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THOMAS F. MCFARLAND

July 5, 2007

By e-filing

Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

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

Dear Mr. Williams:

Hereby transmitted is the Answer to Amendment/Supplement To Complaint, for filing with the Board in the above referenced matter.

Very truly yours,

Handwritten signature of Thomas F. McFarland in cursive script.

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

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**ANSWER TO AMENDMENT/SUPPLEMENT
TO COMPLAINT**

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Defendant

THOMAS F. McFARLAND
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(312) 236-0204

Attorney for Defendant

DUE DATE: July 6, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**ANSWER TO AMENDMENT/SUPPLEMENT
TO COMPLAINT**

Pursuant to 49 C.F.R. § 1111.4(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby answers the allegations of an “Amendment/Supplement to Complaint and Statement Concerning Damages” (hereafter referred to as “Amended Complaint”) filed by PYCO Industries, Inc. (PYCO), on May 17, 2007.^{1/}

SAW is filing this Answer under protest because there is an agreement between SAW and PYCO, in a Joint Report timely filed with the Board under 49 C.F.R. § 1111.10(a), that discovery and a procedural schedule in regard to the Complaint would be deferred until the Board disposes of a Motion to Dismiss the Complaint filed by SAW on the ground of lack of subject matter jurisdiction (commodity exemption from Subtitle IV, Part A, 49 U.S.C.). The attached communication to the Board dated June 19, 2007 and its attachments show that such Joint Report

^{1/} By decision served June 6, 2007, the Board extended the due date for SAW’s Answer from June 6, 2007 to July 6, 2007. That decision also made procedural rulings referred to hereinafter.

was timely filed with the Board, contrary to the Board's statement in the June 6, 2007 decision and elsewhere that it does not have a record of such filing. Moreover, orderly, efficient and economic procedure dictates that the Motion to Dismiss, which would be dispositive of the Complaint, proceed to decision before the parties are put to the cost and time required for evidentiary proceedings on the Complaint. Once again, SAW respectfully requests that evidentiary proceedings on the Complaint be held in abeyance pending disposition of the Motion to Dismiss.^{2/}

I. THE RELIEF SOUGHT IN THE AMENDED COMPLAINT IS CLEARLY PRECLUDED BY THE COMMODITY EXEMPTION FOR RAIL TRANSPORTATION OF COTTONSEED

The Board should dismiss the Amended Complaint without providing for evidentiary proceedings because, as shown in this Answer, the relief sought in the Amended Complaint is clearly precluded by the commodity exemption for rail transportation of cottonseed. It would be an unjustified waste of the resources and time of SAW and of the Board to require evidentiary proceedings in that situation.^{3/}

^{2/} The commodity exemption is dispositive of the Complaint. If the Motion to Dismiss on that basis were to be denied, SAW would file a Motion for Partial Dismissal on the ground that Penny Newman Grain Company, not PYCO, is shown as consignor and consignee on 64 percent of the bills of lading covering the shipments involved in the Complaint. PYCO cannot maintain the Complaint as to those shipments for which it was not a party to the rail transportation contracts of shipment.

^{3/} It was suggested in the decision served June 6, 2007 at 2 (*see* note 1) that if appropriate, the Board might rule on SAW's Motion to Dismiss after the filing of SAW's Answer to the Amended Complaint (. . . (T)he Board might address the motion to dismiss after it receives SAW's answer to the amended/supplemented complaint . . .). The Board is urged to hold further evidentiary proceedings in abeyance while it takes up and disposes of the Motion to Dismiss.

It is even more evident in the Amended Complaint than in the initial Complaint that all of the relief sought by PYCO relates to rail transportation of cottonseed. Specifically, reference to Exhibit A of the Amended Complaint shows the following:

- (1) a claim for damages of \$223,385 and \$134,112, respectively, for costs of seed (i.e., cottonseed) shipped from Plainview, TX, and for loss of oil quality on seed (i.e., cottonseed);
- (2) a claim for damages of \$222,500 for additional costs to haul seed (i.e., cottonseed) around SAW;
- (3) a claim for damages of \$183,600 for surcharges on shipments of cottonseed, and for constructive placement charges on railcars for cottonseed loading.

All of those claims are predicated on alleged violations of provisions of Subtitle IV, Part A, of Title 49, United States Code, i.e., the Interstate Commerce Act, as amended. (49 U.S.C. § 10101 through 49 U.S.C. § 11908). That is necessarily the case because otherwise the Board would not have subject matter jurisdiction over the claims. The Board does not have jurisdiction over matters that are outside of the Interstate Commerce Act. PYCO's Amended Complaint does not identify specific statutory provisions that allegedly were violated by SAW's actions or inactions, and that allegedly give rise to PYCO's claims. It is reasonably certain from the context of the Amended Complaint that the statutes that are implicated by that Complaint are 49 U.S.C. § 11101(a) (inadequate rail service); 49 U.S.C. § 10702 (unreasonable rate practices); and 49 U.S.C. § 10741(a) (unreasonable discrimination).

Relief is not available to PYCO by means of the Complaint because the Board's predecessor exempted rail transportation of cottonseed from application of all provisions of

Subtitle IV, Part A, Title 49 United States Code, including the statutes enumerated above, and such exemption was in effect during the entire period covered by the Complaint. That exemption was adopted in *Rail General Exemption Authority*, 367 I.C.C. 298, 310-312 (1983). The cottonseed exemption has been published at 49 C.F.R. § 1039.10 (STCC No. 01-14110) throughout the period covered by the Complaint.

PYCO's Complaint focuses on relief in the past for inadequate rail service and unreasonable rate practices and discrimination. Thus, the time frame to which the Complaint is directed is the portion of the two-year period prior to the date on which the Complaint was filed during which SAW provided rail service to PYCO (i.e., April 19, 2004 to January 25, 2006). The Complaint is limited to two years prior to the April 19, 2006 filing date because the statute of limitations at 49 U.S.C. § 11705(c) precludes relief for periods more than two years before the Complaint was filed. The Complaint does not involve the period on and after January 26, 2006 because SAW has not provided rail service to PYCO during that period in view of the alternative rail service ordered by the Board. Relief is not required for the future because SAW will not serve PYCO in the future inasmuch as alternative rail service will be followed by operation by a third party pursuant to the feeder line provision.

The Board cannot grant the relief that PYCO seeks because the Board is not legally authorized to retroactively revoke the commodity exemption for rail transportation of cottonseed. That being the case, the Board lacks subject matter jurisdiction over the relief sought in the Complaint. Authority for the foregoing is found in *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” [emphasis added]); *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. 42048, served Oct. 7, 1998); and *Consolidated Rail Corp. -- Declaratory 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).

In the absence of Board action on the dispositive Motion to Dismiss, SAW submits the following answers to the allegations of the Complaint under protest.

II. ANSWER TO BACKGROUND SECTION

At page 3 of the Amended Complaint, PYCO refers to the alternative rail service being provided over the subject rail line, pursuant to 49 CFR Part 1146 until November 22, 2006, and pursuant to 49 C.F.R. Part 1147 from that date to the present. Whereas the Board had statutory authority (although it lacked evidentiary warrant) to impose alternative rail service under 49 CFR Part 1146, the Board clearly lacked statutory authority to impose alternative rail service under 49 CFR Part 1147. The Board’s authority to act under Part 1147 is derived from 49 U.S.C. § 11102. Pursuant to subparagraph (a) of that statute, the Board cannot direct one rail carrier to operate over the tracks of another rail carrier unless it has first provided for the payment of compensation to the second rail carrier, or security for such payment has been put in place. No such payment or security for such payment has been ordered by the Board in this proceeding. Alternative rail service since November 22, 2006 has thus been unlawful, and continues to be unlawful.

III. ANSWER TO AMENDED COMPLAINT

The following substantive answers to the Amended Complaint are submitted under protest.

Complaint Section No.	Sentence	Answer
1	1 st	Admitted that SAW sold property to Choo Choo Properties, Inc. (Choo Choo) subsequent to the filing of PYCO's Complaint. Denied that such property constitutes a "spite strip". Admitted that Larry Wisener owns Choo Choo and that Delilah Wisener owns SAW.
	2 nd	Denied that Choo Choo is an alter ego of SAW.
	3 rd	Denied that Choo Choo/SAW terminated PYCO's crossing between PYCO's cottonseed stockpile and PYCO's Plant No. 1 on the wye property contained in a "spite strip". Further answering, PYCO never had the right to cross SAW property at the involved site, so that SAW's refusal to acquiesce in PYCO's crossing was not a termination of a PYCO right to cross the property.
	4 th	Admitted
	5 th	Neither admitted nor denied. PYCO's pleadings before this Board speak for themselves.
	6 th	Neither admitted nor denied. The Board decision referred to speaks for itself.
	7 th	Neither admitted nor denied. PYCO's pleadings before the Texas State Court speak for themselves.
	8 th	Admitted
	9 th	Admitted. Further answering, the action referred to resulted from a stipulation between SAW/Choo Choo and PYCO.
	10 th	Neither admitted nor denied. The State Court injunction speaks for itself.
2	1 st	Insufficient knowledge to plead -- require proof of allegations
	2 nd	Insufficient knowledge to plead -- require proof of allegations.

Complaint Section No.	Sentence	Answer
	3 rd	Insufficient knowledge to plead -- require proof of allegations
	4 th	These are legal conclusions that do not require an answer.
	5 th	Denied
3	1 st	This is a request for legal relief that does not require an answer.
4	1 st	Admitted, except that there is insufficient knowledge to plead as to whether PYCO is a "rail-dependent shipper" - require proof thereof.
	2 nd	Insufficient knowledge to plead -- require proof of allegations
	3 rd	Admitted that PYCO paid SAW \$100,000 for certain property in December, 2000. Denied that such payment included a 20-year extension of further use of lease rights bearing on railroad property owned by SAW. Denied that SAW did not pay compensation to BNSF for rail property at Lubbock. Admitted as to the allegations of footnote 8.
	4 th	Denied. Admitted as to the first sentence of footnote 9. Denied as to the second sentence of that footnote.
	5 th	Denied, except that admitted that SAW transferred various PYCO licenses and leases to Choo Choo.
	6 th	Answer not required; these Board decisions speak for themselves.
	7 th	These are legal conclusions that do not require an answer.
5	1 st	These are requests for legal relief that do not require an answer.
	2 nd	This is a request for legal relief that does not require an answer.
	3 rd	This is a request for legal relief that does not require an answer.
6	1 st	Denied. Further answering, pursuant to 49 C.F.R. § 213.5(e), West Texas & Lubbock Railway Company (WTLR) has had the legal duty to maintain the line since January 26, 2006, and has failed to provide adequate maintenance of the line.
	2 nd	Insufficient knowledge to plead - require proof of allegations

Complaint Section No.	Sentence	Answer
	3 rd	Denied. Further answering, SAW requested information necessary for participation in telephone calls to coordinate operations, but such information was not provided. Further answering, WTLR has the duty to control weeds on the rail line.
7	1 st	This is a request for legal relief that does not require an answer.
	2 nd	This is a request for legal relief that does not require an answer.

WHEREFORE, SAW denies that PYCO is entitled to any relief against SAW.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Defendant

Thomas F. McFarland

THOMAS F. McFARLAND
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208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Defendant

, DUE DATE: July 6, 2007

CERTIFICATE OF SERVICE

I certify that on July 5, 2007, I served the foregoing document, Answer to Amendment/Supplement to Complaint , by UPS overnight mail, to Charles H. Montange, Esq., 426 N.W. 162nd Street, Seattle, WA 98177.

Thomas F. McFarland

Thomas F. McFarland