

ENTERED
Office of Proceedings
May 31, 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

MOTION TO DISMISS

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 31, 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

MOTION TO DISMISS

OVERVIEW

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”) and an “Unreasonable Practice Complaint” (the “Complaint”), both intended to target the practices and rates of Modesto and Empire Traction Company (“MET”), an independent short line rail carrier in California. In separate filings dated May 8, 14, and 21, MET responded, respectively, to the application for an emergency service order, petition for a preliminary injunction, and request for a Surface Transportation Board (“Board”)-initiated investigation elements of the Application. (Board action on the Application’s multiple elements remains pending.) By Director’s stamp order in this proceeding served on May __, 2018, the Board granted MET’s unopposed request for an extension of the deadline to answer the Complaint until May 31, 2018. Today, MET is filing its Answer, and herewith moves for dismissal of the Complaint.

ARGUMENT

The Board may dismiss a complaint at any time if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). CVAG’s Complaint, when understood in its appropriate context, and in view of MET’s market-based pricing for non-essential services accessorial to common carriage, offers no reasonable basis for further Board consideration and should thus be dismissed in its entirety.

CVAG’s Complaint is nothing more than a winding and unfocused challenge of the level of MET’s unit train switching charges, and a closely-related assault on MET’s estimated charge prepayment requirements calculated on a train-by-train basis. CVAG refuses to pay the applicable switching charges, and, as a consequence, MET conditionally has withheld unit train switching. CVAG contends that MET cannot legally withhold service due to CVAG’s refusal to prepay, explaining that it refuses to prepay these charges because the rates are “unprecedented, inapplicable, unwarranted, constantly changing, and excessive.”¹ CVAG also claims, among many other legally-baseless contentions, that MET cannot restrict its interchange with its line haul partners to traffic volumes that CVAG can unload on its own tracks without the need for MET switching services, despite the fact that MET’s actions are designed to avoid a switching service impasse and the congestion that might occur on MET’s system were it to hold trains pending a resolution of the payment issue.

CVAG’s Complaint could have been and should have been presented simply enough as a focused challenge of the reasonableness of MET’s accessorial tariff rates, but it is instead an unfocused hodge-podge of baseless allegations of MET’s violation of its statutory common carrier obligations presented as an unreasonable practices challenge. The Complaint is,

¹ Complaint at 2.

among other things – (1) an inappropriate challenge of switching rates as an allegedly unreasonable practice; (2) a presentation on unwarranted legal theories inappropriate for the Board adjudication; (3) a series of arguments concerning MET’s common carrier obligations that are inapplicable to the provision of accessorial services to CVAG; and (4) an occasional invitation for the Board to weigh in on contract matters between MET and CVAG. Every part of the Complaint is legally baseless, and, for a variety of reasons, it should be dismissed in its entirety. If not dismissed in total, then, various individual aspects of the Complaint should be dismissed for the reasons provided below.

CVAG’s Complaint is based upon unreasonable rates, not unreasonable practices.

CVAG casts its complaint as one based upon alleged unreasonable practices, yet its case is built around the fundamental premise that CVAG’s tariff-based rates for unit train switching are unreasonable, indicating that CVAG wishes to challenge MET’s rates (not its practices), and to obtain Board-prescribed (and lower) rates going forward. If indeed CVAG intends to have the Board rule on whether MET’s accessorial service charges are unreasonably high, and wants the Board to prescribe reduced rates in place of those in MET’s tariffs, then CVAG’s Complaint is improperly pleaded as an unreasonable practices complaint.² Accordingly, CVAG’s complaint should be dismissed.

² Union Pac. R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989); Kansas City Power and Light Co. v. Union Pac. R.R. Co., Docket No. NOR 42095 (STB served May 16, 2008), (“While the Board has broad authority over the reasonableness of a railroad’s practices under 49 U.S.C. 10702(2), what is essentially a rate dispute should not be addressed via a claim of unreasonable practice”); CF Industries, Inc. v. Ind. & Ohio Rwy. et al., Docket No. NOR 42129 (STB served Jun. 21, 2013).

It is unclear whether the Board has jurisdiction or regulatory authority over MET's provision of accessorial switching services to a non-shipper.

CVAG presumes, without discussion of the issue, that MET's services to CVAG constitute common carriage, notwithstanding the fact that CVAG is not a shipper, and the switching services that CVAG desires are not essential to common carriage under the circumstances. CVAG's customers can reduce their shipment volumes to avoid CVAG's need for MET switching, and there appear to be yet other mechanisms under which CVAG, its customers, or both could avoid the need for unit train switching. MET, therefore, questions whether the Board has jurisdiction to address, or needs to address, the present dispute over accessorial services. And even assuming that the Board has jurisdiction, MET questions whether the Board has authority under applicable law to intervene in such a dispute and prescribe terms and conditions for accessorial services and related charges. On that note, MET observes that the defendant in Albermarle³ raised the same challenges as MET raises here, but the Board did not address the defendant's jurisdictional issues (as that case ultimately settled), and, thus, the issues remain open questions at the very least.

There is no service disruption and no unlawful withholding of rail service – MET is fully able to provide switching services if CVAG will agree to pay for them.

As an overarching matter, CVAG's complaint is predicated upon alleged rail service disruptions occasioned by, in order: (1) MET's assessment of intra-plant switching charges applicable to unit train shipment volumes that CVAG cannot unload without assistance from MET; (2) MET's requirement that CVAG prepay estimated switching charges for inbound unit train shipments; (3) CVAG's refusal to pay, much less prepay, the applicable switching charges; (4) MET's decision to withhold switching services when the applicable charges are not

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").

prepaid; and (5) MET's subsequent determination to avoid congestion and broader service issues by restricting inbound shipments to CVAG to carload volumes that would not require MET switching.⁴ Nevertheless, CVAG-destined traffic continues to move in interchange with MET's connecting line haul carriers, BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"), albeit in volumes that CVAG can accept and unload without MET switching.

MET has explained previously that, under agency precedent, a dispute such as this one (involving a disagreement over MET's accessorial tariff rates) does not give rise to a Board-actionable service disruption, nor does it constitute a withholding of service in violation of 49 U.S.C. § 11101.⁵ MET also has pointed out that it is entitled as a matter of law to require prepayment for services it is asked to supply – that requiring MET to extend credit to CVAG for future switching services is contrary to law.⁶ Accordingly, there is no legal or factual basis under the circumstances supporting the proposition that MET, though its actions, has violated its common carrier obligations under section 11101. CVAG's claims predicated upon an alleged "violation of [MET's] fundamental common carrier and continuous carriage of freight obligations" – Complaint paragraphs 73-87 – must be dismissed.

Similarly, CVAG's allegation of a section 11101 violation resulting from an alleged "commitment [depriving MET] of its ability to respond to reasonable requests for common carrier service" is also unfounded and legally unsupported. To begin with, CVAG is

⁴ MET has offered to reinstate unit train switching support for commodities such as gluten, DDG, and canola that are typically unloaded on CVAG's loop track facilities (which are owned by MET), provided CVAG would agree to prepay estimated switching charges in accordance with MET's estimates

⁵ MET May 8 Reply at 10-13

⁶ Id. at 18-20.

not a shipper, as it has admitted.⁷ MET's switching services underlying this proceeding (provided to a non-shipper) are *accessorial* to common carriage; they do not constitute common carriage. Additionally, CVAG nowhere points to any specific commitments that render MET *unable* to provide the services that CVAG wants.⁸ There is no service agreement upon which to predicate a section 11101 violation, and certainly no service-impeding commitment. MET is able at any time to restore switching to CVAG for unit train shipments if CVAG will agree to pay for the charges occasioned thereby. As such, CVAG has failed to present a discernible, much less justiciable, violation of section 11101's prohibition against common carriage-impeding commitments by rail carriers, and CVAG's various causes of action predicated upon alleged violations of section 11101 must be dismissed.⁹

CVAG also accuses MET of violating the statutory prohibition against intentionally entering into an agreement that would prevent the continuous carriage of freight under 49 U.S.C. § 10744. But MET has not committed any such violation. To begin with, there is no *agreement* of any sort, a predicate for a section 10744 violation, no intent to disrupt continuous carriage, and in fact no disruption of common carriage. (If there were any such agreement, then one would expect CVAG to include the other party or parties to the allegedly

⁷ CVAG Application, Konzen at paragraph 15.

⁸ Perhaps CVAG is attempting to implicate MET's interchange restriction as a "commitment." If so, then one would expect CVAG to have enlarged its complaint to include BNSF and UP as parties to such a commitment. Because CVAG did not do so, and has not identified with specificity the commitment to which it refers, it appears that there actually is no commitment, and that there is thus no justiciable cause of action under CVAG's alternative theory of MET's alleged Section 11101 violation.

⁹ For example, CVAG alleges that MET has struck arrangements with other customers that render the short line unable (or significantly less able) to "respond to reasonable requests for service from CVAG." Complaint at paragraph 86. While the allegation reveals the extreme lengths to which CVAG is having to resort to come up with a plausible legal basis for finding that MET's tariff provisions are unreasonable, it is also entirely without basis. MET has made abundantly clear that, for loop track-destined shipments, it can and will resume switching in support of CVAG's unloading processes if CVAG will agree to pay applicable charges.

offending agreement in its Complaint.) Instead, there is nothing more than a withholding of MET service for CVAG's non-payment, and an adjustment in MET's interchange terms to better regulate the continuous flow of traffic to CVAG via shipment sizes that do not trigger the need for intra-terminal switching. In the absence of any disruption of service as contemplated under section 10744, CVAG's cause of action arising under that statute must be dismissed.

As a non-shipper consumer of services accessorial to common carriage, CVAG lacks standing to complain about MET's participation in line haul service or the particulars of MET's provision of such services.

Fundamentally, CVAG's complaint deals with MET's common carrier obligations, including its obligations to provide common carriage upon reasonable request (see Complaint at paragraph 70); its obligations to publish a common carrier tariff (Complaint at paragraph 75); its obligations to shippers (the purchasers of line haul service, which does not include CVAG) (see Complaint at pars. 83-85); and its obligations to its line haul partners (see Complaint at paragraph 84)¹⁰. CVAG is not a shipper, and thus does not purchase line haul (common carrier) transportation service. Also, CVAG is not party to the so-called "haulage agreements" that MET has with BNSF and UP. For these reasons, CVAG lacks standing as a non-shipper complainant and as a consumer of non-common carriage services to – (a) seek remedies associated with common carrier tariff publication or with rate, service and contract

¹⁰ CVAG purports to know a significant amount about MET's relationship with BNSF and UP, and contends that the unit train switching that CVAG wants MET to provide is already paid for under the terms of MET's handling line agreements with both Class Is. Put another way, CVAG contends that CVAG's customers have already paid for MET switching, and that the charges for such switching are factored into the line haul rates assessed by BNSF and UP. (MET, as a handling line carrier, does not participate in the rate setting for line haul service to and from points on its railroad.) If, however, CVAG believes that its customers – the shippers of the feed commodities that CVAG transloads at Modesto – have already paid for MET's switching services, then why is CVAG pressing the matter, rather than its customers? Also, assuming CVAG's assertion were true (and it isn't), then CVAG also would need to ascertain whether the line haul arrangements in question are governed by rail services contracts outside of the scope of the Board's jurisdiction or under common carrier tariffs published by BNSF and UP.

issues involving line haul service; or (b) challenge the revenue division arrangements that MET has with BNSF and UP relating to line haul transportation. Accordingly, the claims articulated in paragraphs 75 (pertaining to tariff publication), 83 (harm to line haul carriage), 84 (separate billing for services that CVAG claims should be incorporated into BNSF's and UP's line haul charges billed to the shipper), and 85 (alleged shipper injury) must be dismissed.

MET's refusal to accept partial payment for its services does not give rise to a genuine cause of action.

Next, CVAG argues that MET's refusal to accept a "reasonable security arrangements" constitutes an unlawful evasion of MET's "service and delivery obligations."¹¹ To begin with, MET is not sure what "security arrangements" CVAG refers to, but presumes that the allegation is loosely based upon CVAG's past attempts to obtain switching services under a partial payment scheme, which MET readily admits it is unwilling to accept. Second, MET questions how it is that CVAG's partial payment proposal is a "reasonable security," when it is clear that CVAG intends to pay nothing more than some unspecified portion of the applicable charges. More importantly, MET's refusal to accept less than the full amount of its charges for switching services does not constitute an unreasonable practice under Board precedent. Instead, CVAG is acting unreasonably by demanding service for no charge or reduced charge. Accordingly, CVAG's claim under Complaint paragraph 76 must be dismissed.

CVAG's other, miscellaneous claims fail to articulate a Board-justiciable cause of action, and therefore all of them must be dismissed.

CVAG claims that MET's "Tariffs and practices" could put CVAG out of business. MET disputes the allegation as one of many that are baseless and unsubstantiated. CVAG can avoid, and is avoiding, the complained-of tariffs, and it continues to receive and

¹¹ Complaint at paragraph 76.

process shipments for its customers under MET-regulated shipment volumes. There is no evidence that the current circumstances could or will put CVAG out of business. But even assuming strictly for the sake of argument that MET's switching charges could put CVAG out of business, that, by itself, does not give rise to a cognizable cause of action. CVAG's financial future is irrelevant to whether or not MET's tariffs and practices are reasonable, and, if indeed they are reasonable, the fact that such rates might be detrimental to CVAG is not a legal constraint on MET's right to set prices for the services it provides.¹² Accordingly, CVAG's claims under Complaint paragraph 77 must also be dismissed.

CVAG then would have the Board invoke its remedial authority to constrain MET's rates or practices under the theory that alleged harm to downstream consumers of rail-transported commodities resulting from MET's switching charges warrants Board action.¹³ CVAG is wrong – this is no basis for a Board remedy, and, once again, CVAG has failed to articulate a cognizable cause of action. Either MET's switching charges and related prepayment requirements due from CVAG are reasonable or they are not. MET's decision to require prepayment for non-line haul services may introduce costs into the logistics supply chain, resulting in increased costs to feed shippers or consumers, but that is not a basis for legal action. Accordingly, CVAG's claims under Complaint paragraph 78 must also be dismissed.

CVAG then attempts to couch its unreasonable practice cause of action in terms of MET's supposed violations of certain elements of the Rail Transportation Policy ("RTP") set forth at 49 U.S.C. § 10101.¹⁴ Alleged violations of the RTP are not, and have never been, a basis

¹² MET is unaware of any agency precedent establishing that the potential economic impact upon a customer from engaging in market-based pricing for railroad services – whether common carriage or accessorial in nature – is a legal constraint on the railroad's pricing prerogative.

¹³ Id at paragraph 78.

¹⁴ Complaint at paragraph 79.

for a legal cause of action,¹⁵ and, accordingly, CVAG's claim under Complaint paragraph 79 must be dismissed.

For much the same reason, CVAG's claim that MET's "Tariffs and practices" are unreasonable and a violation of MET's common carrier obligations because they "violate the principles established in the Railroad Industry Agreement" ("RIA")¹⁶ also does not give rise to a cognizable cause of action. The RIA, as CVAG notes, is an industry agreement among Class I railroads (such as BNSF and UP) and various signatory short line carriers. CVAG is not a party to that agreement, nor is there anything set forth in the RIA that constrains MET from requiring prepayment of estimated switching charges, withholding payment for non-payment of requested service, or imposition of interchange restrictions to avoid service disruptions that might otherwise be occasioned by an impasse between CVAG and MET. CVAG has no independent right under the RIA to enforce that agreement's terms, and, even if it did, there is nothing here to be enforced. Finally, CVAG reveals that it does not understand that disputes arising under the RIA are to be separately addressed and resolved under prescribed alternative dispute resolution processes, not before the Board. Accordingly, CVAG's claim under Complaint paragraph 80 must also be dismissed.

CVAG asks the Board adjudicate its claims that MET is engaging in a "predatory price squeeze," and that MET is engaging in "unjustified tortious interference" with CVAG's

¹⁵ See CSX Transportation, Inc. – Abandonment Exemption – In Laporte, Porter, and Starke Counties, Ind., Docket No. AB-55 (Sub-No. 643X) (STB served May 31, 2017) slip op. at 6 (citing Chesapeake & Ohio Ry. v. United States, 704 F.3d 373, 376 (7th Cir. 1983); Louisville & Jefferson Cty. Riverport Auth. & CSX Transp., Inc. – Constr. & Operation Exemption – in Jefferson Cty., Ky., 4 I.C.C.2d 749, 754 (1988); and H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 80 (1980)); PCI Transportation, Inc. v. Fort Worth & Western Railroad Company, Docket No. 42094 (Sub-No. 1) (STB served Apr. 25, 2008) ("PCI Transportation") slip op. at 5 (citing DHX, Inc. v. Surface Transportation Board, 501 F.3d 1080, 1087-88 (9th Cir. 2007), "and cases cited therein").

¹⁶ Complaint at paragraph 80.

business relationships.¹⁷ CVAG's allegations are once again completely false and utterly unsubstantiated. And, in any event, the Board is not entrusted with authority to adjudicate alleged predatory pricing schemes or tortious interference claims.¹⁸ Because such matters are not appropriate for the Board to address, the claims set forth in Complaint paragraphs 82 and 83 must be dismissed.

CONCLUSION

CVAG's Complaint overreaches everywhere, and articulates a discernible cause of action nowhere. It is an unfocused blunt object of a filing setting forth creative, but hollow, theories in support of what is ultimately nothing more than a claim that MET's unit train switching tariff rates are unreasonably high, and that, as a consequence, CVAG should not have to pay them. Although this amounts to a form of *rate* dispute, CVAG nevertheless has brought an unreasonable *practices* complaint. But railroad customers aggrieved at the amount of rail service charges cannot bring an unreasonable practices complaint in place of an unreasonable rates complaint. For that reason alone, CVAG's Complaint must be dismissed.

If not dismissed on the basis that it is an incorrectly pleaded rate challenge, then the Board must dismiss the Complaint due to the absence of a genuine service dispute. Traffic is moving to CVAG via BNSF and UP, and will continue to move. What is more, for traffic destined to CVAG's loop track, MET is willing to lift its restriction on longer unit trains if CVAG will agree to pay the applicable charges for switching.

In addition, if assessed paragraph by paragraph, it is easy to see that virtually all of the alleged MET failures to adhere to its "Statutory Requirements" fail to identify

¹⁷ Id. at 81-82.

¹⁸ See PCI Transportation (tortious interference and other common law claims to reside with courts, not the Board),

violations of applicable law. Some allegations are based upon duties to shippers, presupposing, incorrectly, that CVAG is a shipper. Still other allegations presume that alleged “violations” of the RTP form a valid basis for an unreasonable practice complaint, when the RTP cannot be the basis for such a cause of action. And yet other allegations depend upon the Board enforcing the RIA, ruling on issues of alleged predatory pricing, and adjudicating contract tort claims, none of which are appropriate bases for Board action under an unreasonable practice complaint.

For all of the foregoing reasons, MET requests that CVAG’s Complaint be dismissed in its entirety, and, if not entirely, then it should dismiss to the extent that CVAG has raised legal issues and legal theories that are not Board-justiciable.

Finally, this case presents a number of threshold issues not expressly raised in CVAG’s Complaint. First, because CVAG is not a rail shipper, but rather the would-be consumer of MET accessorial services, what is the scope of MET’s legal duties to CVAG? Second, since CVAG is not a shipper, what are the remedies available to CVAG before the Board? For example, could the Board order the provision of accessorial services, particularly when alternative service that does not require the provision of such services is available? Also, if MET must quote accessorial services rates to CVAG, and CVAG makes use of the services pursuant to those rates, may CVAG challenge the level of the rates, and, if so, what is the standard for assessing the reasonableness of those rates and for prescribing relief, if any is warranted? If the Board were not to dismiss the Complaint, then MET respectfully requests that the Board assist in framing the scope of this proceeding and the issues that the Board considers appropriately before it.

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 31, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of May, 2018, he caused a true and correct copy of the foregoing **Motion to Dismiss** 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: 
Robert A. Wimbish
**ATTORNEY FOR MODESTO AND
EMPIRE TRACTION COMPANY**