

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42159

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

v.

MODESTO AND EMPIRE TRACTION COMPANY

Digest:<sup>1</sup> This decision prohibits Modesto and Empire Traction Company from, among other things, requiring prepayment for unit train switching and interchange services for rail traffic destined to the Modesto facility of Central Valley Ag Grinding Inc. and Central Valley Ag Transport Inc. during the pendency of the complaint proceeding.

Decided: June 12, 2018

On May 1, 2018, Central Valley Ag Grinding Inc. and Central Valley Ag Transport Inc. (collectively, CVAG) filed an unreasonable practice complaint against Modesto and Empire Traction Company (MET). CVAG seeks a determination from the Board that certain tariff terms and practices of MET constitute a violation of its common carrier service obligations and an unreasonable and unlawful practice in violation of 49 U.S.C. §§ 11101 and 10702(2). CVAG also seeks a Board determination that MET has violated its obligations to interchange traffic and engage in continuous carriage of freight under 49 U.S.C. § 10744. In addition, CVAG seeks injunctive relief and monetary damages under 49 U.S.C. § 11704(b).

With its complaint, CVAG filed a petition for preliminary injunction under 49 U.S.C. § 1321(b)(4), requesting that the Board enjoin MET from implementing “prepay” demands and order MET to reasonably interchange traffic and to provide otherwise reasonable service. CVAG also filed an application for an emergency service order under 49 U.S.C. § 11123, requesting that the Board immediately order MET to restore interchange service to connecting carriers for service to CVAG’s Modesto facility, free of prepay demands.<sup>2</sup> Lastly, CVAG

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> On May 8, 2018, MET filed a reply to CVAG’s emergency service order request. On May 11, 2018, CVAG filed a rebuttal in response to MET’s reply.

requests that the Board initiate a separate formal investigation of regional service disruptions, pursuant to 49 U.S.C. § 11701. CVAG requests that the emergency service order and preliminary injunction remain in effect during the pendency of the complaint proceeding.<sup>3</sup>

As discussed below, the Board will grant CVAG's petition to enjoin MET from requiring prepayment as a condition for interchange and switching services and will direct MET 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. In light of the relief that will be granted through the preliminary injunction, the Board will dismiss CVAG's application for an emergency service order as moot.<sup>4</sup>

## BACKGROUND

CVAG is a full-service transloading company in Modesto, Cal., that receives by rail, stores, and transloads a variety of agricultural commodities, the vast majority of which are agricultural feed commodities destined for California dairy farmers. CVAG's Modesto facility is served exclusively by MET, a shortline common carrier that interchanges traffic of connecting Class I carriers, BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP), for delivery to the Modesto facility. MET also owns the industrial park where the Modesto facility is located and leases the property underlying the Modesto facility to CVAG.

CVAG states that, in 2009, MET constructed a 110-car loop track for the exclusive use of CVAG so that it could receive unit train shipments. (CVAG Pet. 15; V.S. Konzen ¶¶ 37-39.) According to CVAG, these improvements were made by MET in exchange for minimum volume requirements and rental payments from CVAG. (CVAG Pet. 15.) From June 2009 through February 2018, MET conducted all train activities in support of unloading unit trains for CVAG, including delivering and interchanging unit trains from BNSF and UP to CVAG, as well as cutting and reassembling certain unit trains before returning them to the Class I carriers. CVAG states that, during that time, no accessorial tariff charge assessments or prepayment demands were made for any of these services. (Id. at 15.)

CVAG claims that, in 2017, MET "began taking affirmative steps specifically designed to deprive CVAG of its ability" to remain at its Modesto facility. (CVAG Pet. 17.) In June 2017, CVAG exercised its option to extend its lease, but MET notified CVAG of its alleged default under the agreements governing the use of MET-owned property and advised CVAG that MET would not agree to an extension of CVAG's lease and licensing arrangements. MET states

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<sup>3</sup> On May 31, 2018, MET filed a motion to dismiss the complaint proceeding.

<sup>4</sup> CVAG's request for a formal Board investigation under § 11701 and MET's motion to dismiss the complaint proceeding will be addressed in future decisions.

that it did so out of concern for allegedly unsafe activities by CVAG on and around the Modesto facility track. The parties' lease and property rights dispute is currently pending before a California state court.<sup>5</sup> In that case, CVAG sought to enjoin MET from terminating rail service pending resolution of the parties' property rights dispute, but that request was dropped after MET provided CVAG written assurances that MET would not cease its services. (CVAG Pet. 8.)

CVAG states that, shortly thereafter, MET instituted a series of changes pertaining to service, access, and other tariff provisions and fees for CVAG's Modesto facility. In February 2018, MET informed CVAG that CVAG would have to perform its own train services in support of unit train unloading. (CVAG Pet. 18-19.) MET then restricted CVAG's access to the receiving loop tracks by placing restrictive "derails" on three tracks designated for CVAG's use in receiving trains and denied CVAG access to certain trackage used to support CVAG's unit train service. (*Id.* at 19-20.) These restrictions limited CVAG's unloading capacity and ability to receive unit trains without requiring additional switching services by MET. MET then imposed a series of new fees, including accessorial and demurrage fees, specific to CVAG's Modesto facility, and since March 2018 has required CVAG to prepay up to \$50,000 per train as a condition of interchange and switching services for unit trains exceeding specified car lengths. (CVAG Pet. 21-26; MET Reply 2-3, May 14, 2018.)

CVAG states that it has objected to and protested each invoice, payment, and prepay demand. In lieu of a full prepayment, CVAG states that it has offered, and remains willing to pay, \$10,000 per train as a form of security, but MET has repeatedly rejected this approach. In the absence of full prepayments by CVAG, MET has now ceased unit train delivery to CVAG for shipments exceeding specified train lengths. MET states that it remains willing to deliver shorter unit trains that CVAG can receive without requiring accessorial services by MET, thus eliminating the need for switching and related costs. (MET Reply 7, May 8, 2018.)

CVAG seeks a preliminary injunction from the Board, requesting that the Board enjoin MET from implementing its prepayment demands and from implementing and continuing programs to refuse CVAG reasonable service and interchange of longer unit trains with Class I carriers during the pendency of the complaint proceeding. CVAG asserts that it is likely to succeed on the merits because common carriers cannot refuse to provide service, refuse to interchange traffic with other carriers, or impose "unprecedented, targeted, and punitive prepay demands" that have no cost justification and are designed for an improper purpose. (CVAG Pet. 34.) CVAG also states that, because MET has ceased interchange and delivery of unit trains to the Modesto facility, CVAG, along with the California dairy industry and feed suppliers, will suffer irreparable harm. CVAG further argues that an injunction will not cause MET any

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<sup>5</sup> Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., No. 2028642 (Stanislaus Cty., Cal. Superior Ct. filed Jan. 19, 2018).

cognizable hardship and that the public interest is served by ensuring California dairy farmers access to nearby, vital livestock feed.

On May 14, 2018, MET filed its reply to CVAG's petition for injunctive relief. MET asserts that its accessorial charges are consistent with railroad industry practice and pricing, reflect per-car charges commonly found in other railroad's tariffs, and are appropriate where substantial demands are placed upon a short line carrier's resources. (MET Reply 11, May 14, 2018.) MET argues that CVAG has provided no evidence, particularly with regard to its financial position, to support its claim that it would suffer irreparable harm in the absence of an injunction. (*Id.* at 17-18.) MET asserts that it would be irreparably harmed by an injunction by being deprived of revenues associated with providing accessorial services. (*Id.* at 24-27.) Lastly, MET contends that an injunction would not advance the public interest. (*Id.* at 27-28.)<sup>6</sup>

For the reasons discussed below, CVAG's petition for a preliminary injunction, as described below, will be granted.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined; (2) it will suffer irreparable harm in the absence of a preliminary injunction; (3) other interested parties will not be substantially harmed by a preliminary injunction; and (4) the public interest supports the granting of the preliminary injunction. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours)*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). As discussed below, the criteria for an injunction have been met in this case.

*Success on the Merits.* Prepayment arrangements are not unreasonable per se;<sup>7</sup> however, the Board has found that, for a prepayment arrangement to be lawful, it "must also be reasonable and established at a level based on past payment performance, while at the same time avoiding an undue financial burden on the shipper." *R.R. Salvage & Restoration Inc.—Pet. for*

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<sup>6</sup> On May 16 and 21, 2018, CVAG and MET, respectively, filed surreplies, which, under 49 C.F.R. § 1104.13(c), are not permitted. However, in the interest of compiling a complete record, the Board will accept these filings.

<sup>7</sup> *See generally, Brampton Enters. v. Norfolk S. Ry.*, NOR 42118, slip op. at 5 (STB served Mar. 16, 2011) ("The practice of imposing security deposits to guarantee the payment of demurrage charges has not been found to be per se unreasonable under 49 U.S.C. § 10702(2).")

Investigation & for Emergency Relief Under 49 U.S.C 721(b)(4)—Sec. Deposit for Demurrage Charges, Mo. & N. Ark. RR., NOR 42107 (STB served June 30, 2008) (citing Rail General Exemption Auth.—Miscellaneous Agricultural Commodities—Pet. of G&T Term. Packaging Co., EP 346 (Sub-No. 14A) (ICC served June 13, 1989)).

Here, MET’s prepayment demands and conditions do not appear to be based on any past payment performance; the record contains no evidence that CVAG has a history of being delinquent in paying for services it receives. MET claims that its fees and prepayment arrangement are consistent with railroad industry practice and pricing. Even if this were the case, when viewed in a larger context, the implementation and timing of MET’s prepay arrangement raise questions. The parties are currently engaged in litigation before a state court, after MET refused to accept CVAG’s option to extend its lease. In the state court case, MET provided written assurances to CVAG that it had no intentions of interfering with interstate rail service to CVAG’s Modesto facility. Less than a week after it made this representation, however, MET initiated changes in CVAG’s services, limited CVAG’s access to tracks, and imposed new accessorial fees and prepayment requirements as a condition of switching services. In light of these circumstances, MET’s prepayment demands, as well as its refusals to provide adequate service and interchange, appear unreasonable.

Further, it appears that the prepayment arrangement would place an undue financial burden on CVAG. CVAG states that, for the past nine years, virtually all of the unit trains received at its Modesto facility have consisted of unit trains of 100 cars or more, per the governing UP and BNSF tariffs. CVAG asserts that agricultural feed commodities must be shipped in 90-to-110-car unit trains because of high volume demands, low margins, and the rate incentives provided for such service. CVAG states that, until this dispute arose, MET encouraged the delivery of these longer trains, imposing escalating minimum volume contractual requirements through lease amendments, with substantial penalties for delivery shortfalls. While MET states that it remains willing to deliver shorter unit trains that require no prepayment, CVAG states that train service in shorter, non-standard unit trains would impose substantially higher costs that would render the service uneconomical. Because of the prepayment requirement, which is up to \$50,000 per train, interchange of unit trains of 100 cars or more has ceased, significantly impacting CVAG’s operations at the Modesto facility.<sup>8</sup>

Thus, based on the limited filings thus far, the Board finds that CVAG has established a sufficient likelihood of prevailing in its challenge of MET’s prepayment demands.

*Irreparable Harm.* To show irreparable harm, the requesting party must demonstrate both the imminence and the irreparable nature of any purported harm. Although economic loss is not generally considered irreparable harm, where it “threatens the very existence of the

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<sup>8</sup> See CVAG Pet., V.S. Konzen ¶¶ 94-103; CVAG Pet., Ex. 7, Gavilon Ingredients, LLC Letter, Apr. 27, 2018.

movant's business," such a loss may be considered irreparable. Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

CVAG relies exclusively on MET's interchange and switching services and would be irreparably harmed by the loss of services that are currently being withheld by MET, absent prepayment. 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. (CVAG Pet., V.S. Konzen ¶¶ 12-14.) Absent prepayment, MET will not deliver those unit trains. (MET Reply 2, May 14, 2018.) CVAG states that it cannot afford to pay MET's demands, and MET, itself, has expressed uncertainty as to CVAG's ability to meet MET's demands. (MET Reply 3, May 11, 2018; MET Reply 20, May 8, 2018.) Moreover, while MET indicates its willingness to interchange and deliver traffic to CVAG in smaller carload quantities, moving shipments in manifest train service would involve substantially higher costs that would render the service uneconomical. (CVAG Pet., V.S. Konzen ¶ 91; see A.L. Gilbert, Co. Letter, June 1, 2018 (CVAG shipper stating that the only economically viable way to transport feed and feed ingredients to California is via unit trains, most of which necessarily consist of 100 or more cars).)

The harm to CVAG's operations is actual and imminent, as MET's prepayment demands have disrupted unit train service to CVAG's facility. Cf. Richard Best Transfer, Inc. v. Union Pac. R.R., NOR 42149 (STB served Dec. 22, 2016) (finding no actual or imminent harm when service remained the same after changes to the challenged tariff were imposed). MET has ceased unit train delivery to CVAG for shipments exceeding specified car lengths, issued an Open and Prepay Station List note reflecting its service restrictions, and informed UP and BNSF of these restrictions. In late April, a train en route to CVAG's Modesto facility was refused in interchange and held up for delivery for over two days by MET, because of MET's full prepayment demands.

The harm to CVAG's operations at its Modesto facility, which appears to be certain, threatens the existence of CVAG's operations. Therefore, the Board finds that CVAG has demonstrated that it would be irreparably harmed absent the injunctive relief it seeks here.

*Harm to MET.* The Board finds that MET would not be substantially harmed should it be enjoined from requiring prepayment as a condition of its interchange and switching services. Rather, the record shows that, for nine years, MET has provided CVAG interchange and switching services without charging CVAG, much less required prepayment. Enjoining MET from imposing prepay demands would not prevent MET from bringing a civil action to recover any valid charges. Moreover, the Board is not enjoining MET from charging and collecting accessorial fees; it is only enjoining the demand of prepayment as a condition of service and

directing MET to provide reasonable service and interchange.<sup>9</sup> Thus, MET may collect reasonable accessorial fees for the services it provides.

*Public Interest.* The public interest also warrants granting the preliminary injunction. MET's prepayment arrangement has resulted in uncertainty and service disruptions not only for the parties, but for shippers and dairies in the affected region that rely on the Modesto facility as a critical feed receiving facility. (See CVAG Pet., Ex. 1, W. United Dairymen Letter, Apr. 30, 2018 & Ex. 7, Gavilon Ingredients, LLC Letter, Apr. 27, 2018.) Thus, enjoining MET from requiring prepayment as a condition of service, and from refusing to provide reasonable service and interchange, would facilitate unit train delivery of feed supplies and eliminate the delays caused by MET's prepayment arrangement.

For these reasons, CVAG's petition for preliminary injunction will be granted. MET will be enjoined from requiring prepayment as a condition for interchange and switching services and will be 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.<sup>10</sup> CVAG's application for an emergency service order will be dismissed as moot, as the injunctive relief granted here effectively grants the same relief CVAG has sought through an emergency service order.

It is ordered:

1. MET is enjoined from requiring prepayment as a condition for its unit train switching and interchange services and is ordered 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, until further order of the Board.
2. CVAG's application for an emergency service order is dismissed as moot.
3. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.

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<sup>9</sup> Indeed, MET has acknowledged that it is ready and able to provide interchange and switching services to CVAG for unit trains but is willing to do so only upon prepayment by CVAG.

<sup>10</sup> CVAG also requests that the Board assign appropriate staff to provide oversight and ensure compliance with its orders. CVAG may reach out to the Board's Rail Customer and Public Assistance (RCPA) office should issues with compliance arise. RCPA staff can be reached at 202-245-0238 or [rca@stb.gov](mailto:rca@stb.gov).