

245679

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
May 8, 2018
Part of
Public Record

Docket No. NOR 42159

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

**VERIFIED REPLY TO *EX PARTE* APPLICATION FOR
SECTION 11123(a) SERVICE ORDER**

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 8, 2018

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
OVERVIEW	1
PROCEDURAL MATTERS	3
ARGUMENT	6
A. CVAG is responsible for its logistical inefficiencies, not MET	7
B. Rate disputes do not constitute service disruptions or inadequacies	10
C. Even in the absence of <i>Albermarle</i> and <i>Keokuk</i> , CVAG is not entitled to Section 11123 Relief.....	13
D. The facts here bear no resemblance to those in <i>Canexus</i>	16
E. MET is entitled to require prepayment of its estimated accessorial charge estimates	18
F. <i>Railroad Salvage</i> dealt with a peculiar, and very different, situation; it does not free CVAG from MET’s prepayment requirements	21
G. CVAG inevitably will depart the Modesto facility, whether due to contract termination or as a consequence of its inefficiencies.....	23
H. MET’s accessorial charges will not harm the dairy industry; MET’s business plans contemplate continued support for the dairy industry with or without CVAG.....	26
I. CVAG’s call for a Board-initiated investigation is nothing more than a tactical maneuver to short-circuit a reasonable practice dispute, and it must be denied	29
CONCLUSION.....	30
VERIFIED STATEMENT OF DILLON OLVERA	32
CERTIFICATE OF SERVICE	33

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 *EX PARTE* APPLICATION FOR
SECTION 11123(a) SERVICE ORDER**

OVERVIEW

This proceeding involves a switching rate dispute between a short line, Modesto and Empire Traction Company (“MET”), and its customer, Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, “CVAG”). CVAG has attempted to re-cast the switching rate dispute as a service disruption or service inadequacy necessitating emergency Board action under 49 U.S.C. § 11123, an injunction pursuant to 49 U.S.C. § 1321, and a Surface Transportation Board (the “Board”) investigation pursuant to 49 U.S.C. § 11701. CVAG’s recently-filed and redundantly-styled “Ex Parte Application for Section 11123(a) Service Order and Section 11701 Investigation and Petition for Preliminary Injunction and Investigation” (the “Application”) and its feigned indignation do not overcome existing agency precedent pursuant to which CVAG may pursue a switching rate remedy – as it has done – but under which it is entitled to none of the emergency or injunctive relief it seeks. Nor do CVAG’s melodramatic (and demonstrably false) claims that the survival of northern

California's dairy industry hangs in the balance make up for the Application's lack of substantive legal merit. Accordingly, the Board must deny the Application in its entirety.

CVAG is a transload operator with facilities in Modesto, California. CVAG's Modesto facilities are served exclusively by MET, a short line common carrier. CVAG, like a number of other agricultural transloaders within the region, receives and transloads agricultural products destined to dairy farms throughout the Central Valley of California. CVAG desires to receive feed shipments in "unit train" quantities, but lacks the track and unloading capacity to receive and unload such volumes absent MET's provision of intra-terminal switching services. CVAG depends upon MET switching to handle its unit train transloading operations, and, at times, upon MET holding excess cars from dis-assembled unit trains on MET trackage. The switching and car holding involved can be extensive, make considerable demands upon MET's limited resources, and threaten MET's ability efficiently to serve its many other customers.

In coping with the switching and car holding demands that come from accommodating CVAG's unit train expectations, MET has informed CVAG that it will have to pay MET for accessorial services that extend beyond inbound and outbound unit train transportation. MET has revisited and revised its accessorial services tariffs in light of the unusual demands of CVAG's switching requirements, and it has provided CVAG with fair and timely notice of changes to these tariffs. MET has been careful to develop tariff terms that are in keeping with those of many other U.S. railroads, both large and small.

CVAG has acknowledged that MET is entitled to charge for the switching necessary to support CVAG's unit trains, but CVAG is unwilling to pay the tariff charges that MET has assessed, arguing that MET's per-car charges applicable to the breaking up and switching CVAG's unit trains, along with a one-time unit train reassembly fee, are "patently

unreasonable.” Aware of CVAG’s position, MET has invoked its fundamental right as a common carrier to require prepayment of the estimated accessorial charges that would flow from the switching and (where applicable) demurrage associated with CVAG’s unit train shipments. CVAG does not appear to dispute the estimated services – the parties had arrived at fairly uniform switching practices for most unit train configurations. But CVAG insists that MET should accept only partial advance payment, allowing CVAG to withhold the balance due and forcing MET, a small railroad, to pursue the difference in court.

In addition to resorting to conclusory and unsupported assertions that MET’s tariff-based, per-car accessorial service charges for unit train support are “patently unreasonable,” CVAG complains that the Board should bar MET from requiring advance payment of its estimated switching and demurrage charges. It argues that it cannot afford to pay MET’s switching charges, indicating quite clearly that its offer of a “partial” advance payment (what CVAG tends to call a “security deposit”) is probably all that MET would ever expect to collect. As a consequence of the impasse, MET very recently has advised its line haul service partners BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”) that MET will no longer accept in interchange unit trains destined to CVAG that exceed what CVAG can receive and unload without MET switching. MET will, of course, continue to receive in interchange and deliver traffic to CVAG in carload quantities that CVAG is capable of receiving and unloading without requiring MET’s switching.

PROCEDURAL MATTERS

On May 1, 2018, CVAG filed two pleadings – a Complaint and the Application – both under a single Docket No. NOR 42159. Among the varied remedies that CVAG seeks are the following:

- Under color of authority pursuant to 49 U.S.C. § 11132(a), the STB should “immediately order MET to restore interchange service to connecting carriers for service to CVAG’s Modesto Facility, free of any prepay demands, for an initial period of 30 days, to be extended until the Complaint proceeding is decided, or until the statutory limit of 270 days is reached, whichever occurs first.
- Under color of authority pursuant to 49 U.S.C. § 1321, the STB should order MET to: (a) establish and adhere to reasonable service delivery plans for service to CVAG; and (b) maintain reasonable service delivery arrangements (with CVAG using its own rail car movers to conduct train unloading) and cease various “selfhelp” initiatives to reduce service and otherwise interfere with the reasonable interchange, delivery, and return of CVAG trains.
- Under color of authority pursuant to 49 U.S.C. § 11701, the STB should initiate a separate formal investigation of regional service disruptions.¹

MET will respond to the Complaint and the section 1321 and 11701 requests in appropriate due course as may be necessary, given the procedural deadlines applicable to each. But CVAG’s request for relief under section 11123(a) is a procedural oddity. Without any supporting precedent,² CVAG contends that the Board should dispense with the procedural dictates of 49 C.F.R. § 1146 – the regulations corresponding to 49 U.S.C. § 11123 governing the Board’s assessment of, and its rulings upon, emergency service orders – and instead act on the emergency service relief request “immediately” on an *ex parte* basis, without input from MET. CVAG claims that, because it “is not seeking directed service over the lines of another carrier,” the procedures at subsections 1146(a)(2) and (3) “are not necessary,” tucking this bald assertion into a three-line footnote at the end of its emergency service order argument.³

MET is entitled to respond. 49 C.F.R. § 1146.1(a)(2). Fundamental procedural fairness dictates no less. That the Board would even consider such *ex parte* action in the absence

¹ Application at 2-3.

² Given its penchant for the use of the word “unprecedented,” which CVAG re uses repeatedly to buttress various conclusory assertions in its Application, the fact that CVAG is seeking what appears to MET to be an unprecedented remedy is noteworthy.

³ Application at 33, n.97.

of supporting precedent strains credulity. Depriving MET an opportunity to respond would violate basic tenets of due process. Ralpho v. Bell, 569 F.2d 607, 628 (D.C. Cir. 1977) (“An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process”). To grant CVAG the relief it wants, the Board would deprive MET of its common carrier rights to prescribe charges for its services and demand prepayment of the same. What is more, while CVAG’s request for emergency relief is certainly unconventional – and fails to meet the requisite standards – it is not clear how the peculiar form of emergency relief is anything more than a distinction without difference with respect to the procedural protections of section 1146.

Obviously, MET objects to any such *ex parte* emergency relief, and relies upon 49 C.F.R. § 1146.1(a)(2) as entitling it to respond to the emergency service relief component of the Application in the ordinary course within five (5) business days. In so doing, MET also will address here, preliminarily, why case precedent requiring denial of the emergency service request also requires that CVAG’s requests for an injunction and a Board investigation also should be denied. MET reserves the right to respond substantively to the injunction and investigation elements of the Application later, under applicable procedures, should such additional responses be necessary.

In its conclusion, CVAG drops in a “suggestion” that the Board should “provide MET seven (7) days to reply” to its injunction request, thereby urging the Board to override the otherwise-applicable May 21, 2018 (20-day) reply deadline under 49 C.F.R. § 1104.13(a). This is in addition to CVAG’s contention that the Board should act “immediately” and on an *ex parte* basis to issue an emergency service order under section 11123. MET is unable to confirm how the relief sought under section 11123 and under section 1321(b)(4) interrelate or whether they

actually overlap, neither request being a model of clarity. As best MET can tell, the section 11123 request seeks Board-imposed limits on MET's accessorial service charges (although to what level MET cannot say), or, at a minimum, a prohibition on prepayment, so that CVAG can withhold payments and force MET, a small carrier, to pursue collection. The section 1321(b)(4) request asks for the Board to order unspecified (and redundant) "reasonable service delivery plans" and to hold MET to them. MET has been willing to develop and execute reasonable service plans, as the record in this case already reflects. The problem has been CVAG's refusal to pay for such services.

The following response addresses why agency precedent requires denial of the request for an injunction without the need for analysis under the usual four-part injunctive relief standard. But MET has not engaged in an analysis of the usual Holiday Tours⁴ test here. MET will do so, if necessary, by the appropriate May 21 reply deadline under section 1104.13(a), unless the Board directs otherwise.

ARGUMENT

This proceeding involves a dispute over the rates that MET may assess for unit train switching services for shipments that CVAG lacks the capacity to unload intact. CVAG claims that the current situation is of MET's making, but the facts prove otherwise – CVAG has only itself to blame for its alleged "crisis."⁵ MET has supplied its terms and conditions for switching, and CVAG has refused them, insisting that MET should accept as payment whatever

⁴ 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)).

⁵ CVAG's application contains innumerable falsehoods and half-truths, ranging from its sensational allegation that MET is refusing to accept in interchange traffic destined to CAVG without justifiable basis, to its elaborate and utterly ludicrous conspiracy theory that MET has cooked up an "overlapping" 10-step strategy to snuff out CVAG. The Application is a remarkable departure from the truth of the situation in which MET and CVAG find themselves.

CVAG believes to be fair. MET was ready, willing and able to provide the desired switching, and it remains ready willing and able without precondition to deliver shipments to CVAG in railcar quantities that CVAG can receive and unload without assistance, eliminating the need for MET switching and related costs. But MET will not provide unit train switching to CVAG absent prepayment of the estimated charges for those services. Board precedent establishes that this situation does not give rise to an actionable “service inadequacy” or unlawful withholding of common carrier service. In keeping with such precedent, the Application should be denied in its entirety.

A. CVAG is responsible for its logistical inefficiencies, not MET.

CVAG’s pleadings reveal something of the acrimony that now exists between MET and its customer, but CVAG’s one-sided story omits critical details and circumstances behind this falling out. CVAG is a sizable MET customer, one that MET had for years cultivated. But things changed. CVAG claims that there is some nefarious conspiracy behind MET’s efforts to remove and replace CVAG. In fact, CVAG instigated the falling out, not MET. While the Board need not address the “he said-she said” elements of what went awry and where, it is important for MET, a short line operator that is proud to boast grain transloading capability on its facilities, to offer its side of the story.

CVAG is no longer a genuine unit train unloading facility. MET cannot simply receive unit trains destined to CVAG in interchange from BNSF or UP and deliver them intact to CVAG for unloading, as unit trains typically are handled. MET must break up such trains, switching and re-positioning sections of them, and, at times, holding blocks of a disassembled unit train on MET tracks until the entire train is unloaded, released and reassembled, permitting MET to deliver the empty unit train, once reassembled, to BNSF or UP. Unloading and

switching in this fashion takes several days, and may require that dozens of cars removed from the unit train remain housed on MET track while other parts of the train are unloaded by CVAG.⁶

It wasn't always that way, as CVAG has pointed out in the Application. There was a time when MET supported CVAG's unit train unloading by providing intra-*plant* service (i.e., car movements over and through CVAG's loop track) which expedited train unloading and avoided the need for MET intra-*terminal* switching. MET has elected to end its provision of intra-plant services to CVAG, concluding that operating within the bounds of CVAG's plant was unsafe and too risky for MET trains and crews. CVAG argues that it is a safe operator, indeed one with an exemplary record. MET's experience shows otherwise. MET's termination of intra-plant switching and its decision to pursue termination of its facility lease and license relationships with CVAG is the culmination of MET's observation of two-and-a-half years of serious CVAG safety violations along active railroad track and within its unloading facility.

CVAG's protestations of victimhood don't comport with the facts. As CVAG well knows, the genesis of its falling out with MET can be traced to November of 2016, when CVAG arranged to receive approximately 3.4 million pounds of a Class 9 hazardous substance – mining byproducts known as “Phoenix Gold Concentrate” – to be delivered to MET for delivery to CVAG's transload tracks, all without alerting MET. The delivery was in direct violation of the governing MET-CVAG Transload Agreement, which restricted CVAG to receiving shipments of “Animal Feed Commodities” in the leased transload area. More galling, on this

⁶ MET is a handling line carrier for BNSF and UP, and it receives a per-car allowance for the traffic it originates and terminates for each line haul carrier. MET receives a significantly smaller per-car allowance from BNSF and UP for unit trains than it does for carload (or manifest) traffic, reflecting the general expectation that unit trains do not require any switching or disassembly to place with the customer or any reassembly at the end of the unloading process. Accordingly, CVAG's limitations require MET accessorial services, which MET is entitled under its agreements with BNSF and UP to provide, independently set rates for, and bill to customers.

particular shipment, CVAG listed MET as the “consignee” on the bill of lading, which placed MET, unwittingly, in the chain of ownership or control of these hazardous materials, thus exposing MET to potential liability.

As a consequence of that November 2016 experience, MET’s management began to take a closer look at CVAG out of a concern for the safety of CVAG’s and MET’s workers, and concerns over MET’s liability as a landlord. In the months following, MET discovered that CVAG was running a massive feed transload facility haphazardly, with inadequate regard for work place training or safety and in flagrant disregard of applicable laws and regulations.

In early 2017, as part of an informal inspection of CVAG’s operations and facilities, MET identified a number of safety concerns regarding the land and buildings (the “Facility”) CVAG leases from MET, including blocked walkways and emergency exits, inadequately maintained (or inoperative) fire protection equipment, and improper containment and control of agricultural product and debris, and compromised fire sensors and emergency lights. Alarmed its findings, MET engaged an independent health and safety consultant to review CVAG’s operations to determine whether and to what degree CVAG was complying with applicable Federal and California Health & Safety Code requirements. The consultant completed its own inspection and prepared a “Site Safety Review” listing 26 separate safety issues, 11 of which it identified as “High Risk.”

Both before and since the consultant’s review, MET personnel have observed and reported on unsafe CVAG activities on and around the track that MET leases to CVAG. For example, on or about May 1, 2017, MET personnel observed a CVAG employee using a front-end loader to reposition railcars, setting them into motion and causing them to couple with stationary railcars located elsewhere in the Facility. While these cars were in motion, MET

crews observed a CVAG employee jumping onto and off of the cars, threatening uncontrolled couplings and exposing CVAG employees to grave injury or death from a fall.⁷

In light of the inspections and MET observations of dangerous CVAG activity, MET notified CVAG of its default under the agreements governing the use of MET-owned property, and it has advised CVAG that MET will not agree to an extension of CVAG's leasehold and licensing arrangements.⁸ MET also notified CVAG that, as a result of these safety concerns, MET would invoke its right not to enter upon, and provide intra-terminal switching over, CVAG-leased trackage. And yet MET continues to observe highly questionable and unsafe CVAG worker conduct and practices in the unloading of rail-borne commodities.⁹

B. Rate disputes do not constitute service disruptions or inadequacies.

This proceeding is hardly “uncharted waters” for the Board. Twice before that MET is aware of, rail customers have attempted to pursue emergency relief as a mechanism to leverage a practice or rate dispute. In both cases the Board stood firm and denied the emergency relief sought under section 11123. In one of those two cases, the Board also denied a sister

⁷ This May 1, 2017 incident is but one of many, and is offered here as illustration. If necessary, MET will detail the literally dozens of rail safety violations it has documented over the past 12 months.

⁸ MET's decision to terminate lease relationship with CVAG has become a matter of litigation in California state court, with CVAG having decided that it should sue MET for electing not to continue the relationship.

⁹ For example, on March 29, 2018, MET observed CVAG employees “free-rolling” railcars as part of CVAG's unit train unloading activities. A lone CVAG employee pushed five or six rail cars into motion with a front-end loader, then stopped the front-end loader and exited the vehicle. This CVAG employee then ran down the free-rolling cars, and jumped onto them while they were still in motion to apply handbrakes. MET has a video record of this alarming maneuver. Nobody was spotting the leading end of the cars to warn other rail traffic or employees of the free-rolling cars. Shortly thereafter, a CVAG employee was observed free-rolling rail cars on an active track, darting in between *moving railcars* as they were being pushed together. Clearly, both incidents constitute serious violations of rail safety standards, and justify MET's decision to forego intra-plant switching for CVAG.

request by the rail customer to enjoin the assessment and collection of the disputed charges under section 1321 (then codified at 49 U.S.C. § 721(b)(4)), just as CVAG is seeking to do here.

The two cases, involving remarkably similar denials of emergency service orders – Albermarle Corporation – Alternative Rail Service – Line of the Louisiana and North West Railroad Company, Docket No. FD 34931 (STB served Oct. 6, 2006) (“Albermarle”); and 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”) – are controlling here. The essence of each case is that rate disputes may be the subject of thoroughgoing analysis and may result in permanent relief of an unreasonable practice or unreasonable rate complaint proceeding, depending upon the nature of the service, but they do not form the basis for an emergency service order or injunctive relief.

The facts in Albermarle are nearly identical to those presented here. There, Albermarle Corporation (“AC”), a chemical shipper exclusively served by a short line – Louisiana and North West Railroad Company (“LNW”) – found itself at odds with LNW over LNW’s rates for intra-terminal switching that AC contended were necessary to support its rail shipping needs. LNW had provided a combination of intra-plant and intra-terminal switching services to AC, although, by the time of the dispute, AC had elected to forego the use of LNW’s intra-plant switching, following increases in LNW’s rates, but AC still required LNW’s intra-terminal switching. Under its revised tariff, LNW assessed a \$500/car intra-terminal switching fee (with minimum volume requirements).¹⁰ AC objected to the charges, whereupon LNW advised that, absent acceptance, it would withhold switching.

¹⁰ Albermarle Corporation – Petition for Declaratory Order – Certain Rates and Practices of the Louisiana and North West Railroad Company, Docket No. NOR 42096 (AC Petition at 3).

AC initiated its request for section 11123 relief (in that case looking to install a different short line operator in place of LNW) and a section 1321 injunction, arguing that “LNW has imposed an unlawful embargo on switching services, leading to an imminent failure to transport [AC]’s traffic.”¹¹ A little more than a month after AC filed for emergency relief and an injunction (both adjunct to a pending unreasonable rates and practices proceeding against LNW), the Board denied AC’s petition in its entirety, stating as follows:

The alleged “service inadequacy” at issue here . . . arises from [AC]’s disagreement with the level of LNW’s charges for switching services and is not a failure to move traffic. As the Board stated in Keokuk Junction Railway Company – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003), rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123 . . . Accordingly, we will deny [AC]’s request for an order authorizing alternative rail switching service under 49 CFR part 1146. In light of our denial of an authorization of alternative service, we also will deny [AC]’s petition for immediate relief under 49 U.S.C. [1321](b)(4).¹²

The only factual difference between the cases is that AC sought to install a replacement operator more in keeping with the usual form of section 11123 relief, while CVAG seems to want the Board to prescribe terms and conditions for MET switching acceptable to CVAG. But this difference in the form of the relief sought is immaterial. In both cases, the requested remedy required application of section 11123, which Albermarle (and Keokuk) clearly establish is not a shortcut to a reasonable rate or practice proceeding.

On that note, while Keokuk involved a complex dispute over line haul rates charged by the incumbent carrier (rather than switching rates accessorial to the provision of common carrier service), it is worth quoting the reasoning that formed the basis for the Board’s denial of emergency service in Albermarle:

¹¹ Albermarle, slip op. at 3.

¹² Id., slip op. at 4 (footnotes omitted).

The Board's authority under 49 U.S.C. 11123 provides an accelerated process to address serious ongoing service disruptions and inadequacies of a temporary nature. The relief available is limited in duration and is to be granted without assessing fault. Part 1146 is not intended to provide permanent relief nor to be used as a punitive or preventive measure. Service Inadequacies, 3 S.T.B. at 970, 973.

The alleged service inadequacy at issue here is based primarily on the rates . . . Rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123. Section 11123 provides that the Board may order relief for equipment shortages, traffic congestion, and unauthorized cessation of operations. None of these is analogous to allegations of unreasonably high rates.

Rate disputes require permanent, not temporary, relief, which can be obtained only on fully developed records based on rate complaints filed under 49 U.S.C. 10701(d)(1). In contrast, the regulations at part 1146 are intended to provide temporary relief on an accelerated basis. They are not intended to be a surrogate for rate reasonableness proceedings . . . Therefore, alternative rail service relief is not available here.¹³

C. Even in the absence of *Albermarle* and *Keokuk*, CVAG is not entitled to Section 11123 relief.

Albermarle and Keokuk should put a definitive end to the Application, permitting the parties and the Board to focus on CVAG's unreasonable practice complaint as appropriate. But even without those two controlling cases, CVAG's emergency service request is unavailing.

CVAG begins its argument for emergency service relief (Application at 26-33), appropriately enough, with a discussion of section 11123, and an explanation of how the statute is essentially the amalgamation of three separate statutory precursors.¹⁴ As the Board quickly will note, the relief that CVAG seeks requires a Board finding of a "situation of such magnitude as to have substantial adverse effects on shippers . . ."¹⁵ Shortly thereafter, CVAG undertakes a three-page discussion of how MET's switching rates (and refusal to provide switching absent payment) allegedly harm the local dairy industry – an allegation that MET will show to be false

¹³ Keokuk, slip op. at 6.

¹⁴ Application at 27 and 28, n. 78.

¹⁵ 49 U.S.C. § 11123(a).

in the discussion following. As with much of the Application, CVAG goes out of its way to blame MET, a short line railroad, for CVAG's own logistical limitations, and the alleged consequences of the same. But the dairy industry is not an affected rail shipper, at least not as far as the record indicates.

CVAG offers Gavilon Ingredients, LLC ("Gavilon") as the lone named shipper allegedly harmed by MET's switching requirements, but Gavilon does not purchase MET's switching, CVAG does. Gavilon is not the complainant. And, in the extreme case of Gavilon's recent cotton seed shipment to CVAG, the service issues were the result of CVAG encouraging the shipment of a 102-car unit train to CVAG's two transload tracks – not its loop track – where CVAG has maximum total unloading capacity for roughly 25 to 26 cars of cotton seed at a time.¹⁶ Gavilon could have confirmed CVAG's limited unloading capacity, and it appears that CVAG shared with Gavilon in advance the charges that MET would assess for the extensive switching and off-site car holding (roughly 75 cars at a time on MET's trackage) that this train would require. In fact, MET encouraged Gavilon to avoid escalating the dispute between MET and CVAG by shipping its cotton seed in separately-spaced, non-unit train blocks that could be delivered to CVAG and unloaded and returned without switching. Yet Gavilon elected to ship its product by unit train anyway, presumably on the knowledge that CVAG would not pay the requisite switching charges in advance, or ever.

Gavilon could have shipped its product in carload service in blocks of up to 25 cars and at intervals that would have avoided MET switching, and it could have coordinated

¹⁶ Despite all of the attention that CVAG gives to the loop track on which it unloads commodities such as canola and gluten, CVAG omits mention of its use, pursuant to license, of two MET-owned, parallel "transload" tracks – known as Tracks 1038 and 1039 – which are located a distance on MET from the loop track. CVAG tends to use the transload tracks for smaller-volume commodities not typically handled via the loop track.

accordingly with CVAG and MET, but Gavilon chose not to, possibly at the advice of CVAG. Accordingly, Gavilon' is frustrated with the wrong party. By taking steps to limit its future acceptance of shipments destined to CVAG's transload tracks to no more than 25 cars per individual shipment, MET believes that it has prevented against any shipper or receiver attempting to force another such cotton seed unit train experience.

Additionally, as CVAG notes in its Application,¹⁷ section 11123's intended purpose is temporarily to rectify instances where a rail carrier is found to be incapable of providing common carrier service. The current statute itself speaks of a "failure of service," never stating that it also extends to a suspension of service arising from a non-shipper's refusal to pay for accessorial services it requires. And while CVAG refers to the Board's "wide latitude" to craft a remedy for a genuine failure of service, citing to Expedited Relief for Serv. Inadequacies, Docket No. EP 628 (STB served May 12, 1998) ("Expedited Relief"), it fails to point out that the Board's emergency service order rules are to be "used to remedy only substantial service problems that cannot readily be resolved by the incumbent railroad." Expedited Relief, slip op. at 6-7.¹⁸ Here, the alleged service problem stems from CVAG's refusal to pay a fair price for the services it wants from MET, not from any MET incapacity. This situation is easily resolvable – CVAG could either pay the switching charges or reduce shipment sizes to avoid a service impasse. There is no failure of service as contemplated under the statute.

¹⁷ Application at page 28, footnote 78.

¹⁸ It is ironic that CVAG periodically cites to Expedited Relief, a rulemaking proceeding leading to the promulgation of the Board's emergency relief regulations at 49 C.F.R. part 1146, considering that CVAG has prayed for relief exclusively under 49 U.S.C. § 11123, contending that the Board may dispense with the requirements and processes set forth in part 1146.

Furthermore, CVAG implicitly recognizes that the correct application of section 11123 would not get CVAG what it wants, yet CVAG attempts to force the issue. The emergency relief CVAG seeks, were it to be granted, would extend for up to 270 days.¹⁹ The problem for CVAG, of course, is that it knows that its unreasonable practice complaint proceeding, if litigated as expected, will extend well beyond such a 270-day time period. In an attempt to sidestep section 11123's strict time limitations, CVAG looks to extend the emergency relief by way of an injunction under section 1321.²⁰ The Board must not sanction the use of its injunctive powers as a means to bypass the statutory limits of emergency relief, and this is yet another reason why CVAG's section 11123 request must be denied.

D. The facts here bear no resemblance to those in *Canexus*.

While CVAG is either unaware of, or unwilling to discuss, Albermarle and Keokuk, it relies on another case – one involving issuance of section 11123 relief on the Board's own motion – to support its fatally flawed request for *ex parte* emergency service relief. Specifically, CVAG points to Canexus Chems. Canada L.P. v. BNSF Ry. – Emergency Service Order, Docket No. NOR 42131 (STB served Oct. 14, 2011) ("Canexus"), contending that Canexus involved "similar, albeit less egregious circumstances"²¹ compared to the facts here. This case is nothing like Canexus.

Canexus involved a chlorine manufacturer transporting the dangerous chemical in interline BNSF-UP service via interchange at the Kansas City gateway. BNSF sought to cancel the common carrier tariff provisions enabling the Kansas City interchange, insisting upon new interchanges that would reduce the length of BNSF's hauls considerably and increase UP's

¹⁹ Application at 27.

²⁰ Id. at 3.

²¹ Id. at 31.

hauls. UP objected to the new interchange proposal, resulting in a scenario in which chlorine might not move at all, regardless of the rate, the volume of traffic, or the destination customer's ability to accept the chlorine shipments in the carload volumes tendered.

Perceiving an absolute cessation of service due to an interchange dispute, the Board intervened, observing along the way that railroads had a well-documented aversion to transporting chlorine. Put another way, hauling chlorine was a tough job, but someone had to do it, and no one was. Therefore, although not specifically requested by the shipper, the Board invoked section 11123, and ordered BNSF and UP to continue service via Kansas City.

Canexus rested on two key factors, both missing here. First, in Canexus, there was no possible method for transporting the commodity absent BNSF and UP cooperation – an abject and looming failure of service. Here, by comparison, MET has offered service to CVAG, just not at rates CVAG wants to pay, and it is willing to accept and handle shipments that CVAG can handle without the need for MET switching. There is no failure of service. There is only CVAG's self-inflicted failure of payment and refusal to accept smaller carload batches. This is a dispute about the price of services, not their unavailability. Second, Canexus involved additional exigent circumstances due to the commodity at issue. Rail carriers did not want to touch chlorine any more than they had to. MET has no aversion to CVAG's commodities, provided CVAG is willing to pay a fair price for the services provided to it or avoid them by adjusting shipments to conform to CVAG's capacity.

Canexus is an outlier; one of a handful of cases involving actual application of section 11123 relief, and it is entirely different. Albermarle and Keokuk aside, CVAG's request should be added onto the long list of decisions where the Board has denied emergency relief.²²

E. MET is entitled to require prepayment of its estimated accessorial charge estimates.

MET is not required as a rail common carrier to extend credit to its customers, and it may refuse to provide service absent adequate assurances of payment in the way of financial security. 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).²³ Despite longstanding legal precedent buttressing MET's right to require prepayment, CVAG asks the

²² In contrast to the one decision CVAG cited, the modern-era decisions denying emergency relief are legion. E.g., San Francisco Bay R.R. – Mare Island Petition for Emergency Serv. Order & Petition for Decl. Order – Lennar Mare Island, LLC, Docket No. FD 35360 (STB served Dec. 6, 2010); Pioneer Indus. Ry. Co. – Alternative Rail Service – Cent. Ill. R.R. Co., Docket No. FD 34917 (STB served Jan. 12, 2007); Granite State Concrete Co., Inc. v. Boston & Maine Corp., Docket No. NOR 42083 (STB served Sep. 15, 2003); Keokuk Junction Ry. Co. – Alternative Rail Service – Line of SF&L Ry., Inc., No. 34310 (STB served Feb. 14, 2003); American Plant Food Corp. – Alternative Rail Service – Line of Tex. Ne. R.R., Docket No. 33795 (STB served Dec. 7, 1999); Petition for Emergency Service Order, 4 S.T.B. 434, 435–36 (STB served Nov. 24, 1999); DeBruce Grain, Inc. v. Union Pac. R.R. Co., Docket No. FD 42023 (STB served Apr. 27, 1998).

²³ In fact, prior to passage of the ICC Termination Act of 1995, federal law and corresponding Interstate Commerce Commission regulations imposed strict limits upon railroad extensions of credit to their customers. Specifically, under former 49 U.S.C. § 10743(a), “unless otherwise provided,” a rail common carrier “shall give up possession at destination of property transported by it only when payment for the transportation of service is made.” See also former 49 C.F.R. part 1320 (1995) (Extension of Credit to Shippers by Rail Common Carriers, etc.).

Board to disregard such precedent and order MET to deliver unit trains to CVAG (requiring intra-terminal switching) “free of any prepay demands.”²⁴

Based upon experience delivering and switching unit trains of various configurations to CVAG, MET has found that there is a fairly standard procedure to the switching that CVAG required to unload the unit trains it was receiving depending upon commodity and overall train length. Accordingly, MET has an excellent sense of the switching that it would need to supply on a train-by-train basis. For recent inbound unit trains (when MET became aware that such were destined to CVAG),²⁵ MET has been able to prepare service estimates that it understands are in keeping with CVAG’s usual requirements.

In such service estimates, MET has listed the charges associated with the services it would render. These service estimates – representative examples of which can be found at Exhibits 8, 11, and 12 (each relating to the particular service requirements of different trains with differing switching and car hold requirements) – had become the basis for MET’s prepayment requirements. If, as sometimes was the case, CVAG requested less or more switching (or car holding) than contemplated in the original estimate, MET would revise the estimate and update its prepay charges accordingly, as is reflected in the revised accessorial charges estimate and prepayment requirements for cotton seed unit train G ALOMOD314 discussed in Application Exhibits 9 and 13, once MET and its counsel learned that CVAG had changed its plans from storing overflow cars on CVAG’s tracks to requesting that the overflow cars – roughly 76 cars out of 102 that CVAG could not unload – instead be held on MET yard track, resulting in estimated demurrage that had been excluded from the previous estimate.

²⁴ Application at 2.

²⁵ As a handling line carrier, MET is not involved in the ordering, billing or routing of the trains destined to it interchange. It oftentimes would only learn of an inbound train once it was en route from BNSF or UP.

MET's charges estimates relied upon applicable accessorial services tariff rates, the required prepayment was consistently and directly linked to the charges MET reasonably expected would be incurred with each specific unit train, and MET assured CVAG that it would credit CVAG for any overage in the prepayment. Under the circumstances, CVAG was quite capable of applying MET's accessorial services and tariffs computing for itself the charges it would likely incur on a train-by-train basis.

CVAG does not challenge the scope of the switching set forth in MET's recent estimate and prepayment requirements for trains such as G BPEMV 22 (Application Exhibits 8 and 9), G ALOMOD3-14 (Application Exhibit 11), or G VBTMOD3 09 (Application Exhibit 12), only the per-car switching charges associated with those services. As CVAG well knows, MET had endeavored to accommodate CVAG's unit train switching requirements, including working with CVAG on commodity/train-specific rail service plans, until CVAG's outright objections to the charges and refusal to pay made offering such switching pointless. The problem was not the service plans. The problem has been that CVAG has been unwilling to pay what MET requires for the services CVAG wants, insisting that MET first provide the services, and then pursue payment from CVAG (which MET knows full well would never be forthcoming). Finally, accusing MET of breaching its alleged common carrier obligations by declining service if MET's prepayment terms are not satisfied, CVAG ignores, and would have this Board also ignore, cases such as Security Deposits and G&T Terminal.

F. *Railroad Salvage* dealt with a peculiar, and very different, situation; it does not free CVAG from MET's prepayment requirements.

Facing overwhelming precedent permitting (even expecting) railroads to collect in advance before rendering service, CVAG drops in a footnote²⁶ referring to 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”) to support the proposition that the Board “immediately” should exercise its authority under section 11123 to preclude MET from requiring advance payment as a precondition to providing accessorial services. But the facts and circumstances here are nothing like in Railroad Salvage. That case, with its unusual facts, is not controlling, and that decision is far from the repudiation of a railroad's right to prepayment that CVAG would like the Board to construe it to be.

Railroad Salvage involved the Board's intervention in what amounted to a dispute between a short line railroad and its customers over unpaid demurrage charges. In response to the unpaid demurrage, the short line (Missouri & Arkansas Railroad Company, Inc. – “MNA”) instituted a security deposit scheme under which its customers would pay in advance for future demurrage. Under that system, MNA expected two customers to contribute a total of \$400,000 as security, ostensibly for future demurrage, although it became readily apparent that the deposit closely matched the amount that MNA asserted it already was owed for three-year's-worth of unpaid, contested demurrage.

In what MET believes to be one of the very few instances in which the Board has invoked its authority under section 1321(b)(4), the Board enjoined MNA's enforcement of the security deposit requirement. The Board did so, not because security deposits are impermissible

²⁶ Application at 33, n. 96.

(clearly, they are permissible), but because, among other things, “MNA’s demand for immediate payment of the full amount at issue [in its pending demurrage collection action] as a precondition for continued rail service is an inappropriate self-help measure for a matter that is before the Board and will be resolved in due course.” Railroad Salvage, slip op. at 5.

To liken the situation here to that in Railroad Salvage, as CVAG has attempted to do, strains credulity – the facts in both cases are so very different. CVAG’s dispute is not ultimately about the amount of MET’s prepayment requirement (which CVAG likens to a security deposit), but rather MET’s switching rates behind that requirement. In Railroad Salvage, on the other hand, the level of the demurrage charges themselves appear not to have been challenged. In short, if MET’s switching charges are reasonable – and they have not thus far been proven to be otherwise – then MET’s requirement that those charges be prepaid on a per-train basis shortly before each train is to be delivered cannot be prohibited.

MET’s prepayment requirements have reflected a careful, itemized estimate of the services MET would expect to render, given the particular unit train configuration, and the charges applicable to those services (pursuant to MET’s published tariff rates). MET has not relied upon some aggregated estimate or round number, and its prepayment requirements do not seek to recapture past, unpaid charges that are due to it, unlike MNA in the Railroad Salvage case. Ultimately, Railroad Salvage is a factual outlier, where the Board stopped a railroad’s thinly-veiled attempt to recoup three years of accrued and contested demurrage. Because the facts of the dispute here (the level of the per-car switching charges) and MET’s payment preconditions bear no resemblance to the facts in Railroad Salvage, that case is inapt, and MET’s per-train payment prerequisite must be allowed to stand.

G. CVAG inevitably will depart the Modesto facility, whether due to contract termination or as a consequence of its inefficiencies.

Reduced to its essence, CVAG's emergency service request follows the following flawed logical sequence:

- *CVAG depends upon unit trains.*
- *CVAG lacks the capacity to receive and unload unit trains without intra-plant switching service from MET.*
- *MET's accessorial service rates for unit trains – particularly for intra-terminal switching – are “patently unreasonable.”*
- *CVAG cannot afford to pay the accessorial service charges that MET would assess to support CVAG's unloading of unit trains.*
- *If CVAG must pay the switching charges that MET requires, CVAG will fail.*
- *If CVAG were to fail, the result would be “grave business harm” to area dairy farms.*

CVAG's arguments do not warrant Board intervention by way of either an emergency service order or an injunction. CVAG fails to provide any logical, persuasive reasons why the Board should take such action. CVAG is asking the Board to assist it by forcing MET to subsidize CVAG's operations, alleging a threat to the dairy industry that is not real.

MET doubts that CVAG must have unit train service. There insufficient evidence in the Application to bear out CVAG's claim. MET's switching charges are but one of several elements of dairy feed logistics, with some of the others being things such as local truck transportation from transload sites, access to alternative sources of feed supply, and line haul rail transportation costs, to name a few. While CVAG claims that it will become non-competitive

without unit train service,²⁷ that assertion is undercut by Gavilon's statement that "CVAG-Modesto is one of the only transloaders in the region capable of receiving unit train service."²⁸

It is true that CVAG cannot receive and unload unit train quantity feed shipments without MET switching and (in some cases) demurrage. But MET is entitled to charge fair prices for its services, and it is not required to subsidize CVAG to offset its logistical deficiencies.

CVAG would have the Board simply accept as fact (without any suitable point of reference or appropriate analysis) that MET's accessorial rates and prepayment requirements are "patently unreasonable." CVAG has not proven, and will not be able to prove, that MET's charges are unreasonable, and MET's withholding service for nonpayment of estimated charges is lawful. MET will prove that its per-car accessorial service charges are very much in line with those of other railroads, and are not unreasonable in the least. MET has already pointed to extensive case law that supports the proposition that a carrier may withhold service when a customer refuses to pay for it.

While CVAG has offered glimpses into its business, it is unclear whether CVAG truly cannot afford MET's charges or if CVAG claims this because it plays into the next two claims that CVAG believes it must make in support of its bogus "dairy industry catastrophe" scenario – that if CVAG must pay MET's charges, CVAG will fail, and that CVAG's failure will, in turn, visit "grave harm" on the area's dairy industry.

CVAG has not provided sufficient financial information to substantiate its claim that paying MET's market rate accessorial charges would cause CVAG to fail. CVAG's transloading services are but one part of dairy farm feed logistics and pricing. CVAG could

²⁷ Application at 12.

²⁸ Id. at 14, quoting Gavilon Letter to STB from April 28, 2018.

require its customers to reduce their shipment sizes to avoid MET switching, but CVAG has not demonstrated whether or how reducing shipment sizes would impact feed prices, and, in turn, how any increased costs would affect the California dairy industry. For that matter, CVAG does not demonstrate how maintaining unit train shipments and incurring MET switching charges would affect the overall delivered price of feed via CVAG when compared to other transloaders in California's Central Valley with whom CVAG competes for business.

Assuming for the sake of argument that CVAG's business model depends upon unit train shipments, that it cannot afford MET's switching charges, and that CVAG will fail if current circumstances continue, neither MET nor the Board is under any legal obligation to prop up an inefficient market participant by reducing its switching charges to below-market levels as CVAG would have the Board do. CVAG seems to suggest that MET's accessorial services charges are designed and intended to cause CVAG to fail. That is entirely untrue. MET's unit train switching charges are an outgrowth of the operational and physical plant stresses that come from accommodating large trains that CVAG cannot process whole. The rates now in effect were the product of careful review of MET's previous accessorial services and demurrage tariffs, a comparison with other, publicly-available accessorial services tariffs of various other railroads. They are designed, as many accessorial services tariffs are, to discourage a customer like CVAG foisting its logistical inefficiencies upon MET.²⁹

²⁹ It is well-recognized that an appropriate element of accessorial charges may be set to deter inefficient use or detention of railroad resources. See, e.g., R. Franklin Unger – Trustee of the Ind. Hi-Rail Corp. – Petition for Declaratory Order – Assessment and Collection of Demurrage and Switching Charges, Docket No. NOR 42030 (STB served Jun. 14, 2000); Cities Serv. Oil. Co. v. Soo Line R.R. Co., 356 I.C.C. 838, 845 (demurrage charge permitted to prevent circumstance where consignee is permitted to detain equipment “without penalty”); and see also, Chi. N.W. Transp. Co. – Petition for Declaratory Order – Movement of New Empty Tank Cars, Docket No. FD 40158 (ICC served Aug. 17, 1988).

H. MET's accessorial charges will not harm the dairy industry; MET's business plans contemplate continued support for the dairy industry with or without CVAG.

CVAG claims to be the lynchpin of the Central Valley dairy industry, and contends that, without the allegedly “essential” services it supplies, an entire segment of the California economy would collapse. CVAG suggests that “grave harm” would result from CVAG’s departure, and that MET and the Board would share responsibility if that were to happen. The Board should not be swayed by CVAG’s exaggerated sense of itself. In fact, the dairy industry will not collapse if CVAG’s logistical shortcomings and its alleged (but unproven) inability to pay MET’s market-based switching rates (or to avoid those rates) cause it to fail. Far from it. There is abundant feed transloading capacity throughout the Central Valley. And, even if CVAG were to fail as it has posited, any void created thereby is very likely to be filled by another transload operator whose relative competence (compared to CVAG) allows it to operate profitably and cooperatively with MET while charging market-competitive prices for dairy feed.

MET understands that the dairy industry and related feed market in California, and especially Central and Northern California, is extremely competitive. Given this market landscape, there is an abundance of feed transloading facilities that handle, or are capable of handling, the commodities that CVAG processes. As illustrated in the chart below, MET is aware of 20 grain transload facilities in California’s Central Valley (18 of which are currently active) which handle, or are capable of handling, grain products. There are eight such grain transloading facilities within a 35-mile radius of CVAG’s Modesto operation (seven of which are active). Of these, three – Foster, Associated Grain, and Sierra Grain – handle higher annual throughput than CVAG does.

**Transload Facilities in the Central Valley Capable of Handling
CVAG-Modesto Commodities**

Facility	Facility Location	Miles from Modesto, CA	Approximate Annual Feed Capacity (tonnage)
Penny Newman	Fresno	95	1.5 M
Foster	Delphi Siding (near Livingston)	25	1.04 M
Foster	Traver	121	1.04 M
A.L. Gilbert	Ceres	5	780 K
Associated	Turlock	14	1.04 M
Sierra Grain	Turlock	14	2.08 M
Pacific Ethanol	Madeira/Trigo *Inactive	80	520 K
Pacific Ethanol	Stockton *Inactive	32	520 K
Van G Logistics	Conejo	113	520 K
Port of Ivory (CVAG)	Dinuba	123	780 K
Western Milling	Hanford	126	520 K
Penny Newman	Stockton (rail)	32	390 K
JD Heiskell	Guernsey	137	1.04 M
JD Heiskell	Pixley	157	2.08 M
Western Milling	Goshen	129	1.04 M
Western Milling	Famoso	183	520 K
Quality Grain	Conner	221	520 K
Capital Feed (CVAG)	Stockton	32	130 K
A.L. Gilbert	Oakdale	15	130 K
Pitman Farms	Hanford	126	520 K
Approximate Annual Feed Capacity			5.86 M tons

It is nearly impossible for the loss of one supplier to create serious shortfalls; other transloaders can meet existing needs.

Even accepting as true CVAG's unsupported and dubious claim that it will fail if required to pay market-based switching charges, CVAG's departure from Modesto would likely amount to little more than a brief adjustment in supply chains. As CVAG correctly notes, MET expects CVAG to vacate the Modesto facilities that it leased and licensed from MET whether that exit is through termination of the CVAG/MET lease agreement (a matter currently litigated

in California State court) or due to CVAG's alleged inability to pay market rates for MET switching. When CVAG relinquishes possession of the facilities it leased and licensed from MET, those facilities are likely to remain dedicated to grain transloading, albeit under an arrangement with a new operator.

MET has a vested interest in a smooth transition from CVAG's operations, because MET has already spent an excess of \$10 million constructing and developing the transloading facilities that CVAG currently operates under lease. On that note, CVAG misleadingly claims to have invested \$7 million in the Modesto facilities.³⁰ In fact, the bulk of those improvements have been made and paid for by MET, including construction of two agricultural buildings (totaling over 260,000 square feet of space), an unloading pit and associated 3,000-square-foot steel building, and the loop track that services the large agricultural building. These facilities are transferrable to any grain transloader that might take CVAG's place. Whether it is CVAG or another operator, MET has no plans to convert its already-developed grain transload facility into a different type of operation.

Second, while MET does not have access to the financial records which might support CVAG's claimed expenditure of \$7 million, MET believes that the bulk of CVAG's expenditures were for items which it is entitled to remove at the end of the lease term, including a grain conveyor system, a doublewide modular office, and two truck scales. Accordingly, CVAG is not facing the abject loss of its investment.

Given MET's investment in the grain transload industry, MET plans, and has every incentive, to install a more cooperative, efficient, and safer operator in place of CVAG in very short order, so that there would be minimal, if any, disruption to the region's dairy feed

³⁰ Application at 8.

supply chains. The reality is that MET, and the facility which it has developed, constructed, and owns, is an integral part of the California dairy industry supply chains, not CVAG.

I. CVAG's call for a Board-initiated investigation is nothing more than a tactical maneuver to short-circuit a reasonable practice dispute, and it must be denied.

CVAG is unhappy that MET will not subsidize CVAG's operations and accede to CVAG's rate reduction demands. This entire proceeding boils down to a dispute over – (a) the rates that MET may charge for unit train-level accessorial services that CVAG could avoid by reducing the size of the shipments it invites from feed shippers; and (b) MET's requirements that the charges for any such accessorial services be prepaid. This is a dispute between a small railroad (MET) and just one of many feed transload operators in the Central Valley region of California. It is not a matter of genuine regional or national significance, and CVAG's breathless demand for a Board-initiated investigation is meritless. It is, like the emergency service order and injunction requests, yet another way that CVAG attempts to short-circuit the unreasonable practice review that CVAG has asked the Board to undertake.

CVAG's tactics here are obvious. Figuring that its best shot at rate concessions is to throw the kitchen sink at MET, a small railroad, CVAG has, in fact, thrown the kitchen sink. Where it could have and should have simply challenged MET's accessorial service charges, CVAG has concocted various invalid theories for short-circuiting its unreasonable practice complaint in the hopes that this might overwhelm MET and force capitulation. Not only are CVAG's alternative theories for near-term relief legally bankrupt, they are a form of retaliation centered upon a fanciful, unsupported allegation that, in the absence of immediate Board action, an entire segment of the California economy hangs in the balance. Remarkably, CVAG goes so far as to suggest that the Board should act decisively here before the short line industry as a

whole “gets any ideas” and revisits its accessorial services charges, as if it were necessary for the Board to quell some imagined form of short line uprising.³¹ MET has already shown herein that CVAG’s allegation that its potential failure spells doom for the regional dairy industry is baseless and self-centered.

Because there is no genuine service “emergency” of regional or national significance – only a single customer’s disagreement over MET’s accessorial charge practices – CVAG’s call for a Board investigation under 49 U.S.C. § 11701 must be denied in keeping with the controlling legal principles enunciated in Albermarle and Keokuk. MET reserves the right, however, to address the merits of CVAG’s investigation request in greater detail in a later responsive filing in keeping with 49 C.F.R. 1104.13.

CONCLUSION

CVAG is not able to receive and unload unit train shipments absent MET switching services, but it does not want to pay (much less prepay) the charges applicable to such services, arguing in conclusory terms that MET’s rates are “patently unreasonable.” MET stands behind its accessorial charges and its prepayment requirements. The Application is a back-door attempt to subvert the ordinary processing of a reasonable practices case, particularly where CVAG’s refusal to pay (or to avoid) MET’s service charges is the beginning and end of the

³¹ According to CVAG, the short line industry is poised to turn the tables on customers and Class I railroads if the Board does not constrain MET’s switching rates, stating as follows:

The threat of this dangerous conduct extends beyond MET, to other short line carriers who might also be emboldened by MET’s unrestrained conduct, and that may be looking for similar unrestricted ways to raise revenues, evict unwanted tenants, or to leverage their bargaining power with connecting Class I railroads by holding hostage line-haul deliveries as a means of increasing contractual haulage fee payments that they believe are too low.

alleged service “disruption.” Accordingly, and for the other reasons provided herein, CVAG’s Application must be denied in its entirety.

The present filing was intended principally to address the emergency service order request in keeping with the procedural requirements of 49 C.F.R. part 1146, although, in so doing, MET has demonstrated how controlling precedent supports outright denial of all elements of the Application, not just the request for section 11123 relief. MET reserves the right to respond to the substance of CVAG’s request for an injunction and its request for an investigation in accordance with controlling rules of procedure, unless the Board directs otherwise.

Respectfully submitted,

By: 

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 8, 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 Application for Section 11123 (a) Servicer Order and know that the facts asserted therein are true as stated.

Executed on May 8, 2018

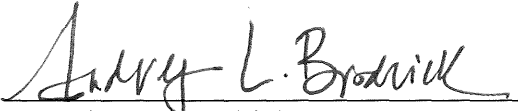
A handwritten signature in black ink, appearing to read 'Dillon', is written over a horizontal line.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of May, 2018, she caused a true and correct copy of the foregoing **Verified Reply to Ex Parte Application for Section 11123(a) Service Order** 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**