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August 21, 2007

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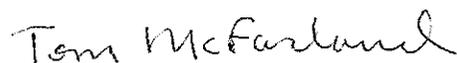
Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

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

Dear Mr. Williams:

Hereby transmitted is a Reply In Opposition To (1) Motion To Compel and (2) Motion For An Order In Limine, for filing with the Board in the above referenced matter.

Very truly yours,



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.)

**REPLY IN OPPOSITION TO (1) MOTION TO COMPEL
AND (2) MOTION FOR AN ORDER IN LIMINE**

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

Defendant

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DATE FILED: August 21, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**REPLY IN OPPOSITION TO (1) MOTION TO COMPEL
AND (2) MOTION FOR AN ORDER IN LIMINE**

Pursuant to 49 C.F.R. § 1114.31(a)(1), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies in opposition to a “Motion to Compel Further Response By SAW To PYCO’s Discovery Requests And Motion For An Order In Limine” (“Motion”), filed by PYCO Industries, Inc. (PYCO) on August 13, 2007. SAW continues to object to processing the complaint before disposition of SAW’s Motion to Dismiss.

REPLY

I. THE MOTION SHOULD BE DENIED BECAUSE THE DISCOVERY IS UNDULY BURDENSOME

On July 5, 2007, SAW furnished hundreds of pages of documents in response to 23 requests for production of documents submitted by PYCO. Many of those document requests had multiple parts, so that there were considerably more than 23 document requests. In addition, SAW at the same time responded to 10 interrogatories that had been propounded by PYCO,

many of which had multiple parts. In total, SAW's response to discovery was approximately four inches thick. -

SAW's response to that discovery is not at all indicative of an entity that is attempting to stonewall discovery. SAW provided extensive documentation and information in good faith on a timely basis.

Soon after that response to discovery had been provided, PYCO submitted a second set of discovery. That second round consists of (1) 14 more requests for production of documents, some in multiple parts; (2) 16 additional interrogatories, most having multiple parts; and (3) 22 requests for admissions, including requests to admit the genuineness of numerous documents. PYCO's second set of discovery is thus even more extensive and broad than its first set.

It may be that the Board's regulations do not impose a limit on the number of document requests, interrogatories, and requests for admission that a party can submit in a proceeding. However, it is provided in 49 C.F.R. § 1100.3 that "(t)he rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." Thus, proceedings before the Board are supposed to be less formal than proceedings in Court. As provided in 49 C.F.R. § 1114.1, the rules of evidence are to be applied in Board proceedings "to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties." (emphasis added).

The Board's discovery rules would not be applied liberally and less formally than in Court, and the substantial rights of SAW would not be preserved, if PYCO were permitted to burden SAW with a total of 37 requests for production of documents, 26 multiple-part interrogatories, and 22 requests for admissions, and to enforce that burdensome discovery with a

“motion for an order in limine.” Indeed, despite having considerable experience before the Board and its predecessor, SAW’s counsel had to consult Court procedure to learn the nature of a “motion for an order in limine.” PYCO’s counsel is attempting to transform what should be a straight-forward complaint case into a game of “gotcha” through technical pleading. That is flatly contrary to the goal of the discovery rules.

Consistently with the foregoing principles, it would be unduly burdensome to require SAW to respond to PYCO’s second set of discovery in light of SAW’s good faith production of extensive documents and information in response to PYCO’s initial discovery. *See Capitol Materials, Inc. -- Pet. for Declar. Order -- Certain Rates & Practices of Norfolk Southern Ry. Co.*, 2002 STB LEXIS 233 at *6 (Docket No. 42068, decision served April 19, 2002) (motion to compel denied where “in light of the extensive documentation that NS has produced relating to switching dates and times, Capitol should have sufficient information to prepare its opening statement”). That is especially the case where in light of overreaching discovery, the burden of proof would effectively be shifted from the complainant to the defendant. *See FMC Wyoming Corp. v. Union Pacific R. Co.*, 1998 STB LEXIS 230 at *15 (motion to compel denied where “the evidentiary burden [would] be shifted to the shipper under the guise of discovery”).

In determining whether discovery is unduly burdensome, the Board should also take into account the relative size and strength of the parties. On one hand, PYCO is the largest producer of cottonseed oil in the world. On the other hand, SAW is small, family-operated company having only 11 employees. In a David-and-Goliath situation of that kind, the rules should be liberally applied to prevent a large, powerful entity from unduly burdening a small, weaker entity by means of extensive and overreaching discovery. PYCO has the resources to use extensive

discovery to wear down SAW's ability to defend itself. In light of that kind of disparity of power, the Board has refused to permit Class I rail carriers to submit extensive discovery to small shippers who protested the rail carriers' abandonment applications. The situation in the present case is substantially the same.

II. THE MOTION SHOULD BE DENIED BECAUSE THE DISCOVERY IS NOT RELEVANT TO THE SUBJECT MATTER, NOR IS IT CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

Even if the discovery were not objectionable as unduly burdensome, it should not be permitted because it is not relevant to the subject matter of this proceeding, nor is it calculated to lead to the discovery of admissible evidence.

The subject matter of this proceeding is a complaint alleging violation of several provisions of the Interstate Commerce Act, as amended. The complaint was filed on April 19, 2006. Ordinarily, if the allegations of the complaint were to be sustained, PYCO would be entitled to an award of sufficiently-proven damages incurred during the two-year period prior to the filing of the complaint (49 U.S.C. § 11705[c]), and for the period during which the complaint was pending, and to a cease-and-desist order for the future.

In the present case, however, SAW has not provided rail service to PYCO after January 26, 2006, and all indications are that the Board will not permit SAW to serve PYCO in the future. Since January 26, 2006, PYCO has been served by an alternative service provider, pursuant to 49 U.S.C. § 11123(a) until November 22, 2006, and pursuant to 49 U.S.C. § 11102(a) thereafter to date. The Board has given every indication that it will grant pending applications under 49 U.S.C. § 10907(b)(1)(A)(i) for permanent acquisition of SAW's rail lines, including the lines that serve PYCO, even though SAW now opposes those applications. The

Board has also signaled that it will continue alternative rail service in effect to coincide with the effective date of permanent acquisition of SAW's rail lines. In contrast to the broad reach of most complaint cases, therefore, the complaint in the present case involves only a claim for damages during a specific period in the past, i.e., April 19, 2004 to January 26, 2006.

An amendment of the complaint filed by PYCO on May 17, 2007 identifies the nature of the damages claimed by PYCO, and the alleged statutory violations resulting in those damages, viz.:

- (1) Increased transportation and handling costs and loss of oil quality of cottonseed required to be trucked by PYCO for transloading to rail at Plainview, TX as a result of SAW's alleged failure to have provided transportation on reasonable request in violation of 49 U.S.C. § 11101(a);
- (2) Surcharges and constructive placement charges whose collection allegedly constituted an unreasonable practice related to SAW's rates in violation of 49 U.S.C. § 10702(2) because they were assessed against PYCO, but not against SAW's other shippers; and
- (3) Additional costs to transport cottonseed "around SAW" whose payment allegedly constituted an unreasonable practice related to SAW's service in violation of 49 U.S.C. § 10702(2) because such costs were incurred as a result of SAW's refusal to permit PYCO to cross SAW's wye track to access PYCO's cottonseed stockpile.

PYCO's initial complaint alleges violation of additional provisions of the Act. However, inasmuch as PYCO does not allege damages as a result of any such violation, the Board need not determine in the abstract whether those provisions were violated.

SAW responded to the relatively few items in PYCO's second set of discovery that had appropriate bearing on the statutory violations alleged above and/or on the nature of those damages. For example, SAW responded to PYCO Request for Admission No. 9 by denying that "(p)rior to November 22, 2005, SAW per Mr. Wisener advised SAW's crews that they were to limit PYCO Plant 1 to one switch per day," because that discovery request bears directly on whether SAW failed to provide transportation on reasonable request in violation of 49 U.S.C. § 11101(a). Similarly, SAW responded to PYCO Request for Admission Nos. 2, 3, 14 and 15 because those discovery requests relate directly to the contention that SAW's collection of surcharges and constructive placement charges constituted unreasonable practices related to SAW's rates and service in violation of § 10702(2).

However, most of PYCO's second set of discovery is wholly irrelevant to the scope of PYCO's amended complaint as identified above, and is in no way designed to lead to evidence that would be admissible in the complaint proceeding. For example, the subject matter of PYCO Document Request Nos. 1 and 2 -- SAW's training program for rail operations -- is not remotely relevant to any issue in the complaint, as amended. In attempting to justify that discovery, PYCO argued that "(o)ne of the issues in the case involves SAW's refusal to allow PYCO to operate its trackmobile to switch cars at Plant No. 1" (Motion at 7). There is no such issue in the complaint. The Board long ago denied PYCO's request for an order directing SAW to allow PYCO to operate its trackmobile on SAW's tracks (Decision served January 26, 2006 at 4).

Similarly, the subject matter of Document Request Nos. 3 through 10 -- proposals by SAW to sell part or all of its rail lines to PYCO and to other entities -- may be relevant in valuing SAW's rail lines in the feeder line cases, but it has absolutely no bearing on any issue in the complaint. In attempting to justify that discovery, PYCO has argued that it "is germane to determining whether SAW in fact is manipulating the evidence, retaliating against PYCO, and whether SAW . . . violated 49 U.S.C. § 11902 by soliciting something of value in return for the supply or movement of railcars in transportation" (Motion at 8). None of those grounds bears remotely on the issues involved in the complaint.

The Board should get the picture from those examples without SAW having to respond item by item to the lengthy matter in PYCO's second set of discovery. The subject matter of this proceeding is quite narrow, i.e., whether the actions or inactions of SAW alleged in the amended complaint to have resulted in damages to PYCO (1) constituted statutory violations, and (2) if so, whether the damages claimed by PYCO have been sufficiently proven. To the extent that the discovery in PYCO's second set relates to that matter, SAW responded to it. However, the items in PYCO's second set of discovery to which SAW objected are not remotely related to that proper subject matter, let alone designed to lead to the discovery of admissible evidence. PYCO's Motion to compel responses to that discovery should be denied on that basis.

III. THE MOTION SHOULD BE DENIED AS TO INTERROGATORY 11 ON THE ADDITIONAL GROUND THAT IT IS VEXATIOUS

In addition to being unwarranted as unduly burdensome and irrelevant, Interrogatory No. 11 in PYCO's second set of discovery is objectionable as vexatious in the extreme. The Oxford

Dictionary defines “vexatious” as “not having sufficient grounds for action and seeking only to annoy the defendant.” -

Interrogatory No. 11 is clearly designed to annoy and personally insult. That interrogatory seeks identification of:

- (1) prescription medication taken by Mr. Larry Wisener, including the prescribing physician and the condition being treated;
- (2) any medication taken by Mr. Wisener for mood control or adjustment;
- (3) any arrests or police citations charging Mr. Wisener with disorderly conduct, obstruction of a peace officer or the like;
- (4) information regarding all lawsuits filed by Mr. Wisener or a company managed by him in whole or in part; and
- (5) recommendations that Mr. Wisener take medication, obtain counseling or other actions to control his anger.

That kind of unwarranted and personally insulting inquiry should not be permitted as a matter of basic decency. There is no reason to believe from the massive record already made in this and related proceedings that Mr. Wisener has ever been arrested, nor that he is unduly litigious, nor that he takes or requires medications for mood control or otherwise.

Interrogatory 11 also asks about Mr. Wisener’s use of cuss words and intimidating behavior, and threats to degrade service. However, assuming solely for the sake of argument that Mr. Wisener has engaged in such behavior, it would not constitute a violation of 49 U.S.C. § 11101(a). That statute is violated by a failure to provide requested rail service or a failure to

provide such service in an adequate manner, not by threats or cuss words. There is absolutely no -
rational support in law for the Board's novel determination in a related proceeding that -

. . . A shipper's affirmative statement that it fears that it could suffer retaliation in the form of poor service for criticizing its rail service provider is sufficient in our view to constitute a showing of inadequate service to the shipper that makes the statement.

See PYCO Industries, Inc. -- Feeder Line Applic. -- South Plains Switching, Ltd. Co., Finance Docket No. 34844, et al., decision served July 5, 2006, at 5. If that were the law, a rail carrier could be found to be in violation of the adequate-service statutes not for actually providing prior service, or even for threatening to provide poor service, but for a shipper's subjective fear that the carrier might provide poor service in the future. That radically lower standard cannot be the law.

Thus, even if Mr. Wisener was the worst ogre in the world from a personality standpoint, there would be no legal basis for PYCO's complaint if PYCO's cottonseed shipments had not been trucked to Plainview for transloading; and if PYCO had not been denied access over SAW's tracks to reach its cottonseed stockpile; and if PYCO had not been assessed surcharges and constructive placement charges. This case will turn on the transportation facts and circumstances surrounding SAW's rail service and charges to PYCO in those respects, and the legal basis for SAW's refusal to permit PYCO to cross its tracks, not on whether Mr. Wisener is a hothead. PYCO's incessant rantings about Mr. Wisener's "bullying" and "threats of retaliation" have been a smokescreen from the start, designed to obscure the real issues in this matter. SAW will focus on those proper issues, even if PYCO will not.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Motion should be denied.

Respectfully submitted,

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DATE FILED: August 21, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2007, I served the foregoing document, Reply In Opposition To (1) Motion To Compel and (2) Motion For An Order In Limine, by e-mail on the following:

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