

ENTERED
Office of Proceedings
May 11, 2018
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CENTRAL VALLEY AG GRINDING, INC.
AND CENTRAL VALLEY AG TRANSPORT
INC.
5509 Langworth Road
Oakdale, CA 95361

Complainants

v.

MODESTO AND EMPIRE TRACTION
COMPANY
530 11th Street
Modesto, CA 95354

Defendant.

Docket No. NOR 42159

REBUTTAL TO

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

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

By:

Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: May 11, 2018

Attorneys for Complainants

CENTRAL VALLEY AG GRINDING, INC.
AND CENTRAL VALLEY AG TRANSPORT
INC.
5509 Langworth Road
Oakdale, CA 95361

Complainants

v.

MODESTO AND EMPIRE TRACTION
COMPANY
530 11th Street
Modesto, CA 95354

Defendant.

Docket No. NOR 42159

Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc.
(individually and collectively, “CVAG”) respectfully submits this rebuttal to the reply of Modesto and Empire Traction Company (“MET”) filed on May 8, 2018 (“Reply”) to CVAG’s *Ex Parte* Application for Section 11123(a) Service Order (“Application”). To the extent needed,¹ good cause exists for accepting this rebuttal, so that CVAG may be afforded

¹ MET contends that CVAG's request for grant of its Application immediately without a response would violate both 49 C.F.R. §1146.1(a)(2) and MET's due process rights. Reply at 4-6. MET is incorrect. 49 U.S.C. § 11323(b)(1) authorizes the Board on its own or on application "to act immediately, without observing normal due process procedures." *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 972 (1998). Also, the

an opportunity to address the substantial factual and legal omissions and distortions in MET's Reply. CVAG has attempted to keep this filing succinct, and failure to address matters should not be construed as acquiescence to MET's claims.

I. MET'S FACTUAL MISSTATEMENTS

MET's opposition² is premised on the following false assertions: (a) CVAG's service disruption allegations are illegitimate, and CVAG's Application is merely a façade for rate-based claims; (b) any CVAG railroad service problems are of its own creation; (c) neither dairy farmers, nor shippers, nor CVAG face any failure-of-service harm; and (d) CVAG is entitled to use its "fundamental right as a common carrier" to block service to CVAG in order to enforce its punitive prepay demands and enable MET "to install a more cooperative, efficient, and safer operator in place of CVAG."³

As shown below, each assertion is without foundation and serves to conceal MET's misconduct.

49 C.F.R. § 1146.1(a)(2) referenced by MET does not exist, and as CVAG stated in its Application (at 33 n.97), the reply filing provided for under § 1146.1(b)(2) is not required here because CVAG does not seek directed service by one carrier over the lines of another carrier. Nevertheless, if the Board accepts MET's reply under § 1146.1 as it requested, then CVAG is entitled to file this timely rebuttal under § 1146.1(b)(3).

² MET describes CVAG's request for section 11123(a) relief as a "procedural oddity" and "redundant," and asserts uncertainty as to how it relates to the Board's § 1321 injunctive relief authority. Reply at 1, 4-6. However, the short-term relief provisions of section 11123(a) are purposely designed to be complementary, and "not mutually exclusive" of the more "complete relief" that may be available elsewhere, including under section 1321(b). *Expedited Relief for Service Inadequacies*, 3 S.T.B. at 972-73.

³ Reply at 3, 28-29.

A. A DIRECTED SERVICE ORDER IS REQUIRED TO REMEDY MET'S DEMONSTRATED BLOCKAGE OF SERVICE FOR ESSENTIAL COMMODITIES

To divert attention from its own actions, MET asserts “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.” Reply at 1, 10-13.⁴ It is true that CVAG’s Complaint seeks relief from MET’s extreme unreasonable practices and charges, although not rates,⁵ including, among other things, double-dipping on its delivery handling fees and charging switching fees of *\$100 per minute* or over *\$5,000 per hour* for services. Application at 7, 40, V.S. Konzen ¶79. However, CVAG’s section 11123 Application at its core addresses MET’s intended and targeted blockages of service delivery and outright refusal to accept in interchange essential livestock feed to CVAG.

MET’s April 27, 2018 directive blocking interchange and delivery of canola and cotton seed unit trains to CVAG still stands. Application at 25-26. Also, that same directive blocking trains to CVAG unless “MET has been able to confirm that [the CVAG delivery] Tracks . . . are free to accept” a shipment still stands. *Id.* CVAG now further states on Reply that its directive applies to *all* livestock feed commodities and “MET will no longer

⁴ MET repeatedly describes itself as a “small railroad.” In fact, MET is part of the Beard Land & Investment Company, a significant and highly profitable enterprise, with over 180 shareholders, that owns one of the largest industrial districts in California, more than 30 warehouses, and several property development and leasing companies. *Modesto & Empire Traction Co., Beard Land & Investment Co., Beard Land Improvement Co., & New Modesto & Empire Traction Co. – Corporate Family Transaction Exemption*, FD 33014 (STB served Sept. 11, 1996).

⁵ MET repeatedly asserts that this dispute involves a “rate” or “switching rate” dispute for MET services. However, MET’s accessorial tariffs seek to assess charges, not rates. In fact, MET acknowledges elsewhere in its reply that it has no ability to assess rates and that it is “not involved in the ordering, billing or routing of the trains.” Reply at 8 n.6, 19, n.25.

accept in interchange unit trains destined to CVAG” above CVAG-determined threshold levels. Reply at 3, 7. MET also confirms on Reply that unit trains for major shippers such as Gavilon are restricted “to no more than 25 cars per individual shipment.” Reply at 14-15.

However, CVAG’s Modesto Facility is more than capable of receiving unit trains as it had done for nine years without interruption until mid-February 2018, when MET initiated a ten-step, overlapping initiative to restrict and block CVAG deliveries. MET’s feeble claim that it “doubts that CVAG must have unit train service,” *id.* at 23, completely ignores the parties’ substantial unit train facility investments,⁶ the nine years of unit train deliveries to CVAG-Modesto, and the overwhelming evidence to the contrary, including detailed testimony from California dairy farmers and a major animal feed shipper of the need for 100+ car unit train service. Application at 11-16.

B. MET’S ERRONEOUS JUSTIFICATIONS FOR ITS SERVICE FAILURES DO NOT OBVIATE THE NEED FOR A DIRECTED SERVICE ORDER

Much of MET’s Reply consists of efforts to blame CVAG for any service problems, even for matters that are solely under MET’s own control. However, MET’s putative justifications for its service blockages are merely smokescreens.

MET asserts that it “is proud to boast grain transloading capability on its facilities,” but claims that somehow “CVAG is no longer a genuine unit train unloading facility.” Reply at 7. However, CVAG-Modesto is still the same facility that MET designed

⁶ MET does not dispute that it designed and built the CVAG’s loop track to receive 110-car trains in full compliance with UP and BNSF’s unit train unloading facility requirements. Application at 15. To the contrary, MET boasts of the \$10 million it spent on CVAG’s unit train unloading facilities and acknowledges similar substantial investments made by CVAG. Reply at 28.

and built for the specific purpose of receiving unit trains and, again, has done so for almost a decade.

MET also alleges that “serious CVAG safety violations” render CVAG incapable of receiving unit train service. *Id.* at 8. MET’s alleged safety violations are untrue and belied by the parties 13-year history of safe and efficient delivery, transloading, and storage of essential livestock feed commodities incurring approximately \$17 million in facility investments by both parties. Application at 7, 15-16; Reply at 28. CVAG has never received a Federal Railroad Administration or State of California citation or notice of unsafe transloading or rail-related activities in 13 years of operations at Modesto. Application at 10, V.S. Konzen at ¶¶ 31-33. MET’s makeweight safety allegations merely mimic the same claims it presented in its unsuccessful attempt to evict and dispossess CVAG in the litigation actively pending in the California courts. Application at 17-18. Such matters are outside the Board’s purview.

MET also claims that the unit train loop tracks, which MET designed and built to grow CVAG’s (and MET’s) business, require MET to engage in significant train handling and switching activities. That is not true. Even with MET’s recent unjustified track access restrictions, a typical Gluten/DDGs delivery requires MET merely to split the unit train in half and deliver two cuts for loading and again for return, with limited exceptions. Most canola trains require only one cut on the empty return side. Application at 18-19, V.S. Konzen, Exh. 17.

MET’s “general expectation that unit trains do not require any switching or disassembly,” Reply at 8 n.6, is also unfounded and unsubstantiated. Numerous comparable unit train facilities (including those that MET identifies for its false assertion that there is no

irreparable harm) require far more handling than CVAG-Modesto, but without novel and unprecedented per car intraplant and interplant switching fees. Application at 40, V.S. Konzen at 61-67. Also, MET does not dispute that CVAG is MET's most efficient receiver of railcars of any of the dozens of customers of MET in the Beard Industrial District. *Id.*

MET's statements do establish its motive for terminating unit train service. The \$20,000 or more MET receives for delivering unit trains for BNSF and UP as a handling line carrier (with no ability to set its own rates) (Application at 11-12) is a "significantly smaller per-car allowance" than what it receives for manifest trains. Reply at 8 n.6. MET's preference for a better deal with BNSF and UP do not entitle it to establish new unprecedented and unauthorized line haul rates amounting to almost \$100 per minute on top of the substantial haulage fees it already negotiated and receives. Application at 7, 40, V.S. Konzen ¶79.

MET's protestations that it is merely seeking a "fair price" for its services and that its practices "are not unreasonable in the least" (Reply at 15, 24) are entirely conclusory. MET does not and cannot reasonably dispute that its charges are discriminatory, targeted solely at CVAG, and contrary to short line industry practices both nearby Modesto and throughout the country. Application at 40, V.S. Konzen ¶¶ 61-67.

C. A DIRECTED SERVICE ORDER IS REQUIRED TO REMEDY THE IRREPARABLE HARM FACING CVAG, DAIRY FARMERS, AND SHIPPERS

CVAG has provided overwhelming evidence of the need for a directed service order from individual California dairy farmers; a large grass-roots organization representing 50 percent of the State's milk production; a dairy industry nutritionist expert; and one of the nation's largest agricultural feed shippers. All attest that directed service and additional

relief is needed to protect California dairies, suppliers, and CVAG from great and irreparable harm if CVAG's Modesto Facility is forced to suspend or shut down.⁷ Application at 28-31, 42-47. In response, MET asserts that CVAG presents a "bogus 'dairy industry catastrophe' scenario." Reply at 24.

MET's only "evidence" is a chart of other Central Valley transload facilities that it contends can cover the loss of CVAG-Modesto with "little more than a brief adjustment in supply chains" because transloading in Central and Northern California "is extremely competitive." Reply at 26-27. However, the facilities listed by MET cannot begin to replace CVAG-Modesto.

Eleven of the 18 active facilities listed by MET are outside of the 75-mile trucking radius for economically feasible deliveries to dairy farms.⁸ Of the remaining facilities, some are small, or do not have rail service, while the others lack CVAG's lay-down and covered storage capacity. Some of the larger facilities (such as Sierra Grain-Turlock) specialize in handling poultry feed, and have limited capacity for the livestock industry. Others, including A.L. Gilbert, actually rely on CVAG for its livestock feed requirements.

Again, this is not just the opinion of CVAG, but of the dairy industry and its suppliers. Application at 28-31, 45-46. For example, the Western United Dairymen confirm

⁷ Additionally, while MET makes a conclusory assertion that it remains "unclear whether CVAG truly cannot afford MET's charges" (Reply at 24), MET's new claim flies in the face of its prior admission that MET fully knows that CVAG cannot afford to pay its demands and survive as a business at Modesto. Application at 8.

⁸ Increased trucking mileage at or above this distance can more than double farmers' freight and fuel costs and produce significant increases in operating expenses. Application at 29.

that the Modesto Facility’s “unavailability, even for a short period of time, would be devastating to regional dairy farmers who comprise our membership.” Application at 30, Counsel’s Exh. 1. Gavilon further confirms that “CVAG-Modesto is one of the only transloaders in the region capable of receiving unit train service, and neither Gavilon nor the Northern Central San Joaquin Valley dairy industry can afford to lose its essential services.” Application at 14, Counsel’s Exh. 7.

A.L. Gilbert, listed on MET’s chart and one of the longest-standing transloading and animal feed businesses in the California Central Valley, also strongly agrees. A.L. Gilbert confirms that it is “not aware of any other facility in the Central Valley that currently has the train receipt capabilities and storage capacity that would be required to absorb the Shuttle/Unit Trains that have historically been shipped to the CVAG Facility.” Letter from A.L. Gilbert Company to STB, dated May 11, 2018, attached as Counsel’s Exhibit 1.

CVAG Modesto Facility’s livestock feed capabilities, capacity, and storage is irreplaceable.

D. A DIRECTED SERVICE ORDER IS REQUIRED TO PREVENT MET FROM USING ITS EXPANSIVE POWERS AS A COMMON CARRIER TO EFFECTUATE A FORCED EVICTION OF CVAG

MET makes no secret that it is invoking its “fundamental right as a common carrier” to block service to CVAG and to enforce its punitive prepay demands in order to evict CVAG as a tenant at Modesto. Reply at 3. MET promises a “smooth transition” as MET “install[s] a more cooperative, efficient, and safer operator in place of CVAG in very

short order.” *Id.* at 28.⁹ MET’s blatant use of its common carrier privileges to obtain a new business partner thus has now been fully revealed.

There can be no legitimate justification for MET’s refusal to provide reasonable transportation service to CVAG, and especially on the basis of MET’s expressed business partner preferences.

II. MET’S COMMON CARRIER OBLIGATION OFFENSES AND LEGAL MISSTATEMENTS

CVAG respectfully submits that MET’s unit train interchange and delivery restrictions are anathema to MET’s fundamental common carrier service obligation¹⁰ and require immediate Board attention through a directed service order and additional injunctive relief.

Additionally, the separate economic considerations that MET acknowledges are at the heart of its efforts to displace CVAG at Modesto fly in the face of its fundamental common carrier obligations and also support the issuance of a directed service order. *E.g.*, *G.S. Roofing Products Co. v. STB*, 143 F.3d 387, 391 (8th Cir. 1997) (discussing how railroads are held to a “higher standard of responsibility” because their “quasi-public nature”

⁹ After severing CVAG from its \$7,000,000 in Modesto Facility improvements, MET promises to quickly restore unit train delivery service to its new “more cooperative” business partner that will receive the same animal feed commodities at the same facilities that MET now alleges “no longer” can accept unit trains. Reply at 7, 28.

¹⁰ *E.g.*, *Pejepscot Indus. Park, Inc., d/b/a Grimmel Indus. – Pet. for Declaratory Order*, FD 33989 (STB served May 15, 2003), at 12-13 (“*Pejepscot*”) (carriers “cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is ‘worth it’ to do so.”)

involves special public interest considerations).¹¹ In *Pejepscot*, the Board emphatically rejected the suggestion that a carrier could rely upon financial or other business considerations to decide for itself whether it must comply with its common carrier obligation:

Respondents cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is “worth it” to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing. See, e.g., *Decatur County Comm’rs v. Surface Transp. Bd.*, 308 F.3d 710, 715 (7th Cir. 2002) (“[railroads] may not refuse to provide service merely because to do so would be inconvenient or unprofitable”) (citing *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998)); *Classification Ratings on Chemicals, Conrail*, 3 I.C.C.2d 331, 337-38 (1986) (Classification Ratings) (railroads may not avoid their obligation to provide rates or service because the commodities in question are hazardous and, if not handled safely, could potentially expose the carriers to substantial financial liability).

Id. at 12-13.

MET’s legal argument on reply is to the effect that CVAG’s directed service application cannot succeed because: (a) CVAG has brought a rate-related complaint and a directed service order cannot be issued where there is a dispute simply over rates; and (b) CVAG is required by law to accede to MET’s prepay demands or go without service. MET is wrong on both counts.

¹¹ Under established precedent, an unreasonable practice may be “observed as well in dealing with a single individual or with the general public or a class,” and the proscription against unreasonable practices may be violated where the carrier’s action is for the purpose or effect of hampering competition among local businesses. *Postal Telegraph-Cable Co. v. Western Union Telegraph Co.*, 59 I.C.C. 512, 516 (1920).

A. A DIRECTED SERVICE ORDER IS FULLY WARRANTED

MET claims that two switching or line-haul rate cases, *Albermarle*¹² and *Keokuk*,¹³ “should put a definitive end to the Application.” Reply at 13. However, these cases are clearly inapposite, and neither comes close to defeating CVAG’s directed service Application.

Abelmarle addressed a unique situation involving manifest train service where the delivering carrier, Louisiana and North West Railroad Company (“LNW”), performed significant switching, storage, and weighing services at the specific request of Albermarle, only after the single car shipments of chlorine were delivered. The services required the use of five off-site storage tracks, all located on LNW’s property, with three of the storage tracks owned by the LNW.¹⁴ The post-delivery switching occurred between Albermarle’s plant and the off-site storage, weighing, and plant loading tracks and required **eight** additional private switches **per day** of individual railcars.

The LNW had provided the post-delivery special services for years, and the services themselves were not in dispute. The parties did not dispute that the post-delivery accessorial switching and related activities were legitimate and necessary, were specifically requested by Albermarle, and were separate from and unrelated to the line-haul delivery service. Indeed, LNW argued that these requested private services were not subject to the

¹² *Albermarle Corp.—Alternative Rail Service—Line of the Louisiana & N. W. R.R.*, STB FD 34931 (STB served Oct. 6, 2006).

¹³ *Keokuk Junction Ry. Co.—Alternative Rail Service – Line of Toledo, Peoria and W. Ry. Corp.*, STB FD 34397 (STB served Oct. 31, 2003).

¹⁴ See LNW’s Aug. 25, 2006 & Sept. 6, 2006 filings in *Albermarle Corp.—Alternative Rail Service—Line of the Louisiana & N. W. R.R.*, STB FD 34931.

Board's jurisdiction. The complaint arose when the private switching fees were increased, and Albermarle sought to bring in an alternate carrier, pursuant to the Board's directed service rules, to provide less expensive switching services over LNW's tracks.

Given the unique circumstances of the case, and without any allegation that the special services for private switching were not necessary or proper, or were not specifically requested by Albermarle, or that the level of charges themselves could not be paid or otherwise threatened Albermarle's business, the Board unsurprisingly denied relief for alternative service by a lower cost carrier. Under the circumstances, the Board found that the "alleged 'service inadequacy' at issue here . . . arises from Albermarle's disagreement with the level of LNW's charges for switching services and is not a failure to move traffic." *Albermarle* at 4. In no way does *Albermarle* establish the general rule against directed service orders depicted by MET.

The *Keokuk* is also unique and even less pertinent. That case arose from the revocation of a carrier's line acquisition, which forced the earlier incumbent carrier, Toledo, Peoria and Western Railway Corporation ("TP&W"), to take back the line in question, the La Harpe Line, and restore service after the acquiring carrier had embargoed service and abused the Board's acquisition exemption procedures.

After TP&W reacquired the line, and after failed negotiations over trackage rights failed, the involved second *carrier*, Keokuk Junction Railway Company ("KJRY"), sought to invoke the Board's directed service rules as a means of gaining access to and controlling TP&W's La Harpe Line. *Id.* at 2, 4. However, the Board found that the two grain shippers on the line never actually requested service from TP&W, so there was no service disruption whatsoever. *Id.* at 7. All that was left was a broad allegation by *KJRY*,

and not a shipper, that the TP&W's line-haul rates were generally too high. Unsurprisingly, the Board determined that KJRY's maximum rate reasonableness contentions, in the complete absence of any evidence of service failure, or any shipper request for service, was insufficient to meet the Board's directed alternative service requirements. *Id.* at 6-7.

Contrary to MET's contentions, the facts in *Albermarle* are anything but "nearly identical to those presented here," and neither are the highly unique facts of *Keokuk*, involving no actual request for rail service, let alone any service disruption. Here, MET is now blocking interchange and delivery of all unit trains, casting aside its own tariffs and established service arrangements. Even if MET were to rescind its unit train service cessation initiatives, CVAG is a receiver and the line-haul rates for delivery are fully paid for by customers of the UP and BNSF shipping under a valid tariff. MET is therefore already receiving substantial haulage carrier fees for its delivery services.

Unlike in *Albermarle*, CVAG has assumed responsibility for all of its own private track train unloading services. CVAG does not receive single-car manifest service; it receives unit train service. CVAG simply seeks delivery of its unit trains in a similar manner to the way it has received service on the same track for almost a decade. CVAG has sufficient and adequate track, and does not require or request special, individual private car switching 8 times per day, and instead, at most requires one train cut for delivery and another for return.

Additionally, unlike in *Albermarle*, CVAG does not seek or require special private switching and storage services of individual railcars post-delivery. CVAG is not disputing increased charges for undisputed, established services. Instead, CVAG's delivery service is being saddled with new and novel per car chargeable items of up to \$50,000 per

unit train (in addition to what CVAG receives from BNSF and UP) targeted specifically at CVAG and intentionally designed to drive it off its property and out of business in Modesto.

Finally, unlike in *Albermarle*, where no substantial business harm was at issue, failure to order directed service and other injunctive relief will result in substantial harm to essential service, dairy farmers, and livestock feed suppliers, as well as destroy competition and CVAG as a business at Modesto.¹⁵

B. CVAG WELCOMES A REASONABLE SECURITY DEPOSIT SOLUTION, BUT SHOULD NOT BE REQUIRED TO PAY MET'S PREPAY DEMANDS DURING THE PENDENCY OF THE COMPLAINT PROCEEDING

MET contends that it “may refuse to provide service absent adequate assurances of payment in the way of financial security” and that CVAG is unfairly refusing to accede to MET’s prepay demands. Reply at 18-19. However, the cases MET cites for support of its forced prepay demands are misplaced. CVAG’s Complaint is not about credit, but rather about MET’s attempt to impose targeted and punitive prepay requirements that are clearly designed as a penalty and for improper purposes, and for services that are already covered and paid for under the line-haul rates.

Again, CVAG is not disputing ordinary increases for established services. The very nature of the unprecedented individual charges are at the heart of this dispute, and even MET has admitted (and intended) that CVAG cannot afford to pay its demands during the

¹⁵ MET contends that *Canexus Chems. Canada L.P. v. BNSF Ry. – Emergency Serv. Order*, NOR 42131 (STB served Oct. 14, 2011) (“*Canexus*”), where directed service was ordered, is inapposite, because, in contrast to *Canexus*, “MET has offered service to CVAG” and *Canexus* involved essential chemical shipments. Again, CVAG’s directed service petition is directed at MET’s service failures, and continued service of the affected livestock feed commodities involved here is clearly essential to the California dairy industry.

course of this proceeding and survive as a business at Modesto. Application at 8. MET's prepayments amount to almost \$100 per minute, or over \$5,000 per hour, for "switching," and meet or exceed what CVAG receives from its customers for providing its unloading services at the Modesto Facility. *Id.* at 39-42.

MET seeks to dismiss *Railroad Salvage*¹⁶ as an "outlier" and "very different" case because it addressed the amount of the prepayment requirement, and not the underlying "rates." Reply at 22. However, as here, the demurrage charges and practices at issue in *Railroad Salvage* were being disputed as unreasonable and challenged in a proceeding before the Board. MET is correct that CVAG is challenging both the amount of MET's prepayment demand and the underlying charges themselves, which it believes are inapplicable and unjustified for the delivery services being provided by MET. As the Board specifically stated:

requiring a payment of this magnitude . . . that are the very subject of the pending proceedings in STB Docket Nos. 42102 and 42103 *ignores the fact that the amount is in dispute before the Board*. Accordingly, based solely on the limited filings thus far *and in view of the pending proceedings* before us involving the disputed demurrage charges, we find that petitioners have met the first prong of the *Holiday Tours* test.

Railroad Salvage at 4 (emphasis added). The Board issued injunctive relief based in part on its finding that "the security deposit requirement appeared to place an undue financial burden on petitioners and that it *represented an improper means of collecting from shippers an*

¹⁶ *R.R. Salvage & Restoration, Inc.—Pet. for Investigation & for Emergency Relief Under 49 U.S.C. 721(b)(4)—Sec. Deposit for Demurrage Charges, Mo. & N. Ark. R.R., NOR 42107* (STB served June 30, 2008).

amount that was at issue before the Board.” Railroad Salvage at 3 (internal citations omitted) (emphasis added).

As in *Railroad Salvage*, the Board has previously allowed security deposits, but they are issued *per company*, not *per individual train*, and are in the range of tens of thousands – not hundreds of thousands of dollars. In *Railroad Salvage*, the Board ultimately approved a \$25,000 cash security deposit per company when there was approximately \$400,000 in disputed demurrage charges. *Railroad Salvage* at 3-4 (MNA was seeking “a nearly \$400,000 security deposit . . . as a precondition for continued rail service”); *Railroad Salvage* (decision served July 25, 2008) at 5 (“the deposit is uniformly capped at \$25,000 per shipper, *regardless of the extent of unpaid charges*”) (emphasis added). Similarly, in *G&T* a letter of credit for \$50,000 per company was found reasonable for securing \$2 million in demurrage charges.¹⁷

To date, CVAG has offered MET far more security than the amounts in either *Railroad Salvage* or *G&T*. CVAG has also tried diligently to negotiate ample security arrangements with MET and has attempted to prepay MET \$10,000 *per train* as reasonable security for MET’s accessorial charge claims as a means of “keeping the trains running,” which is significantly more than the \$25,000 per company security found reasonable by the Board in *Railroad Salvage*. Application at 42. MET has refused.

¹⁷ *Railroad Salvage* (STB served June 30, 2008) quoting *Rail General Exemption Auth. – Miscellaneous Agric. Commodities – Pet. of G&T Terminal Packaging Co., Inc., et al., to Revoke Conrail Exemption*, Ex Parte No. 346 (Sub-No. 14A) (ICC served June 13, 1989) (“G&T”).

CVAG welcomes a security deposit as a solution, but if the Board orders one, it should also require that the security deposit be capped, not apply on a per train basis, and not permit drawdowns of amounts currently being disputed as unreasonable in proceedings before the Board.

III. CONCLUSION

MET has wholly failed to support its factual arguments, particularly those relating to its service disruptions. MET has also failed to support any legal arguments that undermine CVAG's showing of a need for a directed service order under 49 U.S.C. § 11123. Accordingly, the Board should grant CVAG's Application and order directed service.¹⁸ It should also grant a preliminary injunction and related relief in the form requested, and initiate an investigation under 49 U.S.C. § 11701, as soon as possible.

Respectfully submitted,



Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: May 11, 2018

Attorneys for Complainants

¹⁸ At a recent Congressional hearing, the Board Chairman noted the Board's expansive authority to require common carrier railroads under its jurisdiction to serve the public. *Oversight of the Surface Transp. Bd. Reauthorization Act of 2015 Before the Subcomm. on R.R.s, Pipelines, & Hazardous Materials of the House Comm. on Transp. & Infrastructure*, 115th Cong. (Apr. 17, 2018).

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of May, 2018, caused a copy of the foregoing to be served by overnight mail and email upon outside counsel for MET, as follows:

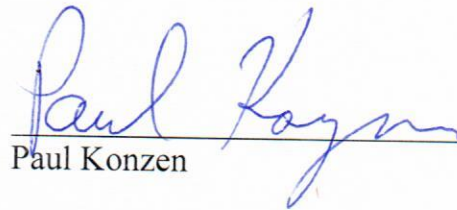
Robert A. Wimbish
James D. Helenhouse
Audrey L. Brodrick
Brandon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832



Katherine F. Waring
An Attorney for Complainant

VERIFICATION

I, Paul Konzen, verify that I have read section I.C. the foregoing Statement, I know the contents thereof, and that the facts pertaining to animal feed transload facilities in the California Central Valley 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 May 10, 2018

Exhibit 1



A. L. Gilbert Company

P.O. Box 38 - 304 N. Yosemite

Oakdale, California 95361-0038

(209) 847-1721 • 524-9261 • Fax (209) 847-3542

Bulk Dairy Feeds

Sacked Feeds

Liquid Feeds

Field Seeds

May11, 2018

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

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

Re: Transportation of Animal Feed to the California Central Valley

A.L. Gilbert Company (A.L. Gilbert) requests that the Surface Transportation Board investigate and provide appropriate injunctive relief to help us ensure safe, efficient and dependable delivery of animal feed and feed ingredients that are essential to the California dairy industry.

A.L. Gilbert, founded in 1892 is a family owned organization that manufactures livestock feed, primarily serving the Dairy Industry, and employs approximately 250 people in Stanislaus County and other nearby counties.

California is a feed deficient state, i.e., there is not enough animal feed stocks grown or produced within the state to meet demand. Dairy farmers rely heavily on feed and ingredients produced in different geographical regions of North America. The only economically viable way to transport these feeds and feed ingredients to California is via Shuttle or Unit Trains, most of which necessarily consist of at least 100 cars.

A.L. Gilbert, as well as other feed manufacturers and ingredient suppliers rely heavily on Central Valley Ag Grinding, Inc.'s (CVAG's) Modesto, CA transload facility to receive these Shuttle and Unit Trains. CVAG then stores and transloads the livestock feeds and ingredients to our trucks for delivery directly to our customers' dairies and for use at one of our Manufacturing Facilities in Keyes and Oakdale. Both of our Manufacturing Facilities are within 15 miles of the CVAG Facility, while the majority of our customers' dairies are located within a 50-mile radius of the CVAG Facility.

In addition to having rail access, in order to receive Shuttle or Unit Trains a facility must have sufficient trackage for at least 100 cars and their locomotive power units. The facility must also have the infrastructure and most importantly the storage capacity for each different feed or ingredient and be able to unload one of these trains in a very short time period. These are very significant issues when considering the average 110-car train contains 11,000 tons of feed or ingredients.

Given A.L. Gilbert's long-time presence in the market, I am well aware of the availability, capabilities, and market reach of all of the regional transloading facilities. I am not aware of any other facility in the Central Valley that currently has the train receipt capabilities and storage capacity that would be required to absorb the Shuttle/Unit Trains that have historically been shipped to the CVAG Facility.

Additionally, Feed Manufacturers and suppliers in the California Central Valley are heavily regulated by various State, Regional and County Agencies. Moving the volume that currently goes through CVAG to any other Facility will require a lengthy, expensive and burdensome permitting process.

In short, if there were any other facilities with the capability to absorb the range and volume of feeds and ingredients that CVAG presently handles, they would be doing it today.

One additional consideration. As I mentioned earlier, both of A.L. Gilbert's Manufacturing Facilities are within 15 miles of the CVAG Facility and the vast majority of our customers are within 50-mile radius of the CVAG Facility. If we and others in our immediate area were forced to look to one of the transload facilities in the Southern Central valley 150 to 200 miles away, not only would the costs be prohibitive, the increased trucking miles and traffic congestion would make such an alternative utterly unfeasible. This is especially so when you consider the average 100 car train contains 440 truckloads.

MET's current actions to interfere with and block unit train service to CVAG-Modesto are causing us and our customers significant problems in terms of additional costs and a great deal of uncertainty. Currently we find ourselves in a dangerous situation in that we must keep our inbound pipeline full of ingredients in order to keep feed supplied to our customers' dairy cows, yet from one day to the next we don't know if we're going to be able to get trains unloaded when they arrive. Even the uncertainty of the availability of consistent train deliveries creates significant market volatility and business harm and needs to be addressed as soon as possible.

We urge the Surface Transportation Board to take appropriate actions within its powers to investigate and finally resolve this matter, as well as provide immediate interim injunctive relief to ensure continued unit train rail service to CVAG-Modesto.

Sincerely,



Robert Gallagher
Chief Operating Officer
A.L. Gilbert Co.
Oakdale & Keyes, CA