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SERVICE DATE - NOVEMBER 7, 1997

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-227 (Sub-No. 10X)

WHEELING & LAKE ERIE RAILWAY COMPANY--ABANDONMENT  
EXEMPTION--IN STARK COUNTY, OH

Decided: October 29, 1997

By petition filed August 12, 1997, Wheeling & Lake Erie Railway Company (W&LE) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad known as the Massillon Branch, extending from milepost 22.05 at Run Junction, near Navarre, OH, to the end of the track at milepost 16.40, near Massillon, OH, a distance of 5.65 miles, in Stark County, OH. Pursuant to 49 U.S.C. 10502(b), a notice was published in the Federal Register (62 FR 45917) on August 29, 1997, instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) and imposition of a public use condition was filed by the Stark County Park District (Stark County).<sup>1</sup> The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the exemption subject to trail use, public use, environmental and standard employee protective conditions.

BACKGROUND

W&LE, a Class II rail carrier, operates approximately 850 miles of rail lines in Ohio, Pennsylvania, West Virginia, and Maryland. W&LE began operations in May 1990 after acquiring its core rail lines from the Norfolk & Western Railway Company.<sup>2</sup> W&LE's principal routes extend from Connellsville and Pittsburgh, PA, to Bellevue, OH, from Brewster and Canton, OH, to

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<sup>1</sup> The August 29 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 had to be filed no later than September 18, 1997. Stark County's request was filed on October 7, 1997. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), we stated that we would retain our policy of accepting filings after the due date when good cause is shown. Because Stark County's late-filed request has not delayed the proceeding and will not prejudice any party, we will accept Stark County's submission.

<sup>2</sup> See Wheeling Acquisition Corporation--Acquisition and Operation Exemption--Lines of Norfolk & Western Railway Company, Finance Docket No. 31591 (ICC served Feb. 6, May 7, and Dec. 28, 1990).

Cleveland, OH, and from Mogadore and Akron, OH, to Carey, OH. W&LE also operates over CSX Transportation, Inc.'s (CSXT) line between Connellsville, PA, and Hagerstown, MD, pursuant to trackage rights.

The Massillon Branch is a single-track, stub-ended branch line that is the remaining segment of a longer branch line which originally extended to Dalton, OH.<sup>3</sup> Due to poor track conditions, the Massillon Branch was embargoed on October 20, 1995, and no service has been provided over the line since that time.

According to W&LE, the line consists of mostly 90-pound rail laid in 1926 and of some 110-pound rail laid in 1943. The ties are in fair to poor condition; the ballast and the three bridges on the line are in fair condition. The line had been classified as Federal Railroad Administration (FRA) excepted track before the embargo. W&LE states that the line would require significant repair and rehabilitation to be returned to service. It estimates rehabilitation costs of \$250,000 to restore the line to minimum FRA class 1 standards and estimates the line's net liquidation value to be \$128,000.

Before the embargo, service was provided to the only shipper on the line, Republic Engineered Steel (Republic), located at Massillon. W&LE submits that revenue generated from Republic's traffic was \$30,492 in 1994, and \$46,751 in 1995. Republic also uses Consolidated Rail Corporation (Conrail) and motor carriers for its shipments and W&LE indicates that these alternatives will still be available after the abandonment. In addition, R.J. Corman Railroad Company (Corman) has a line adjacent to Republic's plant that connects with W&LE, Conrail, and CSXT. According to W&LE, if the former switch connection between Corman's line and Republic's industry track were to be reinstalled, this would be another rail alternative for Republic. W&LE states that it will continue to provide rail service via the loading tracks at its Neomodal intermodal terminal at Navarre, located approximately 5 miles from Republic's facility. It asserts that there is no reasonable prospect for developing sufficient rail traffic to allow profitable operations on the line in the future. W&LE certified that a copy of the petition was served on Republic and states that Republic has contacted W&LE indicating that it does not oppose the proposed abandonment.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C.

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<sup>3</sup> W&LE abandoned the line between Massillon and Dalton in 1994. See Wheeling & Lake Erie Railway Company--Abandonment Exemption--In Stark and Wayne Counties, OH, Docket No. AB-227 (Sub-No. 4X) (ICC served Apr. 19, 1994).

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.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, by allowing W&LE to avoid maintenance and operating costs on a line with limited traffic and revenue and which is not currently operated, an exemption will promote a safe and efficient rail transportation system, foster sound economic conditions in transportation, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The only shipper on the line, Republic, does not object to the proposed abandonment and will continue to have adequate rail and motor transportation alternatives available. Nevertheless, to ensure that Republic is aware of our action, we will require W&LE to serve a copy of this decision on Republic within 5 days of the service date of this decision and to certify to the Board that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

UTU requests the imposition of labor protective conditions. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

W&LE has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on September 25, 1997. In the EA, SEA indicated that the Ohio State Historic Preservation Office (SHPO) has identified three known sites listed in the Ohio Archaeological Inventory for the project area and that additional information is needed to complete its review of this project. The SHPO stated that an identification level survey is needed to identify any property that is eligible for inclusion in the National Register of Historic Places and that the survey must meet the Secretary of the Interior's standards and guidelines. Accordingly, SEA recommends that, pending resolution of these issues, any decision granting an abandonment exemption contain a condition that W&LE shall retain its interest in and take no steps to alter the historic integrity of the three sites and three structures identified by the SHPO, until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. SEA also notes that the U.S. Natural Resources Conservation Service (NRCS) states that approximately 1.5 miles of the line proposed for abandonment runs through Carlisle and Linwood Muck soils. In order to avoid any adverse impact with these soils, NRCS recommends that caution

should be exercised to prevent disturbing these areas, if, in fact, they are jurisdictional wetlands. Therefore, SEA recommends that a condition be imposed requiring W&LE to consult with the NRCS in Canton, OH, prior to salvaging the right-of-way. Finally, SEA states that the U.S. Fish and Wildlife Service (FWS) indicates that the proposed abandonment is within the range of the federally listed endangered species, the Indiana bat, and of a threatened species, the bald eagle. The FWS requested no specific conditions regarding these species. SEA, however, recommends that a condition be imposed requiring W&LE to consult with the FWS field office at Reynoldsburg, OH, prior to salvaging the right-of-way.

No comments to the EA were filed by the October 24, 1997 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Stark County requests that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter dated October 17, 1997, W&LE states that it is willing to negotiate with Stark County for interim trail use. Stark County's request complies with the requirements of 49 CFR 1152.29 and W&LE is willing to enter into negotiations. Therefore, we will issue a NITU for the described line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, W&LE may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. Stark County also requests imposition of a 180-day public use condition, precluding W&LE from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related

structures such as bridges, trestles, culverts and tunnels. Stark County states that the corridor would make an excellent recreational trail and conversion of the property to trail use is in accordance with local plans. It also states that the corridor provides important wildlife habitat and green space and its preservation as a recreational trail is consistent with that end.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. Stark County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification of the period of time requested. Accordingly, a 180-day public use condition also will be imposed, commencing with the effective date of this decision and notice. If a trail use agreement is reached on a portion of the right-of-way, W&LE must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, W&LE is not required to deal exclusively with Stark County, but may engage in negotiations with other interested persons.

W&LE has requested expedited handling of this petition and requests that the exemption be made effective by November 1, 1997, or soon thereafter. W&LE states that, because its financial condition has deteriorated sharply since last year, the money that it expects to receive from salvage of the track materials is vital to its short-term viability. In an effort to accommodate W&LE's request, we have issued the EA sooner than usual and will make the exemption effective in 15 days, rather than the customary 30 days.

It is ordered:

1. The late-filed request for a NITU under 49 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 is accepted.

2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by W&LE of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) W&LE shall retain its interest in and take no steps to alter the historic integrity of the three sites and three structures identified by the SHPO, until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (2) W&LE shall consult with the NRCS in Canton, OH, prior to salvaging the right-of-way; (3) W&LE shall consult with the FWS field office at Reynoldsburg, OH, prior to salvaging the right-of-way; (4) W&LE shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track or track materials), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for

public use; and (5) W&LE shall comply with the interim trail use/rail banking procedures set forth below.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, W&LE may fully abandon the line, provided the conditions imposed above are met.

7. W&LE is directed to serve a copy of this decision on Republic within 5 days after the service date of this decision and to certify to the Board that it has done so.

8. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 17, 1997, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$900. See 49 CFR 1002.2(f)(25).

9. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

10. Provided no OFA has been received, this exemption will be effective November 22, 1997. Petitions to stay must be filed by November 17, 1997, and petitions to reopen must be filed by December 2, 1997.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), W&LE shall file notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by W&LE's filing of a notice of consummation by November 9, 1998, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation

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exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary