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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CENTRAL VALLEY AG GRINDING, INC.	)	
AND CENTRAL VALLEY AG TRANSPORT	)	
INC.	)	
	)	
Complainants	)	
	)	Docket No. NOR 42159
v.	)	
	)	
MODESTO AND EMPIRE TRACTION	)	
COMPANY	)	
	)	
Defendant.	)	

CVAG REPLY TO PETITION TO REOPEN

CENTRAL VALLEY AG GRINDING,
INC. and CENTRAL VALLEY AG
TRANSPORT INC.

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Dated: September 4, 2018

Attorneys for Complainants

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CENTRAL VALLEY AG GRINDING, INC.
AND CENTRAL VALLEY AG TRANSPORT
INC.

Complainants

v.

MODESTO AND EMPIRE TRACTION
COMPANY

Defendant.

Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc.
(individually and collectively, “CVAG”), submit this reply to the “Verified Petition to Reopen and Modify Decision and Motion for Clarification (“Petition” or “Pet.”) that Defendant Modesto and Empire Traction Company (“MET”) filed on August 14, 2018.

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PREFACE AND SUMMARY OF ARGUMENT

Through its Petition, MET requests the Board to reverse its June Decision and enable MET to block interchange and delivery service of essential agricultural commodities to CVAG unless it meets MET's demands for full or partial prepayment of unprecedented and patently unreasonable charges that are strenuously contested and are specifically targeted at CVAG alone. MET also requests the Board to reverse its Decision requiring MET to continue to serve CVAG, thereby authorizing MET to cease unit train service outright for one animal feed commodity to CVAG, and CVAG alone. MET suggests that Decision reversal is warranted because "[t]here is now a record of CVAG non-payment" of the contested charges, CVAG is a "credit risk," and CVAG's shipments are "consuming MET track capacity." MET's belated appeal is improper, and its arguments in support of reconsideration or reopening lack merit and should be rejected.

In substance, MET's filing represents an untimely and unsupported petition for reconsideration. What it says could have been said earlier, was said earlier, and was considered and correctly rejected by the Board in its June Decision. MET's untimeliness alone provides more than sufficient grounds to reject its Petition. MET's filing also fails substantively as a petition to reopen. There is no material or other error in the June Decision that granted CVAG injunctive relief, no new evidence, and no changed circumstances that could begin to warrant reopening. Nothing in the Decision needs modification or clarification.

The only thing that might appear new is MET's expression of remorse that it did not accept the interim measures that CVAG (working with the assistance of the STB's consumer assistance staff) offered earlier, but only until such time as the Board might grant

relief. However, MET remained insistent in its refusals of any interim measures, did not relent on any of its abusive practices and demands, and instead elected to escalate them and force CVAG to bring its Preliminary Injunction action before the Board.

CVAG never suggested that its offers of security would apply in the event that the Board granted the preliminary injunction. To the contrary, CVAG made clear that the proposed interim measure would not apply if a stay was granted. MET calculated CVAG could not obtain a stay and flatly rejected checks that CVAG tendered in a last ditch effort to “keep the trains running” in the face of MET actions that threatened and disrupted rail service. Having gambled and lost, and having severely disrupted CVAG’s business through its service curtailment actions, MET’s new allegations that “CVAG has acted in bad faith” are particularly disingenuous and without merit. MET should not be allowed to engage in the same improper activities that led to the Board’s Decision or otherwise force CVAG to retroactively reinstate an interim compromise offer that MET repeatedly derided and spurned. The June Decision makes clear that no prepayment or deposit is to apply.

MET’s characterization of the *status quo ante* is also unfounded. The June Decision holds MET to its written assurances of continuing service made less than a week prior to instituting its disruptive changes on CVAG. Pet. at 5. The Decision also restores the interim arrangements to those that existed for nine years: MET provides services to CVAG’s customers, for which it is compensated by BNSF and UP. MET’s Petition (at 2) reaffirms that the CVAG loop tracks were “designed to accommodate the unloading of unit train shipments” that are received by CVAG. The Decision further specifies that MET will be entitled to collect reasonable accessorial fees, which CVAG has not objected to paying for any validly assessed charges, and the accessorial charges in dispute to the extent they are

found to be reasonable. However, there is no reason to presume that MET will succeed in establishing the reasonableness of the charges, particularly as the June Decision found “that CVAG has established a sufficient likelihood of prevailing” on the merits. *Id.* at 5. There is also no reason to conclude that CVAG will be unable to pay any charges that are determined to be lawful, but MET will also have the option to seek collection from the actual shippers (who are also very much harmed by MET’s actions).

MET’s attempt to fabricate new evidence regarding CVAG’s use of the transload tracks to unload shipments of whole cottonseed (“WCS”) also fails. Such shipments to CVAG are rare, as there have been only three since January 2018, and just one since the June Decision, delivered without incident. There is nothing new. This traffic is shipped under lawful tariffs, and MET is simply wrong in asserting that the CVAG cars (*i.e.*, the cars of CVAG’s customers) have not and cannot be reasonably received and unloaded, especially given that CVAG has substantial private track available to stage these trains.

Remarkably, MET fails to inform the Board that at the very same time it recasts its prior initiatives in order to block CVAG’s WCS trains, and CVAG’s alone, MET has been openly staging a WCS unit train on its own yard tracks to the same transload tracks for another favored customer. That train took significantly longer (over two weeks) to unload it than CVAG has taken to unload all three of its WCS trains. To the extent there has been any of the congestion and disruption that MET depicts, MET is to blame not CVAG. The relief MET seeks is also blatantly exclusionary and discriminatory, would disrupt supply markets, and once again is designed only to help evict and dispossess CVAG of its property rights.

No basis exists for the Board to grant any aspect of the Petition.

ARGUMENT

I. MET HAS NOT MET THE HIGH STANDARD FOR REOPENING OR RECONSIDERATION

Parties may seek timely reconsideration of Board decisions based on new evidence, changed circumstances, or error, each of which must be material. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. Where, as here, the twenty days has expired, parties may file a petition for the Board to reopen on similar grounds. 49 C.F.R. § 1115.4.¹ When “a party seeks to introduce evidence, the evidence . . . must not appear to be cumulative, and an explanation must be given why it was not previously adduced.” *Id.*, § 1115.3(c).

Reconsideration and reopening are thus available, but rarely granted in practice.² There is no basis for making an exception here. Mere repetition of earlier arguments and associated “opinion evidence” that could have been submitted earlier do not provide a basis for reopening.³ What MET claims is new evidence (CVAG’s purported “withdrawal” of its “offer” to deposit \$10,000 per train) is not new, and is instead cumulative

¹ MET mistakenly seeks reopening under 49 C.F.R. § 1152.25(e)(4) (Pet. at 7), which applies only to abandonments.

² *E.g.*, *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104 (STB served Nov. 26, 2012), at 3-4 (evidence “is not new ‘if the same substance’ could have been brought before us previously”) (citation omitted); *Albany & E. R.R. v. BNSF Ry.*, NOR 42076 (STB served Nov. 10, 2003), at 2 (finding that the petitioner had failed to demonstrate material error); *PPL Mont., LLC v. BNSF Ry.*, NOR 42054 (STB served June 30, 2003), at 2; *Sierra Pac. Power Co. & Idaho Power Co. v. Union Pac. R.R.*, NOR 42012 (STB served Apr. 16, 1998), at 4 (finding that complainants had failed to make an adequate showing of material error).

³ *Consol. Rail Corp.—Abandonment Between Warsaw & Valparaiso, in Kosciusko, Marshall, Starke, La Porte & Porter Cntys., IN*, AB-167 (Sub-No. 1125) (STB served Mar. 14, 1994).

and merely the direct and logical consequence of the June Decision. MET cannot plausibly claim that the decision it seeks to reopen constitutes the new evidence or materially changed circumstance.

As the Decision confirms, the relief provided must be “viewed in a larger context” of abusive MET behavior, and the only thing that might be said to be new is MET’s belated interest in accepting an interim compromise offer that it flatly rejected. However, a party’s “attempt[] . . . to relitigate the matter by taking a new and different position” is not a permissible basis for seeking reconsideration.⁴ “The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.”⁵

Nor has MET identified, much less substantiated, any material error. “In a petition alleging material error, a party must do no more than simply make a general allegation; it must substantiate its claim of material error.”⁶ The June Decision carefully reviewed the facts and applied the established criteria in ruling that MET should be enjoined from imposing any prepayment or train deposit requirements on CVAG until the reasonableness of MET’s charges is determined. MET has not shown any error at all.

CVAG’s receipt of an occasional WCS shipment is also not something “new.” Such movements occurred before the June Decision, and only one has occurred since.

⁴ *Ohio Valley R.R.—Acq. & Op. Exempt.—Hardwood Props., Inc.*, FD 34486 (STB served Feb. 23, 2005), at 4 n.3.

⁵ *Canadian Nat’l Ry. Co. & Grand Trunk Corp.—Control—EJ&E West Co.*, FD 35087 (Sub-No. 8) (STB served Oct. 30, 2017), at 5.

⁶ *Id.*

Moreover, MET previously argued that it should be allowed to block what it called “oversized” trains, but its arguments were rejected by the Board. MET’s services are limited to delivering the train (as it delivers other trains to CVAG) and switching a few cuts of the train for delivery purposes.

Finally, CVAG has acted entirely appropriately since the issuance of the June Decision,⁷ has continued to work cooperatively with MET to facilitate deliveries, and has timely responded to invoices, providing a full basis for its objections. As explained further below, MET’s claims that CVAG somehow unfairly imposes disproportionate infrastructure and resource demands on MET, including forcing it to stage WCS trains on MET’s yard tracks, are unfounded. In fact, as explained further below, MET’s most recent staging of a WCS train on its tracks was for the benefit of another WCS shipper/receiver, not CVAG, and apparently without similar complaint.

A. CVAG Did Not “Withdraw” Its \$10,000 Per Train Security Offer, and the Board’s Decision Was Not Conditional

MET’s core contention is that the Board granted the injunctive relief only because of CVAG’s stated willingness to provide a \$10,000 per train security to cover

⁷ MET falsely claims that on the day the June Decision was served, it reached out to CVAG’s counsel to inform them that MET would fully comply with the decision, but that CVAG’s counsel indicated that it was unlikely that it would be paying CVAG’s invoice demands going forward. In fact, it was CVAG’s counsel that first reached out to MET counsel on an unrelated matter, the procedural schedule discussion required under 49 C.F.R. § 1111.10(a). The parties then held that telephonic conference a short time later, as described in the parties’ Joint Report (filed June 19, 2018). It is true that after the procedural schedule matters were discussed, the parties briefly discussed the Board’s Decision that had just been served in a late release. However, MET counsel did not advise CVAG counsel of MET’s intent with respect to compliance, other than to assert that counsel understood the Decision to still permit MET to invoice, and require CVAG to pay in full, all disputed charges, to which CVAG counsel simply expressed its disagreement.

accessorial services, and CVAG then reneged on that offer as soon as the Board served the June Decision. MET asserts that CVAG is now in arrears, and its withdrawal constitutes new evidence and changed circumstances that cause the decision to be in material error. Pet. at 1-5, 7-11, 15-16.

MET's theory mischaracterizes both the facts and the June Decision, which was designed to address a variety of MET abusive practices (Decision at 5), and also offends common sense. It exemplifies the overreaching on MET's part and confirms why the injunctive relief was appropriately granted in the first place.

As stated in CVAG's Complaint at ¶52, at p. 3 of the June Decision, and at ¶76 of the Verified Statement of Paul Konzen ("Konzen V.S.") accompanying CVAG's Petition for Preliminary Injunction, CVAG did offer to pay \$10,000 per train as a form of security per train. CVAG did so because MET was otherwise unwilling to move CVAG's trains (meaning trains destined to CVAG).⁸ Because of uncertainty as to when and how the Board might rule, and in the face of cessation of service, CVAG was willing to deposit \$10,000 per train rather than not receive service at all.

However, MET was unwilling to accept payment from CVAG or its customers except in isolated instances, and MET actually rejected checks that were tendered. Furthermore, CVAG never indicated it would continue to offer \$10,000 per train once the Board granted injunctive relief. In fact, CVAG counsel informed MET counsel that MET's

⁸ As MET has acknowledged, CVAG operates its transload facilities, but is not the shipper. MET serves as the handling line carrier for trains delivered to CVAG. The shippers, not CVAG, pay transportation charges to the originating carrier, typically either BNSF or UP (which then compensate MET), and not to MET directly.

remedy was through a future collection action, the same remedy as stated by the Board in its June Decision⁹:

MET should invoice for services/charges it believes are appropriate for the delivery after delivery, as provided under the terms of its tariff. Any disputes can then be orderly considered and addressed. If MET is right about its accessorial charge demands, it can obtain full recovery through normal dispute resolution processes. Again, MET's attempt to condition service, and threaten embargoes and cessation of service on the prepayment of validly disputed charges is highly inappropriate.

Konzen V.S., Exh. 10 (containing CVAG counsel Apr. 13, 2018 response to MET counsel).

These matters are spelled out in detail in the letter dated July 20, 2018, from CVAG's counsel to MET's counsel, attached as Exhibit B to MET's Petition:

First, CVAG's earlier proposals were made to "keep the trains moving" pending action by the Board. MET flatly rejected those offers, insisting that "MET will not allow CVAG to take abusive advantage of MET's services and facilities" through such "partial payment" offers, and declared that it would refuse services "unless and until it received payment in full." MET then made good on its threat, stating that "MET's charges and its prepayment demands are appropriate and fully defensible." MET's unwillingness to fulfill its common carrier obligations except under onerous and unreasonable conditions is what forced CVAG to seek, and the Board to grant, the injunction.

Pet. at 22. CVAG's letter notes that it specifically advised MET regarding:

CVAG's intention to seek injunctive relief, and the possible risks and consequences for MET of the lack of payment during the pendency of the proceeding should CVAG obtain relief, yet MET still insisted that it was fully prepared to accept the risk because of its confidence in its legal position. Having doubled-down on its inappropriate demands, and lost on its gambit, it is

⁹ June Decision at 6 ("Enjoining MET from imposing prepay demands would not prevent MET from bringing a civil action to recover any valid charges.").

highly inappropriate for MET to attempt to turn back the clock and ask CVAG to revive offers that MET emphatically rejected.

Id. at 23.

Also, nothing in the June Decision supports in any way MET's thesis that the Board conditioned the injunctive relief on payment of \$10,000 deposits. To the contrary, the June Decision enjoins any prepayment requirement. As noted above, CVAG's train security offer is mentioned only once, in the Background portion at page 3. The "Discussions and Conclusions" repeatedly state that there is to be no prepayment or deposit requirement. Specifically, the Board states that it is "enjoining the demand of prepayment as a condition of service" (*id.* at 6), "enjoining MET from requiring prepayment as a condition of service" (*id.* at 7), and that "MET will be enjoined from requiring prepayment as a condition for interchange and switching services" (*id.*). Finally, the ordering paragraphs begin by stating that "MET is enjoined from requiring prepayment as a condition for its unit train switching and interchange services." *Id.* There is no basis for MET's claim that the June Decision is somehow unclear.

B. MET Should Not Be Permitted to Reverse its Position and Relitigate the Matter

Even if MET were somehow uncertain as to CVAG's position at the time, it could have raised the issue in its earlier replies, or offered its own alternative, rather than claim surprise and seek to raise it only after the June Decision. To the contrary, MET only escalated its strong opposition to any security program in its reply filings before the STB, arguing strenuously that **"MET will not agree to any reduced payment arrangement (which CVAG euphemistically refers to as a "security deposit") for its accessorial services during the pendency of this case."** MET Verified Reply to Petition for

Preliminary Injunction (filed May 14, 2018) at 3 (emphasis added). Through its Petition, MET abruptly reverses its position. However, “[c]hanged circumstances’ or ‘new evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.”¹⁰

The only thing that might be said to be new is MET’s remorse, or the expression thereof, regarding its failure to have accepted CVAG’s offer when it had its chance. However, the offer was only on an interim basis, until the Board acted, as explained in the CVAG response letter included in Exhibit B to MET’s Petition. In any event, MET rejected CVAG’s offer, and even refused the “keep the trains” running offer. MET’s attempt to “tak[e] a new and different position” is not a proper basis for reconsideration.¹¹ It is also basic hornbook law that rejection of an offer, as MET did multiple times, rescinds the offer. “An offeree’s power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.”¹² MET is not entitled to a do-over in any event, particularly of a Board decision that was rightly decided.

C. MET’s Other Reopening Arguments Do Not Warrant the Relief It Seeks

Nor does the Decision require MET to provide switching services for free, as MET implies. Instead, the Decision was based on a “larger context” of inappropriate MET demands made in the face of MET’s January 29, 2018 written assurances of current and

¹⁰ *Canadian Nat’l, et al.—Control—Ill. Cent., et al.*, 6 S.T.B. 344, 350 (2002) (citation omitted).

¹¹ *Ohio Valley R.R., supra.*

¹² Restatement (2d), *Contracts* § 38(1).

future service. Decision at 5. Also, the Decision instead makes clear that MET will be able to collect its charges, to the extent they are found to be reasonable and valid:

Enjoining MET from imposing prepay demands would not prevent MET from bringing a civil action to recover any valid charges. Moreover, the Board is not enjoining MET from charging and collecting accessorial fees; it is only enjoining the demand of prepayment as a condition of service and directing MET to provide reasonable service and interchange. Thus, MET may collect reasonable accessorial fees for the services it provides.

Id. at 6-7. That said, the Board granted the injunction based on its finding “that CVAG has established a sufficient likelihood of prevailing in its challenge of MET’s prepayment demands.” *Id.* at 5.

MET’s ability to pursue collection of reasonable accessorial charges constitutes an improvement from the *status quo ante*, where MET provided the accessorial services for nine years (*id.* at 5-6), and also exclusively conducted all train activities in support of unloading (Konzen V.S. at 41-49), without threat of any additional charges. Nonetheless, if MET’s charges are found reasonable, then MET will be able to pursue collection.¹³ And if CVAG is somehow unable to pay (for which there is no reason to presume), then MET will have the opportunity to seek recovery against the actual shippers.

Also, MET seeks to bolster its Petition by asserting that CVAG is somehow improperly withholding rent payments, and also intimating that MET is not receiving any

¹³ MET also advances the remarkable assertion that CVAG “cannot seriously claim that payment of the requested \$10,000 per-train security . . . subjects it to substantial harm” because MET’s charges “are, in general, significantly higher.” Pet. at 10. MET presumes that its charges will be found reasonable, contrary to the June Decision. Moreover, some trains will not incur any charges, and others will include far lower charges (Pet. at 23), even at MET’s established levels, which are unlikely to be sustained.

payments for its haulage services. Pet. at 8-10. That is incorrect. Attached at Exhibit A is a copy of the letter that MET sent CVAG refusing and returning CVAG's February 1, 2018 rent payment, stating that "[a]s your lease has expired, we are rejecting tender of any rent payments." As MET acknowledges, MET has taken actions to evict CVAG and to dispossess CVAG of the right to operate the Modesto Facility, and has refused CVAG's Notice of Exercise of Option to Extend. The matter remains the subject of state court proceedings.

Additionally, while MET does not acknowledge it, MET does not dispute that it is being paid for its haulage services. Attached at Exhibit B is a letter ("Gavilon Letter") from Mr. Corey Denclau, Vice President and General Manager of Ingredients for Gavilon Incredients, LLC ("Gavilon"), whereby Gavilon confirms that it has shipped over 170 trains of animal feed commodities to CVAG under lawful tariffs, has paid all amounts due for those shipments, and that to the best of its knowledge, MET has been fully paid for its delivery services to CVAG under its Class I railroad handling line arrangements. Gavilon Letter at 1.

In sum, nothing in the text or analysis in the Board's June Decision remotely supports MET's contention that a \$10,000 per train payment obligation somehow applies or should apply. The Board weighed the evidence and properly concluded that MET should be enjoined from imposing any security or other prepayment requirement. MET will be able to collect reasonable charges, but only after, and if, they are found reasonable. There is no new evidence, changed circumstance, or material error that warrants modification or clarification of the Board's order.

II. MET'S CLAIMS REGARDING COTTON SEED TRAINS AND THE TRANSLOAD TRACKS ARE UNFOUNDED

MET devotes considerable effort (Pet. at 5-6 and 12-15) decrying CVAG's use of the transload tracks for receiving shipments of WCS trains transported in unit train service. However, MET largely repeats its prior complaints about its limited ability to interchange and deliver "oversized" trains, which the June Decision considered and properly rejected. MET's "new" information, in addition to being both highly inaccurate and incomplete, provides no legitimate basis for reconsideration or reopening.

As MET notes, the transload tracks are separate from CVAG's loop track and other facilities. In fact, there are two separate and parallel transload tracks (1038 and 1039), as shown on the map attached as Exhibit C. Each track is divided into equal halves that are separated by derails. CVAG has use of half of each of the twin tracks. The other half of each track has recently been occupied by Penny Newman Grain Company ("Penny Newman"), a supplier, shipper, and transloader of animal feed and other commodities, that competes with CVAG and many of CVAG's dairy feed supplier customers (*e.g.*, Gavilon, J.D. Heiskell). Penny Newman is a long-established supplier of the WCS feedstock commodity in the area and has enjoyed an effective monopoly in the local distribution of the commodity for many years.

As described in the Gavilon Letter, in the last eight months (starting January 2018), Gavilon began seeking to become a competing distributor of WCS in the region and to bring the benefits of competition to the California dairy farmers. CVAG has sought to work with Gavilon in its efforts in order to help serve the needs of the California Dairy Industry.

MET is simply wrong in claiming that CVAG's (meaning Gavilon's) WCS shipments "require that the vast majority of each unit train (as much as 75 cars at a time) be stored on MET yard tracks at any given time, thereby consuming MET track capacity." Pet. at 14. CVAG stages the cars on its loop tracks and then moves them to the transload tracks as needed in as few as three cuts.¹⁴ CVAG is usually able to complete unloading within two to three days after MET delivers the loaded unit train. The handling that MET provides for Gavilon's WCS trains for MET is not fundamentally different or more demanding than that for CVAG's other longer unit trains (canola, etc.), except that fewer cars are typically involved. *See also* Gavilon Letter at 1-2. There is no sound reason to conclude that a prepayment or deposit obligation for these very limited shipments is any more reasonable than for CVAG's other deliveries. Again, as Gavilon confirms, MET receives its negotiated compensation from BNSF or UP for serving as their handling line agent.¹⁵

Penny Newman, in contrast, has no other tracks that it can use for staging its WCS trains. Consequently, MET must stage Penny Newman WCS unit trains on MET's own yard tracks, the same tracks that MET incorrectly claims are too congested to accommodate CVAG's WCS activities. Pet. at 14. Penny Newman recently delivered a

¹⁴ WCS requires hand/truck unloading and is not suitable for unloading on the CVAG loop tracks into the CVAG unloading facility. Accordingly, CVAG/Gavilon and Penny Newman have instead both utilized their transload tracks for this purpose. Each transload track half can handle only about 25-26 WCS cars at a time, with room for unloading, and the cotton seed unit trains are typically about 75-80 cars in length. However, CVAG is able to stage, and has been staging, the remaining cars of its unit trains, whether loaded or unloaded, on its own loop tracks.

¹⁵ The Gavilon Letter at p. 1 explains that "Gavilon ships WCS unit trains to the CVAG-Modesto under lawfully established BNSF tariffs, and, again, to the best of Gavilon's knowledge it understands that MET is paid in full for its handling and delivery of such trains."

WCS unit train to its Modesto transload tracks on August 4, 2018. MET staged that train in its yard tracks, and train unloading and release was not completed until August 20, 2018 – a total of 16 days to complete train unloading. Gavilon Letter at 2. A picture of this train in storage on MET’s yard tracks is included as Exhibit D.

To the extent the staging of WCS trains causes any operational problems for MET, those problems are caused by MET and/or Penny Newman, and not by CVAG or Gavilon. MET should not be allowed to blame CVAG for any problems that MET has brought on itself. MET has plainly been willing to accept a large amount of congestion and disruption on its yard tracks for its favored customers if it allows over two weeks for a WCS unit train to be unloaded. In contrast, CVAG has been able to complete the unloading of all three of the WCS unit trains it has received during 2018 in a total of fewer than 10 days. Even if CVAG’s cotton seed unit train deliveries had required the occupancy of MET’s yard tracks, the total occupation for all of CVAG’s unit trains would have been less than that caused by the single Penny Newman train.

In short, any congestion problems are of MET’s own making, not CVAG’s, and CVAG’s limited cotton seed shipments do not begin to rise to the level that would warrant reopening, reconsidering, modifying, or clarifying the June Decision.

Finally, as Gavilon observes, MET’s Petition seeks to restrict only CVAG shipments, but “does not address or seek to hinder continuing unit train deliveries to Penny Newman or other potential receivers.” Gavilon Letter at 2. The granting of MET’s Petition would amount to a selective embargo, exacerbated by significant exclusionary and discriminatory practice issues. In addition, MET’s requested relief would present

fundamental market risk concerns for animal feed suppliers and dairy farm purchasers in Central California, as Gavilon further confirms:

Participating in cottonseed markets requires significant internal and external coordination, including commodity purchase, product marketing/sales, transportation, and transloading. For example, Gavilon is currently purchasing WCS to assemble and ship its next train to CVAG-Modesto in November. However, with the potential future unavailability of CVAG-Modesto to accept such a train, Gavilon faces considerable market risk and uncertainty in making these purchases and arranging transport to CVAG. MET's actions place Gavilon at a considerable market disadvantage. Given MET's demonstrated past efforts to block Gavilon trains from interchange while apparently raising no such objections to the trains serving Penny Newman, Gavilon has heightened concerns over the legitimacy of MET's intentions and actions.

Id. CVAG respectfully submits that the Board should be wary of taking any actions that have the potential to disrupt commodity and supply markets of essential feed commodities.

CONCLUSION

For the reasons stated above, MET's Petition should be denied.

Respectfully submitted,

/s/ Peter A. Pfohl
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1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: September 4, 2018

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th 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 Complainants

EXHIBITS

EXHIBIT A



MODESTO AND EMPIRE

T R A C T I O N C O M P A N Y

Ph: 209-524-4631 Fax: 209-529-0336

530 11th Street P.O. Box 3106 Modesto, CA 95353

February 1, 2018

Central Valley Ag Transport, Inc.
5707 Langworth Road
Oakdale, CA 95361

Dear CVAG,

We enclose your check for \$80,000, which purports to be for February rent at your Leased Premises. As your lease has expired, we are rejecting tender of any rent payments. We do, however, reserve all claims relating to your holding over possession of the Premises.

Sincerely,
M&ET

Encl: CVAG Check #29438

EXHIBIT B



August 31, 2018

Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Deb Miller
Vice Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: Docket No. NOR 42159, *Central Valley AG Grinding, Inc. v. Modesto & Empire Traction Company*

Gavilon Ingredients, LLC (Gavilon) respectfully requests that the Surface Transportation Board deny the Petition that Modesto and Empire Traction Company (MET) submitted on August 14, 2018, that seeks to reverse critical parts of the Surface Transportation Board's June 12, 2018 preliminary injunction decision in Docket No. NOR 42159 (Decision). MET's Petition is unwarranted and, if granted, would result in significant harm to Gavilon, to the California dairy industry, and to competition.

As Gavilon previously conveyed in its April 27, 2018 letter (copy attached), Gavilon is a significant participant in the animal feed commodities business, and CVAG-Modesto is an essential, independent transloading facility used by Gavilon to meet the supply needs of the California dairy industry. MET's actions leading up to the STB's preliminary injunction, including refusing train interchange, demanding new "switching" and related fees, and stranding trains, product, and railcar assets resulted in significant disruptions to Gavilon's business and increased costs. The Board's Decision has helped to reduce that continuing harm. However, even with the preliminary injunction, Gavilon faces continued difficulties and uncertainty with respect to MET's orderly handling, delivery, and return of trains shipped to CVAG-Modesto.

MET's request to allow it to assess security prepayments of \$10,000 per train is without merit and should be rejected as CVAG explained in its July 20, 2018 letter included as Exhibit B to MET's Petition. Additionally, MET's assertion that it is simply seeking to "return to a rail service *status quo ante*" is incorrect. Over the last 10 years, Gavilon has shipped in excess of 170 trains of animal feed products to CVAG-Modesto under BNSF and UP lawfully established tariffs, and it has paid all amounts due for those shipments. To the best of Gavilon's knowledge, MET has been fully paid for its delivery services under its handling line arrangements with respect to these shipments, and to Gavilon's knowledge there is no need for additional "*status quo ante*" payments to MET.

MET's additional request that the Board allow it to restrict and limit shipments of whole cottonseed (WCS) trains to CVAG-Modesto is equally concerning, if not more so. Gavilon has worked long and hard to participate and compete in the WCS commodity market serving Central California, and recently, to increase its competitiveness, has begun to move unit trains into the CVAG Terminal. Over the past eight months, Gavilon has shipped three WCS unit trains to the CVAG-Modesto to meet the needs of the California dairy industry. Gavilon ships WCS unit trains to the CVAG-Modesto under lawfully established BNSF tariffs, and, again, to the best of Gavilon's

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knowledge it understands that MET is paid in full for its handling and delivery of such trains. Gavilon, along with CVAG, has invested in equipment and infrastructure to ensure that the WCS trains are processed, unloaded, and returned without any business disruptions to MET.

Gavilon is aware that Penny Newman Grain Company (Penny Newman) recently located a facility on a portion of MET's transload tracks, apparently under a new lease established with MET. Prior to Gavilon's recent entry into the unit train WCS market in Central California, Penny Newman enjoyed a distinct advantage in the WSC business in the area as the only shipper/receiver of 100 car WCS unit trains serving Central California. Now, at the same time MET has petitioned the Board to allow it to refuse delivery of WCS unit trains to CVAG's Terminal in 25-car blocks because the "trackage clearly is not designed to receive and process shipments of that size," Gavilon understands that MET cooperatively received and delivered a WCS unit train to Penny Newman's facility on or around August 4, 2018 on those same connecting transload tracks where Gavilon's trains are delivered to CVAG (tracks 1038/1039). Moreover, while the three WCS unit trains that Gavilon shipped to CVAG-Modesto were each promptly and efficiently unloaded and returned by CVAG in approximately 2-3 days, Gavilon understands that the Penny Newman WCS unit train took over two weeks to unload. Penny Newman's WCS train delivery (with the cars staged on MET's yard tracks) used far more MET resources than have Gavilon's WCS train deliveries (with the cars staged on CVAG's private loop tracks), but apparently without MET objection or protest. MET's Petition does not address or seek to hinder continuing unit train deliveries to Penny Newman or other potential receivers.

Participating in cottonseed markets requires significant internal and external coordination, including commodity purchase, product marketing/sales, transportation, and transloading. For example, Gavilon is currently purchasing WCS to assemble and ship its next train to CVAG-Modesto in November. However, with the potential future unavailability of CVAG-Modesto to accept such a train, Gavilon faces considerable market risk and uncertainty in making these purchases and arranging transport to CVAG. MET's actions place Gavilon at a considerable market disadvantage. Given MET's demonstrated past efforts to block Gavilon trains from interchange while apparently raising no such objections to the trains serving Penny Newman, Gavilon has heightened concerns over the legitimacy of MET's intentions and actions.

For the above reasons, Gavilon respectfully submits that the Board's Decision is fully warranted and necessary, and MET's Petition to modify the Decision should be rejected. This remains a matter of significant regional importance. We greatly appreciate your continuing attention to this important matter.

Sincerely,
GAVILON INGREDIENTS, LLC



Corey Dencklau
Vice President & General Manager, Ingredients

EXHIBIT C



EXHIBIT D

Exhibit D







Exhibit D



VERIFICATION

I, Paul Konzen, am Vice President of Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. I am sponsoring and verifying the facts as set forth in Section II. of the forgoing Reply to Petition to Reopen. I confirm and verify that I know the contents thereof, and that the same are true as stated to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this statement.


Paul Konzen

Executed on August 31, 2018
