

220277

September 18, 2007

By Hand

The Honorable Vernon A. Williams
Surface Transportation Board
395 F. Street, S.W.
Suite 1260
Washington, D.C. 20423-0001



RE STB Finance Docket No 35063. *Michigan Central Railway, LLC- Acquisition and Operation Exemption- Lines of Norfolk Southern Railway Company*

Dear Secretary Williams

Please find enclosed for filing in the above-referenced document an original plus ten (10) copies of the **PUBLIC VERSION** of the Comments and Request for Conditions of The Dow Chemical Company. Please note that Exhibit 1 is a color document.

In addition, enclosed is a diskette with an electronic copy of the comments in PDF format and Word format.

Also, enclosed is one additional copy of the pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno
Attorney for The Dow Chemical Company

Enclosures

cc All Parties of Record

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35063

**MICHIGAN CENTRAL RAILWAY, LLC
—ACQUISITION AND OPERATION EXEMPTION—
LINES OF NORFOLK SOUTHERN RAILWAY COMPANY**

**COMMENTS AND REQUEST FOR CONDITIONS OF
THE DOW CHEMICAL COMPANY**

The Dow Chemical Company (“Dow”) hereby submits its comments and request for conditions in the above-captioned proceeding. The Applicant, Michigan Central Railway, LLC (“MCR”), has petitioned the Board, pursuant to 49 U.S.C. § 10502, for an exemption to authorize MCR to acquire approximately 299 miles of rail line from Norfolk Southern Railway Company (“NSR”) in Michigan and Indiana, and to acquire various trackage and lease rights and physical facilities related to this track. Dow does not oppose the transaction, provided that the Board imposes certain conditions to preserve the existing competitive situation for traffic that originates at Dow’s Ludington, Michigan production facility.

I. Identity and Interest of Dow

Dow is a publicly-owned company with headquarters in Midland, Michigan. It manufactures chemicals, plastics and agricultural products, at numerous production facilities throughout the continental United States. Dow is a significant user of rail service to transport commodities that it consumes and produces at its various facilities.

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Dow's sole manufacturing facility for the production of calcium chloride is located at Ludington, Michigan. Dow originates approximately 4800 cars of calcium chloride annually. The Ludington facility is served by the Marquette Railroad ("MQT")

MQT operates over approximately 100 miles of track that it leases from CSX Transportation, Inc. ("CSXT") from Ludington to Grand Rapids, Michigan. At Grand Rapids, MQT interchanges traffic directly with CSXT, but also has the ability to reach the NSR via a very short (approximately 100 yard) switch provided by CSXT. The proposed transaction would convey NSR's line from Grand Rapids to Elkhart Junction, Indiana, to MCR, thus inserting MCR as an additional carrier between MQT and NSR.

Dow's concerns over MCR's exemption petition are twofold. First, Dow is concerned that this transaction will adversely impact the ability of NSR to compete with CSXT for Dow's Ludington traffic because the transaction will increase the number of rail carriers that must handle that traffic when routed via NSR. Second, Dow is concerned that the level of the haulage rate paid by NSR to MCR does not deteriorate NSR's competitive position for Ludington traffic. Dow has focused these comments upon the first concern, but Dow supports the comments and request for conditions of MQT as a means of addressing Dow's second concern.

II. The Proposed Transaction Will Impair NSR's Ability to Compete with CSXT for MQT-Originated Traffic.

NSR currently has the ability to compete with CSXT for MQT-originated traffic. Dow is very concerned that sale of NSR's line from Grand Rapids to Elkhart Junction will impose costs that will destroy NSR's ability to compete.

Dow's Ludington facility is served by a neutral shortline railroad, the MQT. MQT originates all of Dow's Ludington traffic, which it hauls approximately 100 miles to Grand Rapids. Although the MQT only connects directly with CSXT at Grand Rapids, the NSR track

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(which would become MCR track) is located only 1700 feet south of the MQT terminus. Thus, traffic that originates on MQT can access NSR via a very short CSXT switch.

Despite NSR's close proximity to MQT, NSR's ability to compete with CSXT for MQT-originated traffic is handicapped by two facts. First, CSXT has imposed a paper barrier upon MQT that Dow believes to be approximately { } per car. Second, CSXT assesses an additional charge of \$105 per car, recently increased from \$75, to switch cars between MQT and NSR in *both the empty and loaded directions*.

{ } Dow is concerned that NSR's sale of its line from Grand Rapids to Elkhardt Junction will impair NSR's ability to compete in the future.

Dow's greatest concern is that NSR's line sale to MCR will increase the number of carriers in all NSR routings, and consequently the time and expenses required to handle MQT-originated traffic. Currently, 70% of Dow's Ludington traffic can be routed via a two-carrier haul, consisting of MQI and CSXT, from Ludington to either a final destination or interchange point. Dow also can route the same traffic via a three-carrier haul consisting of MQI, CSXT and NSR, with CSXT participating only as a switching carrier at Grand Rapids. The proposed transaction, however, would inject a fourth carrier, MCR, into this route, thereby doubling the number of railroads handling Dow's Ludington traffic compared with the MQT/CSXT route. When you also consider the carriers that handle the traffic from the interchange to the final destination, the total carrier count for an NSR route from Ludington is a minimum of five different railroads.

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Extra interchanges mean extra handling, longer transit times, and higher costs. Extra handling increases safety concerns for hazardous materials transportation. It also creates greater potential for lost or misplaced cars. Longer transit times impose additional expenses upon Dow because more rail cars are needed to handle the same volume of traffic. When these costs to Dow are added to the higher costs of the rail carriers, the competitiveness of NSR routes for Dow's Ludington traffic further deteriorates.

The Board, and the ICC before it, have held in a long line of decisions that an important merger benefit is a reduction in the number of carriers required to handle traffic. This is because “[i]nterchanges are costly, time consuming and inefficient” and “results in less control over shipments from origin to destination.” Chicago & North Western Ry Co —Control—Chicago, Rock Island and Pac R R Co., 347 ICC 556, 596 (1974). See also, Spokane, Portland & Seattle Ry co et al —Control—Peninsula Terminal Co., 348 ICC 109, 123 (1975) (“a reduction in transit times will result by reducing time-consuming and costly interchanges”), Burlington Northern, Inc —Control and Merger—St. Louis-San Francisco Ry Co., 360 ICC 788, 807 (1980) (finding significant cost savings from the elimination of interchanges), Burlington Northern Inc et al — Control and Merger—Santa Fe Pac Corp et al., 10 ICC 2d 661, 741 (1995) (“Interchanges between railroads can be costly”), CSX Corp et al —Control and Operating Leases/ Agreements—Conrail Inc et al., 3 STB 196, 245 (1998) (“Cost savings may include elimination of interchanges”), Canadian National Ry Co et al —Control—Illinois Central Corp et al., 4 STB 122, 139 (1999) (same). By way of example, the small volume of Dow's Ludington traffic that currently moves via an NSR routing can take at least two days to move 100 yards via CSX I' at Grand Rapids from MQT to NSR. The proposed transaction would add another such interchange at Elkhart Junction, with all the associated costs and delays.

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NSR itself offered a reduction in interchanges as a public benefit to justify its acquisition of Conrail, in conjunction with CSXT

Another public benefit cited by the Applicants is that the proposed Acquisition would result in a substantial reduction of costly and time-consuming rail traffic interchange that now slows operations as freight moves between the existing Conrail, CSX, and NS systems

Proposed Conrail Acquisition, Finance Docket No. 33388, 1998 STB LEXIS 1541, *12 (served May 22, 1998) That transaction ultimately resulted in NSR's acquisition of the very same lines it now seeks to divest to MCR, resulting in an increase in interchanges

The ICC rejected a railroad acquisition in Guilford Transp Industries, Inc —Control— Boston and Maine Corp., 366 ICC 294 (1982), because it would have increased the number of interchanges Specifically, the ICC rejected a competing application on the grounds that, "since substantial traffic carried over this line terminates on the B&M system, acquisition of the line by P&W would increase the number of interchanges (and resulting interchange costs) required to handle these movements " Id at 355

It stands to reason that, if a reduction in interchanges reduces costs and delays, an increase will have the opposite effect Thus, the increased number of interchanges resulting from the proposed line sale will have an adverse impact upon the competitiveness of NSR, which is contrary to the public interest This impact is particularly troublesome in this case because NSR's ability to compete for MQT-originated traffic already is delicate and could easily be destroyed by this single impact

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III. Without Appropriate Conditions, MCR Cannot Meet the Requirements of 49 U.S.C. § 10502 for an Exemption from 49 U.S.C. § 10901.

The requirements for granting an exemption under 49 U S C § 10502(a) are not satisfied by the facts of this transaction. The statute requires the Board to grant an exemption from Section 10901 if the application of that statute.

(1) is not necessary to carry out the transportation policy of section 10101 of this title, and

(2) either—

(A) the transaction or service is of limited scope, or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power

The statute is needed to carry out the pro-competitive transportation policies at 49 U S C § 10101(1), (4), (5), (7) and (12), because otherwise existing competition would be reduced and in all probability eliminated. Furthermore, this transaction is not limited in scope, since it impacts 299 miles of Class I rail line and would create a new Class II railroad. Moreover, regulation is necessary to protect shippers such as Dow from an abuse of market power that would result from NSR's inability to compete effectively for MQT-originated traffic at Grand Rapids, since NSR no longer would be an effective constraint upon CSXT's pricing.

However, as part of its authority to approve this transaction under 49 U S C § 10901, the Board may require compliance with conditions that it deems to be necessary in the public interest. 49 U S C. § 10901(c). Thus, with appropriate conditions, Dow's concerns can be readily addressed, thereby allowing this transaction to satisfy the statutory requirements for an exemption.

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**IV. The Board Can Preserve the Competitive Status Quo
By Conditioning Its Approval Upon Construction of a Direct Connection Between MQT
and NSR at Grand Rapids.**

The competitive status quo can be preserved by imposing a very basic and feasible condition upon the proposed line sale. Currently, all MQT-originated traffic must be handled by two carriers, MQT and CSXT, before reaching NSR. After the proposed transaction, three carriers, MQT, CSXT and CMR, would handle the traffic prior to an NSR interchange. However, there is an easy way to eliminate CSXT from this routing by constructing a short, approximately 1700 foot, connection between MQT and NS at Grand Rapids.

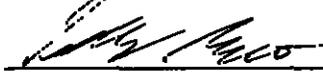
Exhibit 1 is a drawing of the current track layout where the NSR, CSXT and MQT tracks converge in Grand Rapids. MQT's track (the blue line) terminates at a direct connection with CSXT's track (the yellow line) on the north side of Turner Street. The NS Track (the dark green line) terminates at the NS North Yard, just a short distance south of Turner Street. The light green line shows the alignment of a potential build-in to MQT by NS. This build-in would eliminate both the extra handling of MQT-originated traffic by CSXT at Grand Rapids and the \$105 per car switch charge currently assessed by CSXT in both directions to link MQT with NSR. The end result is the same number of interchanges currently required to route MQT-originated traffic over the NSR.

MQT has informed Dow that its lease and operating agreements with CSXT would permit MQT to interchange directly with NSR, or CMR, via this new connection. Furthermore, the short strip of land needed for this new construction is vacant and undeveloped. If the current owner is unwilling to sell, it could be acquired by eminent domain. Mich. Comp. Laws § 462.250. MQT has estimated that total construction costs would approximate \$324,000 plus land acquisition costs.

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I therefore, Dow requests that the Board condition its approval of this transaction upon the construction by CMR and/or NSR of a direct connection at Grand Rapids between MQI and the NSR track to be acquired by CMR

Respectfully submitted,



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September 18, 2007

Counsel for The Dow Chemical Company

CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of September, 2007, served a copy of the *foregoing Comments on all parties of record, by first class mail, postage prepaid*

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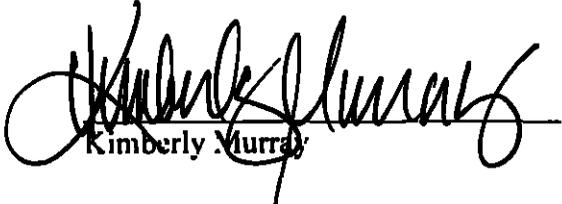
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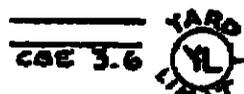
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Exhibit 1

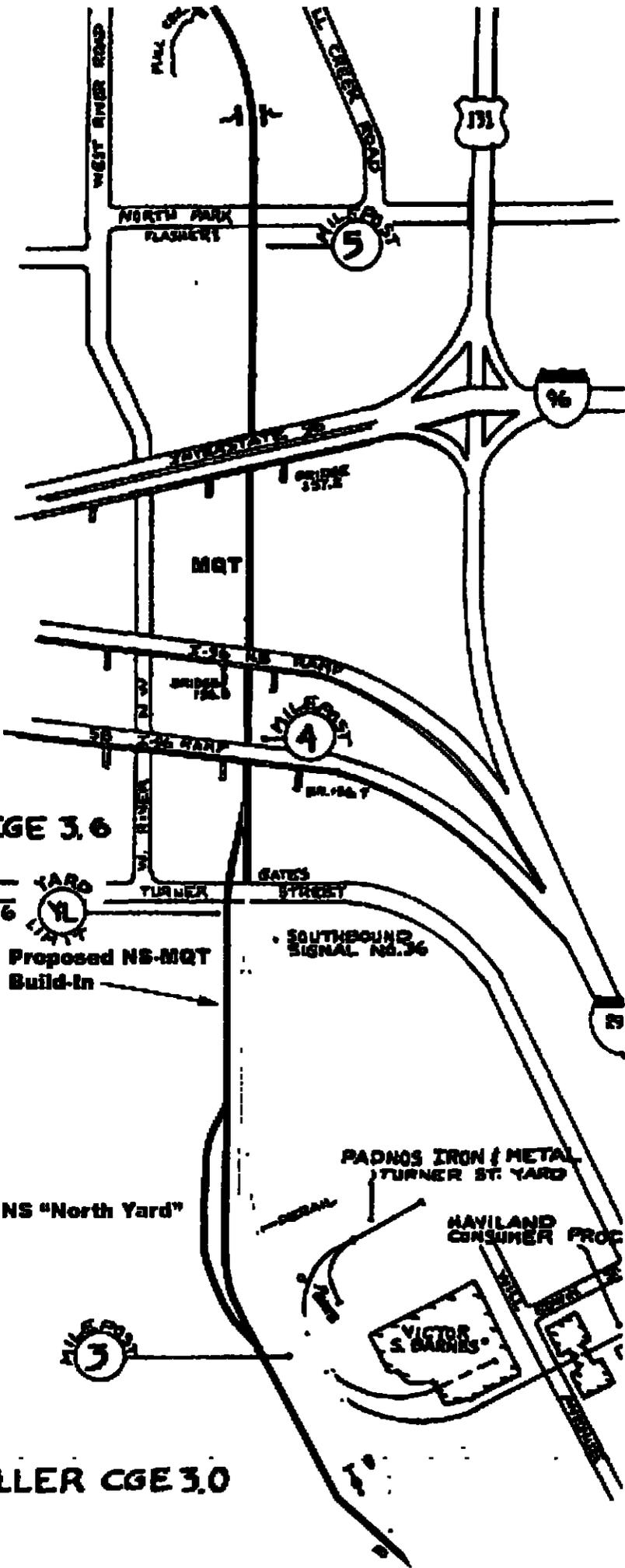
TURNER ST. CGE 3.6



**Proposed NS-MQT
Build-in**

NS "North Yard"

FULLER CGE 3.0



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