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27 13 2006
RECEIVED

THOMAS F. MCFARLAND

June 12, 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

Part of
Public Record

216751

Re: STB Finance Docket No. ³⁴⁸⁷⁰~~34848~~, *PYCO Industries, Inc. v. South Plains Switching, Ltd. Co.*

STB Ex Parte No. 346 (Sub-No. 14C), *Rail General Exemption Authority -- Miscellaneous Agricultural Products* ²¹⁶⁷⁵²

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Motion/Petition For Immediate Revocation Of Claimed Commodity Exemptions, If Found Applicable, And Motion/Petition To Reopen, for filing with the Board in the above referenced matters.

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.

RAIL GENERAL EXEMPTION
AUTHORITY -- MISCELLANEOUS
AGRICULTURAL PRODUCTS

FINANCE DOCKET

NO. ~~34838~~ 34870

EX PARTE NO. 346

(SUB-NO. 14C)

JUN 13 2006

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REPLY IN OPPOSITION TO MOTION/PETITION FOR
IMMEDIATE REVOCATION OF CLAIMED COMMODITY EXEMPTIONS,
IF FOUND APPLICABLE, AND MOTION/PETITION TO REOPEN

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

Defendant

ENTERED
Office of Proceedings

JUN 13 2006

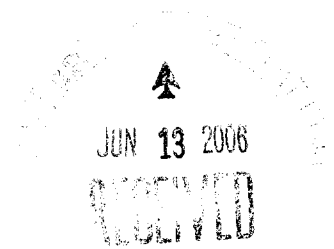
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Attorney for Defendant

DATE FILED: June 13, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD



PYCO INDUSTRIES, INC.,	)	
	)	
Complainant,	)	FINANCE DOCKET
v.	)	NO. 34838 34870
	)	
SOUTH PLAINS SWITCHING, LTD. CO.,	)	
	)	
Defendant.	)	
	)	
RAIL GENERAL EXEMPTION	)	EX PARTE NO. 346
AUTHORITY -- MISCELLANEOUS	)	(SUB-NO. 14C)
AGRICULTURAL PRODUCTS	)	

**REPLY IN OPPOSITION TO MOTION/PETITION FOR
IMMEDIATE REVOCATION OF CLAIMED COMMODITY EXEMPTIONS,
IF FOUND APPLICABLE, AND MOTION/PETITION TO REOPEN**

Pursuant to 49 C.F.R. § 1104.13(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies in opposition to a pleading entitled "Motion/Petition For Immediate Revocation Of Claimed Commodity Exemptions, If Found Applicable, And Motion/Petition To Reopen" (Petition), filed by PYCO Industries, Inc. (PYCO) on May 26, 2006.^{1/}

^{1/} The relief sought by PYCO is not apparent from the lengthy and convoluted title of its pleading. We first attempt to decipher what PYCO is asking of the Board.

RELIEF SOUGHT BY PYCO

It is necessary to wade through PYCO's typically lengthy and rambling pleading to ascertain what PYCO is asking the Board to do.^{2/} Having done so, it appears that PYCO is seeking three distinct alternative forms of relief, as follows:

- (1) immediate partial revocation of the exemption for rail transportation of cottonseeds, cottonseed hulls and cotton linters (the commodity exemption), as applied to SAW's transportation of those commodities for PYCO (Petition at 2); and
- (2) conventional (not immediate) partial revocation of the commodity exemption as applied to SAW's transportation for PYCO, with a request that such revocation request be processed simultaneously with PYCO's Complaint against SAW (Petition at 10-15); and
- (3) complete revocation of the entire commodity exemption (not limited to SAW-PYCO transportation), with a request that such revocation request be processed simultaneously with PYCO's Complaint against SAW (Petition at 15-20). PYCO refers to this revocation request as a "partial reopening" of the commodity exemption proceeding (*id.* at 15). It is clear, however that complete revocation of the class exemption for the involved commodities is thereby sought; that is evident inasmuch as the revocation request is based on alleged changed

^{2/} PYCO's Petition was accompanied by its Reply to SAW's Motion to Dismiss its Complaint. Board regulations preclude SAW from replying to that Reply, but SAW is entitled to reply to PYCO's petition that seeks new relief, i.e., revocation of the commodity exemption.

circumstances in the cottonseed industry generally, rather than more limited circumstances bearing on SAW's transportation for PYCO (*id.* at 16-20).

In all three instances, PYCO seeks revocation of the commodity exemption "with respect to all non-rate practices and obligations (including non-discrimination) and all remedies" (Petition at 10-11). The revocation is requested for all statutes covered in PYCO's Complaint, i.e., 49 U.S.C. §§ 11101, 10702, 10741, 11121, 11103, and 11902 (*id.* at 11-12). PYCO's request in that respect is contradictory in part because its complaint for violation of 49 U.S.C. § 10741 is predicated on the alleged assessment by SAW of rate surcharges and premiums against PYCO that are not assessed against other SAW shippers. (Complaint, F.D. 34802, filed May 5, 2006 at 15-16). If PYCO's request for regulation of non-rate practices and remedies were to be granted, it would not encompass PYCO's complaint that SAW's assessment of rate surcharges violates 49 U.S.C. § 10741.

REPLY

The first and third of those requests are required to be summarily denied. The second request is required to be denied for PYCO's failure to sustain its burden of proof.

I. THE REQUEST FOR IMMEDIATE PARTIAL REVOCATION IS REQUIRED TO BE SUMMARILY DENIED

PYCO's request for immediate partial revocation of the commodity exemption is required to be denied because there is no statutory basis for immediate revocation of an exemption. The governing statute is 49 U.S.C. § 10502(d), which provides as follows:

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within

90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under the subsection shall be completed within 9 months after it is begun.

It is apparent that there is no basis in that statute for immediate relief. The provision for consideration of a request for revocation of an exemption in a proceeding to be instituted within 90 days of the request for revocation is wholly inconsistent with immediate relief. There are few statutes that authorize the Board to grant immediate relief, such as 49 U.S.C. § 721(b)(4). It is apparent that 49 U.S.C. § 10502(d) is not one of those statutes. Inasmuch as the Board does not have statutory authority to revoke an exemption on an immediate basis, PYCO's request for immediate partial revocation of the commodity exemption is required to be summarily denied.

II. THE REQUEST FOR COMPLETE REVOCATION OF THE COMMODITY EXEMPTION CANNOT BE PROCESSED SIMULTANEOUSLY WITH PYCO'S COMPLAINT

PYCO is free to seek complete revocation of the commodity exemption following appropriate public notice and opportunity for comment. However, PYCO's request that such revocation request be processed simultaneously with its Complaint is required to be summarily denied.

In *FMC Wyoming Corp., et al. v. Union Pacific Railroad Co.*, 1998 STB LEXIS 230 (Docket No. 42022, served Aug. 31, 1998), the Board referred to its procedural practice of processing a petition for partial revocation of a commodity exemption simultaneously with a related complaint in which such an exemption was raised as a defense. *Id.* at *4-7. However, the Board made it clear that such procedure is not available where the entire class exemption for the

commodity is requested to be revoked. That is so because of the need to provide public notice and opportunity for comment in regard to any such broad requested revocation, viz., *id.* at 7, n.7:

We stress that this procedure is available only under the type of circumstances presented herein (i.e., partial revocation request). It would not be appropriate in the case of a petition to revoke the entire class exemption, which would require notice and the opportunity for public comment . . .

Accordingly, PYCO's request for simultaneous processing of its petition to revoke the entire commodity exemption and its Complaint is required to be summarily denied.^{3/}

III. THE REQUEST FOR CONVENTIONAL (NOT IMMEDIATE) PARTIAL REVOCATION SHOULD BE DENIED BECAUSE OF PYCO'S FAILURE TO HAVE SUSTAINED ITS BURDEN OF PROOF

The party seeking revocation of an exemption has the burden of proof; petitions to revoke must be based on reasonable, specific concerns that reconsideration of the exemption is warranted. *Minnesota Comm. Ry., Inc. - Trackage Exempt. - BN RR Co.*, 8 I.C.C.2d 31, 35 (1991).

The burden of proof for a party seeking revocation of a commodity exemption is set out in *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674 (1992), at 682, viz.:

As we have indicated, Congress has directed us to exempt rail service when regulation is not necessary to protect against abuse of market power. Therefore, the first thing we look at in assessing a petition to revoke an exemption is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption. If it does, then we focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power. Finally, in assessing whether regulation is necessary

^{3/} SAW will reserve its comments on the request for complete revocation of the commodity exemption until public notice and opportunity for comment are provided.

or appropriate, we address whether regulation or exemption would, on balance, better advance the objectives of the NRTP and the interests of the shipping public overall.

PYCO's request for partial revocation of the exemption for rail transportation of cottonseeds, cottonseed hulls, and cotton linters, as applied to SAW's transportation for PYCO, is required to be denied because PYCO failed to sustain that burden of proof.

A. Failure To Prove That SAW Possesses Substantial Market Power

The testimony in PYCO's Petition does not come close to proving that SAW possesses substantial market power in transportation of cottonseeds, cottonseed hulls and cotton linters for PYCO. PYCO's testimony is that "well over one half" of its cottonseeds are transported by rail to California. (Petition, Appdx. 1 at 3). It is not clear from that testimony what the actual rail percentage is. In any event, nearly half of PYCO's cottonseeds are admittedly transported by truck to local cattlefeed lots. (*Id.*). Transportation of 50 percent or so of a shipper's traffic by no means confers substantial market power on a rail carrier.

There is no PYCO testimony at all in regard to SAW's market share of PYCO's shipments of cottonseed hulls in relation to PYCO's truck shipments. In the absence of such evidence, there would be no rational basis for a finding that SAW has substantial market power over PYCO's shipments of cottonseed hulls.

PYCO has claims that it is "rail dependent for virtually all our production of linters". (Petition, Appdx. 1 at 3). However, PYCO provided no evidence to support that claim. PYCO did not provide the rail and truck market shares of its shipments of linters. More to the point, PYCO failed to provide the destination(s) of its rail shipments of linters in order to permit an evaluation of whether in light of distances involved, truck shipments would be competitive for

those rail shipments. Without that record support, PYCO's testimony does not establish that SAW has substantial market power over PYCO's shipments of cotton linters.

In the absence of proof by PYCO that SAW has substantial market power in transportation of the involved commodities for PYCO, PYCO's Petition for revocation is required to be denied.

B. Failure To Prove That SAW Abused Market Power

Even if PYCO had proved that SAW has substantial market power in the transportation of the involved commodities for PYCO, PYCO's Petition still would be required to be denied because PYCO failed to prove that regulation is required to protect PYCO from SAW's abuse of market power.

The essence of PYCO's Complaint is that SAW abused its market power by failing to provide transportation service to PYCO on reasonable request in violation of 49 U.S.C. § 11101(a), and that SAW failed to provide a reasonable supply of railcars to PYCO. The alleged failure in the latter respect is said to violate a number of statutes: 49 U.S.C. § 11121(a), 10702, and 11103.^{4/} Neither of those contentions is proven in PYCO's testimony.

^{4/} There is also a contention that rate surcharges and premiums allegedly applied by SAW to PYCO but not to other SAW shippers violates 49 U.S.C. § 10741, but PYCO is not understood to seek revocation of the commodity exemption as to that rate practice and remedy (supra, at 4). There is a contention that SAW violated 49 U.S.C. § 11902, which relates to bribes to affect railroad car supply, but there is no PYCO testimony that any SAW representative ever accepted a bribe in exchange for favorable car supply. SAW considers the § 11902 allegation to be frivolous. PYCO also claims that it was unreasonable in violation of law for SAW to decline to permit PYCO to operate a trackmobile on SAW's tracks, and to decline to renew a lease of trackage, and to refuse to permit PYCO to cross its tracks without an easement. However, it cannot be unlawful for SAW to take those actions because PYCO did not have a legal right to do any of those things without SAW's permission.

The following facts regarding SAW's rail service to PYCO are verified by Mrs. Delilah Wisener, owner of SAW, whose verification is attached to this Reply as Appendix 1.

1. The Contention That SAW Failed To Provide Transportation On Reasonable Request

With the exception of a single occasion on November 28, 2005, when SAW was unable to provide requested service to PYCO Plant 2 as a result of a locomotive failure, there is no evidence in this record or in the related alternative rail service proceeding (Finance Docket No. 34802) that SAW ever failed to spot or pick up a railcar in response to a PYCO request for transportation. In that one instance, SAW's locomotive was repaired the very next day, and transportation service then resumed. That single, isolated, quickly-corrected failure to provide requested rail transportation clearly does not constitute a violation of 49 U.S.C. § 11101(a). That statute is not violated when transportation is not provided due to circumstances beyond a rail carrier's control, which are remedied with due diligence. Were it otherwise, every rail carrier in the United States would be guilty of violating that statute on a regular basis.

PYCO was prevented from shipping the volume of traffic that it desired to ship from its Plant 1 in this past shipping season only because of its own inadequate private track capacity and its failure to request that SAW provide additional switching service. SAW has been unfairly blamed for PYCO's inability to ship that traffic volume, resulting in an order of alternative rail service to PYCO under 49 U.S.C. § 11123(a). SAW's rail transportation service during the period in question was not inadequate under the standards of either 49 U.S.C. § 11123(a) or 49 U.S.C. § 11101(a).

On several occasions over the years following SAW's acquisition of its rail lines in 1999, Mr. Larry Wisener, then-President of SAW communicated his opinion to representatives of PYCO that PYCO's private track capacity at PYCO Plant 1 would not be adequate for the rail traffic volume that PYCO would be in a position to ship in the event of a very large cotton crop in the area. At that time, PYCO's private "shop" track had a capacity to accommodate 12 to 13 railcars at a time, depending upon the length of the cars.

The potential for inadequate PYCO private trackage was avoided because SAW permitted PYCO to operate a trackmobile on SAW's tracks between PYCO's Plant 1 and SAW's yard, and in SAW's yard, in order to provide switching service for PYCO's own traffic. PYCO was permitted by SAW to operate its trackmobile in SAW's yard at all hours of the day and night. In that manner, PYCO used SAW's yard tracks as if they were PYCO's own private trackage. That arrangement was very beneficial to PYCO.

In November, 2005, SAW withdrew the privilege of PYCO operating its trackmobile on SAW's yard tracks. That was done on the advice of SAW's traffic consultant, Mr. Dennis Olmstead, out of concern for safety and to minimize the potential for significant liability on the part of SAW. There had been a number of derailments in SAW's yard and adjacent tracks as a result of operation of PYCO's trackmobile. SAW representatives observed a PYCO employee hanging on a moving railcar in SAW's yard in a very unsafe manner.

PYCO has contended that SAW withdrew the privilege for PYCO's operation of a trackmobile in SAW's yard in retaliation for PYCO's refusal to purchase certain SAW trackage at the purchase price asked by SAW. SAW denies that such was the case. However, that dispute is immaterial from a legal standpoint because PYCO never had a legal right to operate its

trackmobile on SAW's tracks without SAW's permission. Consequently, PYCO operated that trackmobile at SAW's sole discretion. SAW was not obligated to provide a reason for withdrawing the privilege of operating the trackmobile on SAW's tracks. SAW's withdrawal of that privilege thus did not violate any provision of law regardless of the reason for such withdrawal.

When PYCO was unable to use SAW's yard tracks as its own private tracks, the inadequacy of the private track capacity in PYCO's Plant 1 was exposed for the first time. That, coupled with an unusually large cotton crop in the area in 2005, put extreme pressure on PYCO's ability to ship the desired volume of traffic in late 2005.

When SAW withdrew the trackmobile privilege, SAW invited PYCO to meet to consider alternative means of providing rail service to Plant No. 1. One of such alternatives would have been for SAW to provide a second weekday switch and/or weekend switching in order to permit a greater volume of traffic to be shipped from Plant 1. However, PYCO never responded to SAW's request for a meeting and never requested that SAW provide a second weekday switch or weekend switching.

PYCO Chief Executive Officer Gail Kring has incorrectly declared that "(t)he management of SAW is in the person of Mr. Larry Wisener". (Petition, Appdx. 1 at 5). Mr. Wisener resigned from SAW months ago. SAW is being managed by Mrs. Delilah Wisener, owner of SAW. However, Mr. Wisener was President of SAW when he invited PYCO to meet with him to discuss alternative means of service. At the bottom of page 5 of his declaration, Mr. Kring refers to Mr. Larry Wisener's "hefty size" and his use of "colorful metaphors" (*id.*). In the

proceeding on alternative rail service, Mr. Kring stated that PYCO refused Mr. Wisener's invitation for a meeting because PYCO's representatives were intimidated by Mr. Wisener.

That is an extremely lame excuse for a powerful national company like PYCO to refuse to meet with what essentially is a "mom and pop" switching railroad. PYCO's representatives are sophisticated, experienced businessmen. It was inexcusable for those representatives to fail to protect PYCO's interests in a matter that it now claims to be critical to its financial well-being. Based on years of experience, PYCO should have known that Mr. Wisener's bark is much worse than his bite, but if a meeting with Mr. Wisener was really too frightening, PYCO could have inquired whether another SAW representative could meet (Mrs. Wisener would have done so), or PYCO could have expressed its rail service desires to SAW in writing. Instead, PYCO did nothing, and pinned the blame on SAW when SAW was unable to do the impossible in attempting to transport the increased traffic volume.

During the period under consideration, PYCO claims that it would have been able to ship 24 cars from Plant 1 per day if it had adequate rail service. However, PYCO's private shop track could accommodate only 12 to 13 cars at a time. It is simple to do the math. It was not possible for SAW to pick up and deliver 24 cars at a time to PYCO because PYCO's private track could not receive that number of cars. SAW could pick up or deliver only as many cars as PYCO's private track could accommodate.

PYCO never requested that SAW provide a second weekday switch or weekend switching. Had SAW been requested to provide that additional switching, it would have done so. It was in SAW's own financial and operational interest to provide such extra switching. SAW would have derived increased revenues from the additional railcars that PYCO could have

shipped. The additional cars that PYCO was unable to accommodate were clogging SAW's yard and adversely affecting SAW's ability to provide rail service to its other customers. SAW would have welcomed the opportunity to provide additional switching for PYCO in order to free up SAW's yard.

After alternative rail service was ordered, PYCO constructed extensive additional private sidetrack at Plant 1 by extending the shop track to accommodate approximately 40 or 50 additional railcars at a time. If that additional private track had been in existence this past November, December and January, PYCO would have been able to ship the desired 24 cars per day from Plant 1. SAW was able to pick up or deliver 24 cars at a time to PYCO. PYCO's construction of that additional private track is a tacit admission that its prior inadequate private track capacity was the reason for its inability to have shipped its desired traffic volume.

The foregoing evidence establishes conclusively that SAW has not failed to provide transportation to PYCO on reasonable request in violation of 49 U.S.C. § 11101(a). Consequently, there is no justification for partial revocation of the commodity exemption on the ground that SAW abused its market power by failing to provide transportation to PYCO on reasonable request.

2. The Contention That SAW Failed To Provide An Adequate Supply Of Railcars To PYCO

As an overriding matter without regard to the type of railcars used to ship cottonseeds, cottonseed hulls and cotton linters, SAW cannot be determined to have abused market power by failing to supply an adequate number of railcars to PYCO because SAW does not have a legal duty to supply railcars to PYCO. Pursuant to the Asset Sale Agreement whereby SAW acquired

its rail lines at Lubbock from BNSF in 1999, BNSF undertook to supply railcars to shippers located on SAW's rail lines. BNSF also retained the right to establish through routes and rates for those SAW shippers. As PYCO itself is fond of saying on a repeated basis, shippers on SAW actually are shippers on BNSF. Consequently, those shippers had to look to BNSF for their supply of railcars.

There is no duty on the part of SAW to supply railcars independently of SAW's agreement with BNSF that BNSF will supply railcars. As a Class III switching rail carrier operating within a terminal area, SAW does not have a duty to provide railcars for transportation. BNSF, as SAW's connecting line-haul rail carrier, has undertaken to retain control over through routes and rates for shippers located on SAW. BNSF has a corresponding legal duty to supply railcars in conjunction with those routes and rates.

Even if SAW had a legal obligation to supply railcars, there is no evidentiary basis in PYCO's Petition for a finding that SAW has failed to satisfy that obligation as to the commodities here under consideration. As to cottonseeds, which constitutes approximately 75 percent of PYCO's rail shipments during the period covered by PYCO's Complaint, SAW cannot be found to have failed to provide an adequate supply of railcars because PYCO ships all of its cottonseeds in privately-owned railcars that are leased by PYCO's customer, Penny Newman Grain Company. SAW has never been requested by PYCO to furnish a railcar for transportation of cottonseeds. SAW cannot lawfully be found to have failed to supply railcars that it was not requested to provide.

PYCO has never claimed in its Complaint, or in the alternative rail service proceeding, or otherwise, that SAW has failed to provide any railcar ordered by PYCO for the transportation of

cottonseed hulls. Accordingly, there is absolutely no basis for a finding that SAW has abused market power by failing to provide an adequate supply of railcars to PYCO for transportation of cottonseed hulls.

In the alternative rail service matter, but not in its Complaint, PYCO contended that SAW had failed to supply an adequate number of boxcars to PYCO Plant 2 for transportation of cotton linters. One good reason that such contention was not repeated in the Complaint may have been that SAW's unchallenged evidence in the alternative rail service proceeding showed that in the most recent period of record, every boxcar ordered by PYCO was supplied on a timely basis. Quite obviously, 100 percent car supply leaves no basis for a determination that SAW failed to furnish an adequate supply of boxcars to PYCO in violation of the statutes cited by PYCO.

The foregoing establishes conclusively that SAW cannot be found to have failed to provide an adequate supply of railcars to PYCO for transportation of cottonseeds, cottonseed hulls or cotton linters in violation of 49 U.S.C. § 11121(a), 10702 or 11103. Accordingly, there is no justification for partial revocation of the commodity exemption on the ground that SAW abused its market power by failing to provide an adequate supply of railcars to PYCO.

C. Revocation Would Not Advance The Objectives Of The National Rail Transportation Policy And The Interests Of The Shipping Public Overall

The National Rail Transportation Policy (N RTP) places strong emphasis on reliance on market forces. *See Rail Exemption Misc. Agricultural Commodities, supra*, 8 I.C.C.2d at 692, citing former 49 U.S.C. § 10101a(1)(2), and (6) (now 49 U.S.C. § 10101[1], [2], and [6]).

Where, as here, an exemption from regulation for specific commodities has been in effect for over 20 years, there would need to be a compelling case for revocation of the exemption, even on

a partial basis. As demonstrated in the foregoing, PYCO has not provided such a case for revocation.

PYCO has cited several provisions of the NRTP in support of its Petition for revocation, but it has not demonstrated that revocation is needed in order to carry out those policies. Thus, PYCO has cited 49 U.S.C. § 10101(3), which encourages rail competition. However, revocation of the commodity exemption is not shown to foster rail competition. PYCO has cited 49 U.S.C. § 10101(5), which favors sound economic conditions in transportation and effective competition and coordination between rail carriers. It is not evident from PYCO's Petition how revocation of the commodity exemption would affect that rail policy. PYCO has cited 49 U.S.C. § 10101(9), which encourages honest and efficient rail management, and (12), which prohibits predatory practices and unlawful discrimination. However, PYCO has not shown how revocation of the commodity exemption would advance those policies.

In short, PYCO had the burden of proof to establish that partial revocation of the commodity exemption is necessary to carry out the NRTP, and PYCO utterly failed to sustain that burden. That is yet another reason for denial of PYCO's Petition to revoke the commodity exemption.

ADDENDUM

Attached to this Reply as Appendices 2, 3, 4 and 5, respectively, are the declarations of Messrs. Rodney Kern, Leonel Guerra, Alan Davidson and Shad Wisener. Those witnesses are train employees of SAW. Their testimony is in rebuttal of the allegations in Section 7 of the Declaration of Mr. Gail Kring, CEO of PYCO. Their testimony establishes that SAW operates

safely within its operating window in the Board's operating protocol, but WLT and PYCO do not.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should:

- (1) summarily deny PYCO's Petition for immediate partial revocation of the commodity exemption as to "non-rate" practices; and
- (2) summarily deny PYCO's request for processing of its Petition for complete revocation of the commodity exemption as to "non-rate" practices on a coordinated basis with its Complaint; and
- (3) deny PYCO's Petition for conventional partial revocation of the commodity exemption as to "non-rate" practices for PYCO's failure to have sustained the required burden of proof for such revocation.

Respectfully submitted,

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

Defendant



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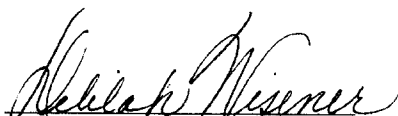
Attorney for Defendant

DATE FILED: June 13, 2006

VERIFICATION

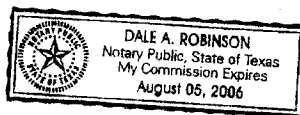
STATE OF TEXAS)
) SS:
COUNTY OF LUBBOCK)

DELILAH WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.


DELILAH WISENER

SUBSCRIBED AND SWORN to
Before me this 5th day
of June, 2006.


Notary Public



My Commission Expires: August 04, 2006

Before the
Surface Transportation Board

DECLARATION

I, Rodney Kern make this declaration in support of this SAW request to terminate Alternative Rail Service filed by South Plains Switching, Ltd. Co.

I am a certified Locomotive Engineer/Switchman in service to the SAW that is involved in these proceedings with the STB. I have read the Declaration of Mr. Gail Kring dated 05/25/06.

I wish to respond to Mr. Kring's allegations regarding the incident of May 24, 2006. His claims of my incompetence, disregard of safety, and professionalism in the discharge of my duties as an employee of South Plains Lamesa Railroad, Ltd., are false and unfounded. I have 23 years of railroad service and have completed and passed all tests and qualifications as required by the Federal Railroad Administration to be certified in my craft and to safely perform those duties.

In response to Paragraph #7; Gail Kring Declaration I offer the following.

Mr. Kring states an incident occurred Wednesday May 24, 2006.

SAW was switching its inbound interchange on the West end of Yard where cars were left by WTLC. WTLC has not reported for duty in the past 5 weeks until 2 – 3 PM each day. WTLC locomotive is dead and secure on PYCO property. SAW was making switching moves from #2 Track onto West End Lead when PYCO employee on TRACKMOBILE came out of PYCO Plant 1 onto SAW property and attempted to switch cars from within the Plant to the tarping shed. I have witnessed this on more than one occasion, it happens everyday and several times a day. PYCO brings its trackmobile on to SAW property (tracks) in front of SAW crews and WTLC crews with no lookout or notification to train crews. It is my understanding that WTLC has an operating window upon SAW property but this does not include use of the PYCO trackmobile.

Although I dislike working under the Alternative Rail Service Protocol and being the recipient of the many false allegations pertaining to our service capabilities to our customers SAW or its crews have never interfered with switching operations of WTLC during their operating window. We have on more than one occasion afforded WTLC additional time as requested. Although they continue to block the Main line, which

disrupts our ability to service Brite Trucking. It was my understanding this track was to be left clear for joint use at the end of each operating window.

Persuant to 28 U. S. C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 6-6-06.

Rodney Kern
signed

Before the
Surface Transportation Board

DECLARATION

I, Leonel Guerra make this declaration in support of SAW request to terminate alternative rail service filed by South Plains Switching, Ltd. Co.

I am a certified Locomotive Engineer/Switchman in service to the SAW that is involved in these proceedings with the STB. I have read the Declaration of Mr. Gail Kring dated 05/25/06.

I wish to respond to Mr. Kring's allegations regarding the incident of May 24, 2006. His claims of my incompetence, disregard of safety, and professionalism in the discharge of my duties as an employee of South Plains Lamesa Railroad, Ltd., are false and unfounded. I have several years of railroad experience. I have been employed by South Plains Lamesa Railroad as of May 2004. I have completed and passed all tests and qualifications as required by the Federal Railroad Administration to be certified in my craft and to safely perform those duties.

Response to Paragraph 7:

Mr. Kring states an incident occurred Wednesday, May 24, 2006.

At approximately 07:30 hours. We (Alan Davidson, Shad Wisener and Myself) started to switch our cars from West end of SAW Yard. Before we began, as like everyday, Shad Wisener drove down the West end of the Yard to make sure the WTLC was not working. The WTLC locomotive was locked up and shutdown on PYCO property. I remember we pulled westward through the switch on 6 track toward the lead. One of our locomotives was cut off past the 6 track derail. Our crew went eastward on #2 and #3 track to get our ADM cars. At that time I noticed PYCO employee, Richard, operating trackmobile upon SAW property by 6 track derail. At no time did I or the SAW crew almost hit or run over PYCO trackmobile or its crew members.

Persuant to 28 U. S. C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 06-06-06



signed

Before the
Surface Transportation Board

DECLARATION

I, Alan Davidson make this declaration in support of SAW request to terminate alternative rail service filed by South Plains Switching, Ltd. Co.

I wish to respond to Mr. Kring's allegations regarding the incident of May 24, 2006. His claims of my incompetence, disregard of safety, and professionalism in the discharge of my duties as an employee of South Plains Lamesa Railroad, Ltd., are false and unfounded. I have 25 years of railroad experience, a promoted conductor since 1983, promoted engineer for over 2 years and 18 years experience as a switch foreman for the BNSF. I have completed and passed all tests and qualifications as required by the Federal Railroad Administration to be certified in my craft and to safely perform those duties.

I was shocked to hear this claim of a near miss on our West switching lead because I wasn't even aware this incident happened.

Persuant to 28 U. S. C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 6-6-06



signed

Before the
Surface Transportation Board

DECLARATION

I, Shad Wisener make this declaration in support of SAW request to terminate alternative rail service filed by South Plains Switching, Ltd. Co.

I am a certified Locomotive Engineer/Switchman in service to the SAW that is involved in these proceedings with the STB. I have read the Declaration of Mr. Gail Kring dated 05/25/06.

I wish to respond to Mr. Kring's allegations regarding the incident of May 24, 2006. His claims of my incompetence, disregard of safety, and professionalism in the discharge of my duties as an employee of South Plains Lamesa Railroad, Ltd., are false and unfounded. I have 6 years of railroad experience. I have completed and passed all tests and qualifications as required by the Federal Railroad Administration to be certified in my craft and to safely perform those duties.

Response to Paragraph 7:

Mr. Kring states an incident occurred Wednesday, May 24, 2006.

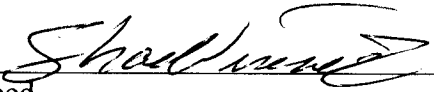
I was the switch foreman on the morning that Mr. Kring references and was on the scene. Mr. Kring was not on the scene and therefore has no personal knowledge of the incident. SAW proceeded to the West end of the Yard to switch cars delivered to SAW by WTLC. SAW did not interfere with PYCO. SAW did not put PYCO employees or equipment in danger. PYCO does continue to operate upon SAW property and tracks with its trackmobile. As switch foreman I take exception to Mr. Kring's false allegations concerning the safety of our operation. Safety is not compromised on the SAW. I have grown tired of the false allegations and lies levied against myself and SAW crews concerning our operations. We work diligently to serve our customers in a safe and professional manner. It is my understanding of the operating protocol that WTLC has an operating window upon SAW property, not PYCO and its trackmobile.

Although I dislike working under the Alternative Rail Service Protocol, SAW or its crews have never interfered with switching operations of the WTLC or has SAW operated upon PYCO property or tracks.

SAW security camera recordings from 05/21/06 through 06/01/06 indicate 69 loads of cottonseed shipped from PYCO Plant 1, 69 cars divided by 12 days equates to an average of 5.7 cars per day. This is significantly less than the 24 loads of cottonseed per day.

Persuant to 28 U. S. C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 6-6-06


signed

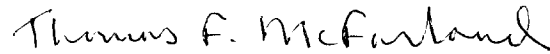
CERTIFICATE OF SERVICE

I certify that on June 12, 2006, I served the foregoing document, Reply In Opposition To Motion/Petition For Immediate Revocation Of Claimed Commodity Exemptions, If Found Applicable, And Motion/Petition To Reopen, by UPS overnight mail, on the following:

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Thomas F. McFarland