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February 27, 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:

On February 23, 2023, Werner G. Smith, Inc. (“WGS”) replied (“WGS 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 served February 3, 2023 (“FIR Appeal”). Unsurprisingly, the WGS Reply offers several reasons it believed the Director made the correct decision. While FIR recognizes replies to replies are generally prohibited, it appears from the WGS Reply that WGS (and possibly the Board) may be confused by certain arguments offered by FIR. Thus, in interest of providing the Board and WGS clarity, Flats Industrial Inc. d/b/a Flats Industrial Railroad Company (“FIR”) seeks leave to clarify/address two arguments in the WGS Reply.

First, WGS argues that the director did not err in accepting the WGS OFA because WGS demonstrated that its offer was reasonable. All but one of the cases WGS cites with respect to this argument not only predate the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), but also totally fail to recognize the revisions to the Offer of Financial Assistance process undertaken by the Board in 2017. See Offers of Financial Assistance, EP 729 (STB served June 29, 2017) (“Revised OFA Rules”). There is nothing reasonable about WGS’s offer given WGS has failed to demonstrate a continue need for rail service (based on the post-2017 requirements), explain why rail service is all of sudden imperative after having only received one carload since 2017, and failed to propose a subsidy that would include all costs the railroad believes necessary to operate and provide service. For all of the reasons, based on the new standards resulting from the Revised OFA Rules, WGS’s OFA should have been denied.

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Second, per the regulations and consistent with past precedent, subsidies are intended to cover all costs railroads believe necessary for a carrier to provide service.¹ WGS continues to argue that the Board's regulations permit an OFA proponent to subsidize a portion of a rail line proposed for abandonment. FIR felt compelled to file this reply to a reply to clarify for the Board and WGS an argument that it appears is not understood. The reason that allowing WGS to subsidize a portion of the Line here is an impermissible parceling of the Line is that for FIR to continue to operate to/from the WGS facility, FIR would have to operate over the entire Line.² To be clear, FIR would have to utilize the remaining 0.65 mile section to provide service to WGS. There is a reason that yards or ancillary facilities are always included by the Board in determinations for trackage rights, rate complaints, and other types of proceedings. Railroads cannot operate without utilizing ancillary supporting facilities. In this case, forcing FIR to continue to operate the 0.65 miles at a loss solely to provide WGS service would not cover all costs attributable to FIR providing service to WGS. As explained in the FIR Appeal, for these reasons and others the Director's February 3, 2023 decision was erroneous and should be overturned.

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.

Sincerely,

/s/ William A. Mullins

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

cc: Parties of Record

¹ All costs/facilities a carrier believes necessary to provide service should be included in a carrier's calculation of avoidable cost for purposes of an OFA. See 49 C.F.R. 1152(d)(2). In fact, should the Board be requested to sets the terms and conditions in connection with an OFA, the Board must 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. See 49 C.F.R. 1152(h)(4)

² FIR's expert, Bruce Carswell explained in the FIR's appeal that WGS's proposal to subsidize operations over only a portion of the Line would not work operationally. Additional trackage is required to properly serve the WGS facility and provide sufficient auxiliary trackage to perform run-around moves to avoid unsafe shoving movements.