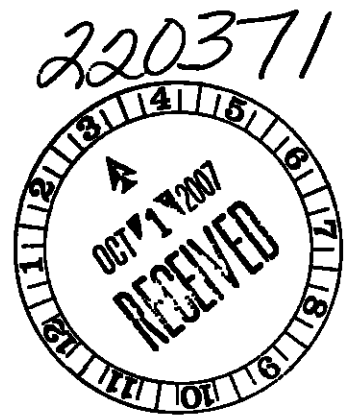


**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35063



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

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY
COMMENTS IN SUPPORT OF PETITION FOR EXEMPTION**

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Dated October 1, 2007

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Norfolk Southern Railway Company ("Norfolk Southern") submits these Reply Comments in support of the Petition for Exemption ("Petition") filed by Michigan Central Railway, LLC ("Michigan Central") on July 13, 2007, seeking an exemption under 49 U.S.C. § 10502 with regard to its proposed acquisition and operation of certain Norfolk Southern rail lines in Michigan and Indiana.

Norfolk Southern strongly supports the requested exemption. As described in the Petition, the proposed transaction will facilitate additional capital investments in the rail lines at issue, allowing Michigan Central to operate these rail lines safely and efficiently, and to provide continued and improved rail service to shippers. Michigan Central's binding agreements with the National Railroad Passenger Corporation ("Amtrak") guarantee that these capital investments, totaling at least \$23 million, will occur as scheduled. Amtrak's support of the proposed transaction demonstrates that any concerns regarding Michigan Central's ability to maintain the rail lines at issue have been addressed and resolved to Amtrak's satisfaction.

Moreover, the proposed transaction will have no adverse effect on competition. No shipper will lose competitive rail service, and there will be no reduction in the number of rail

carriers serving any shipper or interchange point. Thus, there is no basis in fact for any claim that any interested party will suffer competitive harm as a result of the proposed transaction.

Michigan Central's Petition and Reply Comments describe in detail how the proposed transaction is consistent with the public interest and satisfies the statutory criteria for exemption under 49 U.S.C. § 10502. Norfolk Southern endorses and supports these conclusions.

Norfolk Southern's Reply Comments focus primarily on the filing by Marquette Rail, LLC, seeking the imposition of certain conditions on the proposed transaction. Marquette Rail's submission is seriously misleading and factually wrong in a number of important respects. Norfolk Southern believes that the requested conditions are unwarranted and inappropriate, and cannot be justified by the facts of this case or by any precedent in any similar proceeding.

I. MARQUETTE RAIL'S ALLEGATIONS AND REQUESTED CONDITIONS

Marquette Rail alleges that the proposed transaction would "drastically degrade Marquette Rail's ability to provide and maintain competitive interline options for its shippers," and would adversely affect "the adequacy and competitiveness of rail transportation" available to those shippers. Marquette Rail Comments at 7.

Marquette Rail seeks several conditions that allegedly would redress these effects. First, Marquette Rail requests that Michigan Central "should be required to participate with Marquette Rail in the construction of [a] previously-planned connector in Grand Rapids, with each party responsible for the construction expenses on its right-of-way." Marquette Rail Comments at 16-17. In effect, according to Marquette Rail, this means that Michigan Central would be required to pay 90 percent of the construction cost. Verified Statement of Kevin Ruble ("Ruble V S ") at 5.

Second, Marquette Rail argues (at 19) that it “must be allowed to ‘follow’ NS to Elkhart by obtaining overhead trackage rights on the NS/MCR Grand Rapids-Elkhart line for such purposes.” In the alternative, Marquette Rail seeks (at 20) a condition requiring Michigan Central to provide haulage service to Marquette Rail for Norfolk Southern interline traffic between Grand Rapids and Elkhart, at certain allegedly “reasonable” rates specified by Marquette Rail, and to be imposed by the Board

Despite Marquette Rail’s suggestions to the contrary, Michigan Central will have every incentive to compete vigorously for business on the lines at issue, and the proposed transaction will not result in any loss of competition or any reduction in the number of competitors serving any shipper or interchange point. Moreover, there is no factual or legal basis for the relief Marquette Rail seeks. Marquette Rail’s description of the alleged “arrangements” between it and Norfolk Southern is factually incorrect, and its “estimate” of the construction cost for its proposed connecting track is both unsupported and unrealistic. In addition, Marquette Rail’s vague description of the actual and potential traffic volumes that have moved over the route at issue is seriously misleading. Norfolk Southern addresses each of these points in the following sections.

II. MARQUETTE RAIL AND THE CONRAIL TRANSACTION

Marquette Rail sets the tone for its comments by accusing Norfolk Southern of failing to live up to the “promises and representations” Norfolk Southern made in connection with its joint acquisition (with CSX Transportation, Inc. (“CSXT”)) of control of Consolidated Rail Corporation.¹ Marquette Rail asserts that Norfolk Southern is “abandoning” service to important industrial areas in Michigan, and “the former Conrail’s major presence in Michigan is

¹ See *CSX Corp., et al —Control—Conrail Inc., et al*, 3 S I B 196 (1998) (“*Conrail*”), *aff’d sub nom Erie-Niagara Rail Steering Committee v STB*, 247 F.3d 437 (2d Cir. 2001)

being eliminated” Marquette Rail Comments at 2-3. Ruble V S. at 3 (alleging that Norfolk Southern proposes to “abandon Grand Rapids and, in fact, abandon nearly the entire State of Michigan”) According to Marquette Rail (at 2-3), the very purpose of the Conrail transaction – to bring strong two-carrier competition to many areas that had not experienced that competition under Conrail – will be undermined by the Michigan Central transaction

These claims are nonsense. The transfer of the Michigan Central lines affects less than 10 percent of Norfolk Southern’s Michigan traffic. No rail lines or rail service will be “abandoned” as a result of the proposed transaction; to the contrary, Michigan Central’s new capital investments in the rail lines at issue (totaling more than \$23 million in the first five years) will promote continued and improved rail service over all of its lines in Michigan and Indiana.

Moreover, the proposed transaction will have no effect on the pro-competitive benefits created by the Conrail transaction. The Conrail transaction produced, and continues to produce, a number of public benefits, including those associated with the creation of the three Shared Assets Areas, introducing direct, head-to-head competition between Norfolk Southern and CSX I in three major metropolitan areas -- including Detroit -- that were previously served by Conrail alone. *See Conrail*, 3 S.T.B. at 333 (the “most important public benefit resulting from the transaction will be a substantial increase in competition [which will allow] both CSX and NS to serve where only Conrail served before [and which] will bring new competition to shippers in such markets as ... Detroit”). The proposed Michigan Central transaction does *not* involve the Detroit Shared Assets Area, which will continue to be served by both Norfolk Southern and CSXT, and will continue to benefit from direct, two-carrier competition.

Another public benefit from the Conrail transaction arose from the expansion of the Norfolk Southern and CSXT systems, which “enable[d] them to provide more competitive

single-line service over more direct routes, to render improved service, and to use equipment more efficiently.” *Id.* Marquette Rail argues that its shippers will be deprived of the benefits of single-line service created by the Conrail transaction. At the time of the Conrail transaction, however, Marquette Rail’s line was part of the CSXT system (and had been since 1947, when the former Pere Marquette Railroad merged with the Chesapeake and Ohio Railway). These shippers already had single-line access to the entire CSX1 system before the Conrail transaction occurred, and their access to CSXT was unaffected by that transaction.

In sum, shippers on the (current) Marquette Rail lines did *not* gain new competitive rail service as a result of the Conrail transaction, and they already benefited from single-line CSX1 service even before that transaction occurred.² Marquette Rail itself did not exist, and was not created until more than seven years after the Conrail transaction was approved. STB Finance Docket No. 34728. *Marquette Rail, LLC- Lease and Operation Exemption—CSX Transportation, Inc* (served October 26, 2005). Rhetorical flourishes aside, with regard to customers located on Marquette Rail’s lines, the Conrail transaction benefits are not affected by the Michigan Central transaction.

III. MARQUETTE RAIL’S ALLEGED “ARRANGEMENTS” WITH NORFOLK SOUTHERN

As described above, there is no direct physical connection between Marquette Rail and Norfolk Southern at Grand Rapids. In fact, there has never been a direct connection between the two carriers at any time since Marquette Rail’s creation; interchange between the

² While Norfolk Southern agrees that the benefits of the Conrail transaction have been many, Marquette Rail’s attempt to tie the current competitive situation for Marquette Rail customers directly to the Conrail transaction has no merit. *Ruble V S.* at 3 (“In short, for shippers on Marquette Rail’s line, the Conrail transaction has worked.”)

two carriers at Grand Rapids can only be accomplished through an intermediate switching movement handled by CSXT

Despite this fact, Marquette Rail repeatedly attempts to obscure or misrepresent the current status of its rail interchange with Norfolk Southern. For example, Marquette Rail states (at 6) that the proposed transaction “severs Marquette Rail’s connection with NS,” when no such connection currently exists. Marquette Rail also describes the existing interchange (at 10) as a “two-carrier movement (MQT-NS),” when in fact the existing interchange requires three carriers (MQT-CSXT-NS). Marquette Rail repeatedly refers to the proposed transaction as a “2-to-3” transaction, when three carriers are already involved in the movement at issue. Marquette Rail Comments at 10, 12, 13, 16, 17, 18, 19, 20

Perhaps most egregiously, Marquette Rail’s President, Kevin Ruble, states that the current interchange provides Marquette Rail shippers with “direct access” to Norfolk Southern, and refers to the requested conditions as “maintaining our *direct connection* with NS.” Ruble V S. at 8 (emphasis added). Mr. Ruble surely has personal knowledge that there is no such “direct access” and no “direct connection” to maintain. In addition, most of the shipper statements submitted in support of the requested conditions also repeatedly refer to the existing interchange as a “direct connection.” See, e.g., Marquette Rail Comments, Exhibit D (Dow Chemical Co.) at 1, 2; Exhibit E (Packaging Corp. of America) at 1, 2; Exhibit G (Seng Dock and Trucking) at 1, 2. Marquette Rail’s repeated references to an alleged “direct connection,” where no such connection exists, are misleading and should be disregarded.

Marquette Rail also misrepresents certain conversations between it and representatives of Norfolk Southern that occurred at various times since Marquette Rail’s creation. According to Marquette Rail’s version of these conversations, “Marquette Rail and NS

have developed arrangements for construction of a short, 1,700-foot track near Turner Street in north Grand Rapids that would provide a direct connection between Marquette Rail and NS trackage at that location.” Marquette Rail Comments at 6.

This assertion is false. Marquette Rail and Norfolk Southern have not developed arrangements for the construction of any direct connection between them in Grand Rapids. Although Norfolk Southern and Marquette Rail have had informal conversations regarding the *possibility* of constructing such a connection, the parties never reached any agreement (whether formal, informal, preliminary or tentative) regarding Marquette Rail’s proposal. In addition, Norfolk Southern has not conducted any formal site surveys, engineering studies, detailed cost estimates, or any other formal documentation that could be considered as “arrangements” for such a construction project.

Marquette Rail also states that these “arrangements” between the parties “were nearly complete,” but that they have now “been shelved,” allegedly as a result of the proposed transaction. *Id.* These alleged “arrangements,” however, were not “nearly complete,” because they were never begun. As described above, the various conversations between the parties regarding the project never proceeded past the phase of preliminary discussions.³

In any event, regardless of how Marquette Rail chooses to characterize these conversations, the simple fact is that no agreement between the parties was ever reached, and the connecting track under discussion was never built. Marquette Rail’s attempt to elevate the

³ Marquette Rail’s witness Ruble goes so far as to allege that Norfolk Southern’s proposed transaction with Michigan Central “inappropriately stymied discussions regarding the direct connection” between Marquette Rail and Norfolk Southern, and argues that such “stymied discussions . . . should not be tolerated.” Ruble V S. at 5. But apart from that assertion, Ruble does not describe anything remotely “inappropriate” regarding Norfolk Southern’s discussions with either Marquette Rail or Michigan Central.

parties' discussion of the possibility of constructing a connecting track into "arrangements" that were "nearly complete" should be rejected as the bootstrap argument that it is

Marquette Rail also offers an unsupported estimate of the cost of constructing a direct connection between it and Norfolk Southern. This estimate consists, in its entirety, of a statement by Mr. Ruble that the proposed connection would cost "about \$324,000." Ruble V S at 5. Neither Mr. Ruble nor any other witness offers any additional support or details regarding how this estimate was derived. Apart from these two words, there is no evidence regarding the potential cost of this construction project. Norfolk Southern submits that the Board cannot, and should not, base any action or award any relief on such a thin reed. Marquette Rail's failure to support its construction cost estimate with any substantial evidence provides sufficient -- indeed compelling -- reason to deny its requested relief.⁴

IV. CURRENT AND FORESEEABLE TRAFFIC VOLUMES DO NOT SUPPORT THE REQUESTED RELIEF.

Marquette Rail acknowledges (at 5) that "little or no traffic" has moved over the routing at issue in the past. Nonetheless, Marquette Rail asserts that in the less than two years

⁴ Many statements made by Marquette Rail concerning this connection seem to be made without a scintilla of support, or are demonstrably wrong. Marquette Rail claims (at 16) that the connection was "previously-planned." It was not. Marquette Rail claims that the connector "would be located entirely on existing railroad right-of-way, [and] presents no engineering or land acquisition issues." *Id.* at 17. The map attached to Mr. Ruble's verified statement shows a connector route traversing a four lane road (Turner Street), and Marquette Rail presents no engineering work or land acquisition analysis. Marquette Rail states that the connection would "result in no operational issues or revenue impacts on MCR." *Id.* Again, Marquette Rail provides no support for this statement (which, of course, is itself misleading, as it discusses "revenue impacts" without a concomitant discussion of the impact of capital and continuing maintenance costs, and whether projected revenues from the construction of the connection would offset those increased costs). Marquette Rail makes unsupported or incorrect claims concerning other aspects of the proposed Michigan Central transaction as well. *See, e.g.*, Ruble V.S. at 7, 9 (incorrectly describing the nature of Norfolk Southern's trackage rights), *id.* at 8 (stating without support that there are "no abnormal difficulties" in Marquette Rail's proposed trackage rights operations over 100 miles of Michigan Central's lines).

since its creation, it has “somewhat successfully” worked to develop interline traffic movements with Norfolk Southern via the Grand Rapids routing, and that “some traffic” has begun to move via this interchange. Marquette Rail offers a number of vague but optimistic assertions, indicating that its shippers have been “actively looking” to expand traffic movements via this routing. *Id*

Marquette Rail submits several shipper support statements purporting to relate to the amount of traffic involved. One of those comes from Dow Chemical Company, which is, according to its statement, the world’s largest producer of calcium chloride. Dow states that its sole manufacturing facility for this product is in Ludington, Michigan, served by Marquette Rail, and states that this facility originates approximately 4,800 cars of calcium chloride annually. Packaging Company of America (“PCA”) also submits a support statement, noting (at 1) the approximately 4,000 cars that it ships annually from its Filer City, Michigan, plant located on Marquette Rail’s line “to interchanges at Grand Rapids with NS and CSX.” Martin Marietta Magnesia Specialties submitted a similar statement, stating that its sole manufacturing facility for the production of magnesium hydroxides and magnesium oxides is located on Marquette Rail’s line, and that it receives approximately 2,000 cars per year of raw materials and ships approximately 2,000 more cars of products to customers and terminals throughout North America.

Despite these seemingly large traffic flows, and superlative claims by Marquette Rail of the “increasing carloadings” that are moving via Norfolk Southern, and of Marquette Rail’s desires to expand those numbers “well beyond existing levels,” *Ruble V S*, at 2-3,⁵ Marquette Rail provides no evidence of any kind regarding the number of cars that have actually

⁵ See also *Ruble V S* at 6 (discussing unit train movements)

moved through the Marquette Rail interchange in the past two years, or at any other time.

Likewise, neither Marquette Rail nor its shippers offer any estimate of the amount of traffic that might be expected to move via this routing in the future, whether or not the proposed connecting track were to be constructed.

This reticence is not surprising. According to Norfolk Southern's traffic data, only a relative trickle of cars has moved from Marquette Rail to Norfolk Southern via Grand Rapids. Norfolk Southern's records show that only a total of 21 rail cars moved via this routing in 2005 after Marquette Rail's creation in October of that year, while a total of 52 cars moved via this routing in 2006, and a total of 175 cars from only four shippers were shipped through this interchange through September 20, 2007. The shipper statements cited above collectively discuss the movement of over 12,800 cars annually. With the exception of Cal-Chlor Corporation, none of the other shippers submitting support statements discusses the level of its current traffic flows. Cal-Chlor notes that it moves an average of 3 to 4 boxcars per month.

What Marquette Rail fails to discuss is that there has been, and continues to be, substantial rail traffic interlined between Marquette Rail and Norfolk Southern via other interchanges, and that this traffic will *not* be affected by the proposed transaction. In fact, since Marquette Rail's creation, shippers on Marquette Rail have shipped a total of 248 cars via the interchange with Norfolk Southern at Grand Rapids, while interlining 3,871 cars – nearly 16 times as many – with Norfolk Southern via other interchanges. It is apparent that Marquette Rail simply wants to increase its share of revenue of the joint MQI-CSXI-NS movements by eliminating CSXT's involvement in the movement.⁶ While this may benefit Marquette Rail,

⁶ This analysis also throws into question Mr. Ruble's claims that "NS would get the 'lion's share' of resulting traffic benefits [from the construction of the proposed connection] (as

imposition of conditions mandating construction of an improved connection in Grand Rapids at Michigan Central's expense is unwarranted.

In the unlikely event that significant traffic did appear likely to move over this routing, it is important to note that Marquette Rail and Michigan Central would be free to negotiate the construction of the connecting track at any point in the future, based on the relevant data and foreseeable traffic volumes. The minuscule traffic volumes interchanged between Norfolk Southern and Marquette Rail at Grand Rapids are not currently sufficient to support the construction and continued maintenance of the connection tracks. But if such a transaction made economic sense, both Marquette Rail and Michigan Central would have every incentive to pursue it. There is simply no proper basis for the imposition of a condition on this transaction, requiring Michigan Central to bear nearly all of the cost of constructing this track.

V. THE REQUESTED TRACKAGE RIGHTS ARE UNWORKABLE, AND WOULD NOT PROVIDE THE ROUTE SOUGHT.

Marquette Rail requests the ability to "follow" Norfolk Southern to Elkhart, and proposes the connection and granting of new trackage rights to allow it to do so. However, Marquette Rail ignores the fact that the connection would permit Marquette Rail to operate only as far as Norfolk Southern's North Yard in north Grand Rapids. Norfolk Southern's only access to this yard is via trackage rights over CSXT-owned and operated trackage between Turner Street and Pleasant Street interlocking, a distance of about 5.1 miles. To reach the Norfolk Southern line south to Kalamazoo and Elkhart, Marquette Rail would need to use this CSXT trackage. However, Marquette Rail does not have trackage rights over the entire length of CSXT

Marquette Rail would move the traffic regardless of whether it is routed via NS or CSX) " Ruble V S at 5

trackage needed to reach Norfolk Southern. and where it does have trackage rights, those rights are for the sole purpose of interchanging with CSXT

Neither Norfolk Southern nor Michigan Central could grant trackage rights to Marquette Rail over the CSXT tracks. even if the Board imposed a condition requiring them to do so. Because CSXT is not a party to this proceeding, such relief cannot be granted

CONCLUSION

For all of the foregoing reasons, Norfolk Southern supports Michigan Central's requests for an individual exemption from regulation for its proposed acquisition of the rail lines at issue.

Respectfully submitted,



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Dated: October 1, 2007

CERTIFICATE OF SERVICE

I hereby certify this 1st day of October, 2007, that I have caused the foregoing to be served by first class mail, postage pre-paid, on all parties of record in STB Finance Docket No 35063.

Math Wolf ---

VERIFICATION

I, Marcellus C. Kirchner, verify under penalty of perjury that I am Director Strategic Planning of Norfolk Southern Corporation, that I am qualified and authorized to make this Verification on behalf of Norfolk Southern Railway Company, and that I have read the foregoing "Norfolk Southern Railway Company's Reply Comments in Support of Petition for Exemption," and know that the facts asserted therein are true and correct to the best of my knowledge, information and belief

Executed on October 1, 2007



Marcellus C. Kirchner