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SERVICE DATE – DECEMBER 30, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND  
MISSOURI PACIFIC RAILROAD COMPANY  
– CONTROL AND MERGER –  
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND  
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Decision No. 107

Digest:<sup>1</sup> This decision denies a petition for reconsideration of the Board’s December 20, 2013 decision in this proceeding, finding that the petitioners have failed to show that the Board committed material error.

Decided: December 29, 2014

In a decision served on December 20, 2013, the Board denied a joint petition from BNSF Railway Company (BNSF) and G3 Enterprises (G3) requesting enforcement of the Board’s decision in Union Pacific Corporation – Control & Merger – Southern Pacific Rail Corp. (Decision No. 44), 1 S.T.B. 233 (1996), which approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (collectively, UP) and the rail carriers controlled by Southern Pacific Rail Corporation (collectively, SP). In their September 2012 joint petition, BNSF and G3 asked the Board to direct UP to “restore” competitive rail service to a G3 facility (formerly a Procter & Gamble facility) in Modesto, Cal. (the Modesto facility), by allowing BNSF to serve the facility under a reciprocal switching arrangement.<sup>2</sup> The Board denied the BNSF/G3 petition, concluding that it failed to state a claim for which the requested relief may be granted.<sup>3</sup> BNSF and G3 now ask the Board to reconsider the denial of their

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> See BNSF/G3 Amended Pet. 1-3, Sept. 13, 2012. Under the reciprocal switching arrangement, Modesto and Empire Traction Company (MET) would switch traffic to and from the facility to BNSF.

<sup>3</sup> Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp. (Decision No. 106), FD 32760, slip op. at 7 (STB served Dec. 20, 2013).

petition for enforcement of Decision No. 44.<sup>4</sup> For the reasons discussed below, the Board will deny the petition for reconsideration.

## BACKGROUND

As discussed in greater detail in Decision No. 106, a key condition to the Board's approval of the UP/SP merger in Decision No. 44 was its adoption of the "BNSF Agreement," which "permits BNSF to serve all shippers who would otherwise go from two directly serving carriers [UP and SP] to one [the merged UP/SP entity]."<sup>5</sup> The Board concluded that the BNSF Agreement, along with the other conditions it imposed, sufficiently mitigated potential harm to such 2-to-1 shippers.<sup>6</sup> The Board also required that UP and SP adhere to all merger-related representations regarding the extent of coverage and services following the UP/SP merger.<sup>7</sup>

Prior to the merger, the Modesto facility was owned by Procter & Gamble (P&G) and was served directly by UP and indirectly – via reciprocal switching on MET – by SP and BNSF.<sup>8</sup> G3 purchased the Modesto facility from P&G in June 2001, five years after the merger.<sup>9</sup> At that time, P&G was listed in UP's switching tariff as the beneficiary of reciprocal switching.<sup>10</sup> In 2011, UP removed P&G from the tariff's list of customers open to reciprocal switching<sup>11</sup> and, in March 2012, denied BNSF's notice of intent to serve the Modesto facility via reciprocal switching.<sup>12</sup>

BNSF and G3 sought "enforcement" of Decision No. 44, asserting that the closure of the Modesto facility to reciprocal switching conflicted with Decision No. 44 and UP's merger-related representations. In particular, BNSF and G3 claimed that UP's actions would leave a facility that had been served by three carriers pre-merger (UP, SP, and BNSF) with only one serving carrier today (UP). BNSF and G3 argued that this change violated Decision No. 44's condition that the merger not reduce multi-carrier service to single-carrier service.<sup>13</sup> BNSF and G3 also argued that UP had failed to adhere to its December 1995 representation to MET that UP

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<sup>4</sup> BNSF/G3 Pet. 2, Jan. 9, 2014.

<sup>5</sup> Decision No. 44, 1 S.T.B. at 368; see also id. at 247 n.15.

<sup>6</sup> Id. at 368.

<sup>7</sup> Id. at 246 n.14.

<sup>8</sup> BNSF/G3 Amended Joint Pet. 3, Ex. B, Sept. 13, 2012; Oral Argument Tr. 16-17, Jan. 15, 2013.

<sup>9</sup> BNSF/G3 Amended Joint Pet. 3.

<sup>10</sup> Id. at 4-5, Ex. A.

<sup>11</sup> Id. at 5, Ex. E.

<sup>12</sup> Id. at 5, Ex. F, Ex. G.

<sup>13</sup> Id. at 6-7.

would not diminish the switching district of Modesto, California, or close customers listed in the then-current switching tariff to reciprocal switching.<sup>14</sup>

Following an oral hearing, the Board denied the petition for enforcement in Decision No. 106, because UP, BNSF, and G3 had acknowledged that, at the time of the merger, the Modesto facility was not a 2-to-1 point and the Modesto district was not a 2-to-1 location.<sup>15</sup> The Board therefore concluded that BNSF and G3 had failed to establish that UP's actions were contrary to Decision No. 44 or that the alleged harm was a direct result of the UP/SP merger.<sup>16</sup> The Board further found that UP had not failed to adhere to the merger-related representations in its December 1995 letter to MET, because the Modesto switching district (which is defined geographically) had not been diminished, and G3 (unlike P&G) was never a "present open customer" listed in UP's reciprocal switching tariff.<sup>17</sup>

On January 9, 2014, BNSF and G3 filed a petition for reconsideration, arguing that the Board committed material error by failing to "fully consider" the argument that UP's closure of the Modesto facility to reciprocal switching violated both (1) the "purpose and intent" of the Board's merger conditions in Decision No. 44 and (2) UP's representations at the time of the merger.<sup>18</sup> First, BNSF and G3 assert material error on the ground that, in their view, UP's closure of the Modesto facility to reciprocal switching violated the Decision No. 44 principle that "facilities receiving multi-carrier service before a merger must continue to receive at least two-carrier service after the merger."<sup>19</sup> Second, BNSF and G3 argue that UP's actions conflict with statements made by UP employees during the merger proceeding that competition by two carriers would be preserved at all locations and strengthened at all 3-to-2 locations.<sup>20</sup>

On January 29, 2014, UP filed a reply in opposition to BNSF and G3's petition for reconsideration. UP argues that G3 did not lose any competition as a result of the merger, because it did not acquire the Modesto facility until five years later.<sup>21</sup> UP states that it did not promise, and the Board did not require, the preservation of two-carrier service for all 3-to-2

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<sup>14</sup> Id. at 3, 5-6.

<sup>15</sup> See Decision No. 106 at 7 (citing Oral Argument Tr. 15-16, 28-29); Oral Argument Tr. 37-38, 51-52.

<sup>16</sup> Decision No. 106 at 7-8, Dec. 20, 2013.

<sup>17</sup> Id. at 8-9. ("Because the switching obligation expressly ran to P&G, and not to the property itself, UP was under no obligation to continue to keep the Modesto facility open to reciprocal switching.")

<sup>18</sup> BNSF/G3 Pet. 2-3, Jan. 9, 2014.

<sup>19</sup> Id. at 2, Jan. 9, 2014; see also id. at 5-6, 12.

<sup>20</sup> Id. at 6-10, Jan. 9, 2014.

<sup>21</sup> UP Reply 2-3, Jan 29, 2014.

shippers as a condition of the merger.<sup>22</sup> UP thus concludes that no merger conditions or representations were violated by UP's refusal to include G3 in its reciprocal switching tariff.<sup>23</sup>

## DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; *see also* W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008). Where, as here, a petition alleges material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. *See* Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error, but merely restated arguments previously made and cited evidence previously submitted). The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected. *See* Canadian Nat'l Ry.—Control—EJ&E West Co., FD 35087 (Sub-No. 8), slip op. at 8 (STB served Nov. 8, 2012).

Decision No. 106 was the product of a careful Board review of the arguments and evidence. Because we find no material error in the Board's prior analysis, the petition for reconsideration will be denied.

### The Board's Decision No. 44:

BNSF and G3 argue that the Board erred by not “fully” considering their argument that UP's actions are inconsistent with Decision No. 44.<sup>24</sup> Specifically, BNSF and G3 argue that the Board ignored a “bedrock principle” of Decision No. 44, namely, that UP cannot take actions post-merger to eliminate competitive service to any shipper facility – including facilities that were 3-to-2 points at the time of the merger.<sup>25</sup> The Board, however, considered and rejected this argument in Decision No. 106.<sup>26</sup> There, the Board acknowledged petitioners' argument that “the [Modesto] facility is entitled to competition in perpetuity as a result of the conditions imposed in the UP/SP merger” because the Modesto facility “had competition pre-merger” (i.e., competition resulting solely from the reciprocal switch).<sup>27</sup> However, the Board could not extend the competitive protections of the BNSF Agreement to a shipper or facility that was undisputedly *not* a 2-to-1 point as a result of the merger, because Decision No. 44 adopted the BNSF Agreement

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<sup>22</sup> Id. at 3-5.

<sup>23</sup> Id. at 6-7.

<sup>24</sup> BNSF/G3 Pet. 5-6, Jan. 9, 2014.

<sup>25</sup> BNSF/G3 Pet. 5, Jan. 9, 2014.

<sup>26</sup> *See* Decision No. 106 at 5-6, 7-8.

<sup>27</sup> Id. at 6.

in order to preserve competition only for 2-to-1 points.<sup>28</sup> Although the number of carriers serving the Modesto facility (both directly and indirectly) went from 3 to 2 with the absorption of SP into UP as a result of the merger, the subsequent reduction from 2 to 1 was not a result of the merger. Indeed, BNSF and G3 have not—at any time since the initiation of this proceeding—disputed the fact that G3 was never included on UP’s switching tariff as entitled to reciprocal switching.<sup>29</sup> Had the merger never taken place, UP could have refused to extend the reciprocal switch to G3.<sup>30</sup> Moreover, G3 purchased the Modesto facility five years after the UP/SP merger had been consummated and at no point enjoyed the competitive alternatives it now claims to be denied.<sup>31</sup>

Thus, the Board properly found in Decision No. 106 that BNSF and G3 “made no showing that UP’s actions are contrary to Decision No. 44 or that the harm alleged is a direct result of the UP/SP merger.”<sup>32</sup>

UP’s Merger-Related Representations:

With respect to their argument that UP did not adhere to its merger-related representations, BNSF and G3 no longer rely primarily on UP’s December 1995 letter to MET, as they did in their petition for enforcement.<sup>33</sup> Rather, petitioners now rely principally on statements made by various UP employees and consultants at the time of the merger in support of UP’s merger application, many of which petitioners raised for the first time in the petition for reconsideration. Even if the Board were to consider all of these statements, including those that were not raised prior to the Board’s Decision No. 106, it would not lead us to a different outcome.

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<sup>28</sup> Id. at 7-8. In Decision No. 44, the Board was concerned with the preservation of competition at locations where access to competitive rail service would go from 2-to-1 as a result of the UP/SP merger. The Board considered, but rejected, the argument that the UP/SP merger would cause competitive harm at 3-to-2 locations. See Decision No. 44 at 368-69, 390.

<sup>29</sup> See Decision No. 106 at 8-9.

<sup>30</sup> See id. at 9 (“UP was under no stated obligation to continue to keep the Modesto facility open to reciprocal switching, once P&G sold the facility five years after the merger.”).

<sup>31</sup> As found in Decision No. 106, G3 acknowledged at oral argument that it had not attempted to use reciprocal switching since it purchased the Modesto facility in 2001. Oral Argument Tr. 12; Decision No. 106 at 5.

<sup>32</sup> Decision No. 106 at 8.

<sup>33</sup> In Decision No. 106, the Board fully considered petitioners’ argument that UP violated the representations of its December 1995 letter to MET and found that it was without merit, particularly given petitioners’ concession that UP had lived up to its written representations to MET. Decision No. 106 at 6, 8-9. Petitioners’ petition for reconsideration acknowledges the Board’s conclusion and does not challenge it. See BNSF/G3 Pet. at 4, Jan. 9, 2014.

BNSF and G3 assert that these statements constitute binding representations that UP would preserve at least two-carrier competition at all 3-to-2 facilities.<sup>34</sup> However, BNSF and G3 mischaracterize UP's statements or do not account for the context in which they were made. For example, when UP's then-President and Chief Operating Officer Richard K. Davidson stated that UP "would not allow a single shipper to lose a choice between two railroads," he was referring to "locations where UP and SP provided the only rail service" at the time of the merger (i.e., 2-to-1 locations). BNSF/G3 Pet., Ex. B, at 172-173, Jan. 9, 2014. In addition, while UP's then-Senior Director of Interline Marketing Richard B. Peterson made various statements to the effect that 3-to-2 shippers would enjoy "stronger" competition after the merger, he was speaking of the potential for enhanced services being provided by the merged UP/SP entity (e.g., "shorter routes, faster service, lower costs, more single-line rail service"), not shippers' access to multiple carriers. *Id.* at Ex. D, at 170-171; *see also id.* at Ex. D, at 187 (noting that, because "SP is a weak competitor," intermodal shippers believe competition between "a combined UP/SP and BN/Santa Fe will be stronger than competition among BN/Santa Fe, UP and SP"); *id.* at Ex. E, at 24-25 (touting benefits of a stronger, merged UP/SP). Similarly, Mr. Peterson's statements regarding UP's methodology for identifying 3-to-2 points (*see id.* at Ex. D, at 189-190) and his classification of the Modesto region as a "competitive" location (*see id.* at Ex. D, at 211-212) are highly general and cannot be read as specific promises regarding particular services or points of coverage.

Other representations cited by BNSF and G3, including those by UP's outside consultants Richard J. Barber and Robert D. Willig, were general statements regarding the potential benefits of competition between two strong railroads, BNSF and UP/SP. *See id.* at Ex. F, at 475-478; *id.* at Ex. G, at 562, 641. Petitioners argue the statements by the consultants were premised on the assumption that BNSF would have access. *See* BNSF/G3 Pet. 9. However, even if true, such general statements cannot be construed as specific representations that UP would forever maintain two-carrier coverage at all points where the number of carriers declined from 3 to 2 as a result of the merger. Nor can statements from UP's Rebuttal during the merger proceeding, in which UP generally referenced the ICC's historic policy of "ensuring that at least two strong railroads [would] continue to serve every important market" (*id.* at Ex. C, at 178), be construed as a promise that UP would continually ensure that at least two carriers serve every single 3-to-2 facility. We therefore conclude that these general representations do not warrant reopening.

As petitioners have failed to establish any material error in Decision No. 106, the Board denies the BNSF/ G3 petition for reconsideration.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The BNSF/G3 petition for reconsideration of Decision No. 106 is denied.

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<sup>34</sup> BNSF/G3 Pet. 6-12, Jan. 9, 2014.

2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.