14 February 2007
e-filing

Memorandum to Mr. Vernon Williams
Secretary
Surface Transportation Board

Re: PYCO Industries -- Feeder Line Application --
South Plains Switching, F.D. 34890

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Enclosed for e-filing in "pdf" and "Word Perfect 12" formats per STB's e-filing instructions please find an Opposition on behalf of PYCO Industries to the Petition to Reopen/Reconsider filed by incumbent railroad South Plains Switching in the above docket on January 25, 2007. SAW's Petition was directed at this Board's Decision of January 24, 2007.

As indicated in the attached certificate of service, and in accordance with the e-filing instructions, PYCO is serving the other parties by express service, next business day delivery.

Thank you for your assistance in this matter.

cc. Counsel per certificate of service

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	

OPPOSITION
by Pyco Industries to
South Plains Switching's
Petition to Reopen and/or for Reconsideration

PYCO Industries (PYCO) opposes the January 25, 2007 petition to reopen and/or for Reconsideration filed by incumbent railroad South Plains Switching, Ltd. (SAW) in this docket. SAW's Petition is directed at this Board's Decision served January 24, 2007. That Decision responded to a motion filed by Hanson Aggregates in a letter dated December 21, 2006, in effect requesting this Board to apply and to enforce its Decision in this docket (F.D. 34890) served August 3, 2006. This Board's August 3 Decision sought to preserve the status quo and to prevent retaliation by SAW against shippers supporting PYCO's feeder line application (FLA) by barring all lease terminations and voiding all property transfers by SAW after May 5, 2006 (the date PYCO filed its initial FLA).

Hanson, which filed a verified comment dated August 1, 2006, supporting PYCO's FLA, filed its letter-motion of December 21 after SAW refused it service and terminated its track lease on trackage serving its transload facility in Lubbock.

SAW filed a response by letter dated December 27, 2006, defending the termination on the ground that it had earlier

quitclaimed the property to its alter ego Choo Choo Properties (Choo Choo) in an unrecorded deed.

This Board's January 24 Decision voided the purported transfer by SAW to Choo Choo. The Decision also voided the purported track lease termination by SAW and Choo Choo.

SAW's Petition to Reopen on its face purports to assert four grounds for reopening, but none have merit.

ARGUMENT

1. The Petition asserts that the January 24 Decision was defective in failing to afford SAW twenty days to reply to a Hanson pleading filed on January 12. Hanson filed its motion (by letter) dated December 21, 2006. SAW responded to the Hanson motion by a letter dated December 27. SAW filed no other response. On January 12, Hanson filed a proceeding under 49 C.F.R. Part 1146 for alternative service and merely reiterated its motion for relief. SAW does not claim that Hanson raised a new argument to which it now wishes to respond. SAW merely claims that the January 12 reiteration was a "formal Motion[]" as opposed to an "informal" letter. This is a distinction without a difference. SAW's counsel, like PYCO's, and like many other practitioners before STB, frequently comments or seeks relief in letter format, and has done so in this docket. The key to being considered a pleading is notice. Adequate notice is accomplished in most cases by service on the incumbent railroad (or presumably such other party as is

affected by the pleading). In any event, Hanson served its letter on SAW. SAW responded. There was thus no denial of due process. Moreover, STB regulations allow for the filing of "deficient pleadings" subject to this Board's rejection of them for non-compliance, or to this Board's provisional acceptance of the pleading pending remedy of the defect. 49 C.F.R. § 1104.10. Even if Hanson's December 21 letter were somehow deficient (e.g., single spaced as opposed to double spaced), this Board accepted it for filing, as it was entitled to do under its regulations. Given 49 C.F.R. § 1104.10, this cannot be construed as a denial of due process to SAW.

SAW's assertion that this Board acted ex parte has no basis. This Board merely enforced an earlier order after hearing from SAW via SAW's letter of December 27. SAW does not show any prejudice by the Board's action.

2. SAW appears to claim that all shippers are required to furnish their own track pursuant to 49 U.S.C. § 11103, and that, under the referenced statute, a railroad does not have an obligation to makes its track available to a shipper for use as a private track. SAW seems to argue that since the railroad does not have to make its track available, it need not provide service either. SAW Pet. at 3. SAW appears to argue that 49 U.S.C. § 11103 somehow repeals the common carrier obligation set forth in 49 U.S.C. § 11101(a). This is not the case.

Even assuming arguendo with SAW that Hanson's lease somehow converted SAW track into private track,[1] SAW misreads section 11103. That statute is applied to situations involving "shipper-owned track." Minnesota Northern Railroad v. Canadian National Railway Co., STB dkt. 42080, served March 18, 2005. It provides for a remedy in the event a railroad refuses to switch to shipper-owned track. It does not require a shipper to furnish its own track in order to receive service when the shipper's property is immediately adjacent to an existing railroad track. That situation is governed by other provisions, such as the general common carrier obligation to "provide ... transportation or service on reasonable request." 49 U.S.C. § 11101(a). SAW makes no claim, let alone a showing, in its petition to reopen that Hanson's request for service was unreasonable. As matters stand, SAW has simply and arbitrarily retaliated against Hanson because Hanson supported PYCO's FLA by, as Hanson indicated, refusing service and terminating the track lease.

3. SAW claims it can arbitrarily refuse rail service to Hanson because rail transportation of aggregates is exempted from all rail regulation, including 49 U.S.C. § 11101(a), pursuant to 49 C.F.R. § 1039.11. 49 C.F.R. § 1039.11(b) states that the exemption

[1] SAW does not show that the lease granted Hanson some kind of exclusive use, at least to the detriment of SAW or any other shipper. The lease that SAW produced seems to be designed to provide for a transload operation.

applies "unless modified or revoked by a subsequent order of this Board." In its Decision served August 3, 2006, this Board barred all lease terminations and property transfers by SAW after May 5, 2006. The Board did not "except" out lease terminations or property transfers relating to exempt commodities, nor did SAW make an argument for such an exception. The August 3 Decision thus serves to modify the commodity exemption relied upon by SAW to the extent that exemption would otherwise immunize SAW's conduct here. Any other result would render the Board's August 3 Decision uncertain and even meaningless, because Lubbock shippers would not know if they could count on it even for theoretical protection from retaliation by the incumbent railroad.

If there is any doubt on this point, then the Board should issue an order modifying all commodity exemptions so that they do not apply to SAW's common carrier obligations under 49 U.S.C. § 11101(a), or otherwise interfere with this Board's effort to preserve the status quo. This would serve two purposes: (1) it would ensure the accomplishment of the Board's intent to preserve the status quo pending resolution of PYCO's FLA, and (2) it would contribute to preservation of the value of the SAW system during the FLA pendency by inhibiting machinations by SAW which are even now reducing the system's value. For example, SAW's refusal to serve Hanson and efforts to divert Hanson's business elsewhere, if unchecked by this Board, will drive away Hanson, which would reduce

going concern value of SAW. Similarly, SAW's machinations in purporting to sell properties to Choo Choo reduces the net liquidation value of SAW.

In sum, any such commodity exemption should be deemed lifted to the extent it impedes or interferes with this Board's power to require SAW to adhere to 49 U.S.C. § 11101(a) during the pendency of the FLA. A limited modification of commodity exemptions to this extent should clarify this Board's power to bar lease terminations, to void property transfers, and to require service to shippers aligned with PYCO, and otherwise to preserve the status quo pending the resolution of the FLA.

This Board has authority to revoke an exemption, in whole or in part, at any time pursuant to 49 U.S.C. § 10502(d) if the Board finds "that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101." See PYCO Industries -- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, and Rail General Exemption Authority -- Misc. Agricultural Commodities -- PYCO Industries, Inc. Petition for Partial Revocation, Ex Parte 346 (Sub-no. 14C), served June 21, 2006, slip op. at 4. This Board has noted that the commodities exemptions are predicated on the railroads not abusing their market power in transporting the exempted commodities. This Board has already found such abuse by SAW in the form of inadequate rail

service by SAW. Id.[2] SAW's refusal to provide service to Hanson, coupled with (a) its purported lease termination, (b) then its claim that it had transferred the property to Choo Choo, (c) which it then coupled with a lease termination by SAW's attorney on behalf of Choo Choo, are part and parcel to the pattern of inadequate rail service experienced by PYCO. Moreover, they are the second instance of abusive conduct toward Hanson set forth in the record.[3] SAW's abuse of Hanson is simply more evidence of arrogant and flagrant abuse of market power by SAW's owners, justifying a lifting of any commodity exemption behind which SAW seeks to hide to avoid this Board's efforts to maintain status quo pending the outcome of the feeder line proceeding.

This Board accordingly should provide that the commodity exemptions claimed by SAW do not apply to the extent necessary to allow this Board (a) to require SAW to provide service to its customers pursuant to 49 U.S.C. § 11101(a), and (b) to prevent SAW from alienating its property or terminating leases affecting shippers. As in the Decision in F.D. 34802 and Ex Parte No. 346 (Sub-no. 14C) served June 21, 2006, at p. 4, "[t]his action will

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[2] Accord, Pyco Industries, Inc. -- Alternative Rail Service -- South Plains Switching, F.D. 34889 and Rail General Exemption Authority -- Miscellaneous Agricultural Products -- PYCO Industries Petition for Partial Revocation, Ex Parte 346 (Sub-no. 14C), served Nov. 21, 2006, slip op. pp. 5-6.

[3] The first instance is recorded in Hanson's verified letter dated August 1, 2006, and filed on August 3, 2006 in F.D. 34890.

ensure the continuation of a sound rail system to meet the needs of the shipping public. See 49 U.S.C. 10101(4)."

4. SAW finally claims that there is no "rational basis for the Board's finding (decision at 4) that SAW's transfer of Track 269 to Choo-Choo prior to the feeder line application nevertheless was frozen because 'the transfer occurred after SAW was on notice that PYCO intended to file a feeder line application for SAW's rail lines.'" SAW Pet. at 4. But PYCO did put SAW on notice, in a pleading filed January 9, 2006, in F.D. 34802, as the Board indicated in its Decision in F.D. 34890, served January 24, 2007, at p. 3. Obviously the Board thus had a "rational basis" to void any transfers after January 9, 2006.[4]

Contrary to SAW's intimations, there is no rule of law that

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[4] SAW attached to its motion a Verified Statement by Delilah Wisener claiming that "SAW had no way of knowing whether or not PYCO would file a feeder line application at a future date." But SAW was on notice via PYCO's January 9, 2006, pleading. Given SAW's subsequent efforts to find a buyer after PYCO was granted relief in F.D. 34802 and immediately prior to PYCO's May 5 filing of our initial feeder line application, PYCO at least is convinced that SAW and its principals were well aware that SAW was about to face a feeder line application by PYCO.

IN a Verified Motion filed with this Board on or about 14 October 2006 in F.D. 34890, 34889 and 34802, PYCO sought to void certain additional property transfers from SAW to Choo Choo which PYCO learned about from review of SAW's September 21 discovery responses. (SAW did not furnish a copy of the alleged April deed to Choo Choo germane to Hanson, so PYCO did not specifically reference that deed in our October motion.) PYCO sought general relief from any property transfers after January 9, 2006, from SAW to Choo Choo, and even for transfers after December 20, 2005, when PYCO filed is alternative use proceeding in F.D. 34802. The Board has not yet ruled on PYCO's motion.

states that property sales may only be voided after the filing of a feeder line proceeding when the party making the sale is on notice that a feeder line proceeding will be filed. If such a rule existed, an incumbent railroad could subvert the feeder line process by transferring out key parcels to its alter ego, as SAW has purported to do here. And in this case, SAW's alter ego is none other than Choo Choo. SAW's Choo Choo is owned by the husband of the person who claims (now) to own SAW, and that husband is the former manager of SAW, who long represented himself to be the owner of SAW.

There is another problem with SAW's claim. The SAW to Choo Choo transfer was by unrecorded quitclaim deed, and indeed by an unrecorded quitclaim deed which bears the date of April 28, 2006, just before PYCO filed its initial FLA. This deed should have been produced to PYCO by SAW on September 21, 2006, the date to which SAW managed to postpone its very belated relevant responses to PYCO's May 5, 2006 discovery requests. However, although SAW did produce some unrecorded deeds at that time, it did not produce this deed. This suggests two possible conclusions, neither of which are good for SAW: (1) The deed may not have been in existence prior to May 5, or indeed prior to September 21, 2006, when SAW made its final discovery response to PYCO. This would mean that the deed is misleadingly back-dated to a time well before it was actually

prepared and executed,[5] and this would suggest an effort to circumvent this Board's August 3 order by the back-dating process. As this Board noted in its January 24, 2007 decision, SAW included Track 269 in its valuation case (slip op. at p.4), and this is inconsistent with the newly presented April 2006 deed to Choo Choo.[6] (2) If the alleged deed to Choo Choo did exist prior to September 21, 2006, then SAW failed to make relevant discovery. Since this alleged deed (and others of similar ilk) bear on the valuation of SAW, the appropriate penalty would be to throw out SAW's valuation case.

CONCLUSION

SAW states no basis for reopening or reconsideration, and its petition must accordingly be denied.[7]

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[5] It is also possible that SAW has a stockpile of acknowledged signatures dated in April 2006 which it annexes to subsequent deeds.

[6] In all events, "[s]omething is rotten in the state of Denmark." Hamlet, I, iv, 90.

[7] Should this Board nonetheless determine to reopen or to reconsider, then PYCO requests that prior to a final determination on the merits of SAW's arguments on reopening that PYCO be afforded an opportunity to depose, by sub poena pursuant to this Board's authority per 49 U.S.C. §721(c) to ensure attendance of witnesses, any notary who attested to signatures on alleged pre-May 5, 2006, deeds from SAW to Choo Choo (or others), including specifically Dale A. Robinson, who took the acknowledgement in the deed affixed as Exhibit A to SAW's letter of December 27, 2006, and possibly the signatory of the deeds themselves. Should STB reopen pursuant to SAW's request, PYCO would also seek the opportunity to sub poena per 49 U.S.C. § 721(d) any log books of the notaries involved, and to seek other evidence concerning the dates the deeds in fact were executed.

PYCO also joins in Hanson's Opposition to SAW's petition.

Respectfully submitted,

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Cf. Arizona Public Service Co. v. BNSF, STB Dkt. 41185, served Dec. 23, 2003. However, because PYCO wishes the feeder line proceeding concluded, PYCO's preferred relief in response to SAW's petition is that it simply be denied and that the feeder line proceeding move forward to resolution. As the episode with Hanson demonstrates, conditions for shippers in Lubbock cannot improve so long as SAW remains in control of the switching operation there.

Certificate of Service

I hereby certify service of the foregoing upon the following counsel of record by express service, next business day delivery, this 14th day of February 2007:

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