

ENTERED
Office of Proceedings
May 14, 2018
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42159

CENTRAL VALLEY AG GRINDING, INC. AND
CENTRAL VALLEY AG TRANSPORT INC.
vs.
MODESTO AND EMPIRE TRACTION COMPANY

**VERIFIED REPLY TO PETITION
FOR PRELIMINARY INJUNCTION**

Robert A. Wimbish
James D. Helenhouse
Audrey L. Brodrick
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2832
312-252-1500 Telephone
312-252-2400 Facsimile

**ATTORNEYS FOR MODESTO AND EMPIRE
TRACTION COMPANY**

Dated: May 14, 2018

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
OVERVIEW	2
ARGUMENT	4
A. The disputed intra-terminal switching is accessorial, not integral to line haul service	5
B. MET is entitled to be compensated for the accessorial services it provides; it cannot be ordered to provide them for free	6
C. CVAG’s injunction request is vague and overbroad	7
D. CVAG’s “security deposit” is a Board prescription by another name.....	9
E. CVAG is not entitled to an injunction	10
1. CVAG will not prevail on the merits of its unreasonable practice complaint.....	11
2. CVAG may not be harmed at all, and certainly will not suffer irreparable harm, in the absence of the Board injunction	15
a. CVAG has not proven financial frailty	17
b. Even with MET’s charges, CVAG will remain the most attractive option to its customers.....	18
c. CVAG expects damages if it prevails in its unreasonable practice complaint	21
d. CVAG’s irreparable harm case is centered on a false assertion that MET is singling out CVAG.....	21
3. An injunction subjects MET to considerable irreparable harm	24
4. An injunction will not advance the public interest	27
CONCLUSION.....	28
VERIFICATION OF DILLON OLVERA	30
VERIFIED STATEMENT OF LON VAN GEMERT	31
CERTIFICATE OF SERVICE	41

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42159

CENTRAL VALLEY AG GRINDING, INC. AND
CENTRAL VALLEY AG TRANSPORT INC.
vs.
MODESTO AND EMPIRE TRACTION COMPANY

**VERIFIED REPLY TO PETITION
FOR PRELIMINARY INJUNCTION**

On May 1, 2018, Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, “CVAG”) filed an “*Ex Parte* Application for Section 11123(a) Service Order and Section 11701 Investigation and Petition for Preliminary Injunction and Investigation” (the “Application”). On May 8, 2018, Modesto and Empire Traction Company (“MET”) filed a reply (the “May 8 Reply”) to the portion of the Application requesting that the Surface Transportation Board (the “Board”) “immediately” issue an emergency service order pursuant to 49 U.S.C. § 11123 on an *ex parte* basis. In the May 8 Reply, MET indicated that it intended to respond separately to CVAG’s requests for a preliminary injunction under 49 U.S.C. § 1321(b)(4) and for a Board-initiated investigation pursuant to 49 U.S.C. § 11701 in accordance with applicable procedural deadlines. In a Director’s Order served on May 10, 2018 (the “May 10 Order”), the Board directed MET to respond to CVAG’s preliminary injunction request two business days later, on Monday, May 14, 2018, leaving aside the deadline for MET’s reply to CVAG’s request for a Board-initiated investigation. MET hereby responds to CVAG’s injunction request.

OVERVIEW

This proceeding involves a dispute over the rates that MET charges for intra-terminal switching supporting CVAG's transloading business. MET had charged according to duly-published and publicly-available accessorial services and demurrage tariffs, and had required CVAG to prepay on a train-by-train basis for the services CVAG wanted. CVAG claims that MET's per-car switching charges are too high, CVAG uses this as an excuse to withhold payment, insisting that MET should, at most, accept a reduced, flat fee rate that CVAG is willing to supply (which CVAG nevertheless insists is still too high). In response, MET has withheld service for shipments that would require switching. MET has imposed restrictions on the interchange of larger unit trains to CVAG to avoid a "payment vs. service" impasse, and to avoid local congestion from the accumulation of unswitched trains.

It is vitally important that the Board understand the facts and circumstances underlying the MET-CVAG dispute. According to the Board's May 10 Order, CVAG has asserted that MET "has recently ceased unit train delivery and blocked interchange with connection Class I carriers to CVAG."¹ That is a misstatement of the facts. To be clear:

- MET has ceased unit train delivery to CVAG for shipments exceeding specified car configurations. Specifically, for unit trains of gluten or DDG destined to CVAG, which are transported in longer covered hopper cars, MET has advised its connecting carriers – BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") – that it will not accept in interchange any unit train for these commodities exceeding 67 cars. For unit trains of canola, which typically are transported in shorter covered hopper cars, MET will not accept in interchange unit trains exceeding 77 cars. In both cases, MET has entered a Note in the Open and Prepay Station List ("OPSL")² reflecting these service

¹ May 10 Order at 1.

² An "OPSL Note is a permanent method of identifying stations which, due to operational issues such as clearance, weight, capacity, etc., require controlled traffic movement. OPSL Notes may contain a provision for a permit to provide a controlled movement of traffic to a specific station." <https://aarembargo.railinc.com/epdb/>. A source referring to the UP glossary of terms describes the OPSL as, "A publication containing a list of freight stations in the U.S.,

restrictions, and it has requested that BNSF and UP (each of which possesses pricing authority over MET's system under handling line agreements with MET) do the same.

- MET is not refusing categorically to accept unit trains. There is nothing in industry practice disqualifying carriers from handling blocks of 67 or 77 cars as dedicated unit trains. MET understands that line haul carriers can and do offer rates in many cases for multiple carload shipments even when not handled in dedicated unit train service. In this case, UP and BNSF appear to be adjusting to MET's delivery restrictions.
- For cotton seed, one of four commodities discussed in the Application, MET has advised UP and BNSF that it will not accept in interchange more than 25 cars per delivery, reflecting CVAG's more limited unloading capacity for this particular commodity.
- The interchange restrictions are specifically tied to CVAG's unloading capacity for each commodity and car type, and are intended to avoid trains of larger dimensions being forced on MET in the absence of CVAG's commitment to pay for switching in accordance with tariff rates.
- MET has *not* restricted interchange with BNSF and MET other than as described above.
- *MET will lift the maximum carload length restrictions and accept interchange of larger deliveries for CVAG, and will provide the necessary supporting switching services, if CVAG will commit to prepayment in accordance with applicable accessorial tariff rates.* MET has been willing to do this without the need for any STB intervention.
- MET will not agree to any reduced payment arrangement (which CVAG euphemistically refers to as a "security deposit") for its accessorial services during the pendency of this case. MET is entitled to charge for accessorial services as set forth in its tariff unless or until the Board rules that those charges are not reasonable.

CVAG asserts that preliminary injunctive relief is required because MET categorically will not accept CVAG-destined traffic in interchange. That is untrue. Moreover, unless the Board is contemplating ordering MET to resume service as CVAG has requested (i.e., without charge or under a reduced payment scheme), an injunction is unnecessary.

Canada and Mexico, with information as to whether freight may be sent to them collect, or charges must be prepaid." https://definedterm.com/open_and_prepay_station_list.

ARGUMENT

In its May 8 Reply, MET explained that Albermarle,³ controlling case precedent here, establishes that the Board will not employ its injunctive powers to order the restoration of service withheld as a result of a dispute over the level of switching charges assessed by the railroad. The Board in Albermarle pointed out that a service suspension caused by a customer's unwillingness to pay tariff-based intra-terminal switching charges did not rise to the level of a failure to provide common carrier service, and that the appropriate remedy for the aggrieved customers was to seek redress at law through an unreasonable practice proceeding, not by short-circuiting the complaint process by way of an injunction. To the extent that MET's May 8 Reply already addresses the merits of CVAG's request for an injunction, that filing is hereby incorporated herein by reference.

Before showing how CVAG misses the mark for an injunction under the applicable legal standard, MET addresses the following crucial threshold issues:

First, MET explains that the disputed switching is fundamentally an accessorial service, and is not integral to line haul service, and that MET is entitled to be compensated for such services.

Second, MET points out that it is very difficult to say what it is exactly that CVAG wants the Board to enjoin, and what MET service and applicable terms would look like under an injunction.

Third, MET points out that CVAG's suggestion of a Board-imposed "security deposit" is actually a Board-prescribed reduction in MET's accessorial service tariff rates.

³ Albermarle Corporation – Alternative Rail Service – Line of the Louisiana and North West Railroad Company, Docket No. FD 34931 (STB served Oct. 6, 2006) ("Albermarle").

A. The disputed intra-terminal switching is accessorial, not integral to line haul service.

MET can deliver unit trains in excess of 67 cars (for DDG and gluten) or 77 cars (for canola) to CVAG without undertaking any intra-terminal switching, but accomplishing delivery in that fashion fouls CVAG's unloading facilities. MET could place an entire train on CVAG's loop track and deem it placed, or it could split the train between CVAG track (deeming that part placed) and MET yard track (deeming that section constructively placed), in either event accomplishing delivery. But to accommodate CVAG's desire for longer unit trains, MET must provide intra-terminal switching services over its own track following placement or constructive placement of a unit train. That would be the case for any customer that wanted the benefits of unit train service but lacked the internal capacity to handle such a train without additional assistance – switching and car holding – from its delivering carrier.

The switching services that MET has supplied to CVAG (and is willing to supply again if MET's prepayment requirements are met) are not part of MET's provision of line haul service on behalf of BNSF or UP. They are accessorial to the line haul service.⁴ CVAG cannot decide whether – (a) MET is entitled to impose accessorial charges for the switching services that CVAG wants MET to resume providing (just not at rates that MET requires, and not under conditions of prepayment); (b) CVAG is entitled to pay nothing for such services because they are integral in this case to the termination of common carrier line haul service; or (c) because some other short line railroads allegedly don't charge for such services, the Board should require

⁴ Cleo Wrap Corp. v. Burlington N. R.R. Co., Docket No. 39834, 1 I.C.C. 2d. 312, note 3 (ICC served Jul. 15, 1985) (“Anaccessorial charge, however, is typically paid for some additional special service,” and is not factored into the line haul rate); Mobil Chem. Co – Petition for Declaratory Order – Applicability of Switching Charges – Privately Owned Hopper Cars, 362 ICC 8, 16 (ICC served Oct. 18, 1979); Midw. Freight Car Co. – Petition for Declaratory Order – Switching Charges at Clinton, Ill., 358 ICC 462, 470-71 (ICC served Aug. 5, 1977).

the same of MET. Whether the disputed services are accessorial nature is a critical threshold issue upon which the balance of CVAG's requested injunctive remedy depends.

MET is a handling line carrier whose primary common carrier function is to transport traffic between customers located on its lines and its interchange with line haul partners BNSF and UP. In exchange for originating and terminating traffic, BNSF and UP pay MET a prescribed, per-car allowance. The per-car allowances that MET receives from BNSF and UP for originating and terminating unit trains are substantially less than MET collects for originating or terminating mixed carload traffic. The reason is that the handling characteristics of a unit train are such that it typically requires far less handling than mixed carload traffic does. These allowance arrangements were last negotiated well before CVAG found itself unable to unload unit train shipments without additional services from MET.

B. MET is entitled to be compensated for the accessorial services it provides; it cannot be ordered to provide them for free.

CVAG's Paul Konzen indicates that his company would be willing to pay for accessorial services if the charges were reasonable.⁵ But CVAG also suggests that MET's allowances from BNSF and UP are compensation enough,⁶ that the restoration of unit train service (presumably in the absence of accessorial charges) will actually benefit MET, and that

⁵ Application, V.S. Konzen at par. 93 ("CVAG has informed MET repeatedly that it will pay all valid accessorial charges that are reasonable and properly applied. If there are truly additional services being performed separate from reasonable delivery services, then CVAG is willing to discuss what those are and reasonable compensation for such services. However, the charges MET is demanding, in addition to being unprecedented, are clearly not reasonable . . .").

⁶ CVAG does not pay UP or BNSF (or MET for that matter) for the provision of common carrier line haul service. Others do. CVAG has acknowledged that it is not a rail shipper. Application, Konzen at par. 15.

MET should not expect to charge for its switching services because “other short lines do not engage in such accessorial fee charge practices.”⁷

If the Board agrees that the switching that CVAG requires of MET in support of CVAG’s limited car unloading capacity constitutes accessorial services, and it agrees that MET is entitled to charge for such services, then the Board cannot short-circuit CVAG’s pending unreasonable practice complaint by prescribing accessorial charges in place of those contained in MET’s tariffs. Furthermore, because MET is requiring only the prepayment of carefully-estimated charges for switching services to be rendered on a train-by-train basis, agency precedent does not support a Board order requiring MET to desist from preconditioning service upon prepayment of the accessorial charges.⁸

C. CVAG’s injunction request is vague and overbroad.

CVAG’s petition for an injunction is not a model of clarity, and MET is not sure what it is exactly that CVAG wants the Board to do. MET understands that CVAG wants MET to lift its interchange restriction, and that CVAG wants MET to resume intra-plant switching for larger unit trains as it had done until recently. CVAG’s petition is replete with requests for an order directing MET to “comply with its common carrier service obligations,” to reasonably interchange and “deliver CVAG’s livestock feed ingredients and commodity deliveries,” “to provide reasonable service to CVAG,” and “to provide service upon reasonable request.” But under what terms and conditions the Board is supposed to order MET to resume such service?

CVAG is demanding that MET to comply with the law, but MET already is so complying by accepting and delivering traffic that CVAG can accept and unload without MET’s

⁷ Application at 45. Other short lines can and do assess accessorial charges for intra-terminal switching, as is addressed in the Verified Statement of Lon Van Gemert, attached hereto as Exhibit A.

⁸ May 8 Reply at 18.

switching assistance. It is well settled that, “courts will not countenance injunctions that merely require someone to ‘obey the law’”. Hughey v. JMS Development Corp., 78 F.3d 1523, 1531 (11th Cir. 1996). Indeed, “Requests for injunctive relief must be specific.” Gholston v. Humphrey, 2015 WL 6913009 *2 (M.D. Ga. 2015) (citing S.E.C. v. Smyth, 420 F.3d 1225, 1233 (11th Cir.2005)); Calloway v. Mason, 2013 WL 5441974 *5 (M.D. Al. 2013) (holding “requests for injunctions [are] to be specific; an injunction which merely orders the defendants to obey the law is too broad and too vague to be enforceable.”).

Furthermore, an injunction must be narrowly tailored to remedy the specific harms threatened “rather than to enjoin all possible breaches of the law.” Hughey v. JMS Development Corp., 78 F.3d at 1531 citing Epstein Family Partnership v. K-Mart Corp., 13 F.3d 762 (3d Cir. 1994). That an injunction must have terms that are specific and describe in detail the type of conduct that is restrained is not merely a creation of statutory law, but rather “embodies the elementary due process requirement of notice.” U.S. Steel Corp. v. United Mine Workers of Am., 519 F.2d 1236, 1246 (5th Cir. 1975). CVAG’s request for an injunction must be denied for failing to specify in adequate detail the terms or the conduct to be restrained.

The Board’s May 10 Order characterizes the relief CVAG seeks, stating that CVAG wants MET to: “(1) establish and adhere to reasonable delivery plans for service to CVAG; and (2) maintain reasonable service delivery arrangements and cease various ‘self-help’ initiatives to reduce service and otherwise interfere with the reasonable interchange, delivery, and return of CVAG trains.”⁹ An injunction is unnecessary if CVAG pays MET’s accessorial charges, so MET is left guessing as to what it is that CVAG really wants.

⁹ May 10 Order at 1.

CVAG's injunction request appears to be a Trojan horse for Board-prescribed accessorial service rates. But MET has a right to charge for its accessorial services, and the Board would be contravening years of precedent by prescribing MET's tariff rates under color of its injunctive authority. And even if the Board could so exercise its authority under 49 U.S.C. § 1321(b)(4), CVAG does not say at what level the Board should set MET's accessorial service charges. At times, CVAG seems to advocate for some sort of fixed or capped rate scheme, although the switching services that MET may be asked to provide may vary from train to train. Issuing an injunction now without the appropriate adjudication of CVAG's unreasonable practice claims denies MET of due process. Furthermore, an injunction capping MET's accessorial charges may result in an unconstitutional taking for which MET has no remedy and would necessarily be overbroad as it prevents MET from engaging in legal activity – charging for actual services rendered based upon MET's market-based tariff rates.

D. CVAG's "security deposit" is a Board prescription by another name.

If MET is enjoined from withholding service for non-payment of its tariff charges, then what would MET be permitted to charge CVAG during the injunction's effective term? CVAG stops short of explaining how the Board can or should resolve the rate and payment issue, but it suggests that the Board ought to prescribe an amount that MET must accept for the accessorial services MET may be ordered to provide.

At times, CVAG suggests that the Board should consider directing MET to accept \$10,000 per train – regardless of actual switching requirements – as payment enough to “keep the trains moving.”¹⁰ (Commodities continue to move to CVAG even now, albeit under smaller shipments that don't require MET accessorial switching.) CVAG describes the flat-fee payment

¹⁰ Application at 3.

euphemistically as a “security deposit,” although the amount is less than is owed to MET under applicable tariffs, secures nothing, and the parties know that CVAG will not pay any more than this amount, ever, for the services. Under MET’s tariffs, the so-called security deposit would in virtually all cases be exhausted before the services for any given train are completed.

CVAG is not really asking for the Board to establish a security deposit system. Rather, CVAG is masking its request for Board-prescribed service terms by calling the Board’s actions something other than a prescription. Only once that MET is aware of has the Board found that it had the authority to enjoin the collection of a rate, and that was under the clearly distinguishable circumstances of Arizona Public Service, *infra.*, but absent the unique circumstances there, the equities support allowing MET’s charges to continue to apply until completion of the unreasonable practices complaint.¹¹ Any rate cap that the Board would consider imposing would be inequitable, and would amount to a prescription of rates without appropriate agency analysis.

E. CVAG is not entitled to an injunction.

CVAG is not entitled to the extraordinary relief of an injunction¹² – whatever that injunction is supposed to look like – because it cannot satisfy any of the four prongs for such

¹¹ See section E-3, below.

¹² “A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion.” Cobell v. Norton, 391 F.3d 251, 258 (2004) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). The Board requires a party to make a very strong showing of entitlement to equitable relief. “A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces *unredressable actual and imminent harm* that would be prevented by an injunction.” Richard Best Transfer, Inc. v. Union Pac. R.R. Co., Docket No. 42149 (STB served Dec. 22, 2016) (“Richard Best”) (emphasis added) (denying a preliminary injunction in connection with an unreasonable practices dispute, where the complainant argued that it needed the injunction or it would go out of business due to carrier rate increases). Just as in Richard Best, such an extraordinary remedy is not warranted here.

relief under Holiday Tours,¹³ let alone all of them. It is highly unlikely that CVAG will prevail on the merits of its unreasonable practice complaint. CVAG has not proven that it will suffer irreparable harm, and, indeed may not be harmed at all in the absence of an injunction. An injunction, however, will irreparably harm MET by depriving it of revenues associated with the provision of accessorial services, prejudging the validity of its accessorial charge practices, and, and by precluding MET from obtaining after-the-fact relief if its charges are upheld as reasonable. Finally, an injunction will not advance the public interest.

1. CVAG will not prevail on the merits of its unreasonable practice complaint.

MET will prevail against CVAG in the pending unreasonable practice case. MET's interchange restrictions and refusal to supply switching absent payment are appropriate and legally defensible; they are not violations of MET's common carrier obligations.¹⁴ Instead, they are manifestation of responsible business practices intended set prices according to market factors, and to assure MET of adequate revenues.

CVAG's entire case revolves around its bald, legally unsupported assertions that MET's accessorial charges are "excessive" and "patently unreasonable." But as Mr. Van Gemert explains, MET's accessorial charges are consistent with railroad industry practice and pricing, reflect per-car charges commonly found in other railroad's tariffs, and they are appropriate in circumstances such as here, where CVAG's inability to handle unit trains in the ordinary course imposes substantial demands upon a short line carrier's resources.¹⁵ Mr. Van Gemert's testimony contextualizes MET's practices and charges, and explains why MET's unit train-

¹³ Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977) (citing Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

¹⁴ May 8 Reply at 18.

¹⁵ V.S. Van Gemert at par.s 5, 8 and 13.

related charges are appropriate at existing rate levels.¹⁶ It is ultimately up to the Board to decide whether or how to evaluate the reasonableness of MET's accessorial charges, but that analysis has not yet begun, and the evidence necessary to permit such an undertaking has not yet been tendered. For the Board to limit MET's rates or forbid the collection of charges would amount to a pre-judgment of the charges themselves without evidence or analysis.

In a handful of places in the Application, CVAG suggests that MET's accessorial charges must be unreasonable because, in CVAG's opinion, the rates are not "cost-based."¹⁷ It is not clear why CVAG so states. CVAG points to no Board precedent supporting the implicit proposition that an accessorial service charge that is not strictly cost-based is unreasonable, and the concept is at odds with the law and agency policy.¹⁸ And while CVAG also occasionally offers its alleged, observation-driven estimate of MET's charges in hourly and per-minute increments, presumably as a peculiar frame of reference, CVAG nowhere establishes that this is the appropriate, or even an accurate, metric by which to evaluate those charges as reasonable. The question of the appropriate metric is suitable for adjudication in the complaint proceeding; not here. CVAG cannot demand MET accessorial services for free, as it occasionally argues.

¹⁶ CVAG claims that MET does not assess "delivery charges" (MET assumes CVAG means to say "accessorial charges") against "other shippers in the Beard Industrial District." Application at 40. First, CVAG is not a shipper. Second, CVAG is incorrect about, and evidently unfamiliar with, MET's business practices: MET does charge other customers for such services, and has negotiated accessorial services agreements with certain of its customers.

¹⁷ See, e.g., Application at 40.

¹⁸ See Coal Rate Guidelines, 1 I.C.C. 2d. 520, 523 (1985) ("Indeed, we concluded that a meaningful maximum rate policy could not be founded on a strictly cost-based approach Otherwise, the carriers may never be able to cover all their costs and earn adequate revenues"); Burlington N. R.R. Co. v. Pub. Util. Comm'n of Tex., 812 F.2d. 231, 233 (5th Cir. 1987) (noting federal policy supporting market-based rate-setting to improve the financial health of railroads); Assoc. of Am. R.R. v. Surface Transp. Bd., 237 F.3d. 676, 680, (D.C. Cir. 2001) ("[The Preamble to Staggers Act requiring competition *to the maximum extent possible*], *so forcefully expressed*, manifests a preference for market-based . . . rate setting.") (emphasis in original).

Rather, MET is entitled set its rates for such service and to withhold service if CVAG refuses to pay.¹⁹ Such a refusal of service is not an unlawful withholding of common carriage under 49 U.S.C. § 11101.

Assuming for the sake of discussion that the accessorial services in dispute here qualify as common carriage under section 11101, then a customer like CVAG (in this case, one that, by its own admission, is not a shipper) cannot claim to have made a reasonable request in demanding that service at below-tariff rates or at no charge.²⁰ Because CVAG's request is not reasonable, MET has not violated its federal common carrier obligations by denying service under the customer's dictated terms.

MET's interchange restrictions and recent addition of an OPSL Note to enforce those restrictions do not violate 49 U.S.C. § 10744. CVAG does not have the capacity to handle and unload larger unit train deliveries without MET switching and it does not accept MET's switching and prepayment terms. If MET nevertheless allowed trains that exceed CVAG's unloading capacity to be received in interchange, what then? Must MET hold the train on its property and withhold delivery unless or until the switching charges are paid? Must it provide the services CVAG requires and then bill for those services, knowing the switching invoice MET

¹⁹ See, e.g., Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging, Docket No. EP 346 (Sub-No. 14A) (I.C.C. served June 13, 1989) (“G&T Terminal”); Sample v. Atchison, Top. & S.F. Ry. Co., 139 I.C.C. 324, 333 (1928) (cited in Ill. Cent. Gulf R. Co. – Security Deposits, 358 I.C.C. 312, 319 (1978) (“Security Deposits”)); and N.Y. Bd. of Trade v. Dir. Gen., 59 I.C.C. 205, 209 (1920).

²⁰ CVAG's reliance upon Pejepscot Indus. Park, Inc. – Pet. for Declaratory Order, Docket No. FD 33989 (STB served May 15, 2003) is badly misplaced, and indirectly undercuts CVAG's position. There, a shipper complained of the serving carrier's refusal to provide common carrier service upon reasonable request. The Board noted, however, that there could be no unlawful refusal of service in the absence of an offered rate, and the shipper's acceptance of that rate. (The railroad in that case had violated its legal obligation by shirking its responsibility to quote a rate.) Here, MET has provided a rate, but CVAG has rejected it, so there is no shipper demand predicate to an unlawful refusal to serve claim.

tenders will be refused? Should it take delivery of the train and place it on available CVAG track, where it cannot be unloaded due to capacity limitations, and, from that point, await unlikely CVAG payment of the required amounts?

To avoid the gridlock on its system that would come from accepting in interchange trains that CVAG cannot unload on its own, MET has taken appropriate preventative measures, and, instead of inviting a rail service meltdown on its own tracks or those of its Class I partners, it has taken the responsible course, and has restricted interchange of CVAG-destined commodities to quantities that MET can deliver without having to provide accessorial unloading services to CVAG. MET's service-protecting actions in imposing interchange restrictions do not constitute a section 10744 violation; they are in keeping with industry practice.

In its May 8 Reply, MET addressed the legitimacy of its prepayment requirements, explaining that prepayment is the rule in railroad regulatory jurisprudence, not the exception.²¹ Hence, MET's prepayment requirements, closely tailored to estimated service charges on a train-by-train basis, are neither unreasonable nor do they constitute a violation of MET's common carrier duties to a non-shipper customer like CVAG. Railroad Salvage,²² one of only two cases upon which CVAG relies, involves a factually distinguishable exception to the prepayment rule. In footnote 112 at page 40 of its Application, CVAG also relies upon Arizona Public Service²³ as support for enjoining MET's prepayment requirements – and, evidently, as support for the Board restricting the amounts that MET can charge during the pendency of the

²¹ May 8 Reply at 18.

²² Railroad Salvage & Restoration, Inc., et al. – Petition for Investigation and for Emergency Relief Under 49 U.S.C. 721(b)(4) – Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Company, Inc., Docket No. NOR 42107 (STB served Jun. 30, 2008) (“Railroad Salvage”)

²³ Ariz. Pub. Serv. Co. and PacifiCorp. v. Burlington N. & Sante Fe Ry., STB Docket No. NOR 42077 (STB served May 12, 2003).

complaint proceeding here. But that case is also inapposite, as it deals with limitations to a Board-prescribed rate, and it is problematic for CVAG for reasons discussed in a later section.

In sum, CVAG's attempt to short-circuit its unreasonable practice complaint by pressing the Board to embrace up front CVAG's allegations that MET's practices are unreasonable is inconsistent with Albermarle and Keokuk,²⁴ and would require the Board to make an off-the-cuff pre-judgment of MET's rates and/or practices before the development of the evidence. MET is acting wisely as a business by declining CVAG's unreasonable demands, which is in no way a violation of section 11101. Additionally, by restricting interchange of unit trains over a certain size to avoid service disruptions on its railroad and others, MET is acting responsibly and not in violation of section 10744. Finally, MET has demonstrated that agency jurisprudence supports prepayment of services, and not the other way around as CVAG would have it. Accordingly, CVAG's has not shown that it is likely (much less highly likely) to prevail on the merits of its unreasonable practices complaint, and so it has failed to satisfy the first prong of the Holiday Tours standard.

2. CVAG may not be harmed at all, and certainly will not suffer irreparable harm, in the absence of a Board injunction.

Easily the most oft-repeated assertion in CVAG's Application is that – (a) CVAG cannot afford to accede to MET's prepayment requirements; (b) if it is not relieved of the prepayment requirement, then CVAG will be forced out of business at Modesto; and (c) MET and its counsel know that this is so, and *admit* that this is so.²⁵ It claims MET's charges are

²⁴ Keokuk Junction Railway Company – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Corporation, Docket No. FD 34397 (STB served Oct. 31, 2003) (“Keokuk”).

²⁵ Or, as CVAG puts it: “MET's prepayment demands will ‘put CVAG out-of-business at Modesto for service, harm our customers, and destroy competition.’” Application at 43 (quoting V.S. Konzen at par. 95). Or this: “Waiting for a full decision on the merits [while paying

“unaffordable, and that CVAG cannot possibly pay and hope to survive as a business at Modesto.”²⁶ It alleges that “MET’s practices will quickly destroy CVAG’s business at Modesto.”²⁷ And it complains that it will have no choice but to operate “at a loss” if required to pay MET’s reasonable accessorial charges.²⁸ Such assertions are unsupported, false contrivances tendered to gloss over the legal weaknesses of CVAG’s attempt to short-circuit its reasonable practice complaint.

The Verified Statement of Paul Konzen, CVAG’s lone “expert” – who happens to be one CVAG’s two owners – claims that “MET’s demands, if allowed to be implemented, will immediately put CVAG out-of-business at Modesto for unit train service, harm our customers, and destroy competition.”²⁹ Mr. Konzen complains that CVAG already has a “wire-thin level of margins,” although he provides no data on what those margins are.³⁰ CVAG presents no evidence to support these dramatic pronouncements.³¹ CVAG could have provided evidence of its financial position at Modesto, but it hasn’t.³²

MET’s charges] is not a viable option . . . CVAG’s unit train business at Modesto will go out of business virtually immediately, long before the Board issues a decision [in the complaint proceeding].” Application at 44.

²⁶ Application at 4.

²⁷ Id. at 7–8.

²⁸ Id. at 41.

²⁹ Verified Statement of Paul Konzen, at ¶ 95.

³⁰ Id. at ¶ 96.

³¹ MET has no way of knowing for sure whether CVAG cannot afford to pay MET’s switching charges or not, but MET does not believe that this is true. For the sake of some pre-litigation discussions, MET has occasionally suspended disbelief and has accepted CVAG’s claim as true, and so has suggested how CVAG could avoid MET’s switching services. MET has never confirmed or “admitted” that CVAG cannot afford MET’s accessorial service charges.

³² As explained in Richard Best, slip op. at 4:

CVAG could have showed *how* it could not afford to absorb the charges based on CVAG's current profit margins. It didn't. It could have showed *why* passing the accessorial charges along to the purchasers of its transload services would render CVAG more expensive than the alternatives available to the farmers that purchase Modesto-sourced feed. Again, it didn't. Instead, CVAG submitted evidence contradicting its position. Namely, CVAG attached to its Application farmer declarations taken from California litigation addressing feed prices proving that the switching charges will not take away CVAG's market advantage.

a. CVAG has not proven financial frailty.

If CVAG's margins were truly so thin that it could not absorb the accessorial charges, it could have submitted financial data proving its point – financial statements, profit-and-loss statements, or, preferably, transaction-level details. Those documents would concisely demonstrate why CVAG cannot afford to pay the charges at issue here. CVAG knows its profit margins, not MET or the Board, and CVAG knows what the accessorial charges are. Rather than submit this straightforward financial information, CVAG relies on pages of argument. CVAG ducks offering evidence because it *can* afford the charges. MET has reason to believe that CVAG's operation is lucrative.

To show irreparable harm, the requesting party must demonstrate both the imminence and the irreparable nature of any purported harm. Although economic loss is not generally considered irreparable harm, where it “threatens the very existence of the movant’s business,” such a loss may be considered irreparable. Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). Still, a movant must prove its case. “Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur.” *Id.* The harm alleged “must be both certain and great; it must be actual and not theoretical. Injunctive relief ‘will not be granted against something merely feared as liable to occur at some indefinite time’” *Id.* (quoting *Conn. v. Mass.*, 282 U.S. 660, 674 (1931)). See also *Va. Petroleum Jobbers*, 259 F.2d at 925 (“Mere injuries, however substantial . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”).

CVAG's arguments about its financial situation are inconsistent. At one point, CVAG alludes to the strength of its business, boasting that it is "the largest and most efficient animal feed transload business in the State of California north of Fresno."³³ That such a business could not pay customary and normal rail service charges is not plausible. Beyond that, CVAG has indicated that its customers – the purchasers of its transload services – are large agribusinesses,³⁴ and there is no indication that these companies would not or could not factor the switching charges into their pricing at CVAG-Modesto. These CVAG customers are certainly able to absorb costs that CVAG might not be able to absorb. CVAG is a massive business enterprise, but it claims that an increase in short line service costs would destroy its entire business model at Modesto. CVAG is not a failing firm.

To believe CVAG, one must accept that CVAG's survival depends upon strictly limited charges for the services it receives from a short line railroad. MET's charges are just one of the many cost inputs in feed prices, along with UP and BNSF line haul rates, and the fluctuating costs of the products themselves, among others. CVAG is not fighting for its life; CVAG, possibly at the urging of large agribusinesses, is fighting a small trading partner from which it figures it can most easily wrest concessions.

b. Even with MET's charges, CVAG will remain the most attractive option to its customers.

Even if it could not absorb MET's charges, CVAG would still need to show why passing MET's charges through to its customers (the shippers of the commodities that CVAG

³³ Application at 6.

³⁴ Application at 11.

transloads)³⁵ would render CVAG uncompetitive. CVAG has submitted no such evidence. To the contrary, CVAG's own evidence disproves CVAG's argument.

CVAG attached to its Application, declarations from three local dairy farmers taken from state court litigation. Those statements are intended to show the harm these farmers would suffer if CVAG were to fold at Modesto.³⁶ Each of the farmers explains how much his respective costs would increase if he needed to buy feed from a transload source other than CVAG-Modesto. The statements were virtually identical on the following points: (1) CVAG's closest source competition is some 100 miles distant; and (2) buying feed from those transloaders would increase the farmers' feed costs by \$8.00 per ton due to added transportation expenses.³⁷ According to the statements, CVAG-sourced feed would cost these farmers \$8.00 less per ton than feed sourced from CVAG's competition. CVAG, and, by extension, its customers, have an \$8.00 per ton competitive advantage for the business of Modesto-area feed consumers!

For current purposes, MET assumes, *arguendo*, that CVAG would pass 100% of the accessorial charges to the purchasers of its transload services – large shippers like Archer Daniels Midland Company, JD Heiskell, A.L. Gilbert Company, and Gavilon – and those entities, in turn, would adjust their feed prices at Modesto to reflect the costs of MET's switching. So long as the costs associated with MET's switching result in *less* than an \$8.00 per

³⁵ MET understands that CVAG provides its transload services to the feed shippers that also arrange for the line haul railroad transportation of the commodities shipped to Modesto. Dairy farmers in the area then purchase the transloaded feed from CVAG's customers (not from CVAG) and arrange for the transportation of the purchased feed from CVAG-Modesto to the farm. The dairy farmers' total feed costs are a combination of the purchase price at CVAG-Modesto and the farmer's truck transportation costs from Modesto to the farm.

³⁶ Id. at 46 n.139.

³⁷ Pires Decl., Counsel's Exh. 3, at ¶¶ 14–16; Borba Decl., Counsel's Exh. 4, at ¶¶ 15 – 18; Kelley Decl., Counsel's Exh. 5, at ¶ 15.

ton increase in the delivered price of feed to area farmers, then CVAG would still be the most competitive feed source for Modesto consumers.

MET's accessorial charges, if passed through to the farmers, would result in far less than an \$8.00 per ton increase in CVAG-sourced feed. The table below explains why. For Canola, Gluten, and DDG, MET first submits the average estimated accessorial charges per unit train. Then, MET divides that price by the average net tons of the product on each unit train to calculate the per-ton cost of MET's unit switching charges. The per-ton costs range from \$1.01 to \$1.97 per ton, far less than CVAG's \$8.00 per-ton competitive advantage. MET shows the difference, both in actual price and percentage, between CVAG sourced feed (per ton) with the MET switching charge pass-through, and the substantially higher delivered feed prices that farmers would pay if they opted for a different transload source.

Product	Average MET Accessorial Charges Per Unit Train	Average Tons Per Unit Train	MET Accessorial Charges Per Ton	Alternative Source Cost Per Ton Compared to CVAG	Difference in Price Between CVAG-Sourced and Competitor-Sourced Feed
Canola	\$11,250 ³⁸	11,150 ³⁹	\$11,250 / 11,150 = \$1.01	\$8.00	\$6.99 less (or 87.4% less) than competitor
Gluten	\$18,450 ⁴⁰	9,800 ⁴¹	\$18,450 / 9,800 = \$1.88	\$8.00	\$6.12 less (or 76.5% less) than competitor
DDG	\$18,450 ⁴²	9,350 ⁴³	\$18,450 / 9,350 = \$1.97	\$8.00	\$6.03 less (or 75.3% less) than competitor

³⁸ Application, Exhibit 19.

³⁹ This estimate is based on a 100-car unit train where each car has a net tonnage of 223,000 pounds of Canola.

⁴⁰ Application, Exhibit 17.

⁴¹ This estimate is based on a 100-car unit train where each car has a net tonnage of 196,000 pounds of Gluten.

⁴² Unit trains carrying DDG are usually the same size as those carrying gluten and will likely require the same services as unit trains carrying gluten. (Application at 26.)

⁴³ This estimate is based on a 100-car unit train where each car has a net tonnage of 187,000 pounds of DDGs.

As the foregoing chart shows, even if CVAG, and, in turn, its customers, were to pass the entire cost of MET switching onto the dairy farm feed purchasers (and CVAG appears to be able to absorb as much as \$10,000 per train under its misleadingly-labeled “security deposit” proposal),⁴⁴ local farmers would still find CVAG sourced feed to be significantly more attractive than other transload sources. CVAG customers state that their current freight charges are around \$7.00 to \$7.50 per ton.⁴⁵ Adding 100% of MET’s switching charges the CVAG-Modesto feed price to that would increase their costs to \$8.01 to \$9.47 per ton. This is a far cry from the \$15.00 to \$15.50 per ton costs they fear from the loss of CVAG. Accordingly, MET should not have to provide free or reduced-rate switching to subsidize the commercial position of CVAG and its customers in the market.⁴⁶ CVAG’s own evidence disproves that it faces death by competition due to MET’s accessorial service charges.

c. CVAG expects damages if it prevails in its unreasonable practice complaint.

CVAG assiduously avoids discussing whether it may be entitled to reparations in the event that MET’s charges are proven to be unreasonable. Its complaint, however, clearly seeks “damages, with interest, pursuant to 40 U.S.C. § 11704(b) for all unlawful payments made to CVAG [MET].”⁴⁷ MET has shown above how CVAG-supplied testimony disproves its

⁴⁴ MET understands that CVAG’s customers, the aforementioned agricultural concerns such as Gaviion, have, indeed, offered in certain instances to cover the costs of MET switching for CVAG. MET notes that CVAG is its customer, and not the line haul shippers (ADM, Gaviion, etc.). But these instances where CVAG’s customers have contributed indirectly to the payment of MET’s switching charges indicate that CVAG’s customers, like CVAG, are able to absorb at least a portion of MET’s switching costs.

⁴⁵ Id.

⁴⁶ Price alone does not take into account other competitive advantages CVAG may have, such as being 100 miles closer to the customers, which reduces transit times and improves truck cycles.

⁴⁷ Complaint at 29.

“failing firm” theory – MET’s switching charges will not render CVAG uncompetitive despite its logistical inefficiencies. CVAG can afford to absorb the additional costs associated with MET switching or it can pass some or all of those costs along to its customers if it chooses. It is clear that an injunction is unnecessary and unwarranted, because reparations would be an adequate remedy (if they were to be awarded) if MET’s charges were found to be unreasonable.

d. CVAG’s irreparable harm case is centered on a false assertion that MET is singling out CVAG.

CVAG claims that MET’s accessorial services charges are part of a selective, calculated, and multi-faceted strategy to effectuate CVAG’s eviction. It therefore maintains that MET’s tariff policies reflect tortious (and allegedly even anticompetitive) intent. CVAG is wrong; its allegations are perhaps sensational, but they are groundless. True, MET does not want to continue its relationship with CVAG. It has elected not to agree to a renewal of CVAG’s lease and license agreements that have afforded CVAG an occupancy on MET’s land and the use of MET’s extensive grain transportation-supporting infrastructure. On that note, MET disputes as unproven and highly suspect CVAG’s claim to have invested \$7 million in its Modesto facilities.⁴⁸ MET has expended roughly \$10 million in expanding and improving its infrastructure to support agricultural shipments (much of that infrastructure that CVAG currently occupies and benefits from), and MET can, and if necessary will, document the extent of those improvements and the amounts that it has expended. MET challenges CVAG to do the same to support its \$7 million claim.⁴⁹

But MET’s accessorial services policy changes, and its decision to charge for such services where it had not in the past, are not part of some tactical scheme against CVAG.

⁴⁸ Id. at 43; V.S. Konzen, par. 99.

⁴⁹ See May 8 Reply at 28.

Rather, the implementation of charges are part of a larger, company-wide and ongoing analysis of MET's operations and revenues with all of its customers. The result of this analysis: MET could be, but was not, charging for the services that MET commonly provides to its customers outside of the scope of its line haul obligations – its accessorial services – and was short-changing itself in awarding third parties the use of MET-owned track and facilities. MET's review of its accessorial services and the licenses and leases it has extended to customers in the past, as aided by legal counsel, revealed that – (a) MET was foregoing considerable revenue for services it provided *gratis* that clearly were of value to its customers; and (2) MET was not earning market returns on third-party use of its facilities under such arrangements as track leases and the like.

CVAG is among the most noteworthy of the consumers of MET's accessorial services (given the considerable demands of CVAG's unit train switching expectations), but it is far from the only customer that was underpaying MET (or not paying at all, in this case). Accordingly, MET revised and re-issued its tariffs, and it will continue to examine and adjust its accessorial tariffs going forward to fine tune them and adjust to evolving rail service conditions. And it has reopened its track leases and similar agreements where possible to establish terms and conditions that properly compensate and protect the railroad.

MET has begun collecting for accessorial services provided to other customers, not just CVAG, and it is in the process of evaluating whether customers not yet subject to charges (given the more limited scope of their service demands) should also be charged. Accordingly, CVAG is not the target of a nefarious multi-step plan by MET to drive CVAG from the Modesto market. In any event, CVAG's fantastical theory has no traction, because MET has shown that the accessorial charges would not render CVAG uncompetitive.

CVAG will not be harmed, certainly not irreparably, in the absence of an injunction. CVAG's backup suggestion that an injunction is appropriate to prevent against alleged MET predatory behavior is scandalous and false. Accordingly, CVAG has not satisfied the irreparable harm prong of Holiday Tours, and CVAG's requested injunction must be denied.

3. An injunction subjects MET to considerable irreparable harm.

CVAG glibly dismisses the potential impact of an injunction upon MET, arguing that MET should be content to revert back to providing switching services for free, and be happy to accept BNSF's and UP's unit train handling line allowances as payment in full for whatever services CVAG may demand of MET in support of CVAG's limited unloading capacity. Because MET has in the past foregone payment for its switching services, CVAG believes that it is right to ask the Board require MET to go back to providing those services for free, or perhaps for a maximum of a CVAG-contested \$10,000 per train (regardless of the actual scope of switching services and car holding expected of MET).

The fact is, an injunction, particularly one imposing reductions upon MET's prepaid tariff charge requirements or forbidding the assessment of prepaid charges altogether, will harm MET irreparably. To begin with, if the Board were to order MET to resume unrestricted unit train service to CVAG under a reduced rate (what CVAG refers to misleadingly as a "security deposit") or for no charge, MET has no recourse to recover additional amounts due it if its charges are found to be reasonable. CVAG may be entitled to Board-ordered reparations as money damages if it happens to prevail in its unreasonable practice complaint, but MET has no such recourse under applicable federal law if the rates the Board orders it to forego in the interim are later found to be reasonable. Agency precedent, in particular, one of the two cases

that CVAG relies upon to argue that the Board should enjoin the enforcement of MET's tariff charges – Arizona Public Service – establishes that the Board cannot award reparations to MET.

In Arizona Public Service, the Board encountered a fundamental fairness problem involving Board-prescribed rates. The imminent closure of the mine source for the issue traffic suggested that the Board-prescribed rates might no longer be appropriate. If the Board required the railroad to adhere to the prescribed rate while the case was reopened, but after reexamination the Board determined that the rate was too low, the agency could not order the shipper to pay the railroad for the undercharge. On the other hand, if the Board vacated the rate and permitted BNSF to charge as it wanted during the pendency of the reopened proceeding, the customer faced a significant, unanticipated increase to a 20-year prescribed rate.

The Board ruled that by *reopening* a prescribed rate previously challenged and now regulated, it could enjoin BNSF's rate for the pendency of the case, and it could direct the shipper to fund any underage later, should the Board find that the enjoined rate, or any part of it, was reasonable. The Board explained that it could do this because it *already had jurisdiction* over the rate, and thus could “remove . . . the prescriptive effect.”⁵⁰ In explaining its actions, the Board effectively identified why it cannot do the same here with MET.

Specifically, in its Arizona Public Service decision, the Board cited to Burlington N., Inc. v. United States, 459 U.S. 131, 141-42 (1981) (“Burlington Northern”), which provides as follows: “[W]here there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparation for overpayment while the carrier can never be made whole after underpayment.” Thus, if MET is ordered to provide accessorial services at rates below what it

⁵⁰ Arizona Public Service, slip op. at 7.

charges now (or at no charge), and the Board-ordered service terms are later found to be below what MET was legally entitled to charge, MET would be unable to recoup monies that it otherwise would have collected. An injunction forcing MET to accept less than it charges now threatens MET with irreparable harm. CVAG has no equities on its side. It may rely on the tariff rate and practice (and challenge them and seek reparations which arguably could be due it), and yet it is content to subject MET to irreparable harm. CVAG can be made whole after an on-the-merits determination regardless of the outcome, but MET has no such assurance in the presence of an injunction.

Contending that an injunction will not harm MET, CVAG argues that MET should be satisfied with the unit train allowances it receives, asserting that they are compensation enough. That is wrong. The line haul charge does not compensate MET for the accessorial charges. Indeed, in relying exclusively on allowance revenue and not charging CVAG for accessorial services, CVAG is virtually breaking even on CVAG traffic, and MET can provide documentation to prove it. This is true whether CVAG or some other transload operator occupies the site. MET is entitled to compensation for its accessorial charges, and those are services which are not being compensated by the line haul revenue. CVAG is essentially arguing that MET should work for free because they have other sources of revenue. That is ridiculous, and such an obligation clearly irreparably harms MET.

Finally, Mr. Van Gemert has explained that MET's accessorial service charges are solidly in keeping with those found elsewhere in the railroad industry (V.S. Van Gemert at pars. 14-16), supporting the conclusion that MET's tariffs are in alignment with the rail transportation market for accessorial services generally. Accordingly, for the Board to order

MET to accept CVAG's reduced payments, or none at all, would be to force MET to accept below-market rates for its services.

As shown, MET is very likely to be harmed irreparably by an injunction, particularly one that forbids MET to charge in accordance with its tariffs. CVAG has failed to satisfy yet another prong of the Holiday Tours test, and its requested injunction must be denied.

4. An injunction will not advance the public interest.

The first prong of CVAG's public interest argument – that CVAG will be unable to continue as an “essential regional business” – has already been disproven. CVAG enjoys a considerable market advantage despite its logistical shortcomings, and MET's switching charges do not change that.

CVAG then attempts to argue that CVAG's failure (a fiction) will result in substantial, irreparable harm to the local dairy industry. Since there is evidence to show that CVAG will not fail due to MET's switching charges, CVAG's attempt to pit MET against the California dairy industry is a contrivance. Local dairy farmers were concerned about the possibility of roughly \$8.00 per ton increases in delivered feed prices (again, assuming no CVAG at Modesto), but, at most, MET's switching charges, if passed through in their entirety, would result in around a \$2.00 per ton increase at the high end. MET's service charges are but one of many factors in the prices that local dairies, large commercial enterprises in their own right (at least 3,000 cows⁵¹ today, compared to the 2014 average U.S. dairy farm with 115 cows⁵²), pay for feed. And it is far from clear that an up to \$2.00 per ton uptick in those prices would do harm to local farms, particularly when those farmers expressed concerns over price

⁵¹ Pires Decl., at ¶ 1; Borba Decl., at ¶ 1; Kelley Decl., at ¶ 1.

⁵² See U.S. Dairy Industry, <http://idahodairy.com/fact-sheet/u-s-dairy-industry/> (last visited May 11, 2018).

increases that were far larger if they opted for other feed sources in California's Central Valley. In the end, CVAG is arguing that short lines like MET should forego market pricing and revenue adequacy in order to subsidize local dairy farmers, and it is not the Board's role to so constrain small railroads.

MET's current unit train interchange restrictions would not result in service disruption. Shippers can still route feed to CVAG, albeit not in quantities that force a service impasse between short line and transloader. In fact, MET's interchange restrictions promote operational efficiency for CVAG and MET both, by avoiding intra-plant switching operations and the cost of the same. No product need be, or will be, stranded. CVAG's public interest argument and its tactics here in general are remarkably self-serving. To try to get its way with the Board, CVAG is content to refuse MET's service charge payment requirements, and then blame the resulting situation on MET. CVAG would have the board perceive it as the victim, when, in fact, CVAG is attempting to hold the local dairy industry hostage . . . and blame MET for the consequences of its own actions.

CONCLUSION

MET is willing to resume service in keeping with CVAG's request, rendering Board consideration of CVAG's injunction petition unnecessary, provided CVAG will agree to prepay MET's estimated charges for each inbound unit train that CVAG cannot unload without MET's assistance. The sticking point is not MET's service, and never has been. The issue here is the rates that MET charges for such services and CVAG's refusal to pay them. CVAG's petition seems designed to force MET to accept less than the tariff price for its services absent a formal determination that MET's charges are unreasonable.

MET has shown herein that its services are indeed accessorial to line haul transportation, and that MET is entitled to charge for such services when they are requested. On that note, MET's May 8 Reply showed that longstanding agency precedent and policy support a rail carrier's right to require prepayment of charges, such as the charges that MET has required CVAG to prepay in this case. CVAG is not entitled to an injunction as a means to short-circuit CVAG's unreasonable practice complaint. But were the Board to consider granting CVAG's injunction petition nevertheless, what of the rates that MET would charge? Would the Board order MET service restored pursuant to prescribed terms and conditions?

Regardless, CVAG has not shown that it is entitled to an injunction under the Holiday Tours standard. It will not prevail on the merits of its unreasonable practice complaint, it will not be irreparably harmed in the absence of an injunction (although MET would be harmed in the presence of one), and an injunction does not advance the public interest, unless the public interest is that a short line must capitulate to the will of an overbearing customer who demands service, but refuses to pay for it.

For these reasons, CVAG's petition for an injunction must be denied.

Respectfully submitted,

By: R. A. Wimbish

Robert A. Wimbish
James D. Helenhouse
Audrey L. Brodrick
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2832
312-252-1500 Telephone
312-252-2400 Facsimile

**ATTORNEYS FOR MODESTO AND
EMPIRE TRACTION COMPANY**

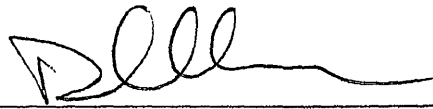
Dated: May 14, 2018

VERIFICATION

Dillon Olvera declares under penalty of perjury under the laws of the United States of America as follows:

I am the President and Chief Executive Officer of Modesto And Empire Traction Company. I have read the forgoing Reply to Petition for Preliminary Injunction and know that the facts asserted therein are true as stated.

Executed on May 14, 2018



BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42159

CENTRAL VALLEY AG GRINDING, INC. AND
CENTRAL VALLEY AG TRANSPORT INC.
vs.
MODESTO AND EMPIRE TRACTION COMPANY

**VERIFIED REPLY TO PETITION
FOR PRELIMINARY INJUNCTION**

**EXHIBIT A
VERIFIED STATEMENT OF LON VAN GEMERT**

Verified Statement of Lon Van Gemert

1. My name is Lon Van Gemert. I am a self-employed transportation industry consultant, specializing in the railroad industry. I have worked in the railroad industry for fifty years, working for Class I, Class II, and Class III (short line) railroads. My railroad career began in 1967 as a track laborer for the Chicago, Rock Island & Pacific Railroad, and, after that, I worked for the Chicago, Milwaukee, St. Paul & Pacific Railroad. From there, I worked for the Soo Line Railroad ("Soo"), a U.S.-based subsidiary of the Canadian Pacific Railway, serving in various marketing positions, including as the railroad's Tariff Publishing Officer.
2. During my 13-year tenure at the Soo, I set and negotiated various rates both for transportation and accessorial services. I then took a position as Vice President of Operations and General Manager of the regional carrier, Indiana Rail Road, where I served for five years. I then became Vice President of Operations at short line operator and holding company, Progressive Rail, Inc. ("Progressive"), later taking the position of Chief Executive Officer. During my nine years at Progressive, I negotiated transportation charges, evaluated and developed tariffs, and oversaw the enforcement and collection of the company's tariff charges. I retired from Progressive in 2016, and now work as a transportation industry consultant, and part of my practice is advising railroad clients on many operational and commercial matters, including the development and application of common carrier and accessorial tariffs and rates.

3. Modesto and Empire Traction Company (“MET”) has retained me to advise it on the development of tariff terms, including the rates for accessorial services, and to testify as circumstances warrant in cases such as this one on issues of railroad rates and charges. I have reviewed and have provided advice on a number of MET tariff provisions.
4. As part of my work for MET, I have evaluated MET’s services to Central Valley Ag Transport Inc.’s (“CVAG”) facility in Modesto. I understand that CVAG is MET’s only customer that currently seeks to handle unit train deliveries. I am aware of the capacity limitations that restrict CVAG’s ability to unload unit trains over certain car lengths without assistance, and I am familiar with the intra-terminal switching and off-site car holding service that CVAG requires and that MET had provided in support of CVAG’s unloading processes.
5. As part of my engagement with MET, I have gained an appreciation of the demands that CVAG’s unit train unloading limitations and its switching and car holding demands put on MET’s resources, including motive power, crews, administrative support, and yard and main line track capacity. I have seen that CVAG has required far more of MET than is typically asked of a short line railroad handling unit trains for an on-line customer.
6. Aware of CVAG’s unit train capacity limitations and the demands that places on MET, I reviewed MET’s Freight Tariff 9500-A (Supplement 1-A), issued on March 20, 2018 and effective on April 9, 2018, and MET’s Tariff 8000-B and including both (Supplement 1-A) issued on March 20, 2018, as well as (Supplement 2-A), issued on April 3, 2018, effective April 23, 2018, with a

particular emphasis on tariff provisions governing accessorial services for unit trains. I have also reviewed MET's service plans for CVAG switching and car holding, including MET-prepared switching services and prepayment estimates that MET had supplied to CVAG in anticipation of the arrival of specific inbound unit trains.

7. MET has asked me to provide my expert opinion and advice on whether the tariff rates MET charged for its provision of accessorial services, especially with respect to CVAG-bound unit trains, and the manner in which they are calculated and assessed were consistent with the rates and practices of other railroads and in keeping with my own experience.
8. Railroads large and small can and do charge for car-handling services beyond the delivery and retrieval of railcars from a customer's industry tracks, and this is especially true with respect to unit trains, because additional handling is practically by definition contrary to the concept of unit train transportation and pricing. Specifically, unit train service contemplates that the assembled cars will not need any switching, disassembly or reassembly. They will be delivered intact to the customer and, once unloaded, will be returned to the railroad as such, reducing railroad handling costs and permitting for lower rates to shippers. In my expert opinion and experience, any breaking and switching of a so-called unit train is a deviation from unit train standard operating procedure, and imposes operating demands and costs upon the serving railroad that are not usually factored into unit train pricing.

9. A short-line like MET acting as a handling carrier for Class I railroads gets a fixed, per-car payment (typically called an “allowance”) from its Class I partner for the handling carrier’s origination or termination of traffic. Additional switching or handling beyond that necessary to accomplish delivery or origination of traffic, such as demurrage (for example, for cars held on the handling carrier’s lines) and switching services necessary to support the customer’s loading or unloading, are deemed “accessorial” to line haul service, and such accessorial services are not factored into the handling carrier’s allowance. As such, the handling carrier is commonly entitled independently to set rates for and charge for accessorial services – they are a matter as between the handling carrier (such as MET) and its customer (CVAG), and often, as is the case with MET and CVAG, involve a railroad and its customer that are not parties to the line haul service arrangement, which is usually between the Class I carrier and the shipper. (I understand that CVAG is not the shipper for purposes of the traffic it receives and transloads at Modesto.)
10. Accessorial services are separately arranged for between the customer and the railroad serving it, and the applicable fees for these services are usually set forth in the serving railroad’s tariffs or are governed by a railroad-customer contract. Although I know of situations where a serving railroad (such as a handling carrier) might agree in certain circumstances not to charge a customer for accessorial services, there is certainly no expectation or requirement that the serving carrier will absorb the additional costs that it incurs in providing accessorial services. Where they can or must, a serving carrier will (and, in my

opinion, should, if it is a responsible, “for-profit” enterprise) charge for accessorial services, and it should ensure that its charges are not only remunerative, but also bolster the railroads profits.

11. I have reviewed CVAG’s “*Ex Parte* Application for Section 11123(a) Service Order and Section 11701 Investigation and Petition for Preliminary Injunction and Investigation” and supporting documentation thereto, including the testimony of Mr. Paul Konzen. I disagree with Mr. Konzen’s statements that short lines do not charge for accessorial services; and that short lines should not price to the market in setting rates for accessorial services. I do not know the extent of Mr. Konzen’s railroad industry experience – his experience seems to be as a railroad customer in the limited context of transloading agricultural products in California. But contrary to Mr. Konzen’s claims suggesting that his businesses should get accessorial services from short lines for free or at nominal rates at best, there is nothing unusual about the charges that MET applies to the unit train switching it has provided to CVAG or the manner in which they are charged. In my expert opinion, and in light of my examination of accessorial service rates around the railroad industry, it is my opinion that the intra-terminal switching and demurrage charges applicable to CVAG, and the manner in which MET has been calculating those charges, are appropriate and in keeping with what other railroads charge for the same or similar services.
12. Mr. Konzen’s statement that other railroads do not charge for accessorial services misstates industry practice. This mischaracterization may be as a result of his lack of experience with railroad service and pricing. In addition to the inherent

flaws in this position, the conclusion ignores the dozens of currently-in-effect accessorial services tariffs from large and small railroads that are publicly available on-line. If it were true that railroads did not charge for these services, as Mr. Konzen says, then why would hundreds of railroads provide for such services and fees in their tariffs? It may be true that *some* railroads choose to forego charging for accessorial services for business reasons that make sense for them, but they are certainly not required to do so. As would any industry, railroads employ their business judgment about fees that are accessorial to the main services they provide. It is simply wrong to conclude that, as a rule, railroads, and short lines in particular, do not charge for accessorial services, period. Quite the opposite, in fact, has been my experience.

13. Breaking up and reassembly of unit trains, and storage of potentially sizeable blocks of “excess” cars on railroad-owned track is particularly impactful. Such services in support of the unloading of large unit trains that a customer cannot handle on its own consume considerable track capacity, require sufficient motive power, and demand substantial attention of railroad crews and management alike, particularly for smaller railroads like MET, with more limited physical plant and resources.
14. As indicated above, I have examined the rates that MET has charged for switching and demurrage in support of CVAG’s unloading operations, and I have compared them against the same charges contained in the current tariffs of various other railroads. I have also weighed them against the rates that I recall that my past employers had adopted for these sorts of situations.

15. To begin with, railroad accessorial services tariffs, particularly those components dealing with intra-terminal switching and demurrage, are, in my experience, invariably charged on a per-car basis, just as MET does.
16. In my experience, intra-terminal switching fees typically range from \$100 - \$300 per car, sometimes higher. I see nothing unusual about MET's \$200 per car unit train switch fee, and I agree that the demands of unit train support services warrant consideration for higher charges than those for carload business, particularly for a handling line carrier that I understand earns considerably more per-car allowance revenue for mixed carload service than it does for unit trains.
17. As part of my services to MET, I have been asked whether MET's intra-plant switching and demurrage charges were in line with industry standards, and I have advised the railroad that, in my opinion, the current switching and demurrage rates now in effect are entirely defensible. To that end, I have advised MET that I am prepared to testify, as I am, that MET's switching and demurrage rates are very much within normal industry parameters, and that the manner that MET assesses those charges is, also. Finally, while I have stated above that intra-terminal switching charges of between \$100 and \$300 per car are most common in the industry, I have recent experience with tariffs that imposed a \$400 per car intra-terminal switch charge for services very similar to those that MET supplied to CVAG. I have also seen intra-terminal switching charges of as high as \$600 per car for hazardous materials.
18. As a final note, I have advised MET that its current demurrage rates are fully in line with those of other railroads, and that MET should assess demurrage in

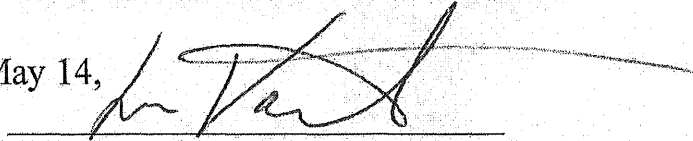
accordance with its tariffs where applicable. But I have advised MET that it should re-think how it charges for holding excess cars from CVAG's unit trains. Demurrage with its customary "free time," as I have explained to MET, does not adequately capture or account for the impacts that come from CVAG's expectation that MET will deploy the railroad's own track to hold cars that CVAG cannot accept at time of delivery (and are thus constructively placed) or that it expects MET to hold empty pending unloading of the balance of a particular unit train. Review of past operations regarding the handling of specific unit trains shows that CVAG may be intentionally altering its operations to specifically capture the free-time window for various switching movements, thus purposefully denying MET demurrage fees, but still significantly impacting MET's operations. Drawing from my past experience, I have recommended that MET revise its tariffs – I don't believe that it has done so yet – to include a per-car hold charge (without "free time") for cars that MET is able to deliver to the customer, but that the customer does not have capacity to receive (and so must be constructively placed), and for cars that the customer has unloaded and has requested that MET hold on its own tracks pending the release of the balance of the shipment.

VERIFICATION

Lon Van Gemert declares under penalty of perjury under the laws of the United States of America as follows:

I have read the forgoing Statement of Lon Van Gemert and know that the facts asserted therein are true as stated.

Executed on May 14,
2018

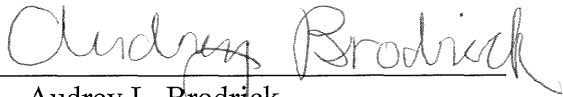
A handwritten signature in dark ink, appearing to read "Lon Van Gemert", is written over a horizontal line.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of May, 2018, she caused a true and correct copy of the foregoing **Verified Reply to Petition for Preliminary Injunction** to be electronically filed with the Surface Transportation Board and served up on the following parties via email and deposit in the United States Mail chute located at 29 North Wacker Drive, Chicago, Illinois 60606, with proper postage prepaid:

Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
pap@sloverandloftus.com
rdr@sloverandloftus.com
kfw@sloverandloftus.com

Attorneys for Complainants

By: 
Audrey L. Brodrick
**ATTORNEY FOR MODESTO AND
EMPIRE TRACTION COMPANY**