

235595

**BAKER & MILLER PLLC**

ATTORNEYS and COUNSELLORS  
2401 PENNSYLVANIA AVENUE, NW  
SUITE 300  
WASHINGTON, DC 20037  
TELEPHONE: (202) 663-7820  
FACSIMILE: (202) 663-7849

ENTERED  
Office of Proceedings  
March 10, 2014  
Part of  
Public Record

William A. Mullins

Direct Dial: (202) 663-7823  
E-Mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com)

March 10, 2014

**VIA E-FILING**

Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001

RE: *James Valley Grain, LLC v. BNSF Railway Company*, STB Docket No. 42139

Dear Ms. Brown:

Enclosed on behalf of the Red River Valley & Western Railroad Company ("RRVW") is a copy of RRVW's reply to BNSF Railway Company's February 18, 2014 motion to dismiss the complaint of James Valley Grain, LLC.

Please let me know if you require any additional information to process the following petition.

Respectfully submitted,



William A. Mullins  
Attorney for Red River Valley & Western  
Railroad Company

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB Docket No. 42139**

---

**JAMES VALLEY GRAIN, LLC  
v.  
BNSF RAILWAY COMPANY**

---

**REPLY OF RED RIVER VALLEY & WESTERN RAILROAD COMPANY  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS**

**Mark H. Sidman  
Rose-Michele Nardi  
TRANSPORT COUNSEL PC  
1701 Pennsylvania Ave., NW  
Suite 300  
Washington, D.C. 20006  
Telephone: (202) 349-3660**

**William A. Mullins  
Robert A. Wimbish  
BAKER & MILLER PLLC  
2401 Pennsylvania Ave., N.W.  
Suite 300  
Washington, DC 20037  
Telephone: (202) 663-7823**

**Attorneys for Red River Valley & Western  
Railroad Company**

**Dated: March 10, 2014**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB Docket No. 42139**

---

**JAMES VALLEY GRAIN, LLC  
v.  
BNSF RAILWAY COMPANY**

---

**REPLY OF RED RIVER VALLEY & WESTERN RAILROAD COMPANY  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS**

Pursuant to 49 C.F.R. § 1104.13,<sup>1</sup> Red River Valley & Western Railroad Company (“RRVW”) hereby replies in opposition to BNSF Railway Company’s (“BNSF”) motion (“Motion”) to dismiss the complaint filed by James Valley Grain, LLC (“JVG”) in the above-docketed proceeding before the Surface Transportation Board (the “Board”).<sup>2</sup> Denial of BNSF’s Motion is fully consistent with Board precedent, will allow for the development of facts that are in dispute in this proceeding, and will enable the Board to move forward with a formal investigation of the novel and complex issues presented in this proceeding without the need to resolve any subsequently-filed complaints based on the same facts.

---

<sup>1</sup> As BNSF correctly notes, motions to dismiss are permissible at any time after a complaint is filed. 49 C.F.R. § 1111.5. The applicable complaint provisions, however, do not prescribe a deadline for replies to such motions, although replies are indeed sanctioned. In such circumstances the “default” rule for reply filings is at 49 C.F.R. § 1104.13.

<sup>2</sup> As is reflected in its earlier filings, RRVW actually shares BNSF’s confusion regarding the content and manner in which JVG has set forth its complaint, which is certainly unconventional when compared to the standard complaint form and procedures. JVG has attempted to explain its departure from the norms of the complaint process under 49 C.F.R. § 1111 by claiming a need for expeditious agency action. As discussed further herein, the facts underlying JVG’s invocation of Board adjudication, and the causes of action arising thereunder, warrant further development and exploration, not expeditious consideration.

## ARGUMENT

Granting BNSF's Motion at this stage would be an extraordinary remedy inconsistent with numerous precedents denying motions to dismiss when there are potential factual issues in dispute. JVG's complaint raises the issue of whether BNSF is required to provide common carrier competitive shuttle-train through rates to JVG's proposed facility at Verona, and whether BNSF must do so in time for JVG to make adequate investments plans. These are not simple legal issues that can be addressed without examining the numerous questions of fact and law that underlie those issues. Among such questions are the following:

(1) Did the structure of the transaction under which BNSF spun off the RRWV rail lines in 1987 result in BNSF retaining certain common carrier obligations (i.e., obligations to provide single through rates upon request for interline RRWV/BNSF traffic) with respect to stations on RRWV, so that BNSF does in fact have a common carrier obligation to quote single through rates to stations located on the RRWV?

(2) Given BNSF's extensive course of conduct of providing the same competitive shuttle train through rates to grain shippers on RRWV's rail line as it does to shippers located on BNSF's line, does the failure of BNSF to now provide those same rates to JVG result in unlawful discrimination under 49 U.S.C. §10741?

(3) Based on the fact that JVG will need to spend substantially more money on its facility in order to qualify for BNSF's more competitive shuttle rates, is BNSF's failure to confirm to JVG, prior to JVG incurring such costs, that JVG's facility does qualify as a shuttle train facility under BNSF's currently published tariffs constitute an unreasonable practice and/or unlawful discrimination under 49 U.S.C. §§10702 and 10741?

These are just some of the relevant questions that need to be addressed to fully answer the issues raised by JVG in its Complaint. As RRWV noted in its Petition to Intervene, the JVG complaint suggests that BNSF has discriminated against shippers located on RRWV's line vis-à-vis shippers located on BNSF's line. JVG's Complaint also contains facts that indicate that BNSF's refusal to provide JVG with a through rate or even to confirm to JVG that JVG's proposed facility would be treated as a shuttle facility under BNSF's tariff is being done solely for the purpose of extracting concessions from RRWV on the allowance it would receive on traffic moving from the proposed facility. Similarly, JVG's Complaint raised the issue of whether, in the event RRWV does not capitulate to BNSF's demands, BNSF will simply use its pricing authority to divert traffic away from JVG and RRWV facilities by causing farmers to truck to loading points located on BNSF's system. The facts underlying each of these BNSF actions must be developed and analyzed to determine if such actions constitute a violation of BNSF's common carrier obligation, constitute an unreasonable practices under 49 U.S.C. § 10702, or result in discrimination against JVG vis-à-vis other shippers in violation of 49 U.S.C. § 10741.

The foregoing issues are inextricably linked to JVG's core complaint regarding BNSF's failure to provide JVG with a single shuttle train through rate for the Verona facility. All require substantial factual development before it can be determined whether BNSF's conduct violates BNSF's common carrier obligation or constitutes unlawful discrimination or unreasonable practices. The resolution of the issues discussed above will have significant implications for RRWV, and it is these implications that have necessitated RRWV's petition to intervene in this proceeding. Because the existing record does not provide a sufficient basis to resolve the factual and legal issues contained within JVG's complaint, BNSF's Motion should be denied.

**I. THE STANDARD REQUIRED TO GRANT A MOTION TO DISMISS IS EXTREMELY HIGH AND BNSF HAS FAILED TO MEET THAT STANDARD**

BNSF's Motion starts by presenting an overly narrow "factual background" and then argues the complaint should be dismissed on the basis of the existing record, without further factual development. Not surprisingly, BNSF does not address the standard for granting a motion to dismiss until the penultimate page of its Motion. When BNSF finally does address the standard, it characterizes the Board as "reluctant at times to grant motions to dismiss at the outset of complaint proceedings" (Motion at 7), but nonetheless leaves the impression that this proceeding easily meets the requirements for granting a motion to dismiss.

The statement that the Board is merely "reluctant" to grant motions to dismiss at the beginning of a complaint proceeding is a mischaracterization of agency policy. In fact, a review of Board precedent reveals that the Board rarely grants a motion to dismiss without allowing parties to develop the factual record. Under 49 U.S.C. § 11701(b), the Board may dismiss a complaint only if it "does not state reasonable grounds for investigation and action." Moreover, the Board has made it abundantly clear that "[m]otions to dismiss [a complaint] are disfavored and rarely granted."<sup>3</sup>

In misconstruing the applicable precedent governing motions to dismiss, BNSF fails to acknowledge that (1) BNSF bears the burden of proof as the party seeking dismissal; and (2) the Board will only grant dismissal if it is able to determine that there is no basis upon which it could

---

<sup>3</sup> State of Montana v. BNSF Railway Company, STB Docket No. 42124, slip op. at 3 (STB served Feb. 16, 2011); Dairyland Power Coop. v. Union Pac. R.R., STB Docket No. 42105, slip op. at 5 (STB served July 29, 2008) ("Dairyland"); Garden Spot & Northern Limited Partnership and Indiana 4 Rail Corp. – Purchase and Operate – Indiana Rail Road Co. Line Between Newton and Browns, IL, Finance Docket No. 31593, slip op. at 2 (ICC served Jan. 5, 1993).

grant the relief sought.<sup>4</sup> Indeed, the Board will deny a motion to dismiss even where the complainant's "underlying rationale as initially presented is not properly developed."<sup>5</sup> A broad survey of Board decisions shows that dismissal of complaints at this stage of the proceeding is rarely granted. Indeed, even in the most recent of cases denying motions to dismiss, the Board confirmed that it is not only reluctant to grant such motions, but rarely grants them.<sup>6</sup> BNSF's answer and argument fall short of meeting the high standard set forth in these cases for granting a motion to dismiss.

Although BNSF has offered four cases that it claims support dismissal, all of them turn upon the absence of material issues of fact to be resolved, or the absence of a legal theory upon which the Board could grant relief, or can easily be distinguished. In DHX, Inc. v. Matson Navigation Co., STB Docket No. WCC-105 (STB served May 14, 2003), the Board dismissed only certain counts of the complaint, not the entire complaint. Similarly, in S. Miss. Elec. Power. Assoc. v. NS R.R. Co., NOR 42128 (STB served Apr. 21, 2011), the Board dismissed only one of the complainant's various counts, predicated on the fact that, unlike the case here, the complaint lacked sufficient facts and details to support the possibility of Board action on that particular count. Although the Board did dismiss the complaint in Omaha Pub. Power Dist. v. UP, STB Docket No. 42006 (STB served Oct. 17, 1997) in its entirety, the Board

---

<sup>4</sup> See, e.g., Sierra R.R. Co., et al. v. Sacramento Valley R.R. Co., et al., STB Docket No. 42133, slip op. at 3 (STB served Apr. 23, 2012).

<sup>5</sup> Dairyland at 5.

<sup>6</sup> A small handful of the more recent cases in which the Board has denied motions to dismiss a complaint in the post-ICCTA era follow: Brampton Enterprises v. Norfolk Southern Railway Company, STB Docket No. 42118 (STB served Mar. 16, 2011) ("Brampton"); Entergy Arkansas, Inc., et al. v. Union Pacific Railroad Company, et al., STB Docket No. 42104 (STB served Dec. 30, 2009); E.I. DuPont de Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42099, et al. (STB served Dec. 20, 2007); and North America Freight Car Assoc. – Protest and Pet. for Investigation, No. 42060, (STB served Aug. 13, 2004).

did so because the complaint involved terms of a rail services contract, and the requested relief was thus beyond the scope of the Board's jurisdiction. JVG's complaint does not rest upon the terms of a rail services contract, but rather upon BNSF's common carrier obligation and the application of existing BNSF tariffs to that traffic.

In contrast to the cases cited by BNSF, in this proceeding there are material facts to be learned with respect to a myriad of BNSF actions vis-à-vis JVG that potentially constitute violations of BNSF's common carrier obligation, unlawful discrimination and/or unreasonable practices. These include, without limitation, whether BNSF, through its transaction structure, has retained the common carrier obligation to provide JVG with single through rates; whether, based on its extensive prior course of conduct with respect to similarly situated shippers, BNSF is discriminating against JVG by failing to provide JVG with single shuttle train through rates; whether BNSF it is acting unreasonably or unlawfully in discriminating against JVG by refusing to confirm, prior to JVG's construction of its facility, that, if JVG spends the significant amount of additional money necessary to construct a facility that currently qualifies for BNSF's shuttle train rates, JVG will be entitled to use those rates. All of these potential claims have legal and statutory provisions, precedents, and theories that support such claims and all of them have been touched upon in one way or another in the JVG Complaint. There is no "absence of a legal theory" supporting such claims nor is there an absence of material facts in dispute. There are materials facts in dispute, which, under Board precedent, require the Board, when viewing the facts in a light most favorable to a complainant, to deny the Motion and instigate a complaint proceeding.

**II. BECAUSE THE ALLEGATIONS RAISED IN THE COMPLAINT CANNOT BE ADDRESSED WITHOUT FURTHER FACTUAL DEVELOPMENT, THERE IS A REASONABLE BASIS FOR DENYING THE MOTION TO DISMISS**

**A. Whether BNSF Has Violated Its Common Carrier Obligation Cannot Be Fully Answered Without Further Factual Development**

JVG's claim that BNSF has a common carrier obligation to quote shuttle-train through rates to/from a station (Verona) located on a line of railroad not owned or leased by BNSF is a complex question of law and fact. RRVW posits that neither party has presented a factual record at this time that would support a reasoned legal finding. JVG relies upon a course of conduct and the existence of BNSF tariffs showing that BNSF "holds itself out" as providing common carrier service to stations on RRVW's line – all factually correct statements. BNSF, on the other hand, largely dodges the issue of whether it has a common carrier obligation to provide rates to JVG at Verona. Instead, BNSF relies upon the doctrine of ripeness as the basis for its motion to dismiss, although it does appear that BNSF is at least prepared to resolve this proceeding via issuance of a procedural schedule.<sup>7</sup>

As for JVG's argument that BNSF's course of dealing with respect to RRVW stations constitutes a "holding out," RRVW believes there are numerous additional facts, not yet in the record, that provide significant support for the conclusion that BNSF has a common carrier obligation to provide single through rates on interline traffic that moves to/from RRVW stations, such as Verona. If the Board permits the record to be developed, RRVW believes the record will show that the combination of BNSF's pricing controls and interchange commitments rise to the level of a retained common carrier obligation on the part of BNSF with respect to the pricing of interline traffic handled by RRVW and BNSF. However, to fully address that issue, additional

---

<sup>7</sup> Even BNSF says that if its Motion is denied, the Board should set a procedural schedule and "give BNSF an opportunity to respond to JVG's 'case-in-chief.'" BNSF Answer at 12.

facts must be examined and developed. See e.g. Kansas City Transportation Company LLC – Lease And Assignment Of Lease Exemption – Kansas City Terminal Railway And Kaw River Railroad, LLC, FD 34830 (STB served May 23, 2007)(Board had to examine underlying transaction and contracts to determine whether seller had retained the common carrier obligation).<sup>8</sup>

Likewise, BNSF's reliance upon the "ripeness" doctrine also depends upon further factual development. The ripeness issue cannot be resolved until it is first determined whether, due to the structure of the BNSF/RRVW deal, BNSF has a common carrier obligation to price interline traffic moving over both railroads, which, as noted above, requires further factual development. If it does have such a retained common carrier obligation, then the parties can address when that obligation "kicks-in," but they can only do so within the factual background of the framework of BNSF's obligations under the 1987 approved transaction.<sup>9</sup>

Assuming BNSF retained the common carrier obligation to price interline traffic in 1987, the issue of when such obligation becomes ripe with respect to JVG will depend on a variety of factors. For example, a reasoned determination will depend on facts relating to (1) the timeframe within which JVG must incur substantial premium construction costs in order to be able to participate in BNSF's shuttle program; (2) BNSF's prior conduct and practice in qualifying other similarly situated facilities recently built adjacent to the lines of RRVW and BNSF under BNSF's shuttle train program, including when, in the course of such planning and construction

---

<sup>8</sup> The underlying contracts between BNSF and RRVW would thereunder be facts in this case in the limited sense that such contracts illuminate the transaction structure and help to determine if the transaction structure itself, confirmed by 26 years of practice, results in BNSF having certain retained common carrier obligations. This question cannot be answered on the existing record.

<sup>9</sup> If BNSF has a common carrier obligation to provide JVG with a single through rate, as discussed above, then any contractual dispute between BNSF and RRVW as to the amount of RRVW's allowance should not provide BNSF with a basis for failing to perform its obligation.

processes, BNSF confirmed that the facilities would constitute shuttle train facilities and provided rates to those facilities; and (3) whether, in light of the above factors, delaying BNSF's common carrier obligation would constitute an unreasonable practice and unlawful discrimination.

Such questions are not mere “legal” questions that can be resolved on the basis of the existing record. The foregoing makes clear there are many factual issues underlying the question of whether BNSF should provide a common carrier through rate, the form that rate should take, and when that rate needs to be provided. There are also unexamined facts related to potential violations of ICCTA, which as further set out below, also weigh in favor of denying the motion to dismiss at this time. Because the factual record is not yet complete, the Board should institute a proceeding, require the parties to meet to develop a procedural and discovery schedule (or impose one if the parties cannot agree), and resolve these very complex questions upon full completion of the record.

B. The Complaint Also Addresses Potential Discrimination And Other Unreasonable Practice Claims Which Require Further Development Of The Record

As discussed above, in addition to the common carrier obligation issue, the allegations contained in JVG's complaint and BNSF's response demonstrate that there are numerous other issues of fact and law that need to be examined to determine if other provisions of ICCTA are being violated. For example, although not emphasized in the Complaint, the record already indicates that BNSF may be engaging in discrimination against RRVW and against similarly-situated grain shippers located on RRVW's lines in violation of 49 U.S.C. § 10741. See e.g., JVG Complaint, Larson V.S. at 14 and Exhibit 2; JVG Complaint, Legal Argument, p. 7, n. 5; and June 4, 2013 Letter from Andy Thompson to Richard Ebel;

The record also suggests that BNSF's pricing and marketing practices may be designed either to force "partner" short lines such as RRWV to accept rate divisions or allowances that could render (or keep) short lines with inadequate revenue, or to divert traffic from its short line partners altogether<sup>10</sup> and onto facilities located on the BNSF thereby potentially violating Sections 10702 and 10741. JVG Complaint, Larson V.S., Exhibits 3 & 6; JVG Complaint, Legal Argument at 17; JVG 2/27/14 Reply at 2 & 7.

JVG does not seek merely a common carrier rate, but a "direct, non-discriminatory through rate and other terms for the transportation of grain in shuttle train service." Thus, the Verified Statement supporting JVG's Complaint provides that "[w]e just want a non-discriminatory through shuttle rate like that of all of our neighboring shuttle elevators." In addition, the Verified Statement provides that BNSF has refused JVG's request to provide JVG with the grain shuttle rates "necessary to allow us to construct a new state-of-the-art \$30+ million elevator at Verona, North Dakota" and that JVG "rel[ies] on shuttle train incentives in BNSF's tariffs "in order to finance and construct their facilities." (JVG Complaint, Larson V.S. at 7-8.) Yet, we know that BNSF has previously provided other similarly designed facilities located on both the RRWV and BNSF with just such grain shuttle rates and in a manner that allowed those facilities to be built in a timely fashion. Yet, for some reason, BNSF won't do so here. Accordingly, the Complaint puts front and center other potential claims of unlawful discrimination among similarly-situated shippers on RRWV's line and/or of unreasonable practices through BNSF's refusal to provide timely confirmation of JVG's participation in

---

<sup>10</sup> Of course, such tactics, if successful, could deprive RRWV of essential traffic, reduce the competition provided by competing shuttle train facilities, and cause farmers located on RRWV and other shortlines to truck their grain over even larger distances to BNSF locations, generating more trucks and ton-miles on North Dakota roads. See March 6 letter from the Public Service Commission for the State of North Dakota.

BNSF's shuttle program, which is a necessary predicate for moving forward with the facility's construction.

While the potential discrimination and unreasonable practice claims may not be the focus of the JVG Complaint, they have been raised. It was the airing of these issues that prompted RRVW's petition to intervene. Now that the issues have been raised, and form at least a part of JVG's complaint, it would be contrary to due process and Board precedent to now deny parties, including RRVW, the right to explore the validity of these issues. The Board should not dismiss them as irrelevant or unnecessary to the resolution of the Complaint. Indeed, in the Dairyland proceeding, a motion to dismiss was denied and the complaint allowed to move forward notwithstanding the fact that the complaint itself was incomplete and flawed in some aspects. Here, the Board has an obligation to allow the parties to fully address not only the common carrier obligation issues, but also some of the other integrally-related issues raised in the initial pleadings.

This proceeding is not simply a matter of addressing a narrowly-cast and overly simplified legal question of whether BNSF has an obligation to quote a common carrier through rate to JVG's Verona facility. As this Reply demonstrates, the common carrier obligation of BNSF to quote a non-discriminatory, single through shuttle rate to JVG, in a timely manner, raises a host of factual and legal issues. Simply put, these are not purely "legal" issues that can be dealt with through a "case-in-chief" filing followed by BNSF's "answer" and Motion. Rather, there are legal and factual issues warranting appropriate scrutiny and requiring the development of a full record.

C. There Are Also Disputes Over The Facts That Have Already Been Presented By BNSF Which Require Further Development

In addition to the underdeveloped factual issues with respect to BNSF's common carrier obligation and those involving potential discrimination and unreasonable practice claims, RRWV disputes many of the supposed facts as stated by BNSF in the record. When there are material facts in dispute, Board precedent requires the Board, when viewing the facts in a light most favorable to a complainant, to deny the Motion and instigate a complaint proceeding.<sup>11</sup>

A prime example of the type of factual assertion made by BNSF that is wholly inaccurate and misleading involves the dispute between BNSF and RRWV over the level of RRWV's allowance requirement and whether that allowance requirement would provide RRWV with enough capital to invest in its infrastructure. BNSF has stated that RRWV's per-car rate allowance for grain shuttle traffic is "extremely robust," enabling RRWV to earn "over \$700 per car on a 151 mile move." After leaving the impression that RRWV is obtaining enormous profitable allowances, BNSF then states that RRWV is not using those "extremely robust" profits to properly invest in its infrastructure. RRWV strongly disputes these assertions.

At the outset, the \$700+ figure cited by BNSF is the current escalated approximate amount that RRWV is entitled to receive under the Rate and Allowance Agreement between

---

<sup>11</sup> Even BNSF's own Answer explicitly notes that there are disputes over whether JVG's facts are accurate and states that there are "numerous critical omissions in its factual account." Answer at 5. In reviewing a motion to dismiss, the Board views all alleged facts in the light most favorable to the complainant. Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011). In accordance with 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.1(a), a complaint must, at a minimum, state reasonable grounds for an investigation and set forth the facts that are the subject of the violation. JVG's Complaint, even though it may not have fully set forth the facts with respect to discrimination or unreasonable practices, has set forth sufficient facts, when viewed in the light most favorable to JVG, support further investigation. Of course Board precedent also indicates that when there are disputes over the factual record (Brampton) or when the complaint fails to fully develop or articulate the factual record (Dairyland), the complaint should not be dismissed in order to allow the parties to develop the record.

RRVW and BNSF. RRVW is entitled to receive this allowance for “each loaded car...interchanged with RRVW at ...Casselton,” which is where the Verona traffic would be interchanged to BNSF. Yet, notwithstanding that BNSF is contractually bound to pay RRVW the \$700+ per-car allowance, BNSF knows full well that RRVW is not insisting on the 700+ allowance, but instead, has been more than willing to negotiate for a substantially lower per-car charge.

Even if RRVW were to insist upon the \$700+/car charge, such a charge is hardly “extremely robust.” A simple calculation under the Board’s URCS program shows that the approximate \$700+ per car allowance returns an R/VC ratio of anywhere from a low of 96% to a high of 198% depending upon whether the traffic moves in a shuttle train, unit train, or single-car moves. Such a charge is hardly remunerative to RRVW and is certainly not “extremely robust.”

BNSF also claims that RRVW “has failed to make the capital investments necessary to maintain its railroad sufficient to accommodate efficient shuttle train movements despite receiving a very high per car handling charge from BNSF for single-car movements ...and for grain shuttle movements originating on RRVW.” Answer at 6. This statement is misleading and inaccurate for two reasons. First, as noted above, even if RRVW were receiving \$700+ per car for existing shuttle train traffic, such an allowance amount is not a “very high per car handling charge.” *Id.*, and Steptoe Transmittal Letter at 2. Second, for a railroad that is allegedly failing to maintain its infrastructure to accommodate shuttle train movements and is moving such traffic in “inefficient” and “circuitous” routings, as BNSF alleges, one must ask why the volume of RRVW shuttle train traffic has grown from 14 such trains in 2000 to 141 in 2013. This belies

any notion that shuttle train traffic over RRVW's lines is "inefficient" or that its track infrastructure is deteriorating.

In fact, even though RRVW is receiving far less than \$700+ per car for its existing shuttle train traffic, RRVW is able to make the capital investments necessary to ensure efficient service. As shown in Exhibit A, BNSF's own "Shortline Inspection Report," summarizing BNSF's September 18-19 inspection trip, concludes that "RRV&W is doing a very good job of maintaining the physical plant," and that the "[g]eneral rail condition is good." RRVW is meeting BNSF's required maintenance standard. Clearly, RRVW is not failing to invest in its infrastructure or maintain its track, and RRVW is doing this at allowance levels that are barely covering its URCS costs.

**III. ADMINISTRATIVE CONVENIENCE ALSO SUPPORTS DENYING THE MOTION TO DISMISS BECAUSE DISMISSING JVG'S COMPLAINT UNDER THE CIRCUMSTANCES WOULD ONLY ENGENDER FURTHER LITIGATION BEFORE THE BOARD**

The record as thus far presented by JVG and BNSF offers reason to believe that BNSF may be engaging in pricing and other conduct intended to discriminate against JVG vis-à-vis other existing shuttle train facilities and may be engaging in unreasonable practices against both JVG and RRVW.<sup>13</sup> As RRVW has explained in earlier filings, the facts and issues that JVG has (intentionally or unintentionally) skirted in its complaint are of great concern to RRVW, and are so intertwined with those between JVG and BNSF that rushed Board action limited to the scope of BNSF's common carrier obligation alone would be an unwise and inefficient use of agency resources. Thus, if the Board does grant the Motion or rules against JVG without fully

---

<sup>13</sup> As such, it is vitally important to bear in mind that BNSF's actions affect not only JVG, but also RRVW. RRVW has sought the right to intervene here to examine these issues in sufficient detail so as to ascertain their validity and their impacts on RRVW.

addressing the potential discrimination and unreasonable practice issues, then RRVW may likely pursue its own complaint before the Board under a separate docket.

RRVW reiterates that if it must file its own complaint, the close interrelatedness of the instant case and the one that RRVW would bring strongly favors the Board resolving all of the issues now, in the context of this proceeding. Doing so is the most expeditious and efficient way to resolve all of the matters raised by JVG, BNSF, and RRVW. Indeed, BNSF itself has agreed that if the Board does not grant its Motion, then the Board should set this case for handling under the customary modified procedure complaint processes, rather than render a decision on the merits at this stage of the proceeding.

### CONCLUSION

For the reasons set forth above, RRVW respectfully requests that the Board deny BNSF's Motion, and that, instead, the Board establish a formal proceeding to govern the adjudication of this matter under the usual formal complaint procedures.

Respectfully submitted,

Mark H. Sidman  
Rose-Michele Nardi  
TRANSPORT COUNSEL PC  
1701 Pennsylvania Ave., NW  
Suite 300  
Washington, D.C. 20006  
Telephone: (202) 349-3660

  
William A. Mullins  
Robert A. Wimbish  
BAKER & MILLER PLLC  
2401 Pennsylvania Ave., N.W.  
Suite 300  
Washington, DC 20037  
Telephone: (202) 663-7823

Attorneys for Red River Valley & Western  
Railroad Company

Dated: March 10, 2014

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB Docket No. 42139**

---

**JAMES VALLEY GRAIN, LLC  
v.  
BNSF RAILWAY COMPANY**

---

**REPLY OF RED RIVER VALLEY & WESTERN RAILROAD COMPANY  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS**

---

**EXHIBIT A**

---

## SHORTLINE INSPECTION REPORT

1. Shortline: Red River Valley & Western
2. Location:
  - a. Wahpeton (MP 0.0) – Wahpeton Jct. ( MP 1.4)
  - b. Wahpeton Junction (MP 0.0) – Minnesota/North Dakota border (6.04)
  - c. Wahpeton Junction (MP 1.4) – Casselton (MP 55.0)
  - d. Chaffee Line Junction (MP 0.0) – Chaffee (MP 11.4)
  - e. Horace (MP 9.5) – Edgeley (MP 107.9)
  - f. Oakes Junction (MP 76.5) – Oakes (MP 149.9)
  - g. Independence (MP 0.0) – Oakes (MP15.3)
  - h. Jamestown (MP 2.0) – LaMoure (MP 48.5)
  - i. Jamestown (MP 0.0) – Maddock (MP 53.7)
  - j. Pingree (MP 0.0) – Woodworth (MP 21.5)
  - k. Carrington (MP 0.0) – Bowdon (MP 29.16)
  - l. Breckenridge Yard, including MP 212.32 – MP 215.2
3. Type of Contract: Contract for Deed
4. Lease Effective Date: July 13, 1987
5. Lease Termination Date: Purchase option available on July 13, 2027
6. Shortline Maintenance Standard: Main lines – standards required to operate at the timetable speeds in effect on the date of transfer. Other tracks – conditions existing as of the date of transfer.
7. Date of Inspection: September 18 – 19, 2013
8. BNSF Participants: Bryan Meyer, Chris Randall
9. Shortline Participants: Andy Thompson, President; Dan Zink, Director of Administration; Cal Gruebele, Manager Track and Structures; Duane Braun, Assistant Manager, Track
10. Recent Shortline Investments: Accompanying this report is a summary of ballast, tie, rail and surfacing work accomplished over the past several years. The RRV&W has done a very good job of maintaining their physical plant. Maintenance was noted on a few bridges including re-decking and select structural strengthening. Three 48” diameter culverts were installed just east of Davenport. Bridge 84 between Oakes Jct. and Mooreton, ND, had recently been re-decked, some piling posted, and looked very good.

11. Planned Shortline Investments: Approximately 9,000 LF of new 115# CWR is being relayed on the 1<sup>st</sup> Subdivision in 2014. Approximately 20,000 ties are planned for renewal each year across various subs for the next ten years.

12. Inspection Results:

- a. Rail: RRV&W maintains rail sections on main lines that vary from 72# to 136#. A rail detector car is operated 2 times per year on lines handling 286K unit train traffic (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Subs). General rail condition is good.
- b. Ties: Overall tie condition is very good. RRV&W has done a good job of managing tie condition which looked consistent throughout the entire inspection. Scrap ties are loaded into roll-offs which are hauled by truck to Enderlin, ND, where they are shredded and incinerated at a local power plant.
- c. Ballast and general track surface & alignment: General surface and alignment were very good. RRV&W procures ballast from Ortonville utilizing 20 ballast cars.
- d. Crossings: Crossings in general looked good. There are some plank crossings with deteriorated material; however, there are a number of concrete crossings that looked very good. I did mention that they may want to audit their whistle posts and that there was numerous public crossing that lead from one field to another, that could be deemed private.
- e. Vegetation: RRV&W conducts vegetation control with equipment they own and operate. They also operate an on-track weed mower with 9' cutting blades. No exceptions taken to vegetation control.
- f. General housekeeping: No exceptions noted. Scrap ties are loaded into roll-offs which are hauled by truck to Enderlin, ND, where they are shredded and incinerated at a local power plant.
- g. Comments (including general comments regarding signal and structures issues): We inspected the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Subdivisions. The 2<sup>nd</sup> Sub between Casselton and Wahpeton Jct. carries about 2.5 MGT annually and is in very good condition. The 2<sup>nd</sup> Sub has 115# bolted and welded rail with very good rail, tie and ballast conditions. The 3<sup>rd</sup> Sub from Oakes Jct. to Oakes and on to Independence is in good condition. The 3<sup>rd</sup> Sub has 90# bolted rail, 100# bolted and welded rail, 112# bolted and welded rail, and 131# bolted rail. Overall rail, tie and ballast conditions are good. The 4<sup>th</sup> Sub between Independence and Edgeley has 90# welded and 112# welded rail and is in very good condition overall. The 4<sup>th</sup> Sub from Independence to Davenport and on to Horace has 27 miles of 72# rail as

well as 85# and 100# bolted rail. The 72# rail is well anchored and tie condition is good. RRV&W utilizes Osmose for annual bridge inspection and for work on timber structures. There are 3 signal maintainers that handle the day-to-day signal maintenance needs and inspections. A typical track maintenance crew consists of 3 people.

13. Does track meet maintenance standard? Yes
14. Are current shortline maintenance efforts sufficient to meet maintenance standard? Yes. RRV&W is doing a very good job of maintaining the physical plant.
15. Recommended next inspection: 2016

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB Docket No. 42139**

---

**JAMES VALLEY GRAIN, LLC  
v.  
BNSF RAILWAY COMPANY**

---

**REPLY OF RED RIVER VALLEY & WESTERN RAILROAD COMPANY  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS**

---

**VERIFICATIONS**

---

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB Docket No. 42139**

---

**JAMES VALLEY GRAIN, LLC  
v.  
BNSF RAILWAY COMPANY**

---

**REPLY OF RED RIVER VALLEY & WESTERN RAILROAD COMPANY  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS**

---

**VERIFICATION**

---

I, Gerald W. Fauth III, President of G.W. Fauth & Associates, Inc., declare under penalty of perjury that I have read the foregoing Reply Of Red River Valley & Western Railroad Company To BNSF Railway Company's Motion To Dismiss and that any references to calculations made under the Surface Transportation Board's Uniform Rail Costing System are true and correct. Further, I certify that I am qualified to make this statement. Executed this 10<sup>th</sup> day of March, 2014.



Gerald W. Fauth III

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

---

STB Docket No. 42139

---

JAMES VALLEY GRAIN, LLC  
v.  
BNSF RAILWAY COMPANY

---

REPLY OF RED RIVER VALLEY & WESTERN RAILROAD COMPANY  
TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS

---

I, Andy Thompson, Chief Executive Officer and President of Red River Valley & Western Railroad, declare under penalty of perjury that I have read the foregoing Reply Of Red River Valley & Western Railroad Company To BNSF Railway Company's Motion To Dismiss and that any facts relevant to Red River Valley & Western ("RRVW") are true and correct and that Exhibit A is an accurate reproduction of BNSF's inspection report as provided to RRVW. Further, I certify that I am qualified to make statement. Executed this 10<sup>th</sup> day of March, 2014.

  
Andy Thompson

**CERTIFICATE OF SERVICE**

I have this day served a copy of the foregoing Reply of Red River Valley & Western Railroad Company to BNSF Railway Company's Motion to Dismiss upon all parties of record by U.S. mail in a properly-addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.



William A. Mullins  
Attorney for Red River Valley & Western  
Railroad Company

Dated: March 10, 2014