

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

**REPLY TO PETITION FOR BOARD-INITIATED INVESTIGATION
AND RESPONSE TO MAY 16, 2018 SURREPLY FILING**

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TRACTION COMPANY**

Dated: May 21, 2018

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This is the third of three filings by Modesto and Empire Traction Company (“MET”) responsive to the “*Ex Parte* Application for Section 11123(a) Service Order and Section 11701 Investigation and Petition for Preliminary Injunction and Investigation” (the “Application”) filed on May 1, 2018, by Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, “CVAG”). MET responded on May 8, 2018, to the portion of the Application requesting that the Surface Transportation Board (the “Board”) issue an *ex parte* emergency service order pursuant to 49 U.S.C. § 11123. And on May 14, 2018, pursuant to an intervening Board order, MET replied in opposition to CVAG’s requests for a preliminary injunction pursuant 49 U.S.C. § 1321(b)(4) (to which CVAG tendered a rebuttal on May 16, 2018). MET hereby replies in opposition to the third of the three elements of the Application: CVAG’s petition for a Board-initiated investigation pursuant to 49 U.S.C. § 11701, and MET files in opposition to CVAG’s request to supplement its injunction petition.

OVERVIEW

This proceeding involves a dispute between MET, an independent short line railroad, and CVAG, an agricultural commodities logistics services provider with facilities in northern and central California (including Modesto). The dispute turns entirely upon the intra-terminal switching charges that MET had been assessing in support of CVAG's preference for unloading unit trains that CVAG cannot handle without MET's assistance.

CVAG is not a rail shipper – the charges for inbound shipments it handles are paid for by CVAG's customers, large agribusinesses that contract with CVAG to handle the transload of their commodities.¹ The vast majority of the product that is shipped to CVAG at Modesto consists of canola, dried distillers' grains (commonly referred to as "DDG"), and gluten, all of which are primary feed sources for dairy cattle. Based upon more recent experience, MET has found that the intra-terminal switching charges for the typical unit train of canola (100 carloads) are \$11,250, or roughly \$1.01 per ton. Again, based upon recent experience, MET has found that the intra-terminal switching charges for a 103-carload unit train of DDG or gluten are \$18,450, or roughly \$1.97 and \$1.88 per ton, respectively. MET's charges for unit trains of cotton seed, which CVAG has far less capacity to handle (and must be unloaded in 25-car blocks, while the balance of the train is held on MET's tracks) were higher (roughly \$42,000 per train), including demurrage.

Because CVAG refuses to pay MET's switching charges, MET has restricted interchange of commodities destined for unloading on CVAG's loop track facilities (canola,

¹ These large agribusinesses – companies such as Archer Daniels Midland Company, JD Heiskell, A.L. Gilbert Company, and Gaviola Ingredients, LLC ("Gaviola") – pay CVAG to transload their commodities at Modesto to facilitate the agribusinesses' sale of the transloaded commodities directly to area farms. The transloading involves the unloading of railcars and storage of the unloaded commodity in an enclosed area, and the loading of these commodities into trucks supplied by area farms.

DDG and gluten) to carload amounts that CVAG can unload without MET switching, and MET has imposed comparable carload restrictions for traffic (such as cotton seed) for which CVAG's unloading capacity on its "transload tracks" is only roughly 25-26 cars at a time.² Traffic continues to flow to CVAG under these restrictions, and CVAG does not require MET service to unload the commodity volumes that MET is now delivering to CVAG at Modesto. However, MET is willing to lift to the unit train size restrictions for loop track-destined commodities, but not for commodities destined to CVAG's transload tracks, as MET has communicated to CVAG in a letter dated May 18, 2018 (attached hereto as Exhibit A).

CVAG seeks to have the Board forbid MET from – (1) assessing its tariff-based unit train switching charges; (2) requiring prepayment of the same (based upon per train service estimates); and (3) restricting interchange of carload shipments to volumes that CVAG can unload without the use of MET's switching. And, in an effort to leverage its position in a dispute over switching charge levels, CVAG has, among other things, urged the Board to consider the present disagreement between a short line and a non-shipper destination customer a matter of national or regional significance warranting a Board-initiated investigation and active monitoring of MET's "compliance" by Board staff.

² CVAG and Gavilon appear to insist that MET should accept 100+ carload unit trains destined to CVAG's "transload tracks" (known as Tracks 1038/1039) and that MET should at the same time reduce (or forego entirely) the charges for the extensive intra-terminal switching for carload volume shipments that far exceed what CVAG can receive and unload at any one time. Neither CVAG nor Gavilon explain why they are correct to object to MET's switching charges when each is aware of that CVAG is not equipped to handle unit trains from the transload tracks. For that matter, CVAG and Gavilon do not point to any precedent supporting the proposition that MET must accept, let alone *encourage* through reduced switching rates, unit train shipments that the receiver obviously is unable to accept without placing considerable switching and car-holding demands upon the delivering carrier.

ARGUMENT

CVAG's investigation petition is an abusive and unwarranted litigation technique.

CVAG devotes roughly one page to arguing for a Board-initiated investigation, revealing that it does not put much stock in the merits of its petition. CVAG's request is easily seen for the abusive tactic that it is: an attempt to exert leverage on MET in the course of litigation.³ There is no issue of "national or regional significance" at play here and there never was, only a dispute over the charges that MET, a lone short line, imposes for unit train switching that a single non-shipper customer refuses to pay. It is likely true that CVAG's unloading inefficiencies translate into added logistics costs, which are the root cause of this dispute over whether MET must subsidize CVAG in light of its inefficiencies or whether CVAG or its customers can (and should) adjust their arrangements to account for these added costs. But this dispute is limited to a single destination at Modesto, California. Additionally, CVAG's logistical issues (and MET's refusal to subsidize CVAG) have not crippled CVAG, its customers, or local dairy farmers. CVAG's overreaching and abusive request for an investigation is baseless, and the Board should decline the invitation to punish MET for not agreeing to adjust or eliminate its accessorial service charges as CVAG has demanded.

There is no severe "service situation," as CVAG puts it,⁴ and no loss of essential services. Commodities continue to flow to CVAG, albeit in volumes that CVAG can accept and unload without MET switching. CVAG claims that it cannot adjust its business terms with its agribusiness customers either to continue with shipments at current volumes and intervals or

³ This is not the first time that a litigant in a matter pending before the Board has asked for an investigation as a threatening, diversionary tactic. See Grand Elk Railroad, Inc. – Acquisition and Incidental Trackage Rights Exemption – Norfolk Southern Railway Company, Docket No. FD 35187 (STB served Nov. 1, 2016) ("Grand Elk"). As in Grand Elk, the Board should reject the request out-of-hand.

⁴ Application at 47.

adapt to the business reality that larger unit train shipments mean added MET switching and additional costs. CVAG would have the Board believe that its customers are inflexible in the presence of changed circumstances and increased costs, though that is disproven by evidence of shippers, such as Gavilon, stepping in to reimburse CVAG for MET's switching charges.⁵

The service "issue" here stems from CVAG's refusal to pay MET's switching charges, nothing less and nothing more. In keeping with Albermarle,⁶ CVAG's withholding of payment and MET's withholding of switching as a consequence does not equate to a service disruption warranting Board intervention. CVAG's petition for an investigation is just another means to the same end as intended by its requests for an emergency service order and an injunction – to short circuit its unreasonable practice complaint against MET.

Aside from the fact that the dispute does not rise to the level of national or regional significance, the legal concepts enunciated in Albermarle and Keokuk⁷ (controlling here) mandate dismissal of CVAG's investigatory last-ditch effort. If anything, the Board could consider whether CVAG and its agribusiness customers are engaged here in a concerted attempt to compel MET (and, by extension, other grain-handling short lines) through threat of litigation to reduce or eliminate switching charges for receivers incapable of accepting and unloading larger shipment volumes without short line switching assistance.

⁵ See Application at Exhibit 7. Also, MET has reason to believe that other CVAG customers have intervened in recent instances to reimburse CVAG for a portion of MET's switching charges.

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

⁷ 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").

CVAG's attempt to reargue the merits of its injunction petition flouts agency rules, but, if it is accepted into the record nevertheless, CVAG's surreply warrants a supplemental response from MET.

CVAG's May 16 letter filing seeks to re-argue its case for a vaguely-articulated injunction. It is an impermissible reply to a reply under 49 C.F.R. § 1104.13(c). CVAG contends that good cause exists for acceptance of its surreply, implicitly acknowledging that section 1104.13(c) prohibits such filings. CVAG's May 16 filing constitutes, in part, a motion for leave to file a surreply. MET is therefore entitled to reply to the motion pursuant to 49 C.F.R. § 1104.13(a), and does so here. CVAG's surreply re-hashes elements of the Application, and allows CVAG to introduce the very sort of "factual and legal misstatements" that it claims are the basis for its surreply in the first place.

CVAG's May 16 filing should be rejected and stricken from the record.⁸ If it is accepted into the record nevertheless, then MET requests that the limited supplemental response that follows also be accepted for precisely the same reasons that CVAG had given in justifying its most recent offering, to correct misstatements and omissions of fact and law. MET will address in serial fashion those instances where CVAG's surreply has taken liberty with the facts, the law or both.

To begin with, because CVAG refuses to prepay applicable tariff rates for MET switching, MET has, in turn, withheld switching. CVAG does not seriously dispute that withholding service is legally permissible where the customer refuses to pay for the service *to be*

⁸ See, e.g., WTL Rail Corporation – Petition for Declaratory Order and Interim Relief, Docket No. NOR 42092 (STB served Jun. 23, 2005) (declining to consider an impermissible reply to a reply filed in support of an injunction request); Union Pac. Corp., et al – Control and Merger – S. Pac. Corp., et al, Docket No. FD 32760 (Sub-No. 44) (STB served Jul. 27, 2005) (denying motion for leave to file a surreply in support of an injunction request).

rendered,⁹ and yet it self-servingly and incorrectly accuses MET of undertaking an “exclusionary scheme.”¹⁰ In fact, MET has taken precautionary steps to avoid interchange of larger unit trains that would precipitate a service-vs.-payment impasse that would result in congestion and threaten MET’s service to other customers.

Next, CVAG wrongly accuses MET of misusing AAR accounting systems to address CVAG’s refusal to prepay for future services, when such measures are not contrary to law or AAR convention. CVAG deliberately confuses the current service situation, where MET has taken appropriate steps to protect itself from non-payment for future services, with a refusal to provide service for non-payment of *previously-supplied* services and *previously-billed* charges (which is not permitted under applicable law or AAR convention).

CVAG then claims that applicable law forbids MET from limiting permitted shipment sizes to carload quantities that the destination receiver can accept and unload at one time, although the cases upon which CVAG relies are inapposite and irrelevant.¹¹ Under CVAG’s misguided theory of the case, literally every shipper would be legally entitled to unit train service, regardless of the track and loading capacities of the traffic originator and receiver, and all railroad customers also could demand that extra handling at either end of the shipment be provided for free or for a price acceptable the customer.

⁹ See Albermarle; MET May 14 Reply at 13, n. 19.

¹⁰ CVAG May 16 Surreply at 2.

¹¹ CVAG’s reliance on Eric Strohmeier & James Riffin – Acq. & Op. Application – Valstir Indus. Track in Middlesex & Union Cntys., N.J., Docket No. FD 35527 (STB served Oct. 18, 2011); and Classification Ratings of Chems., Conrail, 3 I.C.C. 2d 331 (1986) is badly misplaced. Those cases involved categorical refusals to handle commodities that rail carriers find undesirable. They cannot reasonably be interpreted as barring railroad-imposed limitations on carload volumes beyond which the receiver is unable to accept, as is the case here.

Additionally, CVAG struggles again with the inescapable fact that its dispute with MET revolves around the level of MET's accessorial charges. CVAG insists that "the dispute is not one 'over the level of switching charges,'" ¹² yet only a few lines later CVAG explains that it seeks relief from MET's "unfounded charges," which CVAG argues it should be allowed not to pay "during the pendency of the proceeding." ¹³

MET showed that, for the most common commodities that CVAG has received in unit trains, the applicable MET switching charges translate to an additional \$1.01 to \$1.97 per ton, and MET has provided the underlying calculations to support these figures. Nevertheless, CVAG misleadingly alleges that MET's prepay demands increase CVAG's costs by "\$7.00 - \$8.50 per ton." ¹⁴ CVAG's per-ton claim is overblown and false. The only charges that might approximate that figure would be for unit trains that CVAG wanted delivered to its 25/26-car capacity transload tracks, and MET will no longer allow unit train service to those tracks.

Next, CVAG revisits its claim that MET would not be harmed by an injunction, arguing that, if MET has any compensation issues, they should be taken up with Union Pacific Railroad Company ("UP") and BNSF Railway Company ("BNSF"), who CVAG suggests may be shortchanging MET for the handling carrier services it supplies to each. CVAG would have the Board accept without evidence or argument that MET's unit train switching services are integral to the provision of line haul common carrier service, which MET has pointed out is not the case. ¹⁵ MET's switching services are accessorial to common carriage. They are separate and distinct from the line haul services MET provides to BNSF and UP. As such, MET's switching

¹² CVAG May 16 Surreply at 3 (quoting MET's reply to CVAG's petition for an injunction).

¹³ Id.

¹⁴ Id.

¹⁵ MET May 14 Reply at 5-6.

is properly billed separately to the consumer of the service, CVAG in this case. CVAG appears to argue in the alternative that BNSF and UP handling line allowances are payment enough, such that CVAG should not have to pay for MET's switching. In so doing, CVAG seems intent to factor MET's allowance revenues into its challenge of MET's accessorial tariff rates notwithstanding precedent that clearly distinguishes between the two types of service.¹⁶

CVAG then reveals a critical inconsistency in its argument. After claiming that MET ought not to charge anything for switching CVAG's unit trains, CVAG pivots, acknowledging that perhaps MET *is* entitled to charge for these services. CVAG contends, however, that MET should be prevented from collecting any charges until *after* this proceeding has concluded.¹⁷ Ordering MET to resume switching service to CVAG under a long-term credit arrangement conflicts with agency jurisprudence providing that a carrier is not obligated to extend credit to customers.¹⁸ CVAG hopes for a Board order forbidding prepayment, because it expects that such an order would force MET to capitulate on a lower switching charge scheme.

MET is mystified by CVAG's baseless allegations about the per-minute and per-hour levels of CVAG's switching charges. CVAG's numbers are not credible, and the assumptions behind them derive from an individual (Paul Konzen of CVAG) who does not appear to have any experience operating a railroad, much less setting rates for one. MET is equally mystified by CVAG's argument that MET has "convert[ed] hourly charges into per car ones," and that not charging on a per-hour basis for unit train switching "deviates from industry

¹⁶ Id. at 5, n. 4.

¹⁷ Application at 3 (CVAG "will face back charges should the charges later be upheld;" MET's rights "to seek to collect any additional [MET cannot tell what CVAG means by "additional," considering that CVAG objects to any payment at this point] lawful charges" will be preserved in the event of an injunction; MET would retain the "right to bring a civil action to recover any valid charges" at the end of this proceeding.

¹⁸ MET May 8 Reply (to Application for Emergency Service Order) at 18.

norms for unit train service.”¹⁹ Neither argument is supported, and neither is true. They are reckless and purposely misleading assertions from a rail-served customer with (apparently) limited experience with railroad accessorial programs and tariffs. MET has consistently applied per-car rates to intra-terminal switching, and the verified statement of Lon Van Gemert, attached as an exhibit to MET’s May 14 reply filing, explains that, among other things, per-car rates for intra-terminal switching are the industry norm.

Finally, in its Application, CVAG relied upon Ariz. Pub. Serv. Co. and PacifiCorp. v. Burlington N. & Sante Fe Ry., STB Docket No. NOR 42077 (STB served May 12, 2003) (“Arizona Public Service”) as support for the proposition that the Board should enjoin MET from charging pursuant to its tariffs. MET pointed out that this case was distinguishable and not controlling, in that, among other things, it involved a Board-prescribed rate. MET also pointed out that, to the extent that CVAG intended to have the Board prescribe a reduced tariff rate (or no rate), Arizona Public Service and Burlington N., Inc. v. United States, 459 U.S. 131, 141-42 (1981) provides that MET would have no recourse, were its tariff charges (or any portion above the prescription) found to be reasonable.²⁰ CVAG now wishes to distance itself from Arizona Public Service, acknowledging that the case is indeed factually distinguishable from the facts here.²¹

CONCLUSION

CVAG is unhappy with the rates that MET applies to intra-terminal switching for unit train volumes that CVAG needs in order to receive higher-volume shipments from its customers. CVAG will not pay the applicable charges, and yet it wants MET to provide the

¹⁹ CVAG surreply at 4.

²⁰ MET May 14 Reply at 24-26.

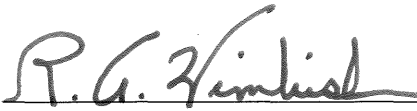
²¹ See CVAG May 16 Surreply at 3.

service it wants. CVAG's latest ploy is to try to persuade the Board to order MET to provide the switching services absent prepayment conditions, on the understanding that somewhere down the road, if MET's rates – or any portion of them – are proven not to be unreasonable, then CVAG will repay MET for the credit that the short line has been forced to extend to CVAG. The entirety of CVAG's Application is founded on the basic proposition (albeit entirely unproven) that MET's accessorial services tariff rates are unreasonable.

CVAG is entitled to explore whether MET's practices are justiciable before the Board, and whether it would be entitled to a remedy under its unreasonable practices theory. But it has resorted to a number of tactics that are unwarranted under Board precedent and policy and abusive, including its three-part effort (through an emergency service order, an injunction, and an investigation) to get the Board to pre-judge the merits of CVAG's complaint and prescribe terms for MET's switching services during the pendency of the complaint. The other legal and policy deficiencies of CVAG's investigation petition aside, CVAG's request exaggerates the scope of this dispute terribly. There is simply no service issue, as Albermarle establishes, let alone one of national or regional significance to justify the commitment of substantial agency resources – all of which would in any event only serve as leverage for CVAG in its efforts to sandbag MET into rate concessions. For these reasons, the Board should summarily decline CVAG's invitation to initiate an investigation.

Finally, CVAG should not be permitted to re-argue for a Board injunction under its impermissible surreply. But even if CVAG's latest filing is not rejected as violative of section 1104.13(c), then, as MET has shown herein, its latest offering is neither persuasive nor does it show particular regard for the facts or the law. As such, CVAG's injunction petition should be denied.

Respectfully submitted,

By: 

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**EXHIBIT A
MET LETTER TO CVAG REGARDING TERMS OF UNIT TRAIN SERVICE
MAY 18, 2018**

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May 18, 2018

Via Email (pap@sloverandloftus.com) and U.S. Mail

Peter A. Pfohl, Esq.
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
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Re: Modesto and Empire Traction Company service to CVAG

Dear Mr. Pfohl:

I am writing on behalf of Modesto & Empire Traction Company ("MET") to clarify elements of our position concerning switching services for Central Valley Ag Grinding, Inc., and Central Valley Ag Transport, Inc. (individually and collectively, "CVAG"). CVAG has noted in its recent filings to the Surface Transportation Board ("STB") that MET has restricted its interchange of CVAG-destined commodities to certain maximum car counts, accounting for the CVSG's current unloading capacity.

To avoid any confusion on the subject, MET wishes to clarify that the aforementioned interchange restrictions are an outgrowth of CVAG's refusal to prepay for intra-terminal switching (pursuant to charges prescribed in MET's accessorial services tariffs) that would be required for CVAG to be able to unload deliveries in excess of the interchange restrictions. However, to be clear, with the exception of commodities destined to CVAG's transload tracks (Tracks 1038/1039), MET will agree to lift the maximum carload restrictions and will resume acceptance in interchange of unit train shipments that exceed the current restrictions, provided CVAG commits to prepay in accordance with applicable tariff provisions now in effect, subject to available track capacity on CVAG and MET to accommodate larger unit trains.

Based upon recent experience, and by way of example, the following estimated unit train switching/demurrage prepayment charges would apply if CVAG's loop track facilities are vacant at the time of MET delivery:

Commodity/Quantity	MET Estimate
Canola/100 Carloads	\$11,250.00
Gluten/103 Carloads	\$18,450.00
DDG/103 Carloads	\$18,450.00

FLETCHER & SIPPEL LLC

Peter A. Pfohl, Esq.

May 18, 2018

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If CVAG will agree to prepayment of estimated switching and (if applicable) demurrage charges, then MET will lift its maximum train size interchange restrictions, so that CVAG's shippers may resume shipments of larger unit trains. MET encourages CVAG to consider sharing these cost estimates with CVAG's customers, so that they may also gain an understanding of the terms under which most larger unit train shipments to CVAG may resume, and so that CVAG and its customers may consider adjusting their respective logistics arrangements. MET requires that prepayment in all instances will come from CVAG, and that CVAG alone will confirm accessorial services charges (and estimates) with MET, and not CVAG's customers.

Sincerely,



Robert A. Wimbish

RAW:mr

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of May, 2018, she caused a true and correct copy of the foregoing **Reply to Petition for Board-Initiated Investigation and Response to May 16, 2018 Surreply Filing** 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:

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