

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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JAMES VALLEY GRAIN, LLC)

Petitioner,)

v.)

BNSF RAILWAY COMPANY)

Respondent.)

Docket No. 42139

**BNSF RAILWAY COMPANY’S MOTION TO DISMISS
JAMES VALLEY GRAIN LLC’S PETITION FOR AN ORDER COMPELLING
ESTABLISHMENT OF COMMON CARRIER RATES**

Pursuant to 49 C.F.R. §1111.5, BNSF Railway Company hereby moves the Board to dismiss the complaint filed by James Valley Grain LLC (“JVG”) on January 29, 2014 in this proceeding. Styled as a petition, as explained in BNSF’s accompanying Answer, JVG’s pleading is a category of formal complaint before the Board.¹ The Board’s rules specifically provide for the filing of motions to dismiss complaints at any time. *See* 49 C.F.R. § 1111.5. JVG’s Petition should be dismissed because its request for a common carrier rate is premature and because it asks the Board to specify the level of common carrier rates, an action that would be beyond the Board’s authority at this juncture.

¹ *See* BNSF Railway Company’s Answer to James Valley Grain LLC’s Company’s Petition for an Order Compelling Establishment of Common Carrier Rates (“Answer”) at 2.

FACTUAL BACKGROUND

There are very few facts that the Board needs to take into account to rule on BNSF's Motion to Dismiss and those facts are undisputed.² They are established through statements in JVG's own Petition³ and the accompanying Verified Statement of JVG's Eric Larson (hereafter "Larson VS"). As there are no disputed facts that Board needs to resolve, the Board should grant BNSF's Motion to Dismiss.

Facts Regarding the Current Need for Common Carrier Service

JVG's own Petition establishes that there is no current need for rail service from a potential JVG shuttle grain elevator at Verona, ND. There is no grain elevator of any type currently operating at Verona. Larson VS at 5. JVG represents that it wants to construct a grain elevator that could accommodate shuttle trains at Verona, and that an elevator of the sort it proposes would take a minimum of 15 to 17 months to construct. Larson VS at 5, 16. JVG says that it could not be in a position to tender any grain for transport until the 2015 harvest season at the earliest. Larson VS at 16. These are the only facts that the Board needs to consider to conclude that JVG's Petition is premature as a legal matter.

Facts Regarding the Level of Common Carrier Rates Requested

JVG qualifies its request for a common carrier rate by insisting that it needs a BNSF direct, non-discriminatory rate for shuttle service. *See, e.g.*, JVG Preface at 2. "Non-discriminatory" means a rate that is "comparable" to rates to other shuttle elevators located on the Red River Valley & Western Railroad ("RRVW"). ("JVG needs BNSF-direct shuttle rates

² As explained in the accompanying BNSF Answer, BNSF disputes many other alleged facts in JVG's Petition, including those related to the relationship between BNSF and Red River Valley & Western Railroad.

³ JVG's Petition consists of two separate lawyers' pieces – a Preface (hereafter referred to as "Petition Preface" and a Legal Argument (hereafter referred to as "Petition Legal Argument").

and service comparable to the rates and service presently available to all other shuttle train elevators located on the RRVW. . . .”) Larson VS at 16. Mr. Larson refers to specific rates in dollars per car that he deems to be “comparable” to the rate JVG seeks at page 13 of his Verified Statement. In short, JVG is asking the Board to require BNSF to provide a common carrier rate that is at a *level* within the same range as other rates specifically identified by JVG. These are the only facts that the Board needs to conclude that it lacks authority to order BNSF to establish a rate with the characteristics that JVG insists on.

ARGUMENT

I. **JVG’s Complaint Requesting an Order Compelling BNSF to Establish a Common Carrier Rate Must Be Dismissed as Premature**

The controlling law governing the timing of requests for common carrier rates has been clearly articulated by the United States Court of Appeals for the District of Columbia Circuit in *Burlington N. R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996). There a coal shipper filed a complaint with the ICC asking it to order Burlington Northern Railroad Company (“BN”) to publish a common carrier rate that would apply to traffic moving under a contract that would expire over a year into the future. The ICC did so in the order at issue before the D.C. Circuit. The issue as framed by the Court was, “could the Commission, more than a year before contract service was expected to end, order the carrier to file a tariff for common carrier service?” 75 F.3d at 687. The D.C. Circuit found that the Commission lacked the statutory authority to do so. *Id.* at 694.

The case did not turn on the existence of a contract between the carrier and the shipper, as James Valley Grain states in its footnote six of its Legal Argument.⁴ Instead, the issue was “a

⁴ JVG also asserts in the same footnote that “BNSF has waived any *Burlington* objection by offering JVG shuttle train rates, although non-responsive, from Casselton to the PNW.” Petition Legal Argument at 12 n. 6. This is incorrect. The letter from BNSF’s Kevin Kaufman responding to JVG’s formal request for a common carrier rate (Larson Exhibit 9) included the

purely legal question” – whether the ICC had “authority to impose upon a rail carrier a *current* obligation to file a tariff specifying a rate for traffic . . . that would not be ready to move under the rate until months or years down the road.” *Id.* at 692 (emphasis in original). The Court said no. It held that the ICC’s decision “was no more than an end-run around the statutory scheme.” *Id.* at 694. The Court further noted that changes brought by the Interstate Commerce Commission Termination Act adopted subsequent to the ICC decision at issue “suggest that any future action by the Board along the lines of the Commission’s action here would be on even weaker statutory ground than was the action taken here.” *Id.* at 693, n. 7.

The Board has recognized *Burlington Northern* as governing law on the question of when a request that a rail carrier establish a common carrier rate is premature. *See Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand--Alone Cost Methodology*, Ex Parte No. 638, 2003 STB LEXIS 162 at *4 (served April 3, 2003), (rejecting a suggestion by some shippers that the Board require railroads to establish a common carriage rate five months prior to the expiration of a contract, as “[i]n light of the court's ruling in [*Burlington Northern*], it is uncertain that we could require a rate to be established that far in advance.”); *TMPA v. BNSF*, No. 42056, 2003 STB LEXIS 153 at *9 (served March 24, 2003) (“Until such time as there is an indication that shipper-owned cars will be needed to move TMPA's traffic, BNSF need not establish a rate for such service.” citing *Burlington Northern*); *Omaha Pub. Power Dist. v. UP*, STB No. 42006 1997 WL 638221 at *2 (served Oct. 17, 1997) (“It is clear that service subject to contract may not be challenged over a year before the contract expires.”

following statement: “Because the proposed transportation is so far in the future and we already have existing mileage table rates for RRVW origins and PNW destinations for the commodities you have identified, we do not believe that we have an obligation to provide any more specific rates at this time.” This is an affirmation of, not a waiver of, BNSF’s position that JVG’s common carrier rate request was premature.

citing *Burlington Northern*); *Cent. Power & Light Co. v. S. Pac. Trans. Co.*, 1 S.T.B. 1059 (served Dec. 31, 1996) (“Under *Burlington Northern* . . . , the Board is without authority to adjudicate a rate case involving a common carrier rate that might be used upon the expiration of a contract until at or near the time at which the contract expires.”). Although neither the D.C. Circuit nor the Board has established a bright line test of prematurity expressed in terms of weeks or months, JVG’s request for a rate applicable to traffic that would not move for well over a year from now at the earliest is clearly premature in light of *Burlington Northern* and the Board’s subsequent decisions applying its prohibition on the premature establishment of common carrier rates.

JVG’s claim that the ICC’s *Ashley Creek* decision authorizes a Board order compelling common carrier rates when a rate is requested for “planning purposes,” is unavailing. *Ashley Creek* was decided before *Burlington Northern* and relied on the same statutory provision (former 49 U.S.C. § 10762) that the ICC unsuccessfully relied on in *Burlington Northern*. Therefore, *Ashley Creek* is not good law.⁵ Moreover, while not relevant for the purpose of deciding this Motion to Dismiss, the fact is that JVG already has rate information that it can use for planning purposes. It knows BNSF’s current rates for movements from Casselton, ND to the PNW on BNSF, and it also either knows or could obtain RRWV’s rate factor from Verona to a connection point with BNSF. JVG knows enough now to estimate the rates it could have to pay

⁵ JVG’s reliance on *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company*, 5 STB 531 (2001) is also misplaced. See Petition Legal Argument at 11. Arizona Electric Power Cooperative, Inc. (“AEPCO”) would have been able to ship coal under the requested common carrier rate at the time AEPCO made the request. In contrast, JVG would not be able to ship grain under the requested common carrier rate for more than a year from now.

if it shipped from Verona, and the fact that the estimate may be higher than the rate it would hope to pay if the facility is built has no legal significance.⁶

II. **The Board Does Not Have Authority to Require BNSF to Establish a Common Carrier Rate at a Particular Level**

There is a second reason why JVG's request for the Board to order BNSF to establish a common carrier rate, implicitly a single factor through rate from origin, must be dismissed. JVG insists that the rate must be "non-discriminatory," by which it means "comparable" to current BNSF-direct rates to shuttle elevators currently operating on the RRVW. Larson VS at 16. But the Board does not have authority to tell BNSF the level at which it must set a common carrier rate in the first instance, nor necessarily the nature of rates as a through rate or a factor to the junction. The carrier has the statutory right to set "any rate" it chooses in the first instance. 49 U.S.C. § 10701(c).

If BNSF were to establish a common carrier rate that JVG believed to be unreasonably high, it would have the option at that point to assert a rate reasonableness claim under the statute. But *Burlington Northern* makes clear that the Board could not prescribe the level of a common carrier rate unless and until JVG had challenged the rate as unreasonably high and had prevailed on the merits of its claim. To order BNSF to set a rate at a particular level at this juncture would constitute an impermissible "end run" around the statute.

⁶ Even though it is not required to do so at this time, BNSF has explained to JVG that common carrier rates over the BNSF portion of a through movement from Verona, ND are in place and that JVG can obtain a common carrier rate from RRVW for its portion of the movement. The combination of those Rule 11 factors would satisfy any future need JVG might have for common carrier service from Verona. JVG does not have a right to a single-factor through rate, and the Board does not have authority to require that one be published. *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company*, STB Docket No. 42113 (served May 22, 2012).

III. **The Board's Reluctance to Grant Motions to Dismiss under Certain Circumstances Does Not Apply In This Case**

The Board has been reluctant at times to grant motions to dismiss at the outset of complaint proceedings. In several such instances, the Board has expressed the view that the complaining party should be given an opportunity to submit evidence in support of its claim “to insure that participants have a full and fair opportunity to meet their burden of proof.” *N. America Freight Car Assoc. - Protest And Pet. For Investigation*, No. 42060, 2004 STB LEXIS 517 at *21 (served Aug. 11, 2004).

Nevertheless, the Board has granted motions to dismiss at the complaint stage if, as here, “the issues involved are essentially legal” and “there are no material issues of fact to be resolved in the proceeding.” *DHX, Inc. v. Matson Navigation Co.*, No. WCC-105, 2003 STB LEXIS 269 at *10 (served May 14, 2003); *see also S. Miss. Elec. Power. Assoc. v. NS R.R. Co.*, NOR 42128, 2011 STB LEXIS 183 (served April 19, 2011) (granting motion to dismiss complaint); *CSX Transport, Inc. – Abandonment*, STB Docket No. AB-55 (Sub-No. 486); FD No. 34019, 2002 STB LEXIS 535 (served Sept 13, 2002) (same); *Omaha Pub. Power Dist. v. UP*, STB No. 42006, 1997 STB LEXIS 268 (Served Oct. 16, 1997) (same).

In the current case, JVG has purported to file its case-in-chief as its opening salvo. It has said, in effect, that there are no additional facts that it needs to develop to support its claims. BNSF believes that a small sub-set of the facts alleged by JVG, those noted above, are sufficient to support BNSF's legal grounds for dismissal at this stage. Under these circumstances, no purpose would be served by evidentiary proceedings.

CONCLUSION

For the foregoing reasons, JVG's Petition for an Order Compelling Establishment of Common Carrier Rates should be dismissed.

Respectfully submitted,



Richard E. Weicher
Jill K. Mulligan
Courtney B. Estes
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Linda S. Stein
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 429-6486

ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2014, I have served a copy of the foregoing **BNSF RAILWAY COMPANY'S MOTION TO DISMISS JAMES VALLEY GRAIN LLC'S PETITION FOR AN ORDER COMPELLING ESTABLISHMENT OF COMMON CARRIER RATES** on the following by hand delivery and in pdf format via e-mail:

Peter A. Pfohl
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036

A courtesy copy was delivered in pdf format via e-mail on the following:

William A Mullins
Robert A. Wimbish
Baker & Miller PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037


