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September 17, 2018
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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

**REQUEST FOR LEAVE TO FILE REBUTTAL AND
REBUTTAL TO REPLY TO PETITION TO REOPEN**

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TRACTION COMPANY**

Dated: September 17, 2018

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VERIFIED REBUTTAL TO REPLY TO PETITION TO REOPEN**

OVERVIEW

On August 14, 2018, Modesto and Empire Traction Company (“MET”) petitioned the Surface Transportation Board (the “Board”), in view of materially changed circumstances, to reopen its decision served on June 12, 2018 (the “June 12 Decision”) to lift restrictions on MET’s switching charge prepayment requirements or, at a minimum, to hold CVAG to its stated commitment to supply a \$10,000 per train security for switching MET provides in support of unit train unloading. MET also asked the Board clarify the scope of the injunction concerning unit trains destined to the Transload Facility. MET requested expedited action on its Petition.

Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, “CVAG”) replied to MET’s Petition on September 4, 2018, seeking leave to file, and filing, a supplement on September 6, 2018. CVAG’s response in opposition to MET’s reopening request is relatively straightforward. CVAG contends that:

- The Board did not rely upon CVAG’s stated ongoing willingness to pay a \$10,000 per train security in framing its injunction.
- CVAG never was willing to pay a \$10,000 security if the Board restored unit train service (and the Board allegedly knew that in enjoining MET).

- The Board lawfully may order MET to provide accessorial services to CVAG without charge or security, notwithstanding the precedent upon which CVAG and the Board relied generally affirming a carrier's right to require security deposits.
- The Board has pre-judged the disputed MET switching rates as being unreasonable.

CVAG attempts to mislead the Board about CVAG's non-payment for its use of MET's property and services. CVAG's Reply introduces new speculation concerning the Transload Facility by dragging into the dispute for the first time a neighboring MET tenant transloader and shipper, Penny Newman Grain Company ("Penny Newman") in an effort to have the Board believe that MET's accommodation of Penny Newman harms CVAG (and, by extension, Gavilon Ingredients, LLC – "Gavilon"),¹ and favors Penny Newman at the expense of CVAG and Gavilon by seeking to impose a "selective embargo."² CVAG's allegations and speculation warrant a brief response to provide the Board with an accurate view of the facts.

REQUEST FOR LEAVE TO REBUT ELEMENTS OF CVAG'S REPLY

Although 49 C.F.R. § 1103.13(c) generally does not permit replies to replies, the Board will permit a rebuttal as the appropriate remedy to a reply's introduction of new facts; doing so serves justice and ensures a complete record.³ For the reasons supplied above, MET

¹ CVAG relies upon Gavilon to insist that MET's switching is already paid for, and that CVAG should not be charged. Gavilon's arguments have become a part of the record, and its claims have been included in the Board's June 12 and 25 decisions. Gavilon should be regarded as a party of record, like A.L. Gilbert is. At a minimum, Gavilon must be subject to discovery.

² CVAG Reply at 16.

³ Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria, and Western Railway Corporation Between La Harpe and Hollis, IL, Docket No. FD 34335 (STB served Feb. 7, 2005), slip op. at 5 ("Our rules are to be construed liberally to effect justice, 49 CFR 1100.3, and . . . we [will accept] replies to replies where . . . appropriate to do so." A party must be permitted to reply to new evidence); See also Rail Switching Services, Inc. – Operation Exemption – Pemiscot County Port Authority, Docket No. FD 35685 (STB served Jan. 8, 2013), slip op. at 3; Reading Blue Mountain and Northern Rwy. Company – Lease and Operation Exemption – Norfolk Southern Railway Company and Pennsylvania Lines LLC,

asks that it be permitted to respond to discrete elements of the Reply where CVAG purposely has misled the Board as to facts underlying the case, and where CVAG has presented new evidence and argument on reply that is also misleading, and to which MET must be afforded an opportunity to respond. Accordingly, good cause exists to permit the Rebuttal that follows.

REBUTTAL

CVAG's purposely muddles the facts to obscure the truth. In point of fact, CVAG is not paying for switching services and refuses to place into escrow amounts from which MET ultimately would be able to draw as compensation for CVAG's continued occupancy of MET-owned facilities.

CVAG's Reply is a model of misdirection, obfuscation, and half-truth. Several of CVAG's half-truths serve to depict CVAG as a victim, leaving out key facts that disprove its narrative. CVAG cannot conceal that it is not paying for MET's switching (and has not offer to pay for switching after the June 12 Decision), and it refuses to provide any security to MET in lieu of payment in full. MET is receiving no payment for CVAG's continued use of MET's Loop and Transload Facilities, and CVAG has refused to pay into escrow amounts that will be due to MET at the end of litigation for CVAG's use of MET's facilities. Consider the following:

- ***CVAG's side of the story:*** MET seeks to evict CVAG from MET-owned facilities that CVAG currently uses and profits from, having refused to agree to an extension of CVAG's Loop Facility lease.
- ***The other side of the story:*** MET's refused the lease extension because, in MET's view, CVAG was, and remained, in material breach of the terms of the then-existing agreement.
- ***CVAG's side of the story:*** The Loop Facility dispute is the subject of state court proceedings under which MET seeks to "dispossess CVAG of the right to operate."
- ***The other side of the story:*** MET believes that CVAG has no right to be on MET's premises, and CVAG undoubtedly will be evicted if it does not leave voluntarily. If so, then CVAG has no rights of which it can be "dispossessed."

Docket NO. FD 34048 (STB served Aug. 1, 2001, note 4 (the agency will construe its rules to allow pleadings that will contribute to a complete record without prejudicing any party . . .)).

- ***CVAG's side of the story:*** MET's switching charges single out CVAG.
- ***What CVAG leaves out:*** CVAG is not the only MET-served customer receiving switching services. CVAG is, however, the largest consumer of MET switching, and it is the only customer that refuses to pay.
- ***CVAG's side of the story:*** MET rejected CVAG's tender of rental payments after MET had determined that the Loop Facility lease had terminated. See Reply, Exhibit A. MET therefore has only itself to blame for CVAG's non-payment.
- ***What CVAG conveniently leaves out:*** To protect its legal rights – and in order to protect its position that no lease arrangement continued to exist – MET declined the proffered rent. Accepting the rental payment would have prejudiced MET's eviction efforts. Instead, MET proposed that CVAG deposit funds into escrow in lieu of rent, thereby assuring funds available to MET at the end of the litigation to compensate MET for the use of its facilities. CVAG has refused.
- ***CVAG's and Gavilon's legal claim:*** MET switching is an integral part of line haul service (or "haulage services"). According to Gavilon, MET's switching services are already paid for as part of Gavilon's line haul service payments.
- ***MET's response:*** BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") pay MET for the provision of line haul services by way of per-car allowances under handling line agreements. MET's switching is not part of what CVAG and Gavilon term "haulage." Rather, it is a separate and distinct accessorial service⁴ excluded from BNSF's and UP's line haul rates to Gavilon. MET may charge separately for switching, as is the common practice with handling line arrangements. Accordingly, MET's line haul income has nothing to do with CVAG's non-payment for switching.

MET's experience with Penny Newman, of which CVAG has only a superficial understanding, reveals CVAG's and Gavilon's extraordinary double-standard.

Gavilon contends that whole cotton seed ("WCS") unit trains are essential for it to compete for business in California's Central Valley. Unit trains are generally more economical

⁴ Precedent long has recognized the distinction between line haul service – the movement of traffic from origin to destination – and services that are accessory thereto. See, e.g., 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) ("An accessorial 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).

for shippers. However, Gavilon ignores the logistical costs that flow from its unit train demand. CVAG is not equipped to receive WCS unit train shipments.⁵ MET can accommodate unit trains, but at a cost. CVAG and Gavilon insist that MET absorb that logistical cost by picking up CVAG's logistical slack for free, subsidizing Gavilon's and CVAG's respective businesses.

Penny Newman, a Gavilon and CVAG competitor, has become the latest vehicle for CVAG's and Gavilon's distractions. Penny Newman sells and ships agricultural commodities (including CWS) as Gavilon does, but it handles its own transloading, rather than contract those services to a third party like CVAG. It recently entered into a comprehensive (and confidential) agreement with MET for the use of transload facilities adjacent to the Transload Facility that CVAG occupies without legal right.⁶

The MET-Penny Newman relationship differs from the one that MET has with CVAG, the details of which, quite frankly, are irrelevant to the accessorial services tariff and prepayment dispute. Moreover, Penny Newman's operations and unloading practices are irrelevant to this proceeding, and CVAG's and Gavilon's fixation on this new Modesto competition reveal a thinly-veiled attempt to pry into Penny Newman's business dealings for purposes not related to this dispute. Suffice here to say that CVAG and Gavilon maintain that MET should be required to provide accessorial services for free in the interest of feed market "competition." In reality, CVAG and Gavilon want an unfair market advantage by way of an MET-supplied subsidy.

⁵ CVAG touts its ability to hold CWS unit train excess cars on the Loop Track when the balance of the train is on the Transload Tracks being unloaded. When that is possible, the arrangement frees up MET yard capacity, and CVAG avoids demurrage charges (that CVAG refuses to pay anyway), but it does not reduce the amount of switching that MET must provide to facilitate unloading. Also, the arrangement only works when CVAG does not have a unit train already on the Loop Track in the process of being unloaded (as it frequently does).

⁶ CVAG's license rights were terminated on 10 day's written notice in keeping with the then-governing contract back in February of this year, but CVAG refuses to leave.

CONCLUSION

Permitting CVAG to consume accessorial services without payment or, at a minimum, a security is financially and legally unacceptable. CVAG offered a per-train security deposit in lieu of paying the disputed accessorial charges in full. The Board relied upon CVAG's representation as an ongoing commitment, and CVAG did nothing to disabuse the Board of its understanding of CVAG's offer until MET accepted it. CVAG has reneged. Under the circumstances, MET should be able to require prepayment for switching, but would agree during the pendency of this litigation to accept the proffered security.

By the Reply, CVAG and Gavilon have unveiled a profound double standard. Penny Newman is more akin to the nearly 30 customers with which MET has a solid working relationship. Penny Newman recognizes that switching is a separate value-added service, and has agreed to pay for it. CVAG and Gavilon insist upon something for nothing.

For these reasons, CVAG's petition to reopen and request for clarification of the Board's June 12 Decision should be granted.

Respectfully submitted,

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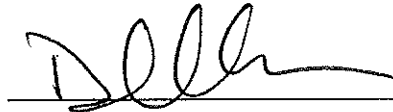
Dated: September 17, 2018

VERIFICATION

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

1. I am the President and Chief Executive Officer of Modesto And Empire Traction Company.
2. I have read the forgoing Request For Leave to File Rebuttal and Verified Rebuttal to Reply to Petition to Reopen, and know that the facts asserted therein are true as stated.

Dated : September 17, 2018



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of September, 2018, he caused a true and correct copy of the foregoing **Request for Leave to File a Rebuttal and Verified Rebuttal** 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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