

306684

ENTERED
Office of Proceedings
June 1, 2023
Part of
Public Record

Karl Morell & Associates
440 1st Street, NW, Suite 440
Washington, DC 20001
(202) 595-9045
karlm@karlmorell.com

June 1, 2023

E-FILED

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: *Docket No. AB 1333X, Cleveland & Cuyahoga Railway, LLC –
Discontinuance of Service Exemption – in Cuyahoga County, Ohio***

Dear Ms. Brown:

Enclosed for filing please find Cleveland & Cuyahoga's Petition for Exemption under 49 U.S.C.
§ 10502.

The filing fee of \$8,000 has been paid via pay.gov.

If you have any questions, please call me.

Sincerely,



Karl Morell

Enclosures

FEE RECEIVED
June 1, 2023
Surface
Transportation Board

FILED
June 1, 2023
Surface
Transportation Board

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 1333X

CLEVELAND & CUYAHOGA RAILWAY, LLC
-- DISCONTINUANCE OF SERVICE EXEMPTION --
IN CUYAHOGA COUNTY, OHIO

PETITION FOR EXEMPTION

Karl Morell
Karl Morell & Associates
440 1st Street, N.W.
Suite 440
Washington, D.C. 20001
(202) 595-9045

Attorney for:
CLEVELAND & CUYAHOGA
RAILWAY, LLC

Dated: June 1, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 1333X

CLEVELAND & CUYAHOGA RAILWAY, LLC
-- DISCONTINUANCE OF SERVICE EXEMPTION --
IN CUYAHOGA COUNTY, OHIO

PETITION FOR EXEMPTION

Cleveland & Cuyahoga Railway, LLC ("CCR") petitions the Surface Transportation Board ("STB" or "Board") to exempt, under 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. § 10903, CCR's discontinuance of its lease operations over approximately 10.4 miles of rail line owned by Wheeling & Lake Erie Railway Company ("WLER") in Cuyahoga County, Ohio.

PROPOSED TRANSACTION

CCR proposes to discontinue its operations over the 10.4-mile rail line leased from WLER and located between Milepost 15.5, at Falls Junction, in Glenwillow, OH, and Milepost 5.1, in Cleveland, OH, in Cuyahoga County, OH (the "Line"). The Line traverses U.S. Postal Service Zip Codes 44105, 44113, 44127, 44128, 44131, 44137, 44139 and 44146. A map of the Line is attached as Exhibit A. A draft Federal Register Notice as required by 49 C.F.R. § 1152.60 (c) is attached as Exhibit B.

Based on information in CCR's possession, the Line does not contain federally granted rights-of-way. Any documentation in CCR's possession will be made available to those requesting it.

STATEMENT OF FACTS

In Finance Docket No. 36287, *Cleveland & Cuyahoga Railway, LLC – Change in Operator Exemption Containing Interchange Commitment – Cleveland Commercial Railroad Company, LLC* (not printed), served August 15, 2019 (“*Cleveland & Cuyahoga*”), CCR was, among other things, authorized to assume the lease agreement between Cleveland Commercial Railroad Company, LLC (“*Cleveland Commercial*”) and WLER and replace Cleveland Commercial as the lessee and operator of the Line.

By mutual agreement of the parties, the lease agreement between CCR and WLER was terminated effective May 31, 2023, and WLER resumed providing service on the Line in place of CCR pursuant to WLER's residual common carrier obligation. CCR and WLER have cooperated fully to ensure an orderly transition of service. The proposed discontinuance will allow CCR to end its common carrier obligations over the Line. No customer on the Line will be left without common carrier service as a result of CCR's proposed discontinuance of its lease operations. The only active customer on the Line is being served with a copy of this Petition.

CCR is a Class III common carrier which, until May 31, 2023, operated over 35.7 miles of rail lines in northeastern Ohio. Since May 31st CCR continues to operate over a 25.3-mile rail line owned by Norfolk Southern Railway Company. See *Cleveland & Cuyahoga*, slip op. at 1. CCR is a wholly owned subsidiary of OmniTRAX Holdings Combined, Inc., and HGS Railway Holdings, Inc. See Finance Docket No. 36288, *OmniTRAX Holdings Combined, Inc. –*

Continuance in Control Exemption – Cleveland & Cuyahoga Railway (not printed), served August 15, 2019.

EXEMPTION REQUESTED

CCR seeks an exemption under 49 U.S.C. § 10502 from the applicable requirements of 49 U.S.C. § 10903 in order for CCR to discontinue service over the Line.

Under 49 U.S.C. § 10502, the Board must exempt a transaction from regulation when it finds that:

- (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and
- (2) either:
 - (a) the transaction or service is of limited scope; or
 - (b) regulation is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a)

The legislative history of Section 10502 reveals a clear Congressional intent that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the Board's predecessor to liberally use the expanded exemption authority under former Section 10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation – Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), *vacated and remanded on other grounds, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. 422, 104th Cong., 1st Sess. 168-69 (1995).

A. The Application of 49 U.S.C. § 10903 Is Not Necessary to Carry Out The Rail Transportation Policy.

Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption would minimize the unnecessary expenses associated with the filing of a formal discontinuance application, expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. § 10101(2) and (7)]. *See, e.g., Norfolk & W. Ry. Co. – Abandonment Exem. – Cinn., Hamilton County, OH*, 3 S.T.B. 110 (1998); STB Docket No. AB-367 (Sub-No. 2X), *Georgia Central Railroad, L.P. – Abandonment Exemption – In Chatham County, GA* (not printed), served September 17, 1997 (“*Georgia Central*”); STB Docket No. AB-6 (Sub-No. 409X), *The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – In Jefferson, Thayer and Nuckolls Counties, NE* (not printed), served July 23, 2004; AB 1271X, *Savage Bingham & Garfield railroad Company – Discontinuance of Trackage Rights Exemption – In Whiting, Ind.* (not printed), served March 1, 2019. By discontinuing CCR’s service over the Line, the overall operating efficiencies of CCR will improve. Granting the exemption will thus foster sound economic conditions and encourage efficient management. 49 U.S.C. § 10101(5) and (9). *See, e.g., STB Docket No. AB-318 (Sub-No. 4X), Louisiana & Delta Railroad, Inc. –*

Abandonment Exemption – In Lafourche and Assumption Parishes, LA (not printed), served August 26, 1997; STB Docket No. AB-497 (Sub-No. 1X), *Minnesota Northern Railroad, Inc. – Abandonment Exemption – In Red Lake and Polk Counties, MN* (not printed), served November 14, 1997. Also, the proposed discontinuance will promote a safe and efficient rail system. [49 U.S.C. § 10101(3)]. In addition, granting the requested exemption will provide for the expeditious handling and resolution of proceedings before the Board. [49 U.S.C. § 10101(15)]. Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound rail transportation system are not affected since the sole active shipper on the Line will continue to be served by WLER, which owns the Line and which operated the Line prior to 2002.

Where, as here, local service is not affected, the Board and its predecessor have consistently found that formal regulation of a proposed discontinuance is not necessary to carry out the rail transportation policy. *See, e.g.*, Docket No. AB-102 (Sub-No. 25X), *Missouri-Kansas-Texas R. Co. – Exemption – Discontinuance of Trackage Rights in Labette and Cherokee Counties, KS* (not printed), served February 9, 1990. As the Board’s predecessor noted: “We have long recognized that operating arrangements designed by carriers to promote more efficient or economical operations promote the national [rail] transportation policy and should be encouraged.” Finance Docket No. 30703, *Soo Line R. Co. – Joint Use of Lines – Chesapeake and Ohio Ry. Co.* (not printed), served August 22, 1986, slip op. at 9.

B. This Transaction Is Of Limited Scope

In determining whether a proposed transaction is of limited scope, the Board considers a variety of factors, such as the length of the rail line, the number of shippers on the line and the traffic volume. *See, e.g.*, Docket No. AB-347 (Sub-No. 1X), *Florida West Coast Railroad*

Company – Abandonment Exemption – Gilchrist and Levy Counties, FL (not printed), served January 16, 1992; Docket No. AB-6 (Sub No. 349X), *Burlington Northern Railroad Company – Abandonment Exemption – In Greene and Polk Counties, MO* (not printed), served August 27, 1993.

The proposed transaction is of limited scope. CCR seeks to discontinue lease operations over approximately 10.4 miles of rail line. The length of the track involved in a proposed discontinuance may not be dispositive of whether the transaction or service is limited in scope. Docket No. AB-6 (Sub-No. 347), *Burlington Northern R. Co. – Abandonment and Discontinuance of Trackage Rights Exemption – In Greene, Sumter, Choctaw, Washington and Mobile Counties, AL* (not printed), served July 6, 1993 (“*BN Discontinuance*”) (length of line not necessarily dispositive).

Of greater relevance to the “limited scope” issue is the number of shippers, if any, that would be adversely affected by the proposed discontinuance. *See, e.g., BN Discontinuance* (discontinuance limited in scope where traffic would continue to be handled under a haulage arrangement); Docket No. AB-290 (Sub-No. 2X), *Southern Ry. Co. – Discontinuance of Trackage Rights Operations Between Greenwood and Piedmont, South Carolina* (not printed), served June 20, 1990 (transaction found to be limited in scope because shippers would be served by a new carrier).

As previously noted, there is only one active rail shipper located on the Line. Because that shipper will continue to be served by WLER, the owner of the Line, no shipper will lose service or otherwise be adversely affected by CCR’s discontinuance of operations. Because the proposed discontinuance will not adversely affect rail service to any shipper, the proposed discontinuance should be found limited in scope.

C. This Transaction Will Not Result In An Abuse of Market Power

There is one active shipper presently located on the Line. That shipper will not lose rail service. The shipper will continue to receive rail service from WLER, a Class II rail carrier and the owner of the Line. Consequently, the proposed discontinuance will not eliminate or reduce rail service available to the shipper. Therefore, regulation is not necessary to protect shippers from an abuse of market power. *See, e.g.,* STB Docket No. AB-55 (Sub-No. 576), *CSX Transportation, Inc. – Abandonment Exemption – In Guernsey County, OH* (not printed), served November 22, 1999; STB Docket No. AB-55 (Sub-No. 563X), *CSX Transportation, Inc. – Abandonment Exemption – In Harrison County, WV* (not printed), served September 25, 1998; *Georgia Central*. The proposed discontinuance will simply result in the replacement of the rail common carrier serving the Line. *See* STB Docket No. AB-566X, *Gateway Western R. Co. – Discontinuance of Service Exemption – In Jackson County, MO* (not printed), served July 21, 2000, slip op. at 2 (“Because service is being continued, regulation is not necessary to protect shippers from the abuse of market power.”). The new service arrangement will preserve service and maintain the efficiencies of the movements without any adverse competitive consequences. *See, e.g.,* Docket No. AB-6 (Sub-No. 340X), *Burlington Northern R. Co. – Discontinuance of Trackage Rights Exemption – Between East Dubuque, IL and Dubuque, IA* (not printed), served September 1, 1992 (regulation not necessary to protect shippers from abuse of market power where service would continue under car haulage agreement).

Level of Labor Protection

The interests of railroad employees will be protected by the conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

ENVIRONMENTAL AND HISTORIC REPORTING REQUIREMENTS

Environmental and historic reporting requirements are not required in discontinuance proceedings. See AB 271X, *Everett Railroad Company – Discontinuance of Service Exemption* (not printed), served November 16, 2007; AB 575 (Sub-No. 2X), *Montana Rail Link, Inc. – Discontinuance of Service Exemption – In Yellowstone, Stillwater, Sweet Grass, Park, Gallatin, Broadwater, Jefferson, Lewis and Clark, Powell, Deer Lodge, Granite, Missoula, Lake, Mineral, and Sanders Counties, Mont.; Bonner and Kootenai Counties, Idaho, and Spokane County, Wash.* (not printed), served March 8, 2023.

Because this is a discontinuance proceeding and not an abandonment proceeding, interim trail use/rail banking and public use conditions are not appropriate. Newspaper notice was published on May 27, 2023 and notice was served under §§ 1152.50(d)(1) and 1152.60(d).

WHEREFORE, CCR respectfully urges the Board to exempt from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of CCR's lease operations over the Line.

Respectfully submitted,

A handwritten signature in dark ink that reads "Karl Morell". The signature is written in a cursive, slightly slanted style.

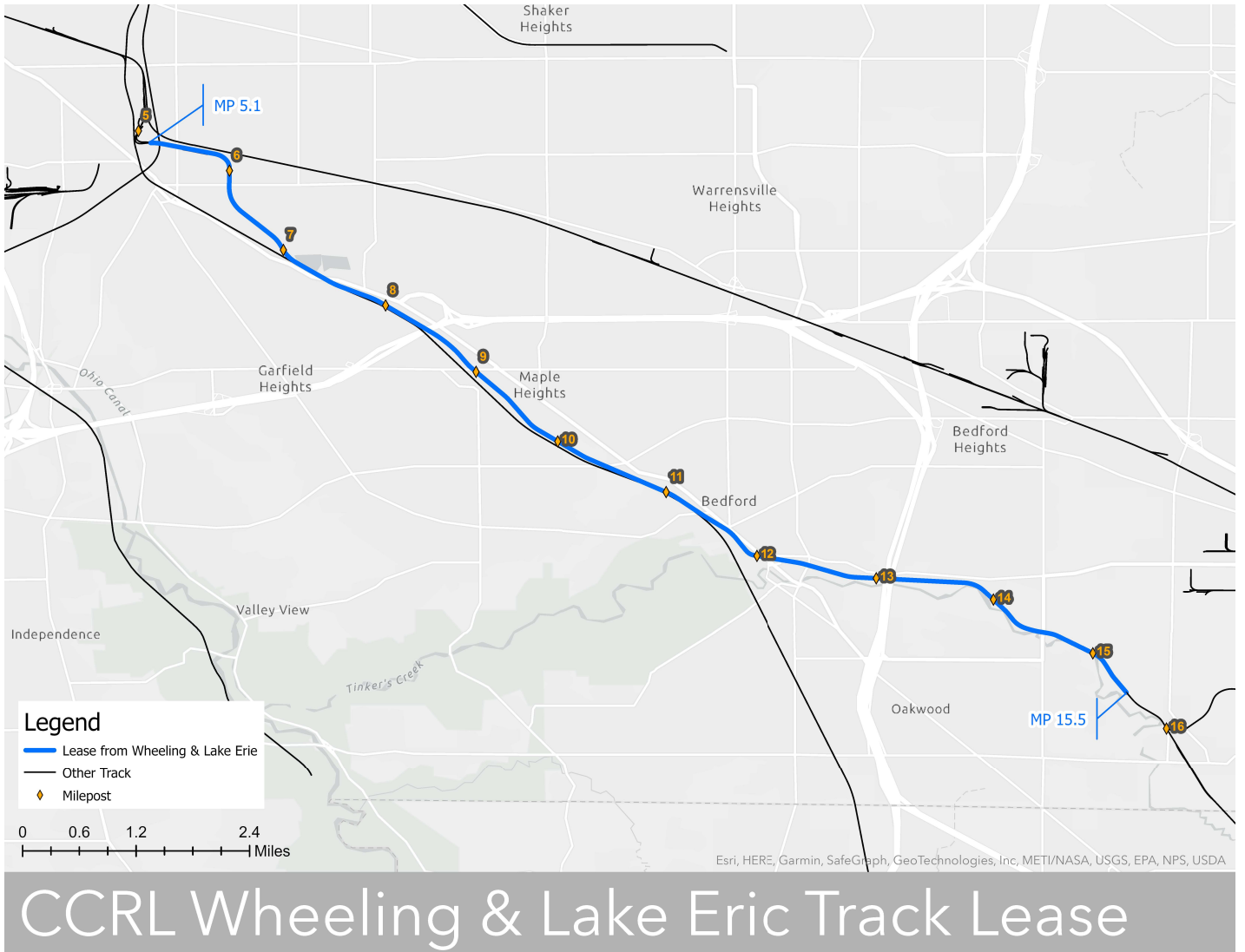
Karl Morell
Karl Morell & Associates
440 1st Street, N.W.
Suite 440
Washington, D.C. 20001
(202) 595-9045

Attorney for:
CLEVELAND & CUYAHOGA
RAILWAY LLC

Dated: June 1, 2023

EXHIBIT A

MAP



CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. §§ 1152.50(d)(1) and 1152.60(d), the undersigned hereby certifies that notice of the proposed discontinuance of lease operations in Docket No. AB 1333X was sent via email or mailed via first class mail on June 1, 2023 to the following parties:

State Public Service Commission

State of Ohio
Public Utilities Commission
180 E. Broad Street
Columbus, OH 43215
Puco.ohio.gov

Military Traffic Management Command

Military Surface Deployment and Distribution Command
ATTN: Railroads for National Defense
1 Soldier Way, Building 1900W
Scott AFB, Illinois 62225-5006
Usarmy.scott.sddc.mbx.tea@mail.mil

National Park Service

U.S. Department of Interior – National Park Service
Recreation Resources Assistance Division
1849 C Street, NW
Washington, DC 20240-0001
RTCA_Apps_IMR@nps.gov

U.S. Department of Agriculture

U.S. Department of Agriculture
Chief of the Forest Service
1400 Independence Avenue S.W.
Washington, DC 20250-1111
vcchristiansen@fs.fed.us

Shipper

Ferrous Processing & Trading
8550 Aetna Road
Cleveland, OH 44105
Tom.mcmurray@fptscrap.com

Dated: June 1, 2023

A handwritten signature in black ink that reads "Karl Morell". The signature is written in a cursive, slightly slanted style.

Karl Morell

CERTIFICATE OF PUBLICATION

The undersigned hereby certifies that notice of the proposed discontinuance of lease operations in Docket No. AB 1333X was published on May 27, 2023 in The News-Herald, a newspaper of general circulation in Cuyahoga County, Ohio as required by 49 C.F.R. § 1105.12.

Dated: June 1, 2023

A handwritten signature in cursive script that reads "Karl Morell".

Karl Morell

EXHIBIT B

SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 1333X

CLEVELAND & CUYAHOGA RAILWAY LLC
--DISCONTINUANCE OF SERVICE EXEMPTION--
IN CUYAHOGA COUNTY, OHIO

On June 1, 2023, Cleveland & Cuyahoga Railway, LLC (“CCR”) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 for CCR to discontinue service over approximately 10.4 miles of rail line owned by Wheeling & Lake Erie Railway Company (“WLER”) and extending between Milepost 15.5, at Falls Junction, in Glenwillow, OH, and Milepost 5.1, in Cleveland, OH, in Cuyahoga County, OH (the “Line”). The Line traverses U.S. Postal Service Zip Codes 44105, 44113, 44127, 44128, 44131, 44137, 44139 and 44146.

The lease agreement between CCR and WLER with respect to the Line has been terminated, and WLER has resumed providing service on the Line in place of CCR.

The Line does not contain federally granted rights-of-way. Any documentation in the railroad’s possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co. – Abandonment – Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued within 90 days (by _____, 2023).

Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there would be

environmental review during any subsequent abandonment, this discontinuance does not require an environmental review. See 49 C.F.R. §§ 1105.6(c)(5), 1105.8(b).

Any offer of financial assistance (OFA) for subsidy under 49 C.F.R. 1152.27(b)(2) will be due no later than 120 days after the filing of the petition for exemption or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner.¹ Persons interested in submitting an OFA must first file a formal expression of intent to file an offer by July [___], 2023, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. See 49 C.F.R. § 1152.27(c)(1)(i).

All filings in response to this notice must refer to Docket No. AB 1333X and must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on CCR's representative, Karl Morell, 440 1st Street, N.W., Suite 440, Washington D.C 20001. Replies to the petition are due on or before July [___], 2023.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238 or refer to the full abandonment and discontinuance regulations at 49 C.F.R. Part 1152. If you require accommodation under the Americans With Disabilities Act, please call (202) 245-0245.

Board decisions and notice are available at www.stb.gov.

Decided: _____ 2023.

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

¹ The filing fee for OFAs can be found at 49 C.F.R. § 1002.2(f)(25).