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The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: NOR 42159, *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. v. Modesto & Empire Traction Co.*

Dear Ms. Brown:

Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, “CVAG”) respectfully submits this response to the surreply that Modesto and Empire Traction Company (“MET”) filed September 17, 2018 (“Surreply”).

MET seeks to avoid the prohibition on filing a reply to reply¹ by asserting a need to address “discrete elements” of CVAG’s Reply to Petition to Reopen (“Reply”) where CVAG supposedly “misled the Board” and “presented new evidence.” CVAG’s Reply is not misleading, did not misstate facts,² and did not introduce any new evidence that might justify acceptance of MET’s Surreply.³

MET’s Surreply does contain one material flip-flop, its admission that it can, and does, accept essential agricultural commodities for a favored customer on the very same tracks

¹ 49 C.F.R. § 1104.13(c). MET incorrectly cites 49 C.F.R. § 1103.13(c), which addresses attorney qualifications.

² *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. in Aroostook Cty., ME*, Docket No. AB-124 (Sub-No. 2), at 3 (STB served May 6, 2003) (rejecting surreply premised on claims that the reply had “blatantly mischaracterize[d]” the law and had “grossly overstated” facts); *Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912, at 3 (STB served Apr. 20, 2011) (“alleged misstatements do not, however, constitute good cause for accepting a reply to a reply”).

³ MET’s Petition did manufacture “new” evidence regarding its delivery of whole cottonseed (“WCS”) unit trains to CVAG, to which CVAG simply responded in its Reply. In fact, the parties had already addressed the receipt and delivery of such trains. See, e.g., the letter from Gavilon Ingredients, LLC (“Gavilon”), dated April 27, 2018, included with CVAG’s May 2, 2018 Petition for Preliminary Injunction and Investigation, and considered by the Board in its Decision of June 12, 2018, granting the preliminary injunction (“June Decision”).

that it previously represented were not designed or reasonably capable of receiving such shipments. Otherwise, CVAG urges the Board to disallow MET's Surreply in the interests of economy and closure. If, however, the Board considers MET's Surreply, it should also accept this brief response, which further confirms that there is no new evidence, changed circumstance, or material error that warrants modification or clarification of the Board's June Decision.

1. "MET's Side of the Story" Contentions are Cumulative and Unavailing

In its Surreply, MET seeks to address five "half-truths" that it asserts CVAG made in its Reply, contending that MET's "side of the story" has not been heard. That is incorrect. MET has had multiple opportunities to present its views. Three of MET's Surreply contentions involve state court litigation matters and simply repeat MET's prior claims concerning its attempts to evict CVAG from its Modesto facilities, its rejection of CVAG's Notice of Exercise of Option to Extend, and its refusal to accept lease payments from CVAG for litigation purposes. MET's two other contentions reiterate MET's prior assertions that MET is not "singling out CVAG" and that the \$20,000-plus MET continues to receive for handling each CVAG unit train is not related to the delivery services under dispute.

While not entirely clear, MET's contentions regarding its "side of story" appear directed at the findings in the Board's June Decision regarding success on the merits and harm to MET. However, again, MET raised all of the contentions previously, and the Board fully considered and properly rejected them. For example, with respect to the state court litigation, the Board correctly found:

The parties are currently engaged in litigation before a state court, after MET refused to accept CVAG's option to extend its lease. In the state court case, MET provided written assurances to CVAG that it had no intentions of interfering with interstate rail service to CVAG's Modesto facility. Less than a week after it made this representation, however, MET initiated changes in CVAG's services, limited CVAG's access to tracks, and imposed new accessorial fees and prepayment requirements as a condition of switching services. In light of these circumstances, MET's prepayment demands, as well as its refusals to provide adequate service and interchange, appear unreasonable.

June Decision at 5. The Board also correctly found that MET faced no harm, let alone irreparable harm, monetary or otherwise, in the granting of the preliminary injunction. MET's Surreply "side of story" contentions are clearly cumulative and present nothing new to possibly warrant reopening or modifying the June Decision.

2. MET's Surreply Admission of Its Exclusionary Conduct Confirms that MET Should Not be Allowed to Block CVAG's WCS Trains

MET's Petition to Reopen asks the Board to reverse its preliminary injunction Decision to allow MET to outright block the delivery of WCS trains to CVAG, and CVAG alone. As part of its Petition to Reopen, MET testified that the involved transload tracks "were never intended to be used for [WCS] unit train unloading," that the "trackage clearly is not designed to receive and process shipments of that size," and that it was not "customary or

practical” to deliver such trains. Pet. at 12-14. MET’s Petition requests that “[t]he Board should make clear that its injunction was not intended to force MET to accept [CVAG] unit trains destined to the Transload Tracks, where unit train service was not customary or practical.” Pet. at 12.

However, as CVAG showed in its Reply, and as Gavilon confirmed in its accompanying letter, the involved tracks can reasonably accommodate WCS unit trains, and WCS trains have all been delivered and unloaded by CVAG efficiently, within two to three days after delivery. Reply at 14-17. As CVAG further showed in its Reply (at 15-17) and its supplement filed September 6, 2018, MET’s testimony is also belied by MET’s recent delivery of two WCS unit trains for the Penny Newman Grain Company (“Penny Newman”), to the same transload tracks that MET has categorically declared could not practically receive such trains. In fact, those two Penny Newman trains took a total of 29 days to unload, while CVAG unloaded all three of the WCS unit trains received for Gavilon in fewer than 10 days. CVAG Reply at 16.

Rather than confess error and retract its testimony, in its Surreply MET doubles down and inexplicably responds that “CVAG is not equipped to receive WCS unit train shipments,” even as it simultaneously admits “MET can accommodate unit trains, but at a cost.” Surreply at 5. MET also asserts that CVAG is somehow engaged in “new speculation,” by calling out MET on its stunning omissions and contradictions. *Id.* at 2. MET acknowledges that Penny Newman competes closely with CVAG and Gavilon, but asserts that “Penny Newman’s operations and unloading practices are irrelevant” because Penny Newman has “recently entered into a comprehensive (and confidential) agreement with MET.” *Id.* at 5. Because “MET has a solid working relationship” with Penny Newman, which “has agreed to pay” MET, all of the otherwise intractable service constraints for WCS service easily vanish, and MET can readily accommodate its favored customer’s service requests. *Id.* Incredibly, MET holds firm to its prior accusations that such train deliveries on the same tracks to CVAG are “not customary or practical,” while somehow asserting that it is CVAG (and Gavilon) that “have unveiled a profound double standard.” *Id.* at 6.

MET’s renewed request to block WCS trains to CVAG under the circumstances has nothing whatsoever to do with feasibility, and everything to do with commercial leverage. MET’s Surreply merely reinforces its intransigence and eagerness to use any means that might be available to disrupt CVAG’s lawful operations and force CVAG off of the premises.

MET’s Surreply should be disregarded, but if considered, it simply confirms that injunctive relief is not merely appropriate, but necessary, and MET’s Petition should be denied.

Respectfully submitted,

/s/ Peter A. Pfohl

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Katherine F. Waring

Counsel for Complainants

Central Valley Ag Grinding, Inc. and

Central Valley Ag Transport Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of September, 2018, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/

Katherine F. Waring

An Attorney for Complainant