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CENTRAL VALLEY AG GRINDING, INC.	)	
AND CENTRAL VALLEY AG TRANSPORT	)	
INC.	)	ENTERED
	)	Office of Proceedings
Complainants	)	June 20, 2018
	)	Part of
v.	)	Docket No. NOR 42159 Public Record
	)	
MODESTO AND EMPIRE TRACTION	)	
COMPANY	)	
	)	
Defendant.	)	
	)	

Attorneys for Complainants

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REPLY TO MOTION TO DISMISS

Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, “CVAG”) submit this reply to the Motion to Dismiss (“Motion”) that Defendant Modesto and Empire Traction Company (“MET”) filed on May 31, 2018. MET’s motion should be denied as CVAG’s Complaint clearly sets forth more than ample grounds for Board investigation and action, and MET does not begin to meet the Board’s high threshold for motions to dismiss.

SUMMARY

CVAG’s Complaint alleges that MET is engaged in multiple unlawful practices and actions in its interchange and delivery of rail service to CVAG that violate its common carrier service and reasonable practice obligations, including its obligations to interchange traffic and engage in continuous carriage of freight under 49 U.S.C. §§ 11101, 10702(2) and 10744. MET asserts that its conduct is somehow proper “when

understood in its appropriate context, and in view of MET's market-based pricing for non-essential services accessorial to common carriage." Motion at 2. However, MET's Motion is bereft of legal and factual support and flies in the face of the Board's demanding standards for motions to dismiss, where all alleged facts are viewed in the light most favorable to the complainant, and dismissal is allowed only where there is no possible basis for the Board to grant relief.

CVAG's Complaint presents detailed factual allegations and legal bases for Board investigation and action, fully complies with the law and the Board's rulings, and provides more than sufficient basis for Board investigation and action. MET's jurisdictional, standing, lack of controversy, and other arguments are far-fetched and easily refuted. MET otherwise misapprehends the nature of CVAG's Complaint and in no way discharges its high burden to show that there is no basis on which the Board could grant the relief sought by CVAG. Denial of MET's Motion is further mandated by the Board's decision served June 12, 2018, granting CVAG's request for injunctive relief.

As demonstrated herein, the Board unquestionably has the authority and responsibility under Title 49 to consider all of the allegations presented in CVAG's Complaint and, once proven, to: (1) direct MET to cease and desist from its unlawful practices, (2) declare that the assailed Tariff provisions shall not be enforced or given effect, and (3) award CVAG damages, with interest, and (4) grant appropriate other relief that the Board deems proper on the record presented.

ARGUMENT

I. THE BOARD HAS JURISDICTION OVER CVAG'S COMPLAINT, AND CVAG HAS STANDING TO BRING ITS COMPLAINT

MET presents various threshold arguments that CVAG's Complaint should be dismissed, or the Board should otherwise "assist in framing the scope of this proceeding," because CVAG is a "non-shipper" "and the switching services that CVAG desires are not essential to common carriage under the circumstances." Motion at 4, 12. MET also "questions" the Board's jurisdiction over CVAG's Complaint because "[i]t is unclear" whether MET's assailed actions are sufficiently related to common carriage. *Id.* at 4. MET also claims that "CVAG lacks standing to complain about MET's participation in line haul service or the particulars of MET's provision of such services." *Id.* at 7-8. MET's jurisdictional and standing assertions are makeweight and devoid of merit.

A. MET's Jurisdictional Challenge is Unfounded

MET's jurisdictional assertions have no foundation. The Board clearly has jurisdiction over MET and its operations,¹ and MET's suggestions that its challenged

¹ The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501. Under 49 U.S.C. § 10102(9), transportation includes a "warehouse, . . . yard, property, facility, instrumentality . . . of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use." A "rail carrier" means a person providing common carrier railroad transportation for compensation," and "railroad" includes . . . the road used by a rail carrier and owned by it or operated under an agreement; and [] a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C. § 10102(5) & (6). "Common carrier" is not separately defined," but "refers to an entity that holds itself out to the general public as engaged in the business of transporting property from place to

activities might lay beyond the Board's reach are belied by its own statements and actions. In particular, MET admits in its Answer, as in its previous filings, that it is a common carrier short line railroad, engaged in the transportation of freight to and from shippers and receivers such as CVAG, and that it established accessorial tariffs and tariff charges, including assailed MET Freight Tariff M&ET 8000-B, as supplemented (Supplement 1-A and Supplement 2-A) and MET Freight Tariff 9500-A, that were targeted to apply to CVAG. Answer at ¶¶4-15, Verified Reply to *Ex Parte* Application for Section 11123(a) Service Order at 2 ("MET Service Order Reply").

While MET "questions whether the Board has authority under applicable law to intervene in such a dispute and prescribe terms and conditions for accessorial services and related charges," (Motion at 4), it has previously "invoked its fundamental right as a common carrier to require prepayment" and take other punitive actions. MET Service Order Reply at 3. MET has further asserted that "[t]o 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." *Id.* at 5. In other words, MET contends that because it is a common carrier, it has a fundamental right to engage in any and all service practices of its choosing without any concomitant common carrier obligations or related Board oversight with regard to those same practices. MET's

place for compensation." *New England Transrail, LLC – Constr., Acquisition & Operation Exemption – in Wilmington & Woburn, MA*, FD 34797 (STB served July 10, 2007), at 9-11.

position is manifestly wrong. Rail carriers “shall establish reasonable . . . rules and practices on matters related to . . . transportation or service,” and “[i]f the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.” 49 U.S.C. §§ 10702(2), 11701(a); *Eric Strohmeyer & James Riffin – Acquisition & Operation Application – Valstir Indus. Track in Middlesex & Union Cntys., N.J.*, FD 35527 (STB served Oct. 20, 2011), at 2. Moreover, the Board already demonstrated its jurisdiction and authority in granting CVAG injunctive relief.²

Mere jurisdictional “questions” as raised by MET cannot support a motion to dismiss, especially when premised on MET’s discredited theory that “CVAG’s customers can reduce their shipment volumes to avoid CVAG’s need for MET switching.” Motion at 4. The Board already considered and rejected that claim on a preliminary basis in granting CVAG injunctive relief. Decision served June 12, 2018, at 6 (“At this stage, CVAG has demonstrated that its transloading operations at Modesto depend on 100+-car unit train service to move large volumes across long distances.”).

B. MET’s Standing Challenge is Unfounded

MET also asserts that CVAG lacks standing to bring its Complaint because “CVAG is not a shipper, and thus does not purchase line haul (common carrier) transportation service” and is also “not party to the so-called ‘haulage agreements’ that MET has with BNSF and UP.” Motion at 7. As with its jurisdictional arguments, MET’s

² MET did not previously assert any jurisdictional (or standing) barriers to CVAG’s service order and injunctive relief petitions, and the Board’s order served June 12, 2018, granting CVAG injunctive relief represents an exercise of the agency’s jurisdiction.

standing contentions are frivolous, especially given the Board’s decision granting CVAG’s request for a preliminary injunction finding that “[t]he harm to CVAG’s operations is actual and imminent.” Decision served June 12, 2018 at 6.

Under 49 U.S.C. § 11701(b), “[a] **person**, including a governmental authority, may file with the Board a complaint” and that “the Board may not dismiss a complaint made against a rail carrier . . . because of the absence of direct damage to the complainant.” (Emphasis added). Under 49 U.S.C. § 10102(4), a “person” includes those encompassed under 1 U.S.C. § 1 (“corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”) and also a “trustee, receiver, assignee, or personal representative of a person.” Line-haul shippers are manifestly not the only persons that can bring complaints.³

The Board determines standing on a case-by-case basis, and is not bound by strict court requirements of Article III standing. *Rail Transportation of Grain*, at 7. The Board considers whether the complainant has suffered an “injury in fact” that is “fairly traceable to the defendant’s challenged conduct,” and “is one likely to be redressed through a favorable decision.” *Id.* CVAG satisfies meets these requirements easily, as MET’s assailed practices and tariff items target CVAG specifically and have

³ *E.g.*, *Rail Transportation of Grain, Rate Regulation Review*, EP 665 (Sub-No. 1) (STB served Dec. 29, 2016), at 7 (“*Rail Transportation of Grain*”) (“the statute permits parties to bring a . . . complaint, even if they have not been directly harmed or did not directly pay for the transportation for which relief is sought”); *McCarty Farms, Inc. v. Burlington N., Inc.*, 91 F.R.D. 486, 491-92 (D. Mont. 1981) (wheat growers that do not directly pay freight rates or charges have standing to bring a complaint under 49 U.S.C. § 11701).

produced substantial, ascertainable business harm to CVAG, as MET intended. CVAG's injuries are directly traceable to MET's conduct that is being challenged, and its injuries are likely to be redressed through a favorable STB decision in the form of orders and the provision of prescriptive and injunctive relief and monetary damages.

MET inexplicably asks that since its disputed charges might already be covered by its haulage agreements with the line-haul carriers UP and BNSF, "why is CVAG pressing the matter, rather than its customers?" Motion at 7 n.10. The answer is because MET is engaged in unreasonable practices and activities (including possible double-dipping of charges for delivery services) targeted at CVAG, and CVAG-alone, and it is seeking payment for substantial accessorial tariff charges that are targeted at CVAG, and CVAG-alone.⁴ While MET's practices obviously also adversely impact CVAG's direct customers as well as dairy farmers and others that depend on needed rail service in the supply chain of essential commodities, as confirmed in the Board's decision granting CVAG's request for a preliminary injunction, MET's demands and practices most directly disrupt rail service to CVAG and threaten its business at Modesto.

⁴ MET asserts that the Board may lack jurisdiction over CVAG's Complaint because it relates to BNSF and UP's haulage agreements with MET. However, while MET's haulage agreements are relevant to elements of CVAG's Complaint, the Complaint does not challenge the line-haul rates themselves or any charges of UP or BNSF, nor does it seek to "challenge the revenue division arrangements that MET has with BNSF and UP relating to line haul transportation," as MET incorrectly contends. Motion at 7-8. See *North Am. Freight Car Ass'n et al. v. Union Pac. R.R.*, NOR 42144 (STB served Dec. 21, 2015), at 3-4 (denying motion to dismiss even where allegations may pertain to contract traffic as well as common carrier tariff traffic).

Decision served June 12, 2018, at 6. That others might also be able to bring a related complaint against MET in no way deprives CVAG of standing.

II. CVAG’S COMPLAINT IS PROPERLY PLEADED AS AN UNREASONABLE PRACTICE COMPLAINT

MET claims in passing that CVAG’s Complaint actually challenges “CVAG’s tariff-based rates for unit train switching” and “is improperly pleaded as an unreasonable practices complaint.” Motion at 3. MET’s attempt to re-write CVAG’s Complaint as a rate reasonableness case is improper and unavailing. CVAG invoked its right to bring a complaint under 49 U.S.C. §§ 10702, 10704, and 11744, 11101, and 11701 – it did not bring a rate reasonableness case. Indeed, CVAG’s Complaint is directed at MET’s accessorial charges and demurrage charges and related practices as implemented and directed at CVAG. CVAG does not pay the line-haul rates established by BNSF and UP, as MET even admits. MET Answer ¶ 26. CVAG’s Complaint goes to the charges that MET is seeking to impose in addition to those separate line-haul rates. Indeed, MET even underscores that the services and practices that are the subject of CVAG’s complaint “are *accessorial* to common carriage.” Motion at 6 (emphasis in original).

However, CVAG is challenging the reasonableness of MET’s practices for those accessorial charges, not rates for transportation. While CVAG is captive to MET, it has not alleged market dominance under 49 U.S.C. § 10707, and is not seeking a prescribed rate. Nor does it need to. CVAG instead seeks a determination from the Board, injunctive relief, and monetary damages for certain actions and practices engaged

in, and common carrier tariffs and rules issued by MET that are imposed on CVAG wholly apart from the line-haul transportation service. *National Grain & Feed Ass’n v. Burlington N. R.R. et al.*, NOR 40169 (ICC decided May 23, 1990), 1990 WL 288197, at *4-*5 (“*National Grain & Feed*”) (unless there is a showing of a clear subterfuge to avoid the constraints of the Board’s rate reasonableness jurisdiction, complainant may proceed with its unreasonable practice claims).

The Board has a mandatory obligation to investigate the actual complaint brought where, as here, reasonable grounds for investigation are identified. The Board has consistently recognized that it has no alternative “but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the Commission.” *ICC v. Baird*, 194 U.S. 25, 39 (1904); *DHX, Inc. v. Matson Navigation Co. & Sea-Land Serv. Inc.*, WCC-105 (STB served Dec. 21, 2001), at 6; *National Grain & Feed*, 1990 WL 288197, at *4-*5.

III. MET CANNOT MEET THE BOARD’S DEMANDING STANDARDS FOR MOTIONS TO DISMISS

To survive a motion to dismiss, a complainant need only plead sufficient facts to establish a *prima facie* case for relief; the Board may dismiss a complaint only if it “does not state reasonable grounds for investigation and action.”⁵ “In reviewing a motion to dismiss, all alleged facts are viewed in the light most favorable to the

⁵ 49 U.S.C. § 11701(b); *Agrium Inc. & Agrium U.S. Inc. v. Canadian Pac. Ry. Co.*, NOR 42145 (STB served Sept. 15, 2015) (“*Agrium*”); *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142 (STB served June 15, 2015), at 1 (“*Consumers*”); *Terminal Warehouse, Inc. v. CSX Transp., Inc.*, NOR 42086 (STB served May 12, 2004), at 7.

complainant.” *Consumers* at 1 (citing *Mont. v. BNSF Ry.*, NOR 42124 (STB served Feb. 16, 2011), at 3). “The party seeking dismissal bears the burden of proof,” and the Board “will dismiss a complaint only when [it] find[s] that there is no basis on which [it] could grant the relief sought.” *Sierra R.R. v. Sacramento Valley R.R.*, NOR 42133 (STB served Apr. 23, 2012), at 3. Moreover, the Board has “stated frequently that motions to dismiss are disfavored and rarely granted.”⁶

Where a claim states a reasonable basis for further Board consideration, a motion to dismiss that claim must be denied as the Board “has a duty to investigate the complaint” *Brampton Enters., LLC v. Norfolk S. Ry.*, NOR 42118 (STB served Mar. 16, 2011), at 4. To be sustained at this initial stage, the complaint need not establish a *clear* violation by the defendant; it only need provide sufficient grounds for further investigation, as the party seeking dismissal must demonstrate that “there is no basis on which [the Board] could grant the relief sought.” *Id.* at 3. Unless the Board finds at this stage “that there are no reasonable grounds for further investigation,” the complaint must be sustained. *Dairyland* at 5.

⁶ *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104 (STB served Dec. 30, 2009), at 3 (“*Entergy*”); *Agrium* at 1 (“Motions to dismiss are generally disfavored”); *Consumers* at 1 (“Motions to dismiss are generally disfavored”); *Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105, (STB served July 29, 2008), at 5 (“*Dairyland*”); *North Am. Freight Car Ass’n et al. v. Union Pac. R.R.*, NOR 42144 (STB served Dec. 21, 2015) (citing *Garden Spot & N. Ltd. P’Ship & Ind. Hi-Rail Corp. – Purchase & Operate – Ind. R.R. Line Between Newton & Browns, IL*, FD 31593 (ICC served Jan. 5, 1993), at 1).

A. MET’s “Overreach” and “No Discernible Cause of Action” Arguments are Incorrect and Unavailing

MET characterizes CVAG’s complaint as “a winding and unfocused challenge” and a “hodge-podge of baseless allegations.” Motion at 2. MET further asserts that various “miscellaneous claims” do not properly articulate a proper cause of action and should be dismissed. *Id.* at 8. These purportedly include Complaint ¶¶ 77-78 (tariffs and practices unfairly targeted and for an improper purpose); ¶ 79 (tariffs and practices are anti-competitive, contrary to the public interest, and contrary to the national rail transportation policy); ¶ 80 (tariffs and practices violate principles established in the Rail Industry Agreement); ¶¶ 82-83 (tariffs and practices involve improper predatory pricing, tortious interference with CVAG’s business relationships, and purposely harm line-haul carriage).

Regardless, MET fails to show an absence of either reasonable grounds for investigation and action by the Board or a basis for the Board to grant relief. MET’s quibbles with various aspects of the Complaint clearly do not support dismissal of the Complaint or any of its elements. CVAG provided multiple, detailed grounds for finding that MET’s practices and tariffs are unlawful. The breadth and variety of CVAG’s machinations hardly provide a basis for dismissal. If MET had any difficulty comprehending any of the Complaint’s allegations, it could have asked to make them more definite under 49 C.F.R. § 1111.5, but did not do so.

Additionally, when evaluating the unreasonableness of unreasonable practices as alleged here, the Board examines “the facts and circumstances” of each case.

State of Montana v. BNSF Ry. Co., NOR 42124 (STB served Apr. 26, 2013), at 3.

“Section 10702 does not limit the Board to a single test or standard for determining whether a practice is unreasonable; rather, Congress has provided the Board ‘broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.’”

Id. at 3-4. For example, MET asserts that allegations of consumer protection or the National Rail Transportation Policy transgressions do not give rise to an unreasonable practice allegation. But the Board confirmed in *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan. 26, 2007), at 7, such matters can and do give rise to and establish a finding of unreasonable practices by carriers.

While resolution of the proceeding will require CVAG to present evidence of unlawfulness of each of the specific practices and tariff items assailed, MET’s arguments clearly fall short of the demanding requirement that MET demonstrate that CVAG’s Complaint offers no reasonable basis for further Board consideration. *E.g.*, *DHX, Inc. v. Matson Navigation Co., et al.*, WCC-105, (STB served Dec. 21, 2001), at 1 (“DHX will have to . . . support with particularity its general claim that the carriers’ practices are unlawful. But we cannot conclude at this point that DHX has not raised any claims that, if proven, could demonstrate a violation of the law.”). In light of the Board’s mandatory obligation to investigate where, as here, reasonable grounds for investigation are presented, the Board has consistently recognized that it has no recourse “but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the Commission.” *ICC v. Baird*, 194 U.S. 25, 39 (1904).

B. There is a Genuine Dispute and Case-and-Controversy

MET devotes much of its Motion to issues that have largely been obviated by the Board's June 12, 2018 decision. For example, MET claims that it is not disrupting service or withholding service, and therefore CVAG's claims under §§ 11101 and 10744 for violations of the common carrier and continuous carriage of freight obligations should be dismissed, and also that its refusal to accept reasonable financial security arrangements "does not give rise to a genuine cause of action." Motion at 4-8. In fact, the Board has already preliminarily found that "[t]he harm to CVAG's operations is actual and imminent" because MET has "disrupted unit train service to CVAG's facility." Decision served June 12, 2018, at 6.

Also, MET states that the purpose of its service cessation actions has been "to avoid congestion and broader service issues by restricting inbound shipments to CVAG." Motion at 5. However, curiously on the next page MET readily admits that there can be no MET common carrier and continuous carriage of freight violations because "MET is able at any time to restore switching to CVAG for unit train shipments if CVAG will agree to pay for the charges occasioned thereby." *Id.* at 6 & n.9. MET thus admits that its assailed tariff terms and practices are not designed to address any legitimate operating or service issues confronting MET, but are instead being imposed as an improper means to extract funds and evade its common carrier and continuous

carriage of freight obligations.⁷ Such practices should not be allowed to stand unaddressed and uninvestigated, particularly in light of the existing preliminary injunction order.

CONCLUSION

For the reasons stated above, MET's Motion to Dismiss CVAG's Complaint should be denied.

Respectfully submitted,



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⁷ MET claims CVAG's allegations at ¶ 86 of the Complaint that MET has improperly favored other customers' service and deprived MET of its ability to respond to reasonable requests from CVAG are "unfounded and legally unsupported." Motion at 5-6. Such objections do not provide a legitimate basis for dismissal of the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of June, 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