Pa., AB 167 (Sub-No. 1191X), slip op. at 4

WGS's offer to only subsidize 1.20 miles instead of the entire 1.85 miles is a form of selective parceling that simply is not operationally feasible.

By accepting WGS's unlawful parceling approach, this means that FIR would be incurring costs (including opportunity costs) to maintain and operate the 0.65-mile section but not being paid for doing so.³⁴ And because the 0.65 section would be necessary to provide service to WGS, FIR could not abandon it. This would, in effect, mean that FIR is subsidizing WGS, not the other way around. As such, the Director was wrong to accept a subsidy for just a portion of the Line when the whole Line would be needed for FIR to continue to operate. If FIR is required to continue to operate the 0.65 and not be compensated for it, doing so would constitute an unconstitutional taking of FIR's property for which FIR should be compensated.

CONCLUSION

The Director's Decision to permit the OFA process to continue was not the correct decision, given the circumstances presented. The correct decision would have been for the Director to reject WGS's OFA. WGS did not demonstrate shipper need for continued rail service; it did not comply with the regulations for filing a subsidy; it failed to provide an explanation of the disparity between FIR's estimate and WGS's estimate; and it failed to show

(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).

³⁴ A simple example illustrates the principle. Assume there is a 10 mile north/south line owned and operated by Carrier A that connects at the north with Carrier B. The shipper is at the far south end. Carrier A goes to abandon. The shipper files a subsidy request but only wants to subsidize a one mile portion on the south end. Yet, to continue to operate to serve that shipper, Carrier A must still maintain its connection with Carrier B and must operate the other nine miles, all without being compensated. Surely the Board would find the shipper's efforts to be simply a means to reduce the amount that it wanted to subsidize while putting most of the costs of operations back on the carrier. This is selective parceling and should not be allowed.

sufficient funds to subsidize even its own low-ball estimates for operations and rehabilitation costs.

The OFA Decision was also in error in other ways as well. The Director's decision appears to confuse a subsidy for a potential shortline operator to be an acceptable form of subsidy when the subsidy should be based on what it would take to subsidize FIR. The Decision accepted the OFA even though the offeror provided no evidence of the costs to rehabilitate the Line to a Class I standard, as opposed to simply rehabilitating the Line so that it can "operate." The Decision made an error as to what was the actual filing date. Most egregious of all, it allowed a subsidy that didn't even comply with requirements as stipulated in 49 C.F.R. § 1152.36 and § 1152.32(m).

Overall, given the circumstances presented, the Director did not make the correct decision. The Decision was not adequately based in reason, was not founded on the evidence, and was inconsistent with numerous prior precedents and the regulations themselves. As such, FIR respectfully requests that the Board grant this appeal, reject WGS's OFA, and vacate the OFA Decision to the extent necessary to permit the abandonment exemption in this proceeding.

Respectfully Submitted,

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

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corporation doing business as Flats Industrial
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of Flats Industrial Inc., a Delaware corporation doing business as Flats Industrial Railroad Company, Appeal of Decision of Director of Proceedings, served February 3, 2023, in the above-captioned proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 13th day of February, 2023, 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