

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Public Record

Docket No. NOR 42159

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

**VERIFIED PETITION TO REOPEN AND MODIFY DECISION AND
MOTION FOR CLARIFICATION**

EXPEDITED CONSIDERATION REQUESTED

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**ATTORNEYS FOR MODESTO AND EMPIRE
TRACTION COMPANY**

Dated: August 14, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42159

CENTRAL VALLEY AG GRINDING, INC. AND
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OVERVIEW

In ordering Modesto and Empire Traction Company ("MET") to restore certain unit train-related services to Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, "CVAG") and to desist from requiring prepayment of estimated switching charges related to those services, the Board relied upon CVAG's commitment to provide a per-train security thereby assuring MET at least partial payment for its services. Following the Board's order, CVAG has refused to make any payment for MET switching, and has withdrawn its commitment to offer a per-train security. CVAG has also insisted upon MET accommodating unit train service to a CVAG-operated facility (the Transload Tracks, as described below) for which unit train deliveries are neither efficient nor customary.

CVAG's tactics, including particularly its refusal to abide by its commitment to pay per-train security in the amount of \$10,000, undercuts the bases of the Board's past decision in this case. For the reasons set forth herein, MET requests that the Board reopen its decision of June 12, 2018 (the "June 12 Decision"), to reconsider whether to permit MET to require prepayment of switching services or, at the very least, to hold CVAG to its security payment

commitment. In addition, MET urges the Board to clarify that its June 12 Decision did not foreclose MET from placing reasonable limits on service to the Transload Tracks. Finally, MET requests expedited Board consideration of the subject petition and motion.

BACKGROUND

The subject proceeding relates to a dispute regarding unit train switching services for rail-borne shipments destined to Modesto, California, that CVAG, a transload services provider, handles for various agricultural commodities shippers doing business in the Central Valley. As a result of a disagreement over MET's switching charges, MET had required prepayment of estimated switching charges for each inbound unit train destined to CVAG-Modesto that would require switching to facilitate unloading. CVAG objected, insisting, among other things, that the charges were too high (or alternatively, that CVAG was not responsible to pay any switching charges). Instead, CVAG offered a per-train "security deposit" of \$10,000 per unit train for MET's accessorial services.¹ MET did not accept CVAG's security deposit proposal, and imposed interchange restrictions that limited deliveries to CVAG-Modesto to shipment sizes that CVAG could receive and unload without resorting to MET switching, including the breaking up and re-assembly of unit trains.

The dispute involves two separate MET-owned and CVAG-operated facilities. The first is the so-called "Loop Track" (also known as MET Tracks 1041 and 1042) which is located in an area CVAG had leased from MET. In addition to the trackage, the Loop Track includes a large building for storage and handling of certain agricultural commodities and an under-track unloading pit, all designed to accommodate the unloading of unit train shipments. The second facility is the "Transload Tracks" (portions of MET's yard trackage known as Tracks

¹ CVAG Complaint at ¶52.

1038 and 1039) and adjoining real property which MET had licensed to CVAG, and which, with very limited exceptions discussed herein, CVAG has used for the unloading of non-unit train volume commodities, such as cotton seed. The Transload Tracks were not designed for unit trains, and have far less freight car capacity than would be needed for unit train unloading.

Cotton seed shipments to the Transload Tracks historically have been handled in carload service requiring little, if any, MET-supplied switching to accomplish unloading. MET has, on three occasions (January, April and July of 2018) reluctantly agreed to handle unit train cotton seed shipments destined to the CVAG-operated Transload Tracks, but, in so doing, MET has pointed out that such unit train service requires considerable extra handling, and, accordingly, substantial switching charges.

In its June 12 Decision, the Board enjoined MET from imposing interchange restrictions on CVAG-destined shipments, and from requiring prepayment of charges as a condition for switching. MET was directed to “interchange and switch full unit trains bound for the Modesto facility (with CVAG using its own rail car movers to conduct train unloading) and to provide otherwise reasonable service during the pendency of the complaint proceeding.”² The Board added that it was “not enjoining MET from charging and collecting accessorial fees,” offering that, if CVAG refused to pay for such services, MET could bring a civil action to recover “any valid charges.”³

In characterizing CVAG’s position, the Board observed that “CVAG states that it has offered, *and remains willing to pay*, \$10,000 per train as a form of security” for the provision

² June 12 Decision at 7.

³ Id. at 6.

of MET unit train switching.⁴ The quoted passage is based on the Verified Statement of CVAG's President, Paul Konzen ("V.S. Konzen") submitted in support of CVAG's Application. Mr. Konzen states: "CVAG remains willing to pay MET \$10,000 per train as a form of security under protest, and without waiver of its objection to the charges and underlying tariff terms"⁵

Reflecting its relevance to the Board's decision, CVAG's stated willingness to pay a \$10,000 per train security deposit is discussed again in a Board decision served July 25, 2018 (the "July 25 Decision") denying MET's motion to dismiss CVAG's complaint, and establishing a procedural schedule to govern the complaint proceeding going forward.⁶ At no point has CVAG sought to correct the Board by advising that it was not, in fact, willing to pay a per-train security, or, for that matter, that CVAG would withhold all payment for MET's switching services (as it has been doing since June 12).

MET promptly lifted its service, interchange and prepayment restrictions. Unit trains in configurations that CVAG's customers preferred to ship have resumed. On the very same day as that decision was served, counsel for MET contacted CVAG's regulatory counsel to discuss the decision, advise of MET's intent to lift the complained-of restrictions, and to inquire about CVAG's plans to pay for switching services going forward. CVAG's regulatory counsel indicated that he believed that payment of any invoices for switching services was unlikely.

In observance of the Board's injunction, MET has provided switching services for six unit trains destined to CVAG-Modesto since the June 12 Decision. In each case, MET has tendered a bill to CVAG for MET's handling of each unit train. Four of the six invoices are past

⁴ Id. at 3 (emphasis added).

⁵ V.S. Konzen at ¶82.

⁶ July 25 Decision at 3.

due, and, in every instance, CVAG has objected to the charges and refused to pay. Given CVAG's stance, MET expects CVAG to refuse near-due and future unit train switching invoices as well. Confronted with CVAG's written refusals to pay, and facing with what it regarded as a Board-issued mandate to continue providing switching services, MET requested on July 18, 2018, that CVAG supply a pre-train payment of \$10,000 for unit train switching in keeping with CVAG's prior security deposit offer.⁷

On July 20, 2018, CVAG's regulatory counsel wrote to MET's regulatory counsel formally rejecting MET's \$10,000 security request, and construing (incorrectly) MET's request as an "implicit threat" to withhold service if refused. CVAG has not paid a dime of accessorial charges to MET since the Board's June 12 Decision, and it has advised MET that the short line "is in no position to now request CVAG to revive" CVAG's per-train payment proposal.⁸ CVAG's steadfast refusal to pay anything for MET's switching services conflicts with Mr. Konzen's statement that "CVAG . . . will pay all valid accessorial charges that are reasonable and properly applied."⁹ Under the circumstances, MET has little choice, absent further Board action, but to extend potentially millions of dollars in credit to CVAG for accessorial charges during the pendency of this proceeding.¹⁰

As previously indicated, CVAG and its customer Gavilon Ingredients, LLC ("Gavilon") reached out to MET following the Board's June 12 Decision, 2018, expressing Gavilon's desire to ship a unit train quantity of cotton seed to Modesto for unloading on the

⁷ See Exhibit A.

⁸ Letter from Peter Pfohl to Robert Wimbish, July 20, 2018 at 2 (attached as Exhibit B).

⁹ V.S. Konzen at ¶93.

¹⁰ The Board has advised the parties that MET could seek to recover unpaid "valid charges" by way of civil litigation. As a practical matter, collection of any such charges by way of a civil action is unlikely pending the outcome of this proceeding.

Transload Tracks. MET was inclined to instruct CVAG that MET was unwilling to accept unit trains destined to the Transload Tracks because – (a) the vast majority of such shipments have been handled in carload (non-unit train) quantities; and (b) the capacity limitations of the transload tracks means that MET must provide extensive switching, and hold the majority of the train (roughly 75 cars at a time) on MET yard tracks.¹¹ Yet, in view of the potentially sweeping language of the injunction set forth in the Board’s June 12 Decision (which did not distinguish between unit train service to the Loop Track and the Transload Tracks), MET reluctantly agreed to accept the unit train cotton seed shipment.¹² MET advised CVAG and Gavilon that switching for such a unit train would be considerable, as would be the switching charges. Gavilon and CVAG ignored MET’s position and the estimate of charges, responding only that Gavilon had arranged to ship a unit cotton seed train to CVAG-Modesto.

MET received Gavilon’s cotton seed unit train shipment in interchange in July. Following extensive switching and car storage to facilitate unloading MET reassembled and returned empty the unit train in interchange to BNSF Railway Company (“BNSF”). In turn, MET tendered an invoice to CVAG for the accessorial charges associated with MET’s handling of the cotton seed unit train. To date, MET has received no payment and CVAG has expressly objected to the invoice.

¹¹ Because Gavilon has ordered unit train service, MET understands that it will take delivery of the train from MET’s line haul connection as such, and that MET will need to retain unloaded car blocks on the premises (rather than return blocks incrementally back to MET’s line haul partner as those blocks are released empty) until the entire shipment is unloaded, so that the unit train, now empty, can be returned in interchange to MET’s line haul connection intact.

¹² See June 20, 2018 email to CVAG and Gavilon, attached hereto as Exhibit C.

ARGUMENT

A. CVAG's withdrawal of its offer of \$10,000 per train security is a material changed circumstance warranting Board reconsideration of, and modification to, its injunctive order.

Under 49 C.F.R. § 1152.25(e)(4), the Board may reopen a decision if the petitioner adequately details the respects in which reopening is warranted to address material error, new evidence, or substantially changed circumstances.¹³ The alleged ground for reopening must be sufficient to convince the Board that it would lead the agency to alter its prior action materially. E.g., Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017).¹⁴

CVAG's unwillingness to pay \$10,000 per train security amounts to a materially changed, and highly relevant, circumstance bearing upon the Board's June 12 Decision, and upon the respective position of the parties going forward. The Board's injunction turns upon recognition of CVAG's offer (and ability) to pay security in lieu of full payment of estimated charges. MET respectfully submits that, in view of this changed circumstance, the June 12 Decision should be modified either to permit MET to require prepayment of estimated charges

¹³ 49 C.F.R. § 1152.25(e)(4).

¹⁴ See also Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc., Docket No. FD 35110 (STB served Jun. 22, 2011), slip op. at 4, n.11 (citing Pioneer Indus. Ry. – Alternative Rail Serv. – Cent. Ill. R.R., FD 34917, slip op. at 8 (STB served Jan. 12, 2007) (reopening granted after the only shipper on a rail line changed position and opposed the discontinuance of rail service, materially affecting the Board's analysis)); Gauley River Railroad, LLC – Abandonment and Discontinuance of Service – In Webster and Nicholas Counties, WV, Docket No. AB-559 (Sub-No. 1X), et al. (STB served June 23, 200) (abandonment and discontinuance of service exemption proceeding reopened, and authorized, due in part to a shipper's decision, following denial of the abandonment petition, to terminate subsidy payments that had factored into the Board's previous abandonment merits analysis).

or, the alternative, to hold CVAG to its commitment to supply a \$10,000 per-train security payment for unit trains that would require MET-supplied switching to facilitate unloading.

The Board's June 12 Decision enjoining MET from withholding service absent prepayment of estimated switching charges was primarily based on four considerations: (1) the lack of any past payment issues with CVAG; (2) perceived irreparable financial harm to CVAG if it were forced to continue to pay estimated switching charges in full in advance of service; (3) the harm to CVAG, its customers, and local dairy farms resulting from a suspension or restriction of unit train service as a consequence of non-payment; and (4) the perception that MET would not suffer substantial harm if barred from requiring switching charges prepayment due to the availability of both partial payment under CVAG's per-train security payment proposal and MET's ability to pursue a civil collection action for unpaid amounts beyond the security payment. The Board's decision reflects an expectation that MET, now enjoined, would return to a rail service *status quo ante*, and that CVAG would ensure at least partial payment to MET via the previously-offered security arrangement, while encouraging a negotiated outcome.

There is now a record of CVAG non-payment. In fact, before this proceeding was initiated and before MET instituted a prepayment requirement, CVAG had refused to pay invoices for switching. In response to the Board's injunction, MET resumed full unit train service to CVAG without seeking any form of prepayment, invoicing CVAG for services after the fact. To date, CVAG has paid none of the invoices – of which four invoices are currently delinquent. MET is being forced to provide rail services to CVAG on extended credit, an arrangement that is thoroughly at odds with precedent.

In an average year, CVAG will receive and unload approximately 55 unit trains, each one requiring a certain amount of MET-supplied switching (and also resulting in incurred

demurrage in some cases) to facilitate unloading. Assuming that the average “valid” combined switching and demurrage charges for each unit train were \$10,000 (and, under MET’s tariffs, the average charges would be significantly higher than that), then CVAG would stand to incur roughly \$550,000 in annual switching charges. If this proceeding were to run its full course, necessitating a final Board decision on CVAG’s complaint (presumably a year or more hence), and assuming that CVAG were permitted to evade payment of any kind in the interim, then the accumulated total switching charge arrearages due to MET could approach \$1 million, plus interest. Would CVAG be willing and able to pay such arrearages, and could it guarantee the same? On the other hand, it is possible, given the Board-observed acrimony and CVAG’s recent renegeing on its security offer, that CVAG would walk away from its obligations through dissolution, bankruptcy, or similar debt evasion technique.

CVAG has characterized itself as a business running on tight margins, suggesting that it has limited resources and restricted wherewithal to pay to railroad accessorial services beyond \$10,000 per train.¹⁵ It is bad enough that MET faces considerable financial risk that CVAG will be unable to cover its future liability for unpaid switching services charges. But worse, CVAG is, in MET’s view, currently a holdover tenant/licensee on the Loop Track and Transload Tracks. As matters now stand, CVAG is paying *nothing* to MET for CVAG’s possession and use of these facilities, and, in fact, has not paid any rent since January 2018. Moreover, CVAG has refused to pay rent for its ongoing use of MET’s facilities into escrow pending resolution of the parties’ dispute. While the rental issue is admittedly a matter for the

¹⁵ See, e.g., V.S. Konzen at ¶96 (“The unprecedented charges sought by MET meet or exceed what CVAG receives from its customers for its unloading services at the Modesto Facility. The transload business operates on a wire-thin level of cost margins, hence the need for large volumes of business for survival and possible success”).

California court to resolve, the switching charge issue is for the Board. But the combination of factors reinforces the possibility that, once the litigation dust has settled, CVAG will owe large amounts of money to MET (in unpaid rent and switching charges) that CVAG has made inadequate arrangements to set aside and cannot pay.

Such a prospect of cumulative arrearages is a serious concern. This concern bears upon the Board's injunction analysis, and supports reconsideration of the Board's prepayment prohibition. At the very least, such consideration reinforces holding CVAG to its \$10,000 per train security payment proposal.

While CVAG has built a track record of non-payment and is a considerable credit risk, it cannot seriously claim that payment of the requested \$10,000 per-train security (that it had offered of its own volition prior to the issuance of the June 12 Decision) subjects it to substantial harm. MET's accessorial charges for unit trains are, in general, significantly higher than the \$10,000 security, and the June 12 Decision seems only to presume financial harm associated with prepayment of these higher rates.¹⁶ In short, there is no evidence whatsoever to presume that holding CVAG to its security payment offer subjects CVAG to irreparable harm. CVAG would not have offered a \$10,000 per-train payment if doing so were financial suicide. Finally, if the Board were to grant CVAG a remedy at the end of this proceeding that resulted in average switching charges of less than \$10,000 then it appears that CVAG would have access to reparations for the overage.

¹⁶ Of course, the unproven (vaguely asserted) possibility that CVAG may not be able to afford to pay MET's switching rates does not render those rates unlawful, and it is troubling that if the rates and MET's switching charge calculations are found not to be unreasonable, it appears that CVAG's argument portends non-payment of arrearages.

The principal harm upon which the Board focused was the injury CVAG and its customers arguably had experienced as a result of the suspension of full unit train service to CVAG-Modesto. But such service has been restored. Moreover, MET does not intend to disrupt the current service situation absent additional Board guidance.¹⁷ Accordingly, there is no ongoing or threatened service-related injury to CVAG, its customers, or to its customers' customers. The *status quo ante* service arrangement for the Loop Track commodities has been restored, albeit at the sole expense of MET.

These changed circumstances bear on the Board's balance-of-interest analysis relative to MET. In addressing MET's interests as part of the injunction analysis, the June 12 Decision assumed modest, if any, harm to MET for two reasons. First, the Board appears to have expected that MET could at least resort to CVAG's per train security payment, a factor that the Board has twice cited to in its decisions. Second, in reinforcing the proposition of collecting a security payment, the Board has made clear that it was "not enjoining MET from charging and collecting accessorial fees."¹⁸ The latest developments, however, undercut the Board's harms analysis. It is now clear that CVAG's rigid no-payment and no-security stance means that MET will be irreparably harmed by being required to provide switching services at no charge to CVAG during the pendency of this case (without any assurance that MET will be made whole thereafter). Particularly where it is far from clear that CVAG would make good on any – much less all – of the switching charges due to MET for the services that the Board ordered it to resume, the harm to MET in being forced to extend 100% credit to CVAG is substantial.

¹⁷ MET reserves the right to revisit this issue with the Board, or it may challenge the lawfulness of the Board's injunction if it becomes clear that MET is expected for the duration of this proceeding to provide services to CVAG with no security or assurance of present or future payment.

¹⁸ June 12 Decision at 6.

The June 12 Decision establishes that MET is permitted to “collect reasonable accessorial fees for the services it provides.”¹⁹ The Board has temporarily barred MET from requiring prepayment (or, more particularly prepayment at the levels set forth in MET’s accessorial services tariffs), but the June 12 Decision does not categorically bar prepayment of service charges. Instead that decision contemplates the restoration of unit services in exchange for CVAG honoring its commitment to a security payment. Indeed, prohibiting MET from seeking any prepayment, regardless of computation or amount, would be contrary to law,²⁰ and thus cannot be the thrust of the June 12 Decision.

B. The Board should make clear that its injunction was not intended to force MET to accept unit trains destined to the Transload Tracks, where unit train service was not customary or practical.

The Board may clarify elements of a prior decision “whenever there appears here appears to be a need for a more complete explanation of the action taken therein.”²¹ The June 12

¹⁹ Id at 7 (emphasis added).

²⁰ See, e.g., Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging, Docket No. EP 346 (Sub-No. 14A) (I.C.C. served June 13, 1989) (“G&T Terminal”); Sample v. Atchison, Top. & S.F. Ry. Co., 139 I.C.C. 324, 333 (1928) (cited in Ill. Cent. Gulf R. Co. – Security Deposits, 358 I.C.C. 312, 319 (1978) (“Security Deposits”)); and N.Y. Bd. of Trade v. Dir. Gen., 59 I.C.C. 205, 209 (1920); and see, generally, discussion set forth at pages 18-20 of MET’s Verified Reply to Ex Parte Application for Section 11123(a) Service Order (filed May 8, 2018).

²¹ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Docket No. 32760, (STB served Dec. 31, 1996), slip op. at 4; see also E.I. DuPont de Nemours and Co. v. CSX Transportation, Inc., Docket No. STB 42099, 42100, 42101, 2 (STB served Jan. 22, 2008) (clarifying scope of relief granted in rate case as applicable to a per challenge, not per movement); FRVR Corporation – Exemption Acquisition and Operation – Certain Lines of Chicago and North Western Transportation Company, Docket No. FD 31205, 6 (Jan. 28, 1998) (clarifying scope of labor conditions imposed); 1411 Corporation – Abandonment Exemption – In Lancaster County, PA, Docket No. AB-581X, 4 (clarification appropriate when scope of relief is indefinite with regard to key terms); CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway

Decision made no distinction between MET unit train switching for Loop Track-destined commodities, where the parties acknowledge that unit train-sized shipments have been customary, and the same services for commodities destined to the Transload Track, where unit train service is not customary. If the June 12 Decision was intended to restore the rail service *status quo ante*, then MET respectfully submits that the broad scope of its injunction could be read unintentionally to have deprived MET from reasonable discretion to control the use of its assets and set maximum per-shipment sizes for the Transload Tracks. To that end, MET asks the Board to clarify that its injunction was not intended to force MET to accept unit train shipments to the Transload Tracks.

The unloading capacity of the Transload Tracks is now, and has always been, roughly 25 to 40 cars (total) at a time.²² These tracks were never intended to be used for unit train unloading. And while CVAG has used those tracks over time to unload thousands of railcars delivered in carload (non-unit train service), MET is aware of only three instances, each involving recent cotton seed shipments, where CVAG and its agricultural shipping customers have demanded that MET accommodate unit train service to the Transload Tracks for commodities that are unsuited for unloading on the Loop Tracks. CVAG, of course, is aware of the capacity limitations of the Transload Tracks, and yet it appears intent in recent months to depart from past practice and encourage its customers to avail themselves of the economies of unit train service, while expecting CVAG to subsidize such economies by absorbing the

Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation, Docket No. FD 33388, 8 (STB served October 19, 1998).

²² While MET and CVAG are locked in a dispute involving, in part, changes to the way commodities are unloaded on the Loop Track (and, by extension, the practical capacity of the Loop Track); that dispute has had no bearing on the capacity of the Transload Tracks or the way that MET serves those tracks.

substantial switching and car holding that MET must undertake to accommodate such shipments. Not only do unit trains destined to the Transload Tracks consume considerable handling, but they 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.

MET respectfully submits that no rail carrier should be required to provide unit train service to a destination customer whose trackage clearly is not designed to receive and process shipments of that size. 49 U.S.C. § 10101 provides that a rail common carrier such as MET must provide service upon reasonable request. And if that statutory mandate extends to the provision of accessorial services – MET questions whether it does – it is certainly unreasonable for a shipper to demand that a delivering railroad handle unit train shipments that the receiver has only a quarter of the track capacity to accept and unload.

MET is willing to handle shipments destined to the Transload Tracks in 25-car blocks (with the expectation, of course, that neither CVAG nor its customers will arrange for shipment intervals that flood MET's yard tracks pending the unloading of previously-delivered carload blocks), but it should not be required to subsidize, or even allow, unit train shipments destined to the Transload Tracks simply because CVAG's customers find unit train line haul service less costly. And if the Board's June 12 Decision was intended to restore *status quo ante* service – requiring MET to accept unit trains to the Transload Tracks does not approximate historical service levels. MET is inclined to restore limits on Transload Tracks shipments consistent with the capacity of that track, but the Board's injunction could be read to hold MET to an unreasonable service requirement mandating the provision of unit train service to this CVAG-operated facility – essentially a windfall to CVAG and its customers. For these reasons, MET urges the Board to clarify that it is entitled to impose maximum carload restrictions on

commodities destined for unloading on the Transload Tracks in keeping with the capacity of that unloading facility.

EXPEDITED CONSIDERATION

CVAG's conduct is not in keeping with the objectives of the June 12 Decision or with the Board's expectations of the parties. CVAG's maneuvers are financially harmful to MET. Whether the Board sanctions CVAG's post June 12 conduct and will take corrective measures to hold CVAG to its commitments will have a direct and meaningful impact upon MET's financial position and will shape the scope of MET's exposure in the event that CVAG is required to make switching services payments but is unable at such point to do so.

CVAG is incurring substantial arrearages regardless of the switching charges method and rate, subjecting CVAG to ongoing, and potentially irreparable injury. Requiring MET to forego switching services income, particularly without any assurance that CVAG will be able to pay those charges at the end of a prolonged collection action, is neither fair nor in keeping with applicable law. Accordingly, MET urges expedited consideration of this Petition and prompt issuance of a decision.

CONCLUSION

The June 12 Decision (1) mandates the restoration of a certain level of local rail/switching service that had been disrupted as a result of the underlying payment dispute, and (2) ensures that MET, in resuming such service, does not have to do so for free. MET has complied with the Board's order, and unit trains are moving without restriction to the Loop Track in the ordinary course. CVAG, on the other hand, has refused to make any payment for CVAG's switching services, and has declined MET's request to institute a \$10,000 per train security in keeping with its offer.

In reneging on its security offer and in withholding all payment to MET, CVAG has acted in bad faith and in contravention of the Board's expectations of the parties. This change in circumstances is directly relevant to the upcoming mediation. It places the parties on a much different footing going forward, affording CVAG leverage that the Board had not intended, and placing MET at risk that it will never fully recover the switching amounts validly charged. Moreover, because CVAG is paying nothing for either its use of MET's facilities (the Loop Track and the Transload Tracks) or for MET-supplied switching, MET is currently extending potentially millions of dollars in credit to CVAG. The sheer magnitude of the debt being incurred raises serious questions concerning whether CVAG will be able to pay the accumulated amounts that ultimately will be owed to MET when the time comes – yet another factor that will likely bear on mediation. CVAG's creditworthiness is now at issue.

For all of these reasons, the Board should reopen its June 12 Decision and, modify its directions to the parties contained therein either to allow MET to require prepayment of estimated switching and demurrage charges as a precondition to unit train switching, or, in the alternative, to hold CVAG to its commitment to pay a \$10,000 per train security for such services. And the Board should clarify that, in keeping with longstanding operating practice, MET may limit shipments destined to the Transload Tracks to carload quantities that CVAG can accept and unload without the provision of accessorial switching.

Respectfully submitted,

By: R. A. Wimbish

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**ATTORNEYS FOR MODESTO AND
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Dated: August 14, 2018

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MODESTO AND EMPIRE TRACTION COMPANY

EXHIBIT LIST

- A. Modesto & Empire Traction Company Letter to Central Valley Ag Grinding Dated July 18, 2018
- B. Letter from Peter Pfohl to Robert Wimbish Dated July 20, 2018
- C. Email to Central Valley AG Grinding and Gavilon Ingredients, LLC Dated June 20, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

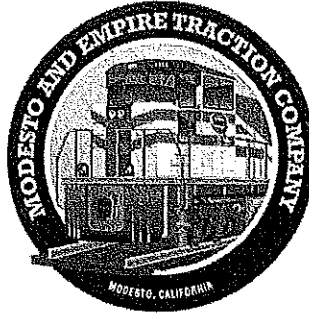
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EXHIBIT A

**Modesto & Empire Traction Company Letter to Central Valley Ag Grinding
Dated July 18, 2018**



Ph: 209-524-4631 Fax: 209-529-0336
530 11th Street P.O. Box 3106 Modesto, CA 95353

July 18, 2018

Central Valley Ag Grinding
5509 Langworth Drive
Oakdale, CA 95361

I am writing you in response to the Surface Transportation Board (STB), filing date June 12, 2018. In the decision, paragraph five (5) under the "background" section, CVAG agrees to and is willing to pay a security deposit of \$10,000 for each train.

There are currently two trains enroute; one on the Union Pacific, GMP2MV 15, 100 car Canola train. The second train to be interchanged with BNSF Railway, G VBTMOD3 25, for furtherance to M&ET. Per CVAG's willingness to pay \$10,000 security deposit per train, M&ET hereby requests a security deposit for the each train listed above.

As you are aware, M&ET has processed three trains where switching services were requested by CVAG and performed by M&ET. CVAG has responded, via email, to invoice 84113, in the amount of \$6,250 in which CVAG is not willing to pay. M&ET has not received response for invoice 84119, for the amount of \$28,250. In addition, CVAG completed a third train, cotton seed train, which M&ET will send a switching invoice on 7/19/2018 for switching services performed by M&ET.

I appreciate your response to this request.

Regards,

Tracy Alves
VP Marketing/ Sales
Modesto & Empire Traction Company, M&ET
209-557-2705

BEFORE THE
SURFACE TRANSPORTATION BOARD

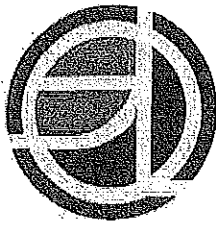
Docket No. NOR 42159

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

**VERIFIED PETITION TO REOPEN AND MODIFY DECISION AND
MOTION FOR CLARIFICATION**

EXHIBIT B

**Letter from Peter Pfohl to Robert Wimbish
Dated July 20, 2018**



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

July 20, 2018

Via Email and First Class Mail

Mr. Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606

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

Dear Rob:

Central Valley Ag Grinding, Inc. ("CVAG") has asked us to respond on its behalf to the letter from Modesto and Empire Traction Company ("MET") dated July 18, 2018 since it addresses the Board decision served June 12, 2018 ("Decision").

MET's letter "requests" that CVAG pay a security deposit of \$10,000 for each of two trains, GMP2VV15 and GVBTMOD325. MET asserts its request is "in response to" the Board's Decision, particularly "paragraph five (5) under the 'background' section, [wherein] CVAG agrees to and is willing to pay a security deposit of \$10,000 for each train."

There is no basis for MET's request, which misstates and mischaracterizes the facts before the Board, seeks to impose conditions that violate the preliminary injunction that the Board imposed in its Decision, and is otherwise unjustified and unwarranted.

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 service to CVAG "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.

Having rejected and derided CVAG's earlier interim compromise proposal and refused to engage in meaningful discussions to help keep the dairy feed trains moving; asserted repeatedly that CVAG had no basis for seeking relief; blocked and shut down rail

Robert A. Wimbish, Esq.
July 20, 2018
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service and disrupted CVAG's regular operations; and forced CVAG to seek, successfully, injunctive relief at the STB at substantial expense, MET is in no position to now request CVAG to revive a proposal that MET repeatedly dismissed. In fact, at the time MET rejected CVAG's proposal, we specifically discussed 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 highly inappropriate for MET to attempt to turn back the clock and ask CVAG to revive offers that MET emphatically rejected.

Second, the injunction does not allow MET to seek to impose such additional burdens on CVAG. As the Board Decision found, MET is not substantially harmed in the absence of such payments, and if MET does, somehow, ultimately convince the Board that its charges and actions are reasonable, then MET will be in a position to seek recovery against CVAG at that time. But by seeking to impose a payment obligation that would attach to each individual train before it will be delivered, MET's "security deposit" is nothing more than a thinly veiled prepayment demand that directly violates the Board's Decision.

Third, and perhaps most troubling, there is no factual foundation for MET's requested \$10,000 per train payments for the involved trains. CVAG understands that GMP2MV15 is a 78-car train that MET can deliver intact, without performing any MET accessorial services under MET Freight Tariff 8000-B. Additionally, based on recent MET invoicing, train GVBTMOD325 will incur far less than \$10,000 in MET asserted tariff charges. Yet, MET apparently still believes that its request is somehow justified. MET's "request" for \$20,000 in payment for these two trains, and the implied threat that delivery will be refused otherwise, directly violates the Board's injunction and is highly inappropriate.

While CVAG must decline MET's July 18, 2018 request under these circumstances, CVAG looks forward to engaging in reasonable discussions with MET on its services as part of the upcoming STB-sponsored mediation. Additionally, in further response to MET's letter, CVAG will continue to timely review and respond to MET's invoicing.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Pfohl", written over a horizontal line.

Peter A. Pfohl

cc: Jeff Robinson, CVAG

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EXHIBIT C

**Email to Central Valley AG Grinding and Gavilon Ingredients, LLC
Dated June 20, 2018**

From: Tracy Alves <TALVES@METRR.COM>
Sent: Wednesday, June 20, 2018 8:13 PM
To: Jeff Robinson
Cc: Tracy Alves; Dencklau, Corey (Corey.Dencklau@gavilon.com)
Subject: Cotton Seed Unit-Train- CVAG request

Good afternoon Jeff,

Gavilon has contacted MET inquiring about a possible unit train shipment of cotton seed to CVAG/Modesto. As a reminder, such inquiries should be made by CVAG, not Gavilon, as applicable switching and demurrage charges would be billed to CVAG and would be CVAG's responsibility.

As you know, cotton seed shipments to CVAG/Modesto typically have been transported in non-unit train (carload) quantities. Only recently (on two occasions) has MET made an exception to accommodate a cotton seed unit train. We strongly recommend, given a number of logistical considerations and the time and expense of switching and demurrage for shipments like this one that would not be unloaded from the loop track, that Gavilon and CVAG arrange for carload (manifest) shipments of cotton seed in keeping with past practice.

MET reluctantly will agree to accept in interchange a unit train shipment of cotton seed destined to CVAG/Modesto. As you know, such a unit train shipment depends upon MET having sufficient yard track capacity to handle the unit train excess (in this case, holding roughly 75 cars at any time) on MET yard tracks. If at the time of expected delivery MET lacks yard track capacity to handle the unit train excess, we will advise our line haul partner not to attempt interchange the cotton seed unit train until sufficient track capacity becomes available.

We will take all appropriate measures in good faith to accommodate a cotton seed unit train, even though such shipments impose unfair and unusual demands upon MET track capacity and switching resources, particularly during a busy shipping season for many of our customers, including for shipments to and from the loop track. Accordingly, please make appropriate steps with loop track shipments to ensure that there is no canola/DDG/Gluten unit train backlog that would contribute to MET capacity shortages. Should there be two loop track unit trains already on MET (including the loop track) at the estimated time of a cotton seed unit train delivery in interchange, MET is likely to require that interchange of the cotton seed unit train be postponed to prevent against traffic gridlock on our railroad.

Also, although we will accept the interchange of this train (barring a track capacity problem) and will provide the intra-terminal switching necessary to permit CVAG to unload the train in sections, please keep in mind that the switching and demurrage for this train will be considerable, and so, also, would be the switching and demurrage charges. Based upon past experience, we estimate that the combined switching and demurrage charges for this train would be in the vicinity of \$45,000 under applicable tariffs. MET cannot require prepayment of its switching charges, but it is entitled to bill for the switching services actually rendered. MET will invoice CVAG (and not Gavilon) once all switching services have been tendered and demurrage has been incurred, and we will expect payment in accordance with our invoice terms.

As you know, CVAG's right to continued possession of the transload is disputed and the subject of pending legal proceedings. The outcome of these proceedings may impact CVAG's ability to store product in the transload on behalf of shippers.

Regards,

Tracy Alves | Modesto and Empire M&ET | VP Rail Sales and Marketing | 209-557-2705 (office) | | 209-281-7948 .
(mobile)

talves@metrr.com

530 11th Street

Modesto, CA 95353

VERIFICATION

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

I am the President and Chief Executive Officer of Modesto And Empire Traction Company. I have read the forgoing Verified Petition to Reopen and Modify Decision And Motion for Clarification and know that the facts asserted therein are true as stated.

Executed on August 14, 2018



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of August, 2018, he caused a true and correct copy of the foregoing **Verified Petition to Reopen and Motion for Clarification** to be electronically filed with the Surface Transportation Board and served up on the following parties via email and deposit in the United States Mail chute located at 29 North Wacker Drive, Chicago, Illinois 60606, with proper postage prepaid:

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Party of Record

By: 
Robert A. Wimbish
**ATTORNEY FOR MODESTO AND
EMPIRE TRACTION COMPANY**