

ENTERED
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July 10, 2014
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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| JAMES VALLEY GRAIN, LLC |) | |
| |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Docket No. 42139 |
| |) | |
| BNSF RAILWAY COMPANY |) | |
| |) | |
| Respondent. |) | |
| |) | |

**JAMES VALLEY GRAIN, LLC'S MOTION TO WITHDRAW
PETITION AND REQUEST FOR DISMISSAL
OF PROCEEDING WITHOUT PREJUDICE**

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Dated: July 10, 2014

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Petitioner James Valley Grain, LLC (“JVG”) hereby moves to withdraw its Petition for an Order Compelling Establishment of Common Carrier Rates (“Petition”), without prejudice, and in support hereof states as follows:

(1) On January 29, 2014, JVG filed its Petition seeking a Board order compelling BNSF Railway Company (“BNSF”) to establish direct, non-discriminatory through rates and other terms for the transportation of grain in shuttle train service from Verona, ND to designated destinations reflected in BNSF’s shuttle-train Tariff 4022 series. The relief requested was necessitated by needs of JVG and its 450+ farmer-members in southeastern North Dakota to have such rate information in order to proceed with construction of a planned new, 120-car shuttle train grain loading facility at Verona, ND (“JVG-Verona”) to replace a previous 26-car facility, and BNSF’s refusal to provide

such responsive rates. As explained in JVG's Petition, the JVG-Verona station, along with seven other shuttle train facilities, are physically located on the Red River Valley & Western Railroad Company ("RRVW") lines, with BNSF having the authority to establish through rates for RRVW-served grain shippers for service to BNSF-served destinations.

(2) On February 18, 2014, BNSF responded to JVG's Petition and filed a Motion to Dismiss. On February 12, 2014, RRVW filed a petition to intervene and participate as a party of record in the proceeding, and on February 18, 2014 RRVW filed a reply to the JVG Petition.

(3) On February 27, 2014, JVG filed a Reply in opposition to BNSF's Motion to Dismiss. On March 10, 2014, RRVW also filed a reply in opposition to BNSF's Motion to Dismiss.

(4) On May 27, 2014, BNSF and RRVW jointly filed with the Board an unopposed petition to hold the proceeding in abeyance for 30 days, stating that BNSF and RRVW "have reached an agreement in principle which would allow BNSF to establish through common carrier shuttle rates from [the JVG proposed shuttle] facility at Verona." *Id.* at 1. BNSF further stated that it "believes that such resolution will address the concerns that JVG has raised before the Board in this proceeding." *Id.* BNSF said that the abeyance request would "give BNSF and RRVW an opportunity to complete their negotiations and finalize an agreement" and that it would notify the Board of the resolution of the matter "[u]pon completion of negotiations of definite terms and conditions." *Id.* JVG did not oppose the BNSF/RRVW abeyance petition.

(5) The BNSF/RRVW abeyance petition was granted by the Board on June 4, 2014.

(6) On June 27, 2014 BNSF and RRVW filed with the Board a Notice of Settlement, notifying the Board that the parties had “reached a settlement on the per car allowances payable by BNSF to RRVW under through rates for proposed shuttle train movements from [JVG’s] proposed shuttle facility at Verona, ND. Thus, BNSF will be in a position to establish through common carrier shuttle rates from such a facility at Verona.” BNSF and RRVW had previously conveyed to JVG their settlement agreement.

(7) JVG is not a party to the BNSF/RRVW settlement arrangement and is unaware of its terms. However, in light of BNSF’s settlement with RRVW, and in reliance on BNSF’s representations that the settlement provides for through common carrier shuttle rates from JVG-Verona and addresses the concerns that JVG has raised about obtaining responsive rates to be able to proceed with JVG-Verona construction and operation, JVG’s interests appear protected, and JVG at this time no longer seeks the relief requested under its pending Petition.

(8) Under the circumstances and in light of these developments, JVG respectfully moves to withdraw its Petition. JVG further requests that this withdrawal be without prejudice. As noted, the issues raised in JVG’s Petition appear to have been resolved based on representations by BNSF (and RRVW) concerning their private settlement agreement. However, JVG wishes to reserve its right to later file with the Board should BNSF fail to provide responsive rates for JVG-Verona.

(9) The relief JVG requests here is consistent with the relief ordered by the Board in other similar situations, *See, e.g., Puerto Rico Mfrs. Ass'n v. Trailer Marine Transp. Corp.*, Docket No. 40343 (ICC served July 24, 1990) (dismissal without prejudice appropriate where “length of case is relatively short, discovery has not occurred, the litigation progress is in preliminary stages, and there are genuine issues of dispute between the parties. The only inconvenience to the defendants...is the possibility of another litigation.”); *Ashbro, Inc. – Petition for Declaratory Order – Wilson Spur Track in Denham Springs, LA*, STB Finance Docket No. 35171 (STB served Feb. 22, 2010) (after proceeding was held in abeyance pending negotiations the Board granted motion to dismiss without prejudice); *Ariz. Pub. Serv. Co. v. Burlington N. & S.F. Ry.*, STB Docket No. 42077 (STB served Dec. 31, 2003) at 2 (granting request to withdraw rate reasonableness complaint and dismiss proceeding without prejudice); *Bell Oil Terminal, Inc. v. BNSF Ry.*, STB Finance Docket No. 35302 (STB served Nov. 4, 2011) at 6 (dismissing complaint without prejudice); *Brampton Enters., LLC d/b/a Savannah Re-Load v. Norfolk S. Ry.*, STB Docket No. 42118 (STB served Sept. 29, 2011) at 1 (dismissing complaint without prejudice).¹

¹ Conversely, the STB dismisses complaint proceedings *with* prejudice when it has been advised that all of the involved the parties have reached a negotiated resolution of their dispute. *See, e.g., AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1) (STB served Oct. 26, 2011) at 2 ; *S. Miss. Elec. Power Ass'n v. Norfolk S. Ry.*, STB Docket No. 42128, (STB served Aug. 31, 2011) at 1. This form of dismissal – often requested by the parties themselves – operates as a confirmation of the parties’ settlement agreement rather than as any particular holding with respect to the merits of the case. As stated, JVG is not a party to, nor privy to the terms of the BNSF-RRVW settlement agreement, and therefore is not in a position to seek dismissal of this matter with prejudice.

