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SERVICE DATE – JULY 19, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1327X

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

Digest:¹ The Board denies an appeal, filed by Flats Industrial Railroad Company, of a decision finding Werner G. Smith, Inc., to be financially responsible and postponing the effective date of an exemption authorizing the abandonment of a line to allow the offer of financial assistance process to proceed.

Decided: July 18, 2023

On February 3, 2023, in response to an offer of financial assistance (OFA) to subsidize continued rail service filed by Werner G. Smith, Inc. (WGS), the Director of the Board's Office of Proceedings (Director) found WGS to be financially responsible, and therefore postponed the effective date of an abandonment exemption to allow WGS and Flats Industrial Inc. d/b/a Flats Industrial Railroad Company (FIR) to negotiate concerning the terms and conditions of the potential subsidy. FIR filed an appeal on February 13, 2023. For the reasons discussed below, the Board will deny the appeal.

BACKGROUND

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).²

The exemption was scheduled to become effective on November 30, 2022, but WGS filed a formal expression of intent to file an OFA 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

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² A corrected notice was served and published on November 8, 2022 (87 Fed. Reg. 67,532).

until December 10, 2022.³ On November 29, 2022, in response to WGS's request for a 60-day extension of the OFA deadline, the Board extended the stay to January 29, 2023. Flats Indus., Inc.—Aban. Exemption—in Cleveland, Ohio, AB 1327X, slip op. at 1-2 (STB served Nov. 29, 2022).

On January 30, 2023,⁴ WGS filed an OFA to subsidize service over a portion of the Line, from the connection point with Norfolk Southern Railway Company (NSR) at milepost 11.85 to the WGS facility, located near Abbey Avenue, a distance of approximately 1.2 miles. WGS offered to subsidize rail service on that 1.2-mile portion of the Line for \$64,000 per year. (OFA 3.) WGS explained 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.)⁵

By decision served February 3, 2023, the Director ruled on WGS's OFA, finding that WGS was financially responsible. Flats Indus., Inc.—Aban. Exemption—in Cleveland, Ohio (Director Order), AB 1327X, slip op. at 2 (STB served Feb. 3, 2023). The Director noted the disparity between WGS's subsidy offer of \$64,000 per year and FIR's subsidy estimate of \$3,420,938.13 per year and found that WGS had adequately explained the disparity between its offer and FIR's estimate. Id. The Director therefore postponed the effective date of the exemption to allow the OFA process to proceed and set March 1, 2023, as the date by which WGS or FIR could request the Board to establish the terms and conditions of the subsidy. Id. at 3.

FIR filed an appeal of the Director Order on February 13, 2023, arguing that the Director did not make the correct decision in permitting the OFA process to proceed. FIR argues that WGS did not demonstrate a continued need for rail service, did not comply with the Board's regulations requiring the offeror to explain the disparity between its proposed subsidy and FIR's estimated subsidy, did not demonstrate that it is financially responsible, and filed its OFA late. (Appeal 4-5.) In addition, FIR argues that WGS's offer to subsidize service over only a portion of the Line is a form of selective parceling that is not operationally feasible. (Id. at 17-18.)

On February 23, 2023, WGS filed a reply, requesting that the Board deny FIR's appeal because the Director made the correct decision. On February 27, 2023, FIR filed a reply to WGS's reply, seeking leave to address certain arguments in WGS's reply.⁶

³ See 49 C.F.R. § 1152.27(c)(2)(i).

⁴ The Board received WGS's OFA on January 29, 2023, but it was marked as filed on January 30, 2023. WGS filed a corrected OFA on January 30, which added page numbers, but made no substantive changes. All citations to the OFA in this decision are to the corrected version.

⁵ FIR filed a reply to the OFA on January 31, 2023, to which WGS filed a reply on February 2, 2023.

⁶ Although the Board's regulations generally prohibit replies to replies, see 49 C.F.R. § 1104.13(c), the Board will accept FIR's February 27 reply in the interest of a complete record.

By decision served February 27, 2023, to allow the Board sufficient time to consider FIR's appeal, the date by which WGS or FIR could file a request that the Board establish the terms and conditions of the subsidy was extended to 30 days after the service date of the Board's decision on FIR's appeal. Flats Indus., Inc.—Aban. Exemption—in Cleveland, Ohio, AB 1327X, slip op. at 2 (STB served Feb. 27, 2023).⁷

DISCUSSION AND CONCLUSIONS

The Board's regulations at 49 C.F.R. § 1152.27 govern the submission of an OFA pursuant to 49 U.S.C. § 10904. To submit an OFA, an offeror must set forth its offer "in detail" and meet the requirements for the contents of an offer found at 49 C.F.R. § 1152.27(c)(1)(iv). The authority to determine initially whether an OFA satisfies 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 such decisions are considered under 49 C.F.R. § 1011.2(a)(7). When reviewing an appeal of a Director's initial decision under 49 C.F.R. § 1011.7(a), the Board considers whether the Director made the correct decision, given the circumstances presented. See CSX Transp. Inc.—Aban. Exemption—in Pinellas Cnty., Fla., AB 55 (Sub-No. 794X), slip op. at 3 (STB served June 22, 2020).

Continued Need for Rail Service

FIR argues that WGS's failure to demonstrate a continued need for rail service by a shipper is inconsistent with Board precedent requiring an offeror to show specific and concrete evidence of a continued need for rail service. (Appeal 5.) FIR asserts that WGS is a receiver, not a shipper, and has failed to present evidence that actual shippers intend to use the Line. (*Id.* at 6.) In reply, WGS acknowledges that it is a receiver, but argues that support from receivers on the Line is one form of evidence that an offeror can present to demonstrate that a continued need for rail service exists. (WGS Reply 3-4, Feb. 23, 2023.) WGS also points to the investments it has made to improve its rail facilities and to its negotiations with shippers to switch from trucks to rail cars to transport products to the WGS facility. (*Id.* at 4.)

Among the requirements for submitting an OFA, an offeror must "[d]emonstrate that there is a continued need for rail service on the line, or portion of the line, in question." 49 C.F.R. § 1152.27(c)(1)(iv)(E). The Board codified this requirement, which was consistent with prior precedent, in Offers of Financial Assistance, EP 729 (STB served June 29, 2017). In that decision, the Board stated that offerors "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," and noted that "an offeror is likely to have a more difficult time showing a continued need for service over a line where there has not been service in at least two years." *Id.* at 14-15. Examples of the types of evidence that can be provided to show a continued need for rail service include, among other things, "[e]vidence of a 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)" and "evidence of community support for continued rail service." 49 C.F.R. § 1152.27(c)(1)(iv)(E). When considering

⁷ By letter filed May 1, 2023, FIR inquired into the status of its appeal.

whether an offeror has met its burden to show a continued need for rail service, the Board must look at the totality of the circumstances. See Offers of Financial Assistance, EP 729, slip op. at 14.

FIR cites R.J. Corman Railroad Property—Abandonment Exemption—in Scott, Campbell, & Anderson Counties, Tenn. (R.J. Corman), AB 1296X (STB served June 26, 2020), appeal denied, (STB served Sept. 23, 2020), and argues that the Director’s reasons for rejecting an OFA in that case, which were affirmed on appeal to the entire Board, warrant rejection of WGS’s OFA.⁸ In R.J. Corman, the offeror (a Class III railroad) filed an OFA to purchase a line over which there had been no rail service in seven years. R.J. Corman, AB 1296X, slip op. at 1-3. In rejecting the OFA, the Director stated that although the offeror provided evidence of general community support for its OFA, the offeror’s submissions provided no specific detail demonstrating any commercial need for rail service. Id. at 2. The Director further stated that the record lacked any specific information such as statements from actual prospective users of the line explaining their intent to use freight rail service in the foreseeable future or the actual volume of shipments they anticipated making. Id. at 3.

In contrast, WGS itself is a prospective user of the Line. WGS provides both concrete evidence of improvements that it has made, and specific details of negotiations concerning future use of the Line. See 49 C.F.R. § 1152.27(c)(1)(iv)(E) (specifically referring to support from receivers as an example of relevant evidence). With support from a grant from the Ohio Rail Development Commission, WGS made improvements to its rail spur, rail pad, and pump for unloading rail cars, the purpose of which was “to capitalize on commercial opportunities requiring rail service.” (OFA 11; see also WGS Reply 4, Feb. 23, 2023.) WGS states that it is in negotiations to ship 44 cars per year and is pursuing another opportunity to ship an additional 14 cars. (OFA 12.) Evaluating the totality of the circumstances, the Board finds that WGS has demonstrated a continued need for rail service.

This holding is consistent with the agency’s decision in Illinois Central Railroad—Abandonment Exemption—in Perry County, Ill. (Perry County), AB 43 (Sub-No. 164X) (ICC served Nov. 8, 1994).⁹ In Perry County, the offeror, the owner of an inactive coal mine, indicated that its offer to subsidize continued rail service—rather than to purchase the line, which was the case in R.J. Corman—was intended to preserve rail service to its mine pending the return

⁸ FIR also relies on Great Redwood Trail Agency—Abandonment Exemption—in Mendocino, Trinity, & Humboldt Counties, Cal., AB 1305X (STB served Oct. 21, 2022), arguing that, in that case, the Director rejected an OFA that included evidence that the offeror had entered into an agreement with a shipper on both compensation and volume of traffic to be shipped annually. (Appeal 6.) However, that case is inapposite because there the Director rejected the OFA on the ground that the offeror failed to show it was financially responsible, not because the offeror failed to demonstrate a continued need for rail service. See Great Redwood Trail Agency, AB 1305X, slip op. at 4.

⁹ While Perry County predates the Board’s adoption of the current rules, the 2017 rulemaking indicated that it was codifying “the existing continued-rail-service requirement.” See Offers of Financial Assistance, EP 729, slip op. at 15. There is no suggestion that the “prior precedent” codified in the 2017 rule excluded Perry County. See id. at 13.

of favorable market conditions for its coal. Perry County, 1994 WL 613355, at *1. In affirming the Director’s decision to allow the initiation of OFA negotiations, the agency indicated that the offeror expected to use the line to transport coal at some future time and was willing to back up that expectation with a subsidy offer. Id. at *3; see also Burlington N. & Santa Fe Ry.—Aban. Exemption—in King Cnty., Wash., AB 6 (Sub-No. 380X), slip op. at 10 (STB served Aug. 5, 1998) (discussing Perry County and noting that the offeror’s willingness to make payments to the railroad, from which the offeror received no immediate benefit, manifested a strong intent to use the line in the future if the mine were again to become active), aff’d sub nom., Redmond-Issaquah R.R. Pres. Ass’n v. STB, 223 F.3d 1057 (9th Cir. 2000).

The agency in Perry County acknowledged that it had no intention of authorizing a subsidy for an inactive line in perpetuity, noting that at some point in the future a lack of traffic may negate the finding that the subsidy was being offered for rail service. Perry County, 1994 WL 613355, at *3. But the current version of the statute—which was not in effect when Perry County was decided—provides that “[n]o subsidy arrangement approved under this section shall remain in effect for more than one year, unless otherwise mutually agreed by the parties.” 49 U.S.C. § 10904(f)(4)(B); see also 49 C.F.R. § 1152.27(h)(5) (same).

Here, as in Perry County, WGS’s OFA to subsidize service over a portion of the Line, from which WGS receives no immediate benefit, supports a conclusion that the offer reflects a need for continued rail service. Therefore, based on the foregoing, the Board finds that WGS has demonstrated that there is a continued need for rail service.

Disparity Between WGS’s Offer and FIR’s Estimate

FIR argues that WGS failed to explain the disparity between the offer to subsidize service over a portion of the Line and FIR’s estimated subsidy, as required under the Board’s OFA regulations, and states that the Director Order is not “well-reasoned” on this issue.¹⁰ (Appeal 8-10.) More generally, FIR faults WGS for failing to calculate its proposed subsidy using the form and methodology at 49 C.F.R. § 1152.36, which includes calculations for revenues attributable, avoidable costs, subsidization costs, and return on value to calculate the proposed subsidy. (Appeal 10-13.) WGS argues in reply that FIR’s subsidy figures were inflated because FIR’s estimate included a segment of the Line that WGS is not seeking to subsidize and because FIR’s method for property valuation overestimates the value of the Line’s real estate. (WGS Reply 6, Feb. 23, 2023.) In addition, WGS contends that FIR’s methodology for rehabilitation costs overestimates the amount of rehabilitation the Line needs. WGS states that Railmark and Resourceful Rail, the companies it retained to develop the subsidy, have greater knowledge of the Line than FIR’s expert. (Id.; see also OFA 9.)

¹⁰ FIR filed a reply to WGS’s OFA on January 31, 2023, urging the Board to reject the OFA, and WGS filed a reply to FIR’s reply on February 2, 2023. In the appeal of the Director Order, FIR states that the Director did not set out WGS’s and FIR’s arguments on the disparity between WGS’s offer and FIR’s estimate and then explain why WGS’s offer could go forward. (Appeal 9.)

According to WGS, once it demonstrated that FIR's subsidy calculation was too high, it could not rely on FIR's subsidy figures, so WGS instead developed its proposed subsidy through two cost assessments provided by Railmark and Resourceful Rail, companies with railroad experience in Cleveland and an understanding of how to operate a short line railroad. (WGS Reply 6-7, Feb. 23, 2023.) WGS contends that it was not required to submit its subsidy offer using the form and methodology at 49 C.F.R. § 1152.36, but acknowledges that it will have to do so if it files a request that the Board set the terms and conditions of the subsidy under 49 C.F.R. § 1152.27(h). (WGS Reply 7-8, Feb. 23, 2023.)

The Board finds that, at the offer stage, WGS was not required to submit its proposed subsidy using the form and methodology at 49 C.F.R. § 1152.36. The Board's current regulations are inconsistent as to whether an offeror is required to do so in formulating a proposed subsidy payment. Compare 49 C.F.R. § 1152.30(a)(2) (stating that "an offeror of financial assistance may use th[e] method [at 1152.36] to formulate a subsidy offer and/or Proposed Subsidy Payment" (emphasis added)) with 49 C.F.R. § 1152.36 (stating that "[s]uch information, form[,] and methodology shall also be used by an offeror of financial assistance to formulate a Proposed Subsidy Payment") (emphasis added). The Board intends to remove this inconsistency from its regulations in a future rulemaking.

Prior to the ICC Termination Act of 1995, Public Law 104-88, 109 Stat. 803 (1995) (ICCTA), before instituting OFA negotiations, the agency was required to determine, in addition to finding that the offeror was financially responsible, whether the offer was bona fide (i.e., that the offer was reasonable in relation to the likely value of the line). See 49 U.S.C. § 10905(d) (1994); see also Offers of Financial Assistance, EP 729, slip op. at 10. Specifically, in the subsidy context, the bona fide requirement meant the agency was required to find that it was likely that the subsidy would be equal to "the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line." 49 U.S.C. § 10905(d)(2)(A) (1994). ICCTA removed the requirement that the agency find the offer to be bona fide before instituting negotiations. See Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, EP 537, slip op. at 15 (STB served Dec. 24, 1996) (noting that the new version of the statute did not retain the bona fide requirement).

In addition, until 1984, the agency's OFA regulations required an offeror to provide in its offer, among other things, "[a]n offer of financial assistance accompanied by a Proposed Subsidy Payment in the form prescribed in § 1152.36," and "[i]f the offer to subsidize or purchase the line is less than the carrier's estimate . . . , the offeror shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated." 49 C.F.R. § 1152.27(c)(2)(i), (v) (1983). However, in Abandonment of Railroad Lines & Discontinuance of Service—Offers of Financial Assistance, 367 I.C.C. 808, 808 (1983) (becoming effective Jan. 9, 1984), the agency modified 49 C.F.R. § 1152.27 to reduce the amount of information required to be submitted with an OFA. The agency removed the requirement that an offer be accompanied by a Proposed Subsidy Payment in the form prescribed in 49 C.F.R. § 1152.36 while retaining the requirement to "[e]xplain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate . . . , and explain how the offer of subsidy or

purchase is calculated,” 367 I.C.C. at 817, a requirement that is retained in the current version of the Board’s OFA regulations at 49 C.F.R. § 1152.27(c)(1)(iv)(C).

Based on the foregoing, the Board concludes that an offeror is not required to submit a calculation of a Proposed Subsidy Payment in the form prescribed at 49 C.F.R. § 1152.36 with its subsidy OFA. As previously stated, the agency removed the reference to 49 C.F.R. § 1152.36 from the requirements for submitting a subsidy OFA, and the Director no longer must determine whether an offer is bona fide before instituting OFA negotiations, which in the subsidy context would have required calculations from 49 C.F.R. § 1152.36 for total revenues attributable, total avoidable costs, total subsidization costs, and nominal return on value. An offeror may utilize 49 C.F.R. § 1152.36 to formulate a subsidy OFA, but the Board will not reject a subsidy OFA merely because the offer did not conform with 49 C.F.R. § 1152.36.

As to the requirements at 49 C.F.R. § 1152.27(c)(1)(iv)(C), the Board finds that WGS has explained the disparity between its offer to subsidize rail service over a portion of the Line and FIR’s estimated subsidy, and that WGS has explained how its offer was calculated. According to WGS, FIR’s estimated net liquidation value of \$25,479,439.61 is flawed because it includes more of the Line than WGS is seeking to subsidize and because FIR overestimates the value of the Line’s real estate. (OFA 5-6.) In addition, WGS states that FIR’s estimated rehabilitation costs of \$353,571.41 are overstated because FIR again included more of the Line than WGS is offering to subsidize and because there is no evidence that FIR’s expert developed the estimate based on the most recent report on the physical condition of the Line or a physical inspection of the Line. (*Id.* at 7.)

As to its offer to subsidize service over a portion of the Line for \$64,000 per year, WGS states that it did not have time to hire a railroad consultant to critique FIR’s subsidy and instead solicited cost assessments from Railmark and Resourceful Rail, which based their cost assessments on what they believe it would cost them to operate the FIR Line. (*Id.* at 8; see also *id.*, Ex. B.) Based on their experience, Railmark and Resourceful Rail also concluded that the Line is not in need of significant rehabilitation. (OFA 9.)¹¹ The Board finds that WGS’s OFA based on the two cost assessments is reasonable for the purpose of instituting OFA negotiations.

FIR states that WGS’s cost assessments are based on what it would cost Railmark and Resourceful Rail to rehabilitate and operate the Line, rather than on what it would cost FIR to rehabilitate and continue operating the Line. (Appeal 12.) The Board emphasizes that it only finds WGS’s explanation for the disparity between its offer and FIR’s estimate, as well as WGS’s cost assessments, sufficient to institute OFA negotiations. If the negotiations are unsuccessful, and WGS files a request that the Board establish the terms and conditions of the subsidy, WGS must provide with its request a calculation of a Proposed Subsidy Payment in the form prescribed at 49 C.F.R. § 1152.36. In that situation, the Board will not set the subsidy amount based on what it would cost a third-party railroad like Railmark or Resourceful Rail to operate the Line. Instead, the Board will determine the amount and terms of the subsidy as the difference between the revenues attributable to the portion of the Line and the avoidable cost to

¹¹ In particular, Resourceful Rail estimates that the Line only requires about \$17,000 in repairs. (See OFA, Ex. B.)

FIR of continuing to provide freight transportation, plus a reasonable return on the value of the portion of the Line. See 49 U.S.C. § 10904(f)(1)(C); 49 C.F.R. § 1152.27(h)(5).

The Board therefore finds that the Director was correct in concluding that WGS had explained the disparity between its offer and FIR's estimate and explained how its offer was calculated. Moreover, the Board finds no fault with the Director Order for not directly addressing FIR's arguments in the January 31 reply to the OFA. As noted in the Director Order, the Board's regulations do not provide for the consideration of replies to OFAs. Because the Director has only five days from the date an OFA is submitted to decide whether to institute negotiations, the Director's decision 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).

WGS's Financial Responsibility

FIR argues that WGS failed to show financial responsibility to fulfill the proposed subsidy of \$64,000 per year. (Appeal 14.) FIR claims that the financial information WGS submitted with its OFA does not show whether WGS is profitable, and WGS did not provide a balance sheet, statement of cash flow, or working capital document that could have provided a more accurate picture of WGS's financial situation. (Id.) FIR further argues that the line of credit at PNC Bank that WGS provided is dated June 12, 2019, and should not have been considered as evidence of WGS's financial responsibility without a current letter from PNC Bank attesting to the status of the line of credit. (Id. at 15.) WGS argues in reply that the profit and loss statement it submitted with its OFA is alone sufficient to demonstrate that its net income is sufficient to meet the proposed subsidy amount. (WGS Reply 8, Feb. 23, 2023.)

The Board finds that WGS is financially responsible to fulfill the proposed subsidy of \$64,000 per year. Under 49 C.F.R. § 1152.27(c)(2)(iv)(B), “[e]xamples 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.” The Board's Office of Economics has reviewed WGS's profit and loss statement submitted with the OFA and determined that WGS's net income is sufficient to meet the proposed subsidy amount. Therefore, the Board finds the Director was correct in finding WGS to be financially responsible.

Timeliness of WGS's OFA

FIR states that WGS's OFA was due January 29, 2023, and argues that it may have been late-filed because the Director Order indicated that the OFA was filed on January 30, 2023. (Appeal 16.) FIR further argues that the Director Order was incorrect to state that the OFA deadline had been inadvertently extended to January 29, a Sunday, because the Board's rule stating that if a filing deadline falls on a weekend, then it is due the following business day does not apply to OFAs. (Id.) WGS contends that it filed its OFA on January 29. (WGS Reply 2 & n.1, Feb. 23, 2023.)

As noted above, although WGS's OFA was marked as filed on January 30, the Board's records indicate that it was received on January 29. WGS filed a corrected OFA on January 30, which merely added page numbers. Accordingly, the Board finds that WGS's OFA was timely filed.

Parceling

FIR argues that WGS's offer to subsidize only a portion of the Line would not work operationally because FIR would have to continue to operate the entire Line to serve the WGS facility. (Appeal 17.) According to FIR, WGS's proposal amounts to unlawful selective parceling, which is grounds for rejecting the OFA, and would result in an unconstitutional taking of FIR's property without just compensation. (*Id.* 17-18.) In reply, WGS argues that the Board's OFA regulations permit an OFA to subsidize service over a shorter segment of a line to be abandoned and that, as discussed in previous Board decisions, parceling does not refer to an offer to subsidize a shorter segment of a line to be abandoned, but instead refers to an offer to acquire only a narrower portion of a right-of-way. (WGS Reply 9, Feb. 23, 2023.) In its February 27 reply, FIR reiterates its position that WGS's offer is unlawful selective parceling and explains that forcing FIR to continue to operate over the 0.65 miles of the Line not included in WGS's offer would not cover all costs attributable to FIR providing service to WGS. (FIR Reply 2, Feb. 27, 2023.)

Although we draw no conclusions here as to what the appropriate level of subsidy might ultimately be, the Board finds that WGS's OFA does not amount to unlawful selective parceling. The Board's OFA regulations allow offerors to submit offers to purchase or subsidize a portion of a line to be abandoned. *See, e.g.*, 49 C.F.R. § 1152.27(c)(1)(iv)(A) (requiring the offer to "[i]dentify the line, or the portion of the line, in question") & 49 C.F.R. § 1152.27(c)(1)(iv)(E) (requiring the offer to "[d]emonstrate that there is a continued need for rail service on the line, or portion of the line, in question"); *see also Offers of Financial Assistance*, EP 729, slip op. at 7 (noting that the Board's OFA regulations permit offerors to submit offers to subsidize or acquire only a portion of a line). Moreover, WGS is correct that OFAs have been rejected for selective parceling in cases where the offeror proposed to acquire a narrower width of a right-of-way to be abandoned, *see Great Redwood Trail Agency*, AB 1305X, slip op. at 3-4; *Consol. Rail Corp.—Aban. Exemption—in Phila, Pa.*, AB 167 (Sub-No. 1191X) et al., slip op. at 4-5 (STB served Mar. 14, 2012), not where, as here, the offer covers a shorter segment of the line to be abandoned.

As to FIR's argument that WGS's offer to subsidize only a portion of the Line would not work operationally, the Board notes that the issue of how much of the Line must be subsidized for FIR to serve the WGS facility appears to be unresolved. FIR argues that it would have to operate the entire Line to serve the WGS facility, (Appeal 17), while WGS proposes to subsidize from the connection point with NSR at milepost 11.85 to the WGS facility, located near Abbey Avenue, (OFA 5-6), although, as WGS represents, the cost assessments provided by Railmark and Resourceful Rail were for a slightly longer segment of the Line than WGS is offering to subsidize, (*id.* at 9). While this apparently unresolved issue does not affect the Board's conclusion in this decision that the *Director Order* was correct, if negotiations between WGS and FIR are unsuccessful and WGS requests that the Board establish the terms and conditions of the

subsidy, WGS must include with its case-in-chief, and will have the burden of proof to show, precisely how much of the Line will need to be subsidized for FIR to serve the WGS facility. See 49 C.F.R. § 1152.27(h)(3) (“[t]he offeror has the burden of proof as to all issues in dispute”) & § 1152.27(h)(4) (noting that “[n]o rebuttal evidence will be permitted” from the offeror).

For the reasons stated above, the Board concludes that, given the circumstances presented, the Director Order was correct in finding WGS to be financially responsible and postponing the effective date of the exemption to allow the OFA process to proceed. Accordingly, FIR’s appeal will be denied.

It is ordered:

1. FIR’s appeal of the Director Order is denied.
2. The deadline for WGS or FIR to file a request that the Board establish the terms and conditions of the subsidy is August 18, 2023.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus, joined by Board Member Fuchs, concurred with a separate expression.

BOARD MEMBER PRIMUS, with whom BOARD MEMBER FUCHS joins, concurring:

I agree with the Board’s denial of the appeal. But today’s decision calls attention to several deficiencies in the Board’s regulations governing OFAs, which the Board should address in a rulemaking. First, as noted in the decision, 49 C.F.R. §§ 1152.30(a)(2) and 1152.36 conflict with one another regarding the form and methodology to be used by an offeror in formulating a subsidy payment.

Second, § 1152.27(c)(iv)(E) requires offerors to demonstrate a continued need for rail service and lists examples of evidence to be provided. The decisional timelines stated in § 1152.27(e), however, may not be sufficient to accommodate these significant factual determinations and should be reassessed. For example, in cases where the deadline for filing an OFA has been tolled for the carrier to provide requested information—a relatively common occurrence in OFA proceedings—§ 1152.27(e)(2) states that the decision will be issued within five days after the offer is filed. That five-day window can grow smaller still due to the Board’s general practice of moving decisional deadlines ahead of weekends and holidays.

Third, when the Board is requested to establish conditions and compensation, the offeror has the burden of proof as to all issues in dispute, and no rebuttal evidence is permitted. 49 C.F.R. § 1152.27(h)(3), (h)(4). Here, as the decision notes, FIR argues that it would have to operate the entire Line to serve the WGS facility. FIR Appeal 17. In support of this claim, FIR

states that: “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.” FIR Reply 2 n.2, Feb. 27, 2023. However, neither FIR’s appeal nor the information FIR furnished to WGS and the Board pursuant to 49 C.F.R. § 1152.27(a) on January 20, 2023, included any explanation from Mr. Carswell regarding this alleged operational issue. Even if FIR had explained the operational issue it alleges, this procedural arrangement would concern me. WGS will bear the burden of proof as to an argument that FIR raised, regarding a railroad operational issue, and without an opportunity for rebuttal. The Board should amend its regulations to address these problems.