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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 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

**UNION PACIFIC'S REPLY TO THE PETITION OF BNSF RAILWAY AND G3
ENTERPRISES FOR RECONSIDERATION OF DECISION NO. 106**

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In Decision No. 106, the Board found that BNSF/G3 “made no showing that UP’s actions” in declining to open G3’s Modesto-area facility to reciprocal switching were “contrary to Decision No. 44 or that the harm alleged is a direct result of the UP/SP merger.” Decision No. 106 at 8. BNSF/G3’s petition for reconsideration fails to show that the Board’s decision was erroneous. The petition is flawed in several respects, but the Board can reject it for a simple reason: G3 plainly did not lose *any* competition as a result of the UP/SP merger. Moreover, contrary to BNSF/G3’s claim, UP *never* promised, and the Board *never* required, the preservation of two-carrier service for all 3-to-2 shippers as a condition on the UP/SP merger.

I. G3 did not lose *any* competition as a result of the UP/SP merger.

BNSF/G3 claim that UP was required as a condition to the UP/SP merger to preserve two-carrier service to 3-to-2 shippers, as well as 2-to-1 shippers. Petition at 2. But G3 was neither a 3-to-2 shipper nor a 2-to-1 shipper, so that claim simply is not pertinent to this dispute. G3 was not served by *either* UP *or* SP *before* the merger. The undisputed evidence is that G3 did not acquire

the facility at issue until 2001, five years after the UP/SP merger. Decision No. 106 at 2. G3 did not lose *any* competition when UP and SP merged in 1996.¹

II. UP never promised, and the Board never required, the preservation of two-carrier service for all 3-to-2 shippers.

The Board need go no further to deny the petition, but BNSF/G3's claim is also flawed because it is not true: UP never promised, and the Board never required, the preservation of two-carrier service for all 3-to 2 shippers as a merger condition. BNSF/G3 claim that the Board failed "to fully consider" their arguments about preserving two-carrier service for 3-to-2 shippers. Petition at 4. But the Board fully considered their arguments and rejected them. The Board recognized that UP's promise to preserve two-carrier service extended only to 2-to-1 shippers:

The BNSF Agreement was adopted and expanded as a condition of the UP/SP merger to allow BNSF to preserve competition for 2-to-1 shippers. Extending the competitive protections of the BNSF Agreement to a non-2-to-1 shipper at a non-2-to-1 location would effectively increase rather than preserve the pre-merger level of competition in Modesto.

Decision No. 106 at 7-8 (footnote omitted). BNSF/G3's petition is premised on promises that were never made and conditions that were never imposed.

A. BNSF/G3 misstate UP's representations.

BNSF/G3 try to advance their claim that UP promised to maintain two-carrier service for all 3-to-2 shippers by quoting out of context several excerpts from UP witness statements in the UP/SP merger.² Their selective quotations grossly distort the record. For example, BNSF/G3

¹ BNSF/G3 allege that G3 "lost access" and was "transform[ed] . . . into a location that is exclusively served by UP" (Petition at 1, 2), but they cite no support for such claims. In fact, as the Board found, it was "undisputed" that "G3 has never been listed on UP's reciprocal switching circular as open for reciprocal switching" and BNSF/G3 "made no showing" that G3's closed status "is a direct result of the UP/SP merger." Decision No. 106 at 8.

² BNSF/G3 offer no excuse for failing to present any of this "evidence" in their initial petition.

quote a statement by UP's then-CEO, Richard Davidson, to the effect that not a single shipper would lose a choice between two railroads as a result of the merger. Petition at 6. However, as the full excerpt shows, Mr. Davidson was discussing 2-to-1 shippers. The very next sentence, which BNSF/G3 chose not to quote, makes clear that Mr. Davidson was describing how UP's settlement with BNSF "would introduce a second strong railroad competitor at every location *where UP and SP provided the only rail service.*" Petition, Ex. B, p. 173 (emphasis added).

BNSF/G3 also claim their view is supported by UP witness Richard Peterson, who noted that 3-to-2 shippers would enjoy "*stronger, not weaker competition*" as a result of the merger. Petition at 7 (citing Ex. D, Peterson V.S. at 171). BNSF/G3 assert that "'stronger' competition implies the existence of competitive options" (*id.*), but they ignore Mr. Peterson's testimony that explained *how* competition would be strengthened. Just one page earlier, Mr. Peterson explained that "[*e*]xclusively-served shippers" would "gain *stronger* competition." Petition, Ex. D, p. 170 (emphasis added). Plainly, UP never promised to open all of its exclusively-served shippers to two-carrier service. Rather, Mr. Peterson was summarizing his judgment that the merger would strengthen competition in ways that did not involve service from multiple carriers. Mr. Peterson discussed these other dimensions of enhanced competition by the merged UP/SP, including: shorter routes; expanded single-line service; increased capacity and capital investment; faster, more frequent and more reliable service; better intermodal and other facilities; improved equipment utilization and supply; and lower costs. *See* Exhibit A hereto.³

³ Exhibit A is the table of contents of Mr. Peterson's verified statement, which outlines what he considered to be "The Many Dimensions of Increased Competition."

BNSF/G3 also claim that Mr. Peterson's analysis of the competitive effects of the merger supports their position because it treated all 3-to-2 shippers as "competitive." Petition at 8. In fact, Mr. Peterson's movement-by-movement analysis of "open" and "closed" traffic proves UP's point— (continued...)

The Board should reject BNSF/G3's attempt to rewrite history. The record is abundantly clear that UP's commitment to maintain two-carrier service involved 2-to-1 shippers—shippers that would otherwise lose two-carrier service as a direct result of the UP/SP merger.⁴ Nor was there any mystery that there might be some unaddressed competitive impacts on 3-to-2 shippers. Rather, the Board concluded that the benefits of the merger would outweigh any harms:

As many parties have noted, the BNSF agreement does not address competition lost by 3-to-2 shippers. We find, however, that parties have greatly overstated the harm that would be experienced by shippers in 3-to-2 markets. . . .

Any competitive harms will be heavily outweighed by the broad-based, positive effects of the merger as conditioned. Many of these benefits will be passed through to shippers in terms of lower rates and better service.

Union Pacific/Southern Pacific Merger, 1 S.T.B. at 369.

BNSF/G3's claim that UP's general representations about strengthening competition for 3-to-2 shippers lulled "shippers such as P&G and shortlines such as MET" into inaction (Petition at 4) is absurd, especially in the context of this case. BNSF/G3 have apparently forgotten that they framed their initial petition in this case as an attempt to enforce a specific agreement between UP and MET to protect MET's access to P&G.⁵ BNSF's lack of access to G3 has nothing to do with MET or P&G having been lulled into inaction: the Board carefully considered evidence and

(footnote cont'd)

that G3 is not a 3-to-2 or a 2-to-1 shipper because it did not acquire the facility at issue until five years after the merger. G3 at Rogers has always been served exclusively by UP.

⁴ BNSF/G3 cite other UP witnesses' statements regarding the benefits of two-carrier competition. Petition at 9-10. None of those statements constituted a promise that UP would never again close a 3-to-2 shipper to reciprocal switching. In any event, as discussed above, G3 was not a 3-to-2 shipper, and there is no evidence that G3's closed status is a result of the UP/SP merger.

⁵ That legal theory had to be abandoned when BNSF/G3 conceded at oral argument that UP had lived up to its representations to MET. *See* Decision No. 106 at 6.

arguments submitted by many parties urging the extension of protective conditions to 3-to-2 shippers and concluded that such conditions were not warranted.

B. The Board's merger conditions separately protect the ability of new shippers to obtain two-carrier service.

BNSF/G3 also contend that the Board's conditions on the UP/SP merger must be interpreted as requiring the preservation of two-carrier service at *physical locations* that had two-carrier service pre-merger, not just *shippers*. Petition at 10. They say this must be the case, or else there would not be enough sites available for shippers to establish new facilities where they could receive two-carrier service. *Id.* at 11. However, the Board expressly rejected BNSF/G3's claim that the right to reciprocal switching runs with the land. Decision No. 106 at 9. UP, like most other rail carriers, including BNSF, uses a customer-specific, rather than a location-specific approach to reciprocal switching. G3's acquisition of land previously owned by another shipper did not entitle G3 to the commercial benefits, including the benefit of reciprocal switching, that UP agreed to provide the prior shipper. *See* UP Reply to the Amended Joint Petition at 8-9.

BNSF/G3's argument also ignores that the Board's merger conditions directly protect the ability of new shippers to locate facilities at locations open to two-carrier service. In the UP/SP merger, the Board imposed a condition that allows BNSF to serve new shipper facilities located subsequent to the merger at any 2-to-1 point or on any of the approximately 4,000 miles of SP-owned or UP-owned track over which BNSF received trackage rights. *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 419-20. G3 chose to locate its new facility at a *non-2-to-1* point on a *non-trackage* rights line, rather than take advantage of the available merger condition.

CONCLUSION

The Board was correct when it found that G3 had not lost a competitive option and that no merger conditions or representations were violated when UP did not include G3 in its reciprocal

switching circular. BNSF/G3's petition really asks the Board to impose a new condition on the UP/SP merger—one that would expand competition at new facilities located after the merger at *non-2-to-1* points and on *non-trackage* rights lines. BNSF and G3 failed initially to present evidence to justify reopening a transaction that UP and SP consummated almost two decades ago. They have done no better in their petition for reconsideration. A decision imposing a new condition on the merger at this point in time would improperly deprive UP of its fundamental “right to walk away from a transaction if it deems the conditions too burdensome.” *Canadian National, et al. – Control – Illinois Central, et al.*, 6 S.T.B. 492, 496 (2002).

The BNSF/G3 Petition for Reconsideration must be denied.

Respectfully submitted,

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January 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2014, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on

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Michael L. Rosenthal

EXHIBIT A

VERIFIED STATEMENT

OF

RICHARD B. PETERSON

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