

BEFORE THE  
SURFACE TRANSPORTATION BOARD

235536

ENTERED

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JAMES VALLEY GRAIN, LLC	)	Office of Proceedings
	)	February 27, 2014
	)	Part of
Petitioner,	)	Public Record
	)	
v.	)	Docket No. 42139
	)	
BNSF RAILWAY COMPANY	)	
	)	
	)	
Respondent.	)	
	)	

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REPLY OF JAMES VALLEY GRAIN, LLC  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS

**EXPEDITED ACTION REQUESTED**

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DATED: February 27, 2014

*Attorneys for Complainant  
James Valley Grain, LLC*

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**EXPEDITED ACTION REQUESTED**

Petitioner James Valley Grain, LLC (“JVG”) submits this reply to Respondent BNSF Railway Company’s (“BNSF’s”) Motion to Dismiss JVG’s Petition for an Order Compelling Establishment of Common Carrier Rates (“Motion”), which BNSF filed in this proceeding on February 18, 2014, accompanied by a cover letter and a document labeled BNSF’s “Answer” to JVG’s Petition (“Answer”).<sup>1</sup>

**SUMMARY**

There is no basis for dismissing JVG’s Petition. BNSF is a common carrier and as such it has a duty to hold itself out to provide rates and service upon reasonable

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<sup>1</sup> BNSF’s arguments and factual assertions supporting the relief requested in its Motion are interwoven with those in its Answer. JVG thus is compelled to refer to both documents in this reply. To the extent references to BNSF’s Answer might be deemed a reply to a reply, JVG moves the Board to waive the rule prohibiting a reply to a reply.

request. 49 U.S.C. § 11101(a) - (b). Rather than fulfill its obligation, which it assumes in exchange for valuable privileges and franchises, BNSF seeks to evade its obligation through diversionary tactics and prolonged proceedings that inflict substantial harm on JVG, a shipper whom it has a duty to serve, and whom it should want to serve as JVG seeks to provide BNSF with estimated volumes of over 20 million bushels of new grain business once its new Verona, ND shuttle facility (“JVG-Verona”) is constructed and in full operation. Yet, inexplicably, BNSF still resists this substantial, profitable business.

BNSF now says that JVG should have to wait potentially a year or longer, on top of the 2+ years it has already had to wait for a potentially responsive rate, while BNSF arbitrates its differences with its short-line subcontractor/vendor, the Red River Valley & Western Railroad (“RRVW”). In the meantime, BNSF says that JVG needs to go ahead with construction of its planned \$30+ million shuttle-train loading elevator on the hope of being included in BNSF’s shuttle-train program in the future, yet it makes no assurances that it will actually provide such a responsive rate even with a successful arbitration and full facility construction. Shippers should not have to construct major facilities first on the “hope” of future responsive rates and service following successful litigation between vendors. That is certainly not industry practice, and it clearly is not what the common carrier obligation requires.

While BNSF speaks of matters such as potentially changing rates in the future, etc., JVG clearly does not seek to interfere with BNSF authority to revise its common carrier rates to the extent such changes comport with governing law. However, as Board precedent makes clear, at a minimum, JVG is entitled to the best available

information for its business planning purposes through the provision of single-line, BNSF-direct rates, along with assurances that it will be included in the BNSF shuttle-train program (under BNSF Tariff 4022) like every other local and regional grain shuttle facility, including seven other shuttle facilities located on RRVW's lines. This will allow JVG to move ahead with construction of JVG-Verona just as the other regional shuttle facilities were able to proceed in the past. In fact, BNSF has set up its shuttle-train program to do just that. Yet BNSF steadfastly refuses to provide any such information and assurances with respect to JVG-Verona, at the ultimate expense of North Dakota farmers in need of BNSF's essential services.

JVG respectfully submits that it should not have to wait 3+ years to get responsive rates and assurances that should have been provided immediately after JVG initially requested them. BNSF has hundreds of short-line partners, and thousands of customers on those lines that receive responsive rates on a daily basis. JVG appears to have been unfairly singled out by BNSF – apparently because BNSF seeks to walk away from its successful shuttle-train program, at least in southeastern North Dakota, and potentially pursue other, more profitable opportunities, leaving shippers and farmers on short lines like JVG potentially permanently stranded.

BNSF asserts that, with respect to movements of grain from JVG-Verona, it need not provide any rates until (i) shortly before the movements actually commence, and (ii) BNSF has dotted every “i” and crossed every “t” with its subcontractor/vendor, RRVW, or otherwise successfully arbitrated its vendor disputes. Again, even then, JVG still has no assurances that JVG-Verona will have direct access to the BNSF shuttle-train

program. BNSF's position, in a nutshell, is that the fundamental common carrier obligation of a railroad to provide "immediate disclosure" of responsive rates and service terms (49 U.S.C. § 11101(f)) from stations where a carrier holds itself out to provide service should not apply to it until BNSF is ready to provide rates on its own terms, regardless of the needs of the shipper requesting the rate, and regardless of the adverse effects on essential commerce.

JVG respectfully submits that BNSF's position of "if you build it, we will come, maybe," is simply not the law, and in fact would frustrate, if not eviscerate, the Board's authority over common carrier service and disable the Board from carrying out its regulatory mission as JVG demonstrates below. This is also a very dangerous proposition, because, if accepted, BNSF's position has the real potential to thwart or inhibit new rail-facility construction opportunities and projects that rely on pre-construction rates and service terms, as well as the entire shuttle-train success story, especially in rural regions of the country that depend on connecting short-lines for their immediate service needs.

Additionally, if, as BNSF contends, resolution of JVG's Petition requires a prolonged, full-blown evidentiary hearing to determine whether a railroad has an obligation to provide responsive rate and service terms within ten business days after receipt of the request (49 C.F.R. §1300.3), Congress's directive for "immediate disclosure" of rates would be effectively subverted.

Finally, the Board should be aware that BNSF's pleadings spin the facts (*e.g.*, by claiming that JVG seeks "joint through rates" for the movement of grain in

shuttle-train service from JVG-Verona to Pacific Northwest (“PNW”) destinations served by BNSF, when in fact JVG seeks single-line BNSF rates), or ignore facts that BNSF does not like. This includes that BNSF holds itself out to serve Verona and that Section 5 of the 1987 Rate and Allowance Agreement (“1987 Agreement”) between BNSF and RRWV expressly *requires* BNSF to provide single-line rates for all rail movements from points physically served by RRWV to BNSF-served points and *prohibits* RRWV from providing local (or any other) rates for movements between points it physically serves and BNSF points.<sup>2</sup> Moreover, BNSF offers highly misleading statements, even going so far as contending that JVG Verona is not entitled to receive responsive rates over “highly circuitous” routes – conveniently neglecting to inform the Board that grain movements from three of the seven shuttle facilities on the RRWV operate over the *very same* routings and one has a *longer* routing – yet BNSF has not hesitated to provide BNSF-direct shuttle rates for these other shuttle facilities over the same “circuitous” routings.

In the end, BNSF’s Motion is simply a ploy to block the development of JVG-Verona, an important regional investment, and it should be rejected. As JVG demonstrates below, the facts presently of record in this proceeding are more than sufficient to warrant a Board order requiring BNSF to provide the requested single-line rates from JVG-Verona to the PNW.

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<sup>2</sup> BNSF asserts that the per-car fees payable by BNSF to RRWV for moving cars between RRWV-served points and RRWV’s interchange/connection with BNSF (which are set forth in Section 2 of the 1987 Agreement) do not apply to shuttle-train movements and have been superseded by a 1999 agreement between BNSF and RRWV. However, BNSF does not claim that Section 5 of the 1987 Agreement has been superseded by any subsequent agreement between the two railroads, and it further says that it has invoked arbitration under the 1987 Agreement.

## ARGUMENT

### I. JVG'S REQUEST FOR BNSF COMMON CARRIER RATES IS NOT PREMATURE

BNSF's principal argument in support of dismissal of JVG's Petition is that it is premature because there is not presently a shuttle-train loading facility at Verona and grain movements will not commence until after construction of the facility is completed (hopefully by the fall 2015 harvest season). Motion at 2-3; Answer at 4. BNSF asserts that JVG's Petition is "premature as a legal matter" because there is no "current need" for rail service from the "potential" JVG-Verona facility. Motion at 2. These assertions ignore the relevant facts and are demonstrably wrong for several reasons.

First, BNSF ignores JVG's demonstrated business and planning need to have single-line shuttle rates in place in order to proceed with construction of JVG-Verona.<sup>3</sup> As set forth in the Verified Statement of Eric Larson accompanying JVG's Petition ("Larson V.S."), JVG's Board of Directors will not authorize full construction to proceed until JVG has assurances that it has, or will have, single-line BNSF shuttle-train rates of the same kind that seven other nearby shuttle elevators served by RRWV (which are JVG's and its member-farmers' competitors in the export market for southeastern North Dakota grain). Larson V.S. at 10, 16-17. Contrary to BNSF's assertions, while JVG of course ultimately needs competitive, non-discriminatory rates, it is the *form* of the rates that is most important. This is no different than any other new shuttle or other

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<sup>3</sup> See *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, 5 I.C.C.2d 303, 310 (1989) (requiring establishment of rates when shipper has presented a "demonstrable business or business planning need" for the responsive rates) ("*Ashley Creek*").

major facility being constructed anywhere that requires assurances on the availability of appropriate rates *prior* to construction.

BNSF has publicly represented (including to this Board) that “it will share shuttle-facility efficiency gains with producers through lower rates and efficiency incentive payments” (Larson V.S. at 7), and it has done so through the promulgation of its BNSF Tariff 4022 program that applies to all local and regional elevator facilities, offering single-line, non-discriminatory rates. Larson V.S. at 7-10 and Exhibit 1. Yet BNSF’s position with respect to JVG-Verona is that unless and until it works out its differences with RRVW, it is willing to provide only “Rule 11” shuttle rates from the BNSF/RRVW interchange at Casselton, ND to the PNW, and that JVG must attempt to obtain a separate Rule 11 rate from RRVW for its portion of the movement. Motion at 6; Answer at 9-10.

Such combination rates are completely non-responsive to JVG’s common carrier rate request and requirement that it receive BNSF-direct shuttle-train rates (under BNSF Tariff 4022). They effectively bar JVG from proceeding with construction of JVG-Verona because they put JVG at a competitive disadvantage with its neighboring RRVW-served shuttle elevators – all of whom have single-line rates from BNSF under BNSF Tariff 4022.<sup>4</sup> Furthermore, the essence of being a common carrier is the duty to

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<sup>4</sup> See, e.g., *Pennsylvania Power & Light Co. v. Consolidated Rail Corp.*, ICC Docket No. 42195, 1995 WL 13669 at \*3 (ICC served Jan. 17, 1995) (ordering appropriate and “suitable” trainload rate tariffs to be published within 30 days, and rejecting the defendant carrier’s request to stay the proceeding pending arbitration over service and the carrier’s other objections that it already has in place non-responsive “proportional rates”). *San Antonio, Tex. v. Burlington N.*, 355 I.C.C. 405, 418 (1976)

“hold out” to provide service to the public indiscriminately.<sup>5</sup> That fundamental obligation is violated when carriers decide they can suddenly offer non-responsive rates, such as non-direct service rates, rates applicable from other origins or “from some point in the area,” or rates “contingent upon guaranteed profits from that service,” as BNSF has done here. *Pejepscot Indus. Park, Inc. d/b/a Grimmel Indus. – Petition for Declaratory Order*, 6 S.T.B. 886, 893-99 (2003) (“*Pejepscot*”).

Second, BNSF’s expression of puzzlement as to why JVG needs single-line shuttle rates now, as opposed to shortly before rail service from JVG-Verona is to commence (in mid-2015), is disingenuous.<sup>6</sup> As stated above, railroads routinely provide such rates in the ordinary course because they know shippers need rate assurances *prior* to construction of the facilities to enable the shipper to reasonably undertake major investments. There is no legal support for BNSF’s argument that there must be an immediate need for service before a party proceeds to seek a rate. To the contrary, BNSF’s obligation to establish and disclose rates and other service terms extends to “any person” who makes a “request” for disclosure or publication. 49 U.S.C. § 11101(b).

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(shipper may obtain required unit train service tariff rates and a rate prescription in advance to apply to prospective traffic when construction of a facility completed).

<sup>5</sup> See e.g., *American Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“the *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking ‘to carry for all people indifferently’”) (citations omitted).

<sup>6</sup> Specifically, BNSF states that “[i]t is not clear exactly what role a 1Q2014 rate – clearly subject to change – would serve in allowing JVG to commence construction” of JVG-Verona. Answer at 4.

Failure to use the rate immediately cannot be a valid reason for withholding a rate.<sup>7</sup> The Board has frequently held that “a rail carrier may not avoid its common carrier obligation to provide service by evading the requirement to establish rates upon request.” *Union Pac. R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219, 2009 WL 1630587 at \*2 (STB served June 11, 2009) (“*Union Pacific*”). As explained by the Board:

This obligation creates two interrelated requirements. Railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. 11101(b). And, they must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to providing requested service.

*Id.* JVG Witness Larson has stated that JVG’s Board will not authorize shuttle facility construction of JVG-Verona unless JVG has assurances that it will receive the same kind of single-line BNSF rates (under BNSF Tariff 4022) that are available from the seven nearby RRVW shuttle elevators – the same type of assurances any similarly situated shipper would need from its railroad partner. Larson V.S. at 7-8, 10. This is critical for the viability and continued existence JVG Verona (as it is with any other shuttle-train facility, such as JVG-Oakes), because if only joint or combination of local/Rule 11 rates

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<sup>7</sup> *Lum v. Great N. Ry.*, 21 I.C.C. 558 (1911) (rate action appropriate even from areas not yet in commercial development); *Ashley Creek*, 5 I.C.C.2d 303, 310-11 (shippers are entitled to receive rates for business planning purposes, and concerns about a tariff becoming obsolete are unwarranted because shippers are “entitled to the best available information for [their] business planning purposes”); *San Antonio, Tex.*, 355 I.C.C. at 418 (shippers are entitled to unit train service tariff rates and a rate prescription in advance to apply to prospective traffic, following construction of a facility).

are available, it is extremely unlikely that the facility can be competitive and viable. *Id.* at 13-14, 16.<sup>8</sup>

Third, BNSF's reliance on *Burlington N. R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996) ("*Burlington*"), in which the D.C. Circuit held that a rail carrier could not be required to provide a common carrier rate more than a year before expiration of an existing rail transportation contract covering the movement in issue, is misplaced. Contract service constitutes a separate class of service that lies beyond the Board's jurisdiction.<sup>9</sup> *Burlington* is entirely inapposite in that it involved a shipper that was shipping under a contract that precluded its use of the common carrier rates it sought to challenge.<sup>10</sup> Here, in contrast, there is no existing rail transportation contract – a key fact that distinguishes JVG's situation from that involved in *Burlington*. BNSF states that "[t]he Board has recognized *Burlington* as governing law on the question of when a request that a rail carrier establish a common carrier rate is premature" (Motion at 4), but

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<sup>8</sup> JVG understands that the level of the rates to be provided is not something the Board is likely to address in this proceeding. Rather, the rate level can be addressed later, in a subsequent proceeding, if JVG believes them to be unreasonably high or discriminatory in violation of the ICCTA. However, JVG badly needs rates in the form it has requested (shuttle-train rates under BNSF Tariff 4022) because without them, it clearly cannot compete with the seven other nearby RR/VW-served elevators who do have single-line BNSF shuttle rates, and thus cannot justify spending the funds necessary to construct JVG-Verona.

<sup>9</sup> See *State of Tex. v. U.S.*, 730 F.2d 409, 417 (5<sup>th</sup> Cir. 1984) ("railroads are common carriers when they serve all comers at a general, publicly disclosed rate, and contract carriers when they enter into private contracts authorized by the Act.")

<sup>10</sup> *Burlington* itself explained that "[t]he present case poses a question at the cusp of the contract and common carrier forms of service." 75 F.3d at 687. The case thus hinged on the transition from contract to common carrier service, and says nothing about a carrier's ability to avoid establishing and maintaining rates from specific origins in circumstances where no contract carriage is involved.

in fact the Board has recognized (in a post-*Burlington* decision) that in the absence of a contract, a shipper is entitled to a common carrier rate if there is “no basis for finding that [the shipper] will not use the rates that it seeks here in the foreseeable future.” *Arizona Elec. Power Coop. v. Burlington N. & Santa Fe Ry., et al.* 5 S.T.B. 531, 532 (2001) (“*AEPCO*”).<sup>11</sup>

BNSF also disputes JVG’s reliance (Petition at 11-12) on *Ashley Creek*, allegedly because that case was decided before *Burlington*. Motion at 5. However, the court in *Burlington* did not directly address the “demonstrable business need” standard used by the Board in ordering the establishment of common carrier rates in *Ashley Creek*. Here, JVG has demonstrated a clear business need for the establishment of a BNSF-direct shuttle rate now, as the availability of such a rate (regardless of its specific level) is a condition precedent to proceeding with full construction of JVG-Verona. For these reasons, “shippers are entitled to know in advance what rates they must pay, and tariffs

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<sup>11</sup> BNSF attempts to distinguish *AEPCO* on the ground that the shipper (*AEPCO*) “would have been able to ship coal under the requested rate at the time *AEPCO* made the request.” Motion at 5 n.5. The Board’s *AEPCO* decision does not specify any such requirement, so long as the Board could conclude that the shipper could use the rates sought in the foreseeable future. Such a conclusion is clearly warranted here, as JVG has unequivocally stated that it will use a BNSF-direct shuttle rate from Verona to the PNW as soon as construction of the JVG-Verona facilities is completed (by mid-2015 if the Board acts promptly to grant JVG’s Petition). See also *Arizona Elec. Power Coop., Inc. v. BNSF Ry. & Union Pac. R.R.*, STB Docket No. NOR 42113 (STB served Nov. 22, 2011) at 38 (STB allows rates to be challenged well in advance of the provision of the underlying common carrier service and rejects arguments that under *Burlington*, it should not prescribe rates from mines where complainant was not actually shipping any commodities and it was unclear when in the future complainant would be engaged in such shipments).

should be so published that the applicable charges may be readily ascertainable.” *S.H. Kress & Co. v. Agwilines, Inc.*, 246 I.C.C. 655, 658 (1941).

Furthermore, the question the Court addressed in *Burlington* was when a common carrier was required to provide common carrier rates. The Court applied pre-ICCTA law. ICCTA answered this question in new Section 11101 of the Act, entitled “Common carrier transportation, service and rates.” Section 11101(a) provides, as did the pre-ICCTA version of this statute, that a common carrier provide “service on reasonable request.” However, unlike pre-ICCTA law, Congress added a new subsection (b) to Section 11101 which specifically provides that “[a] rail carrier shall also provide to any person, on request, the carrier’s rates and other service terms” in a “prompt[]” manner. *Id.*

BNSF’s attempts to ignore the statute and otherwise broadly extend *Burlington* beyond contract service and require customers to expend large sums to construct facilities prior to obtaining responsive rates is a very dangerous proposition. The danger cannot be overstated because it addresses fundamental railroad common carrier obligation issues and has the real potential to thwart or inhibit new rail-facility construction opportunities and the entire shuttle-train success story, especially in rural regions of the country that rely on connecting short-lines for their immediate service needs.

In short, JVG’s request for single-line BNSF shuttle rates is not premature. If the Board dismisses JVG’s Petition (or fails to act expeditiously in granting the relief requested), construction of the JVG-Verona facility simply will not proceed to

completion. JVG thus would be in the “Catch-22” position of being unable to obtain a rail rate until it constructs facilities that it cannot construct until it has such a rate.

## II. BNSF IS OBLIGATED TO PROVIDE JVG WITH SINGLE-LINE RATES

Another reason advanced by BNSF for dismissing JVG’s Petition is that the Board does not have jurisdiction to dictate either the form or the level of common carrier rates to be provided by BNSF. Motion at 6. JVG acknowledges that the level of the rates is within BNSF’s discretion in the first instance, subject to subsequent challenge on rate-reasonableness or unreasonable-discrimination grounds. With respect to the form of the rates, BNSF repeatedly mis-characterizes JVG’s request as for “interline” or “joint through rates” (*e.g.*, Answer at 6). This is incorrect; JVG expressly requested single-line (“BNSF direct”) rates. Larson V.S., Exhibit 8. BNSF then goes on to assert that “the Board does not have authority to tell BNSF . . . necessarily the nature of rates as a through rate or a factor to the junction.” Motion at 6.

As discussed above, it is clear that the Board does have the authority to order responsive BNSF direct rates to JVG-Verona, which rates (as discussed above) are specifically required to meet JVG’s service needs. Furthermore, JVG submits that the facts now of record in this proceeding clearly warrant an order requiring BNSF to establish single-line or BNSF-direct rates from JVG-Verona to the PNW. These facts include the following:

1. Section 5.A. of the 1987 Agreement between BNSF and RRVW<sup>12</sup> grants BNSF power of attorney to establish tariff charges (and contracts) relative

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<sup>12</sup> Section 5 of the 1987 Agreement is set forth in Exhibit 4 to the Larsen V.S. (*see* pp. 8-10 of Exhibit 4).

to the transportation of shipments originating or terminating at points on the lines sold to RRVW and interchanged with BNSF. Section 5.A. goes on to authorize RRVW to establish its own tariffs and contracts only for “any and all other services.” Accordingly, BNSF has the right and obligation to provide BNSF-direct (single-line) rates between RRVW points and BNSF points, and RRVW does not have the right to establish its own rates (*e.g.*, Rule 11 rates) for shipments interlined with BNSF.

2. BNSF does not claim that Section 5 of the 1987 Agreement has been abrogated by any other subsequent agreement, nor does it dispute that it holds itself out to provide rates and service from Verona, with RRVW simply serving as its agent.<sup>13</sup>
3. BNSF’s uniform custom and practice in the 25-plus years since the 1987 Agreement was executed has been to provide BNSF-direct shuttle-train rates for movements of grain from all elevators physically served by RRVW that can load shuttle trains. Thus, every one of the RRVW-served elevators in the area that is capable of loading shuttle trains has available BNSF single-line rates. Larson V.S. at 9-10.
4. The RRVW-served stations, including Verona, are listed in BNSF’s Grain Elevator Directory as BNSF-served points, and all waybills and freight bills for grain shipments from JVG’s Oakes, ND shuttle elevator (and presumably from all other RRVW-served shuttle elevators) represent the origin as a BNSF station. *Id.* at 10.
5. Verona, ND is listed as a BNSF station in the Open and Prepay tariff’s Official Railroad Station list (OPSL 6000), notwithstanding that it is physically served only by RRVW. *Id.* at 12-13 and Exhibit 5.
6. Verona is described as a BNSF station in the PC/Miler\**Rail* computer program, and the route from Verona to Seattle, WA (for example) is shown in PC/Miler\**Rail* as a single-line BNSF route.

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<sup>13</sup> Cf. *Continental Grain Co. – Petition for Declaratory Order*, 1 I.C.C.2d 624, 627 (1984) (holding that switching carrier whose charges are absorbed by the line-haul carrier acts as agent for the latter); *Southern Rds. Co. v. Galveston, H. & A. Ry. Co.*, 168 I.C.C. 768, 770-72 (1950) (same). This is not an unusual circumstance. See *South Carolina Rys. Comm’n v. Seaboard Coast Line R.R.*, 365 I.C.C. 274, 277-78 (“[i]t is common practice for terminal carriers to act as agents for line-haul carriers” and the fact “that the line-haul carriers and switching carriers do not publish a joint rate or share in the division of that rate are indicia of an agency relationship”).

BNSF does not contest any of these facts.<sup>14</sup> Moreover, RRVW, in its Reply to JVG's Petition, confirms that BNSF has the "sole right to price interline rail services to shippers located on" RRVW's lines, in the form of "single-line through rates." *Id.* at 3. Since BNSF has not disputed that it has the exclusive right to provide rates from RRVW-served points to BNSF-served points, it is clear that Section 5 of the 1987 Agreement remains in effect.

The facts summarized above, demonstrate that the rail route between Verona and the PNW is a single-line BNSF-direct route for ratemaking purposes. They also confirm that BNSF does not have the ability to force RRVW to establish local or Rule 11 rates for use in combination with a BNSF local rate from the interchange point at Casselton, ND to complete a joint through route.

Moreover, the descriptions by BNSF and RRVW in their respective Answer and Reply to JVG's Petition of their ongoing negotiations over the level of RRVW's fee for moving shuttle trains between JVG-Verona and the PNW confirm that both carriers have proposed a fee level. This means that BNSF is fully capable of providing a BNSF-direct rate from Verona to the PNW. In fact, RRVW has already offered to accept rates from Verona including "an allowance that is 63 percent of the per carload allowance (as adjusted) BNSF pays to RRVW for shuttle-train traffic moving

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<sup>14</sup> BNSF asserts that the 1987 Agreement "contains no [RRVW] per car handling charge applicable to shuttle train movements" and that such movements "were first addressed by BNSF and RRVW in a separate 1999 Agreement between the carriers" (Answer at 5-6). However, BNSF carefully avoids stating that Section 5 of the 1987 Agreement has been superseded by the 1999 agreement (the terms of which BNSF does not otherwise describe) or any other agreement.

from Oakes, ND,” with such resulting BNSF-direct rates in effect “pending our efforts to resolve our differences through alternative dispute resolution or otherwise.” Larson V.S., Exhibit 3. BNSF can simply publish BNSF-direct rates now, and include JVG-Verona in its Tariff 4022 as it has all other shuttle facilities on the RRVW, subject to change if/when RRVW and BNSF reach agreement or their differences are settled through arbitration. BNSF should not be allowed to “game” the system by refusing to provide a BNSF-direct rate until such time, if ever, it works out its differences with RRVW, and then unilaterally choose whether or not to provide responsive rates.

Finally, BNSF asserts that it should not have to provide direct shuttle service rates to JVG Verona because of the alleged insufficiency of RRVW’s line east of Verona and that “under current circumstances they would have to move over a highly circuitous and longer route [151 miles] to Casselton.” Answer at 7. This intimates that that JVG deserves discriminatory treatment.<sup>15</sup> BNSF’s assertion is highly misleading, and in fact, only serves to heighten JVG’s concerns about BNSF’s real intentions with respect to the provision of JVG-Verona rates and service. BNSF fails to inform the Board that grain trains loaded at three other shuttle facilities also move over the very same “circuitous” routing, yet each is included in BNSF Tariff-4022, and each of these three facilities receives non-discriminatory, BNSF-direct shuttle rates. In fact, the BNSF routing to the BNSF Casselton interchange from one of these facilities, a BNSF-direct shuttle-train facility at Edgeley, ND, is 21 miles longer than the current route from Verona (172 miles versus 151 miles). Yet BNSF apparently still insists that JVG-Verona

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<sup>15</sup> BNSF even includes a schematic reflecting this routing. *Answer* at 8.

deserves to be singled out because of its “circuitous routing.” An updated version of BNSF’s schematic, which reflects these other routings, is set forth in the Appendix to this Reply.

**III. THERE IS NO NEED TO UNDERTAKE AN EVIDENTIARY “FORMAL COMPLAINT” PROCEEDING BEFORE GRANTING THE RELIEF REQUESTED IN JVG’S PETITION**

In its Motion at 7, and more extensively in its Answer at 2-3 and 12, BNSF asserts that JVG’s Petition is in the nature of a formal complaint and that, if BNSF’s Motion is denied, the Board should treat it as such and establish a procedural schedule.<sup>16</sup> This is not the equivalent of a formal complaint proceeding. JVG is not asking the Board to order BNSF to provide rates at any particular level, nor is it challenging, at this time, any BNSF rates that the carrier may establish on reasonableness or other grounds. JVG’s Petition simply requests an order directing BNSF to establish responsive common carrier rates pursuant to its statutory obligation to do so.

As demonstrated above, the Board has all the information it needs to order BNSF to establish single-line shuttle rates on movement of grain from JVG-Verona to the PNW. BNSF clearly has both the right and obligation to provide JVG with such rates, and JVG has established a clear business need for the rates now, so that it can proceed with construction of JVG-Verona.<sup>17</sup>

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<sup>16</sup> RRVW takes a similar position in its November 18, 2014 Reply to JVG’s petition, and further seeks to expand the proceeding to address the dispute between BNSF and RRVW over the appropriate level of the fee RRVW would receive for handling grain shuttle trains over a portion of the route from Verona and the PNW.

<sup>17</sup> BNSF’s contention that the Board has assigned a “NOR” docket number to JVG’s Petition does not make the proceeding a full-blown formal complaint proceeding.

As stated earlier, JVG is not now challenging the level of the rates to be established by BNSF on reasonableness or other grounds (although, as indicated in JVG's Petition, BNSF has a clear obligation under its 1987 Agreement with RRVW to provide non-discriminatory rates that do not favor BNSF-served shuttle elevators over shuttle elevators served by RRVW). The Board's rules (in particular 49 C.F.R. § 1300.3, which JVG cited in its Petition) contemplate the kind of relatively simple, straightforward petition that JVG has filed here.<sup>18</sup>

BNSF's and RRVW's pleadings (e.g., BNSF Answer at 8-9) indicate that the carriers have initiated arbitration on related issues pursuant to their contractual arrangements. Collateral issues, such as BNSF's allegation that "RRVW has failed to make the capital investments necessary to maintain its railroad to a level sufficient to accommodate efficient shuttle train movements" (Answer at 6-7), presumably will be

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For example, in *AEPCO*, involving a rate reasonableness challenge, because the request for common carrier rates "involve[d] the defendants' common carrier obligations and not the reasonableness of the challenged rates," the Board created a separate "NOR" Docket to address the rate request. 55 S.T.B. 531, 532 n.5. However, the STB did not initiate a separate formal complaint proceeding to consider the rate-request issue in *AEPCO*. Moreover, the Board routinely treats petitions such as that filed by JVG as requests for declaratory orders, and it does not require prolonged evidentiary proceedings with discovery to resolve such issues. See, e.g., *Union Pacific*, 2009 WL 1630587 (upholding railroad's common carrier obligation to engage in hazardous commodities service); *Pejepscot*, 6 S.T.B. 886 (ordering the establishment of responsive, direct service rates).

<sup>18</sup> This is essentially the approach followed by the shipper in the *AEPCO* case. In *AEPCO*, the shipper filed a petition for the establishment of responsive common carrier rates in Docket No. 34041 on April 4, 2001, the defendants' reply was filed 20 days later on April 24, 2001, and the Board served its final decision two weeks later on May 8, 2001, ordering the establishment of common carrier rates within six days of the service date. *AEPCO*, 5 S.T.B. 531, 532-33. There was no need for formal evidentiary proceedings or the establishment of a lengthy procedural schedule, and the same is true of this case.

addressed in that pending arbitration proceeding, and in any event are irrelevant to BNSF's obligation to provide single-line common carrier rates for the movement of grain in shuttle-train service from JVG-Verona to the PNW.

### CONCLUSION

For all of the foregoing reasons, JVG submits that the Board should deny BNSF's motion to dismiss its Petition and proceed to order BNSF to establish common carrier shuttle-train rates from JVG-Verona to PNW export destinations. Since time is of the essence if construction of the JVG-Verona shuttle loading facilities is to be completed in time for the 2015 harvest season, JVG again requests expedited action by the Board, both on BNSF's Motion and on JVG's Petition itself. Ultimately, if the Board believes that JVG's request for BNSF-direct shuttle-train rates is premature, which JVG strongly believes is not the case, at a minimum the Board should declare now that BNSF has an obligation to establish such rates, and provide shuttle service consistent with the service and terms provided to all of the other shuttle facilities listed under BNSF Tariff 4022 at the appropriate time.

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Dated: February 27, 2014

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of February, 2014, caused a copy of the foregoing Reply to Motion to Dismiss to be served by hand delivery to counsel for BNSF Railway Company and Red River Valley & Western Railroad Company, as follows:

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