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May 8, 2006

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

MAY 9 2006

Part of
Public Record

34870

Re: Finance Docket No. 34838, ~~PYCO Industries, Inc.~~ v. South Plains Switching, Ltd.
Co.

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Motion To Dismiss Complaint, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for South Plains
Switching, Ltd. Co.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC.,

Complainant,

v.

SOUTH PLAINS SWITCHING, LTD. CO.,

Defendant.

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FINANCE DOCKET
NO. 34838

34870

ENTERED
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MOTION TO DISMISS COMPLAINT

SOUTH PLAINS SWITCHING, LTD. CO.
10917 East FM2150, East CR78
Slaton, TX 79364

Defendant

THOMAS F. McFARLAND
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Attorney for Defendant

DATE FILED: May 9, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC.,	)	
	)	
Complainant,	)	FINANCE DOCKET
v.	)	NO. 34838
	)	34870
SOUTH PLAINS SWITCHING, LTD. CO.,	)	
	)	
Defendant.	)	

MOTION TO DISMISS COMPLAINT

Pursuant to 49 C.F.R. § 1111.5, SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby moves for dismissal of the Complaint filed by PYCO Industries, Inc. (PYCO) on April 19, 2006. SAW submits the following as grounds for this Motion.

I. DISMISSAL IS REQUIRED BECAUSE THE BOARD DOES NOT HAVE AUTHORITY TO REGULATE THE TRANSPORTATION INVOLVED IN THE COMPLAINT

PYCO's Complaint is required to be dismissed because rail transportation of the commodities involved in the Complaint has been exempted from the Board's regulatory authority. According to PYCO's Complaint (at 3, Section 3[c]), PYCO ships whole cottonseed, cottonseed hulls and cotton linters via SAW's rail service at Lubbock, TX. Rail transportation of those commodities has been exempted from the Board's regulatory authority under subtitle IV of Title 49. *See* 49 C.F.R. § 1039.10 (STCC Nos. 01-14110; 20-914-25; 20-915); *Rail General Exemption Authority*, 367 I.C.C. 298, 310-312 (1983). Subtitle IV of Title 49 encompasses all statutes alleged to have been violated by SAW.

Where, as here, rail transportation of a commodity has been exempted from the Board's regulatory authority, the Board cannot entertain a complaint alleging that rail transportation of that commodity violates any statutory provision of Subtitle IV of Title 49, which includes all statutes alleged to have been violated in PYCO's Complaint. *Pejepscot Industrial Park, Inc. -- Pet. for Declar. Order*, 2003 STB LEXIS 253 at *12-13 (Finance Docket No. 33989, served May 15, 2003) (... even if a carrier's conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force ...); *Accord: Consolidated Rail Corp. -- Aband. Exempt. -- in Erie County, NY*, embracing *Buffalo Crushed Stone, Inc. v. R.J. Corman R. Co.*, 1998 STB LEXIS 777, slip opinion at 9 (Docket No. 42028, served Oct. 7, 1998); and *Consolidated Rail Corp. -- Declar. Order - Exempt.*, 1 I.C.C.2d 895, 900 (1986), *aff'd. sub nom. G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3rd Cir. 1987).

The exemption from regulation for rail transportation of cottonseeds, cottonseed hulls and cotton linters thus precludes a finding that SAW's transportation or failure to transport those commodities violated any provision of subtitle IV of Title 49. It follows that PYCO's Complaint alleging violations of statutes in subtitle IV, Title 49, in regard to SAW's transportation of those commodities, is required to be dismissed.

II. DISMISSAL FOR OTHER LEGAL DEFECTS

In its Answer to Complaint being filed concurrently with this Motion to Dismiss, SAW has denied that there is a factual basis for PYCO's claims that SAW violated specified statutes. As set out in this Motion to Dismiss, there is no legal basis for PYCO's claims of statutory violation, even assuming for the sake of argument that a factual basis exists. Moreover, there is

no legal basis for PYCO's claims for relief. Consequently, PYCO's Complaint is required to be dismissed.

A. Section 4 Should Be Dismissed

SAW hereby moves to dismiss the allegations of Sections 4(a) and (c) through (i) on the ground that as a matter of law, such allegations, if proven, would not constitute violations of 49 U.S.C. § 11101(a). SAW hereby moves to dismiss the allegations in Section 4(b) on the ground that they are legally insufficient to establish a cause of action for violation of 49 U.S.C. § 11101(a).

As here pertinent, it is provided in 49 U.S.C. § 11101(a), as follows:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request . . .

The provisions of 49 U.S.C. § 11101(a) are violated when a rail carrier either fails to provide, or inadequately provides, reasonably requested rail service. There is no contention that SAW failed to provide any service at all to PYCO. Instead, the contention is that the service provided by SAW to PYCO was inadequate in the circumstances.

Section 4(a) should be dismissed because a failure to furnish railcars does not violate 49 U.S.C. § 11101(a). Section 11101(a) relates to providing rail service, not to providing railcars. *See Winnebago Farmers Elevator Co. v. Chicago & NW*, 354 I.C.C. 859, 871-872 (1978). Even if § 11101(a) related to railcar supply, BNSF, rather than SAW, has the obligation to supply railcars to PYCO. Even if SAW had an obligation to supply railcars, the allegations of Section 4(a) are too broad and indefinite to establish a violation of a car supply obligation. Section 4(a) does not allege the essential elements of a violation of a car supply obligation, i.e., that PYCO

ordered cars of a specific type from SAW to be delivered at a specific PYCO plant at Lubbock, and the extent to which SAW allegedly failed to provide the requested cars.

Sections 4(c) through (i) should be dismissed because the actions alleged in those subsections do not constitute violations of 49 U.S.C. § 11101(a). For example, a rail carrier can threaten any manner of action in discussions with a shipper, as alleged in Section 4(c), but § 11101(a) would not be violated as a result of any such threat unless reasonably requested rail service were to be refused or to be provided inadequately as a result of the threat. In other words, the actions alleged in Sections 4(c) through (i) as a matter of law do not violate § 11101(a), as alleged.

Thus, it does not constitute a violation of 49 U.S.C. § 11101(a) to threaten an embargo (Section 4[d]);^{1/} nor to threaten physical violence (Section 4[e]); nor to cut service (unless the reduced service is inadequate in the circumstances) (Section 4[f]); nor to preclude a shipper from operating a trackmobile on rail carrier property^{2/} (Section 4[g]); nor to refuse to place cars on a particular private track^{3/} (Section 4[h]); nor to take other unspecified actions consistent with threats (Section 4[i]).

The allegation in Section 4(b) does not establish a valid cause of action for violation of 49 U.S.C. § 11101(a) because (1) it does not allege that PYCO requested switching services alleged

^{1/} On the contrary, an embargo is a defense to a claim of violation of 49 U.S.C. § 11101(a).

^{2/} A shipper does not have a legal right to operate a trackmobile or any other equipment over rail carrier property in the absence of permission from the rail carrier.

^{3/} A rail carrier does not have a legal duty to operate over a shipper's private track in order to make pick up or delivery more convenient for the shipper.

to have been refused; and (2) it does not identify (a) the specific switching services alleged to have been refused; and (b) the period of time during which such switching services allegedly were refused.

For the foregoing reasons, Section 4 of the Complaint is required to be dismissed.

B. Section 5 Should Be Dismissed

Inasmuch as Section 4 alleging violation of 49 U.S.C. § 11101(a) is required to be dismissed, it follows that Section 5 requesting relief for violation of § 11101(a) is also required to be dismissed. However, for the reasons set out below, Section 5 would be required to be dismissed even if there had been a legitimate allegation of violation of § 11101(a).

The Board can lawfully provide two means of relief in response to a determination that a rail carrier has violated 49 U.S.C. § 11101(a): (1) order the rail carrier to cease and desist from violating the statute in the future; and (2) award damages to the extent sufficiently proven for violations within the limitations period in the past.

Section 5(a) should be dismissed because the request for damages is impermissibly vague and unsupported. A required explanation is not provided for how the alleged failure to provide switching services resulted in "lost sales and delay". The estimated damage of "no less than \$4,000,000" is entirely unsupported. No time frame is stated for when the damages were alleged to have been incurred. An essential nexus is not provided between the alleged failure to provide adequate switching services and damages for "unneeded rail construction" and "costs of mitigation".

Section 5(b) should be dismissed because the Board does not have authority to award the relief requested in that Section. Thus, the Board does not have authority under 49 U.S.C.

§ 11101(a) or otherwise to require a rail carrier to train a shipper's employees to operate a trackmobile on the rail carrier's property (Section 5[b][i]); nor to require a rail carrier to permit a shipper to operate a trackmobile on the rail carrier's property (*id.*, [ii]); nor to require a rail carrier to provide an unlimited number of switches per day at a shipper's facility without compensation (*id.* [iii]); nor to require a rail carrier to spot cars on a particular private track in the absence of a private sidetrack agreement if such action would require the rail carrier to operate over a private track within the shipper's plant site (*id.* [iv]); nor to require a rail carrier to refrain from unspecified retaliatory action (*id.* [v]); nor to require a rail carrier to refrain from threatening to impose an embargo (*id.* [vi]); nor to require a rail carrier to refrain from physical intimidation or threats (*id.* [vi]); nor to require a rail carrier employee to complete a course in anger management (*id.* [vii]); nor to require a rail carrier employee to withdraw from employment by that rail carrier until completion of an anger management course (*id.* [ix]).

For the foregoing reasons, Section 5 of the Complaint is required to be dismissed in its entirety.

C. Section 6 Should Be Dismissed

PYCO alleges that 49 U.S.C. § 10702 prohibits "unreasonable practices" (Complaint at 13-14). That is too broad. Section 10702 is aimed at unreasonable practices that affect a rail carrier's rates or charges (unreasonable rate practices, for short). The statute reads as follows:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable--

(1) rates, to the extent required by section 10707, divisions of joint rates, and classifications for transportation and service it may provide under this part; and

(2) rules and practices on matters related to that transportation or service.

Subsection (2) of the statute refers to Subsection (1). Thus, the “practices” in subsection (2) refer to a rail carrier’s “rates” or “classifications” in subsection (1).

None of the allegations in Section 6 is directed at an action which would constitute an unreasonable rate practice. Thus, it does not constitute a violation of 49 U.S.C. § 10702 to refuse to provide adequate transportation services (Section 6[a]); nor to prevent a shipper from operating a trackmobile on rail carrier property (*id.* [b]); nor to refuse to provide service on the ground that a locomotive required repair, after having claimed to have multiple locomotives (*id.* [c]); nor to fail “to take care of car supply” (*id.* [d]); nor to threaten physical violence or intimidation (*id.* [e]); nor to fail to train a shipper’s employees on how to operate a trackmobile on rail carrier property (*id.* [f]); nor to fail to furnish adequate rail service (*id.* [g]); nor to fail to provide adequate car storage and staging (*id.* [h]); nor to impose discriminatory and arbitrary charges not imposed on other shippers (*id.* [i]). The latter allegation relates to SAW’s rates, but it alleges that such rates are discriminatory, not that such rates or charges constitute an unreasonable rate practice in violation of 49 U.S.C. § 10702.

For the foregoing reasons, Section 6 of the Complaint is required to be dismissed in its entirety.

D. Section 7 Should Be Dismissed

Inasmuch as Section 6 alleging violations of 49 U.S.C. § 10702 is required to be dismissed, it follows that Section 7 seeking relief for violations of 49 U.S.C. § 10702 is also required to be dismissed.

However, Section 7 would be required to be dismissed even if there had been legitimate allegations of violation of 49 U.S.C. § 10702. That is so because the Board does not have

authority to award the relief requested in Section 7. Thus, the Board does not have authority under 49 U.S.C. § 10702 to require a rail carrier to refrain from harassing another rail carrier who is not a party to the complaint, nor to pay for that other rail carrier's increased costs resulting from such harassment (Section 7[i]); nor to require a rail carrier to train shipper employees to operate a trackmobile on rail carrier property (*id.* [ii]); nor to require a rail carrier to report safety problems involving shipper employees to the shipper (*id.* [iii]).

For the foregoing reasons, Section 7 of the Complaint is required to be dismissed in its entirety.

E. Section 8 Should Be Dismissed

Section 8 of the Complaint should be dismissed because it fails to set out a valid cause of action for unreasonable discrimination in violation of 49 U.S.C. § 10741. It is provided in § 10741, as follows:

Prohibitions against discrimination by rail carriers

(a)(1) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may not subject a person, place, port, or type of traffic to unreasonable discrimination.

(2) For purposes of this section, a rail carrier engages in unreasonable discrimination when it charges or receives from a person a different compensation for a service rendered, or to be rendered, in transportation the rail carrier may perform under this part than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances.

(b) This section shall not apply to--

- (1) contracts described in section 10709 of this title;
- (2) rail rates applicable to different routes; or
- (3) discrimination against the traffic of another carrier providing transportation by any mode.

(c) Differences between rates, classifications, rules, and practices of rail carriers do not constitute a violation of this section if such differences result from different services provided by rail carriers.

It can be seen in 49 U.S.C. § 10741(a)(2) that in order for there to be a violation of the statute, different compensation must involve transportation of "a like kind of traffic." There is no allegation in Section 8 that different compensation assessed by SAW for PYCO and for other shippers in Lubbock involves a "like kind of traffic". On the contrary, the kind of traffic transported by SAW for PYCO and for other shippers in Lubbock was not identified at all in Section 8 of the Complaint. In the absence of a showing that a like kind of traffic is involved, the competitive relationship between shippers that is an essential element of violation of § 10741 is not established. In the absence of an allegation that a like kind of traffic is involved in the differing compensation, a violation of § 10741 is not successfully alleged as a matter of law. See *Harborlite Corp. v. ICC*, 613 F.2d 1088 (D.C. Cir. 1979).^{4/}

For the foregoing reasons, Section 8 of the Complaint is required to be dismissed.

F. Section 9 Should Be Dismissed

Inasmuch as Section 8 alleging violation of 49 U.S.C. § 10741 is required to be dismissed, it follows that Section 9 seeking relief for violation of § 10741 is also required to be dismissed.

However, Section 9 would be required to be dismissed even if there had been a legitimate allegation of violation of § 10741. That is so because PYCO has requested relief that is beyond the Board's authority to award.

Section 9(a) should be dismissed because it seeks an award of the allegedly discriminatory rates or charges themselves, whereas the Board's authority to award damages for

^{4/} In addition, the allegations in Section 8 are insufficient to establish a violation of § 10741 because the "surcharges and premiums" alleged to constitute differing compensation are not identified (Complaint at 16).

violation of 49 U.S.C. § 10741(a) is limited to damages specifically shown to have been incurred as a result of the assessment of unreasonably discriminatory rates or charges. The discriminatory rates or charges themselves are not to be awarded as damages.

Section 9(b) should be dismissed because any relief for a violation of 49 U.S.C. § 10741(a) for the future is required to be in the alternative; i.e., the rail carrier must be given the alternative of eliminating the prejudicial rate or charge, or of assessing that rate or charge against the shipper or shippers alleged to be preferred. *Texas & P. Ry. Co. v. United States*, 289 U.S. 627 (1933). In contrast, in Section 9(b), PYCO seeks only to have the prejudicial rates or charges eliminated.

For the foregoing reasons, Section 9 of the Complaint is required to be dismissed.

G. Section 10 Should Be Dismissed

Section 10 alleges violations of 49 U.S.C. § 11121, which as here pertinent, prohibits a rail carrier from unreasonably failing to provide an adequate supply of railcars requested by its shippers. As here pertinent, it is provided in 49 U.S.C. § 11121(a) as follows:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall furnish . . . adequate car service . . .

A rail carrier fails to provide adequate car service in violation of 49 U.S.C. § 11121(a) when it unreasonably fails to furnish railcars which it has a legal obligation to provide. Section 11121(a) relates to the furnishing of equipment not services; it is not a violation of 49 U.S.C. § 11121(a) to fail to provide adequate rail service. See *Winnebago Farmers Elevator Co. v. Chicago & NW*, *supra*, 354 I.C.C. at 871-872.

Section 10 should be dismissed because as a matter of law, the actions alleged in that Section do not constitute unreasonable failures to furnish rail cars in violation of 49 U.S.C. § 11121(a). Thus, it is not a violation of § 11121(a) for a rail carrier to fail to provide adequate switching service (Section 10, second sentence); nor to terminate a shipper's lease of rail carrier tracks in accordance with the terms of the lease (*id.*, fourth sentence); nor to assess an allegedly discriminatory charge for constructive placement of rail cars (*id.*, fifth sentence); nor to move cars to be switched for a shipper into the rail carrier's yard (*id.*, sixth sentence).^{5/}

For the foregoing reasons, Section 10 of the Complaint is required to be dismissed.

H. Section 11 Should Be Dismissed

Inasmuch as Section 10 alleging violations of 49 U.S.C. § 11121(a) is required to be dismissed, it follows that Section 11 seeking relief for violations of § 11121(a) is also required to be dismissed.

However, Section 11 would be required to be dismissed even if there had been legitimate allegations of violation of 49 U.S.C. § 11121(a). That is so because the Board does not have authority under § 11121(a) to grant the relief requested by PYCO. Thus, the Board does not have authority under § 11121(a) to require a rail carrier to rescind a properly published tariff charge (Section 11[a]); nor to rescind termination of a track lease which expired by its terms (*id.* [b]); nor to require a rail carrier to store cars for a shipper without compensation (*id.* [c]); nor to require a rail carrier to provide adequate switching service (*id.* [d]).

^{5/} It is assumed that reference to 49 U.S.C. § 10702 in the final sentence of Section 10 is inadvertent in that the heading and first sentence of Section 10 refer to failure to provide adequate car service in violation of 49 U.S.C. § 11121(a).

I. Section 12 Should Be Dismissed

Section 12 should be dismissed because it does not allege that SAW has failed to construct, maintain and operate a switch connection between SAW's tracks and PYCO's private tracks. Rail carriers are required to do so when conditions specified in § 11103(a) are satisfied.

It is provided in § 11103(a) as follows:

(a) On application of the owner of a lateral branch line of railroad, or of a shipper tendering interstate traffic for transportation, a rail carrier providing transportation subject to the jurisdiction of the Board under this part shall construct, maintain, and operate, on reasonable conditions, a switch connection to connect that branch line or private side track with its railroad and shall furnish cars to move that traffic to the best of its ability without discrimination in favor of or against the shipper when the connection--

- (1) is reasonably practicable;
- (2) can be made safely; and
- (3) will furnish sufficient business to justify its construction and maintenance.

The violation of § 11103 alleged in Section 12 is that SAW has failed and refused to furnish cars for traffic moving over an existing switch connection. That does not constitute a violation of the essence of § 11103. While § 11103(a) contains a requirement that a rail carrier furnish cars to move traffic over an existing switch connection, a rail carrier's obligation to supply cars is traditionally considered under 49 U.S.C. § 11121(a), not § 11103. As evidence that Congress did not intend that a rail carrier's car supply obligation be considered under the switch connection provisions of 49 U.S.C. § 11103(a), the relief provided in 49 U.S.C. § 11103(b) for violation of § 11103(a) relates solely to providing a requested switch connection, not to supplying cars over the connection.

For the foregoing reasons, Section 12 of the Complaint is required to be dismissed.

J. Section 13 Should Be Dismissed

Inasmuch as Section 12 alleging a violation of 49 U.S.C. § 11103 is required to be dismissed, it follows that Section 13 requesting relief for violation of § 11103 is also required to be dismissed.

However, Section 13 would be required to be dismissed even if there had been a legitimate allegation of violation of § 11103. That is so because PYCO has asked for broad relief in Section 13, whereas relief for violation of § 11103 is limited to installation and operation of the requested switch connection, as set out in § 11103(b), *viz.*:

(b) If a rail carrier fails to install and operate a switch connection after application is made under subsection (a) of this section, the owner of the lateral branch line of railroad or the shipper may file a complaint with the Board under section 11701 of this title. The Board shall investigate the complaint and decide the safety, practicability, justification, and compensation to be paid for the connection. The Board may direct the rail carrier to comply with subsection (a) of this section only after a full hearing.

For the foregoing reasons, Section 13 of the Complaint is required to be dismissed.

K. Section 14 Should Be Dismissed

The allegation of violation of 49 U.S.C. § 11902(b) in Section 14 of the Complaint is so far-fetched as to be frivolous. An employee of SAW offered to sell assets of SAW to PYCO for a stated price. By no stretch can that simple offer of sale be deemed to constitute solicitation of a payment in exchange for favorable railcar treatment in violation of § 11902(b). Nor can that simple sale offer be deemed to constitute a threat of unfavorable railcar treatment unless the requested purchase price were to be paid. SAW's offer to sell assets to PYCO thus was in no way comparable to the bribery for preferential railcar treatment prohibited by virtue of § 11902(b). PYCO should be admonished for making this kind of irresponsible allegation.

For the foregoing reasons, Section 14 of the Complaint is required to be dismissed.

L. Section 15 Should Be Dismissed

Inasmuch as Section 14 alleging a violation of 49 U.S.C. § 11902(b) is required to be dismissed, it follows that Section 15 requesting relief for violation of § 11902(b) is also required to be dismissed.

However, Section 15 would be required to be dismissed even if there had been a legitimate allegation of violation of 49 U.S.C. § 11902(b). That is so because the relief for violation of § 11902(b) is specified in that statute, i.e., a stated fine, a stated period of imprisonment, or both. The Board does not have authority under § 11902(b) to prohibit retaliation, as requested in Section 15(i), and there is no rational basis for prosecution, as requested in Section 15(ii).

For the foregoing reasons, Section 15 of the Complaint is required to be dismissed.

M. Section 16 Should Be Dismissed

No statutory basis was cited by PYCO for its catch-all request that the Board institute its own investigation into the subject matter of the Complaint, impose unspecified penalties, and seek enforcement of unspecified causes of action by the Attorney General. In the absence of such statutory authority, Section 16 of the Complaint is required to be dismissed.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Complaint should be dismissed.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
10917 East FM2150, East CR78
Slaton, TX 79364

Defendant

Thomas F. McFarland

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Attorney for Defendant

DATE FILED: May 9, 2006

CERTIFICATE OF SERVICE

I certify that on May 8, 2006, I served the foregoing document, Motion to Dismiss
Complaint, by UPS overnight mail, on the following:

Charles H. Montange, Esq.
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