

SERVICE DATE – SEPTEMBER 14, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1327X

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

Decided: September 14, 2023

Flats Industrial Inc. d/b/a Flats Industrial Railroad Company (FIR), filed a 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), and a corrected notice was served and published in the Federal Register on November 8, 2022 (87 Fed. Reg. 67,532).

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 a portion of the Line, from milepost 11.85 to the WGS facility. The filing of the notice of intent automatically stayed the effective date of the exemption until December 10, 2022.¹ In response to a WGS petition to toll the OFA filing deadline, by decision served November 29, 2022, the deadline for WGS to file an OFA was extended to January 29, 2023, and the effective date of the exemption was postponed until February 8, 2023. Flats Indus. R.R.—Aban. Exemption—in Cleveland, Ohio, AB 1327X, slip op. at 1-2 (STB served Nov. 29, 2022).²

WGS filed an OFA to subsidize service over a portion of the Line, and, by decision served February 3, 2023, the Director of the Board’s Office of Proceedings (Director) found that WGS was financially responsible. Flats Indus. R.R.—Aban. Exemption—in Cleveland, Ohio (Director Order), AB 1327X, slip op. at 2 (STB served Feb. 3, 2023). The Director therefore postponed the effective date of the exemption to allow the OFA process to proceed and set

¹ See 49 C.F.R. § 1152.27(c)(2)(i).

² The decision indicated that environmental conditions, requests for public use conditions, and requests for issuance of notices of interim trail use or abandonment (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), if any, would be addressed in a future decision. Flats Indus. R.R.—Aban. Exemption—in Cleveland, Ohio, AB 1327X, slip op. at 1 n.3 (STB served Nov. 29, 2022).

March 1, 2023, as the date by which WGS or FIR could request that the Board establish the terms and conditions of the subsidy. Id. at 2-3.

FIR appealed the Director Order on February 13, 2023. To allow the Board to consider FIR's appeal, by decision served February 27, 2023, 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 ruling on the appeal of the Director Order. Flats Indus. R.R.—Aban. Exemption—in Cleveland, Ohio, AB 1327X, slip op. at 1-2 (STB served Feb. 27, 2023). The Board denied FIR's appeal of the Director Order on July 19, 2023, setting August 18, 2023, as the date by which WGS or FIR could file a request that the Board establish the terms and conditions of the subsidy. Flats Indus. R.R.—Aban. Exemption—in Cleveland, Ohio (Appeal Decision), AB 1327X, slip op. at 10 (STB served July 19, 2023).

Since the Appeal Decision was served, the Board has received no subsequent filings. Accordingly, because the Board has not received a request to establish the terms and conditions of the subsidy or a motion to extend the deadline for filing such a request, the OFA process is terminated, and the abandonment exemption will be effective on the service date of this decision, subject to the conditions discussed below.

Environmental Analysis of the Proposed Abandonment. The Board's Office of Environmental Analysis (OEA) served a Draft Environmental Assessment (Draft EA) on November 4, 2022, recommending that two conditions be imposed on any decision granting abandonment authority.

First, OEA stated that because a portion of the Line is located within the boundary of the Lake Erie watershed, consultation under the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1467, regarding coastal zone consistency would be necessary for the proposed abandonment. Therefore, pursuant to the CZMA and the Board's environmental regulations at 49 C.F.R. § 1105.9, OEA recommended a condition requiring FIR to consult with the Ohio Department of Natural Resources, Office of Coastal Management and obtain state coastal management consistency certification, if necessary, and prohibiting FIR from consummating abandonment or initiating salvage activities until it reports the results of those consultations to OEA and the Board has removed the condition.

Second, OEA stated that because it had not received comments from the Ohio State Historic Preservation Office (SHPO), OEA had not been able to consider the SHPO's opinion before determining if the Line may be eligible for listing in the National Register of Historic Places (National Register). Accordingly, OEA recommended a condition requiring FIR to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act had been completed and the Board had removed the condition.

OEA served its Final Environmental Assessment (Final EA) on November 23, 2022, indicating that new comments were received. According to OEA, the SHPO filed a comment stating that a review of its records confirmed that the Line travels through portions of the

Cleveland Centre Historic District, which is listed in the National Register, and near many historic properties, but that removal of the track and track materials would not impact the significance or integrity of any historic properties in a way that would alter their National Register status. OEA states that following consultation with the SHPO and the public, it has determined that the proposed abandonment would not affect historic properties listed in or eligible for inclusion in the National Register. Accordingly, OEA is no longer recommending that a Section 106 condition be imposed.

In addition, OEA reports that it contacted 20 federally recognized tribes with associations to the area of the proposed abandonment and received one response from the Miami Tribe of Oklahoma (Miami Tribe). Based on consultation with the Miami Tribe, OEA recommends that the Board impose a condition requiring FIR to stop work and notify OEA, the Miami Tribe, other interested federally recognized tribes, and the SHPO if any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during abandonment-related salvage activities.

Based on OEA's analysis and recommendation, the two conditions recommended in the Final EA will be imposed.

Public Use. On November 21, 2022, the City of Cleveland (City) filed a request for issuance of a public use condition under 49 U.S.C. § 10905. Under § 10905, the Board may prohibit disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Here, the City requests that FIR be barred from removing or destroying any and all bridges, culverts, or roadbed on the Line and from selling or otherwise transferring any interest FIR holds in the underlying real estate in the Line, other than for public uses, for 180 days from the effective date of the abandonment exemption, unless the properties have first been offered, on reasonable terms, for sale for public purposes. According to the City, the Line would make an excellent trail and recreational facility for residents and visitors to the City. As justification for the requested condition, the City states that the 180-day period will not interfere with salvage activities for the rail and ties, or with closing a transaction between the City and FIR. The City also states that it seeks to acquire the bridges, culverts, and roadbed, as well as the underlying real estate interests in the Line pursuant to the Trails Act.³

Because the City has complied with the requirements of 49 C.F.R. § 1152.28(a)(2), a public use condition will be imposed, requiring FIR to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and refrain from disposing of the corridor, other than tracks, ties, and signal equipment, for a 180-day period from

³ If the City wishes to pursue interim trail use/railbanking of the Line under the Trails Act, it must request issuance of a NITU pursuant to 49 C.F.R. § 1152.29.

September 14, 2023, the effective date of the exemption, to March 12, 2024. A public use condition is not imposed for the benefit of any one potential purchaser but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, FIR may engage in negotiations with other interested persons as well.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The Director Order and the Appeal Decision are vacated to the extent they postponed the effective date of the exemption to allow the OFA process to proceed.
3. The exemption will be effective on the service date of this decision.
4. Upon reconsideration, the notices served and published in the Federal Register on October 31, 2022, and November 8, 2022, exempting the abandonment of the Line described above are modified to the extent necessary to permit the public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until March 12, 2024. The abandonment is also subject to the following conditions:⁴
 - (a) Pursuant to the CZMA and the Board's environmental regulations at 49 C.F.R. § 1105.9, FIR shall consult with the Ohio Department of Natural Resources, Office of Coastal Management and obtain state coastal management consistency certification, if necessary. FIR may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until it reports the results of these consultations in writing to OEA and the Board has removed this condition.
 - (b) In the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during abandonment-related salvage activities, FIR shall immediately cease all work and notify OEA, the Miami Tribe, other interested federally recognized tribes, and the SHPO pursuant to 36 C.F.R. § 800.13(b). OEA will then consult with the SHPO, the Miami Tribe, other interested federally recognized tribes, FIR, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.
5. FIR shall keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days from the effective date of the

⁴ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is reached for the Line (or a portion thereof), compliance with the conditions set forth below is not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.

exemption, until March 12, 2024, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use.

6. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.