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TRANSPORTATION BOARD

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25 May 2006
by Federal Express



Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

34870-216627

Re: PYCO Industries, Inc. v. South Plains Switching,
F.D. ~~34838~~ (Non-coal Complaint proceeding per 49
USC 11701 and 49 CFR 1111.1

ENTERED
Office of Proceedings

MAY 26 2006

Part of
Public Record

Rail General Exemption Authority -- Misc.
Agricultural Products -- PYCO Industries, Inc.
Petition for Partial Revocation, Ex Parte 346
(Sub-no. 14C)

216628

PYCO Industries -- Alternative Rail Service,
F.D. 34802 (comment on SAW's untimely May 24
filing)

216629

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc., enclosed please find an original and ten copies of document entitled "Reply to Motion to Dismiss and Motion/Petition for Immediate Revocation of Claimed Commodity Exemptions." PYCO is tendering three originals and thirty copies, for filing in three STB proceedings.

The first set is provided for filing in STB Finance Dkt. 34838, PYCO's Complaint against SAW.

The second set is supplied as PYCO's opening petition for partial revocation of a commodity exemption claimed by South Plains Switching in F.D. 34838. The petition has been assigned the docket number Ex Parte 346 (Sub-no. 14C). A check for \$200 for the filing fee is enclosed.

The third set is for filing in F.D. 34802. PYCO notes that SAW on 24 May filed a "Supplement" in PYCO Industries--Alternative Rail Service, F.D. 34802. In that Supplement, SAW claimed that this Board lacks jurisdiction to issue an order authorizing alternative service under 49 C.F.R. Part 1146 due to the commodity exemption claimed by SAW (i.e., for cottonseed and linters per 49 C.F.R. § 1039.10). As we note in our Reply and Petition, furnished for dockets F.D. 34838 and Ex Parte 346 (Sub-no. 14C), PYCO ships between 1500 and 2000 carloads per year of cottonseed oil and meal which most definitely is not

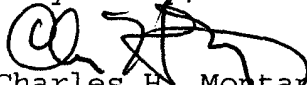
exempt. That alone is sufficient to render SAW's latest pleading in F.D. 34802 specious. SAW's pleading is deficient for additional reasons as well. We believe the chief reason that SAW made its May 24 filing was to cause confusion and delay in addressing PYCO's concerns about SAW's blockade of PYCO's seed stockpile, and SAW's continued breach of the applicable service protocol. We note that paragraph 7 of Mr. Kring's Declaration (Appendix I in the filing tendered herewith) notes yet another instance (8 AM, 24 May) in which SAW's breach of the protocol placed a PYCO employee at risk of injury or worse. We tender herewith eleven additional copies of our Reply and Petition for filing in F.D. 34802, in an effort to counter SAW's effort to delay necessary relief. PYCO reserves the right to respond to SAW's "Supplement" as appropriate, including the right to move to strike it as untimely.

By my signature below, I certify service by Federal Express, next day delivery, upon:

Thomas McFarland, PC
208 South LaSalle St., Suite 1890
Chicago, IL 60604-1112
(counsel for SAW)

Thank you for your assistance in this matter.

Very truly,



Charles H. Montange
counsel for PYCO Industries

Encls.

cc. Gary McLaren, Esq. (w/encl.)
(for PYCO)
Thomas McFarland, Esq. (and SAW) (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries Inc.)

vs.)

South Plains Switching, LLC)

F.D. 34838

FD 34870

Rail General Exemption Authority)

-- Misc. Agricultural Products --)

PYCO Industries, Inc. Petition)

for Partial Revocation)

Ex Parte 346 (Sub-no. 14C)

REPLY
to Motion to Dismiss

and

MOTION/PETITION FOR IMMEDIATE REVOCATION
of Claimed Commodity Exemptions, if Found Applicable,
and Motion/Petition to Reopen

Plaintiff PYCO Industries, Inc. (PYCO), replies to the motion to dismiss filed by defendant South Plains Switching (SAW) both with this document as a Reply, and as a Petition for revocation, as to SAW, of the commodity exemption for cottonseed, linters and hulls, claimed by SAW in its motion to dismiss.

Summary

The principal argument presented in SAW's motion to dismiss is that the commodities shipped by PYCO are exempt from regulation under 49 C.F.R. § 1039.10(a). Some of the commodities shipped by PYCO are exempt under that regulation;

however, PYCO also ships -- as SAW well knows -- between 1500 and 2000 carloads of cottonseed oil and cottonseed meal per year, and those two commodities are specifically not exempt. See 49 C.F.R. § 1039.11. Thus SAW's motion must be denied.

Even if PYCO shipped only cottonseed and linters, the exemption claimed by SAW would not apply in the circumstances here. But should it be applicable, it should be immediately revoked as applied to SAW. To this end, PYCO petitions for revocation of the exemption claimed by SAW with respect to all service provided by SAW to PYCO in Lubbock, Texas. If instead of immediately revoking the exemption as to SAW, this Board instead elects to institute a proceeding, the proceeding should be coordinated with the Complaint proceeding. See FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Co.; Rail General Exemption Authority -- Selected Commodities, STB Dkt. 42022, STB Ex Parte No. 346 (Sub-no. 46A), served August 31, 1998, 1998 STB Lexis 230 at p. *4 (simultaneous consideration of complaint and petition for partial revocation).

SAW's other arguments against specific causes of action set forth in PYCO's Complaint are totally lacking in merit.

SAW's motion to dismiss must be denied. The commodity exemption claimed by SAW should be revoked as applied to SAW rail service to PYCO in Lubbock in respect to common carrier duties, discrimination, practices, and essentially all non-rate matters.

Argument

SAW's motion to dismiss has no merit. It seems interposed mainly to confuse, to increase litigation expenses, and to delay.

1. Applicable legal standards. Motions to dismiss this early in a proceeding are heavily disfavored. "Granting a motion to dismiss requires that all factors be viewed in the light most favorable to the complainant." Grain Land Coop v. Canadian Pacific Limited, STB Dkt. No. 41687, served Dec. 1, 1997 (Grain Land I), p. 4, citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 326 (1991). This Board has indicated that

"to ensure that participants have a full and fair opportunity to meet their burdens of proof, motions to dismiss prior to the submission of evidence are, as a general rule, denied." Grain Land I, supra, p.4, citing Hill v. Federal Power Comm'n, 335 F.2d 355, 363 (5th Cir. 1964). In considering a motion to dismiss, the Board "construe[s] the factual allegations in a light most favorable to the complainant. Grain Land Coop v. Canadian Pacific Limited, STB Dkt. No. 41687, served Dec. 8, 1999 (Grain Land II), p. 2, citing Sierra Pacific Power Co, et al. v. Union Pacific RR, STB Dkt. No. 42101, served Jan. 26, 1998. "We dismiss complaints only when we find that there is no basis on which we could grant the relief sought." Grain Land II, p. 3.

Since PYCO ships products which are non-exempt and the commodity exemption claimed by SAW in any event is not a bar

here, the main argument SAW advances in its motion to dismiss is totally unavailing, and SAW's motion insofar as based upon it must be denied. SAW advances additional grounds for dismissal of the various causes of action stated by PYCO. As shown in section 4, infra, all these arguments are either legally erroneous, belied by the facts, vastly premature, or a combination of the foregoing.

2. SAW's claim of exemption for all conduct toward PYCO. SAW invokes the exemption in 49 C.F.R. § 1039.10 for cotton linters, cottonseed hulls, and cottonseed. While PYCO in its Complaint did not list all products on which it is rail dependent, the above list encompasses some of those products. However, PYCO is also a major cottonseed oil producer, leasing a fleet of 120 tankcars for that purpose. In addition, PYCO produces cottonseed meal, which PYCO ships by rail. See Gail Kring Declaration, annexed as Appendix I, ¶ 3. When this Board both proposed (Rail General Exemption Authority -- Misc. Manufactured Commodities, Ex Parte No. 346 (Sub-no. 25), 1998 ICC Lexis 69, Jan. 29, 1988) and adopted (id., 6 ICC2d 186, Nov. 28, 1989) its list of exempt commodities now set forth in 49 C.F.R. § 1039.11(a), this Board specifically excepted from those exemptions cottonseed oil and cottonseed meal [see 49 C.F.R. § 1039.11(a) (STCC No. 20, except 20 911, cottonseed oil; STCC No. 20 914, cottonseed cake or meal or byproducts)]. Thus, SAW's motion is unavailing as to the Complaint's charges in respect to all oil and meal shipments.

SAW's service deficiencies in respect to PYCO are across the board, pertaining to service with respect to all PYCO's shipments, including cottonseed oil and meal, and not just cottonseed, linters and hulls. In other words, SAW service is uniformly inadequate and unlawful, without distinction between commodities shipped. SAW's motion to dismiss on grounds of exemption must accordingly be denied.

More broadly, however, the commodity exemption in 49 C.F.R. § 1039.10 should not be applicable here. Rail service to PYCO cannot be segregated into exempt and non-exempt cubby-holes. If SAW provides inadequate rail service in connection with cottonseed and linters, this impacts and disrupts SAW's rail service for cottonseed oil and meal and PYCO's operations generally. SAW cannot excuse misconduct as to non-exempt commodities by claiming that other commodities are exempt. But more to the point, PYCO is rail dependent for cottonseed and linters as well as cottonseed oil and meal. The exemption claimed by SAW is simply irrelevant for evaluating the underlying misconduct of SAW, and for structuring appropriate relief.

The exemption under section 1039.10 for linters, hulls and cottonseeds is unavailable to SAW for at least three additional reasons.

a) SAW failure to file notice. The exemption referenced by SAW is conditioned upon a notification letter. On its face, it applies "except that carriers must ... send a letter of

notification to the docket [Ex Parte No. 346 (Sub-No. 14)], within 30 days, of the fact they are using the exemption." Upon inquiry, the Secretary's Office of this Board stated to PYCO's representatives that there is no record that SAW filed a letter of notification that it was using the exemption. In its motion, SAW does not claim to have filed such a letter. 49 C.F.R. § 1039.10 by its terms is therefore not available to SAW. Even if the notice requirement were treated as a dead letter, the exemption is still irrelevant here, because SAW continues to have basic common carrier duties, as well as obligations arising from its contract with BNSF Railway (BNSF).

b) Common carrier. SAW in essence claims that it has no enforceable duty at all to provide any service to PYCO, because of the exemption in 49 C.F.R. Part 1039. According to the argument in SAW's motion to dismiss, SAW may lawfully employ its local monopoly over access to BNSF and the national rail system to halt all service to PYCO with impunity from the civil or criminal jurisdiction of this Board, or from imposition of damages, so long as some of the PYCO products were "exempt commodities." Indeed, in PYCO Industries -- Alternative Rail Service, F.D. 34802, SAW has the temerity to argue that the commodity exemption disempowers this Board from authorizing another carrier to provide adequate rail service to PYCO when SAW -- regardless of reason, lack of reason, malfeasance, bad intent, or conduct otherwise unlawful under federal or state law

-- determines to provide inadequate service.¹ Additionally, because of this Board's plenary regulation of rail freight operations, SAW presumably claims that PYCO must be denied all remedies at common law or pursuant to otherwise applicable state regulation.² In essence, SAW claims the absolute right to behave however it wants, as a petty dictator, holding all power and beholden to no one, in respect to rail service in Lubbock. It is determined to subject PYCO to that infamous sort of world view. This statement is neither empty nor overinflated rhetoric: this Board has already found in F.D. 34802 (see Complaint, Exhibit C) that SAW was delivering inadequate service to PYCO.³

This Board's predecessor adopted the various commodity exemptions to eliminate rate regulation and to free up car supply. The idea behind the exemptions was that the commodities in question were not rail dependent, and that producers could readily substitute truck transport if a railroad chose not to compete for their business, or for that matter effectively boycotted their business. The exemption was not intended as

¹ SAW "Supplement to Petition to Terminate" filed May 24, 2006, in PYCO Industries -- Alternative Rail Service -- South Plains Switching, F.D. 34802.

² Consolidated Rail Corporation -- Declaratory Order-- Exemption, 1 ICC 2d 895 (1986).

³ No economic purpose is served by SAW's behavioral meltdown. SAW's view of the world, and accordant actions, are indicative of SAW's perception that it holds a strategic position (market power) allowing it to exploit or destroy its customers. This is the epitome of a situation requiring regulatory control.

an invitation to declare some kind of open hunting season against rail dependent shippers.

A freight railroad, even a switching operation like SAW, is and remains a common carrier, "and a common carrier, to the extent it is able to do so, has an obligation to provide service to the general public." Rail General Exemption Authority-- Misc. Agricultural Commodities -- Petition of G.&T. Terminal Packaging, 8 I.C.C.2d 674 (1992), citing B.J. Alan Co., Inc. v. United Parcel Service, Inc., 5 I.S.C. 2d 700 (1989), aff'd, B.J. Alan Co. v. ICC, 897 F.2d 561 (D.C. Cir. 1990), cert. denied, 112 S.Ct. 1760 (1992). This is so even if all PYCO's products were covered by Part 1039, which of course they are not. But once one recognizes that PYCO ships between 1500 and 2000 carloads per year of non-exempt products, SAW's claims become irrational. SAW clearly remains subject to common carrier obligations to PYCO, and SAW's motion in denial of same becomes an exercise in futility, diversion and confusion. No commodity exemption protects SAW from the basic common carrier obligation to PYCO.

c) BNSF contract obligation. Wholly apart from its general obligation, SAW owes a common carrier obligation to PYCO on all products by reason of its contract with BNSF.

PYCO is a customer of BNSF Railway (BNSF), paying a tariff to BNSF for common carrier services.⁴ SAW provides local

⁴ PYCO sometimes herein will refer to itself as a SAW customer or to other shippers as SAW customers. Technically all shippers in south Lubbock are BNSF customers. For ease of

switching service to all BNSF customers in the southern portion of Lubbock pursuant to a contract between SAW and BNSF in return for a division of revenue from the tariff, which SAW receives directly from BNSF. Pursuant to BNSF/SAW contract (already filed in this proceeding (see Complaint, Exhibit A), BNSF is empowered to establish through routes and offer through freight rates involving SAW in Lubbock for 99 years, and SAW must deliver the traffic for the division of rates specified in section 17 of the Contract. See Complaint, Exhibit A, section 16. In Exhibit A, section 4(b)(5), SAW represents insofar as germane here that by closing it shall have obtained all authority necessary to conduct rail freight operations as a common carrier.

PYCO ships on BNSF pursuant to BNSF through route tariffs. Pursuant to the BNSF/SAW contract, SAW owes a common carrier duty to PYCO by reason of SAW's contract with BNSF. The only means of enforcement is pursuant to a complaint proceeding before this Board. SAW cannot claim an exemption disabling its responsibility to provide rail freight transportation services pursuant to the BNSF tariffs when it is contractually bound to perform such services for BNSF's south Lubbock customers whenever those customers seek to do business with BNSF.

PYCO is not seeking a tariff quote, or contesting a tariff, or aspiring to impose rate regulation. This is a non-rate

explanation, we will refer to those who receive local switching services from SAW as SAW customers.

complaint, seeking redress from unlawful practices by SAW. PYCO simply wishes adequate rail service, as opposed to the kind of passive aggressive boycott served up by SAW. 49 C.F.R. § 1039.10(a) is inapplicable in the circumstances.

3. Revocation of any Part 1039 exemption to the extent applicable to SAW. Under this Board's precedent, when a commodity exemption is claimed, a shipper may bring a partial revocation proceeding as well as a complaint, and both proceedings will be conducted simultaneously. See FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Co.; Rail General Exemption Authority -- Selected Commodities, STB Dkt. 42022, STB Ex Parte No. 346 (Sub-no. 46A), served August 31, 1998, 1998 STB Lexis 230 at p. *4.

Because PYCO is dependent on rail for the majority of its cottonseed business, as well as for transport of linters, and because PYCO (and its customers) have sustained substantial losses due to SAW's abuse of its strategic position in connection with cottonseed shipments, PYCO wishes to ensure that no section 1039.10(a) exemption may be claimed by SAW in connection with any shipments by PYCO. PYCO accordingly hereby petitions this Board to revoke the exemption in 49 C.F.R. § 1039.10(a) in relation to SAW's service in Lubbock as to cottonseed, cotton linters, or cottonseed hulls with respect to all non-rate practices and obligations (including non-

discrimination) and all remedies.⁵

a) Partial revocation. This Board's predecessor indicated that a commodity exemption

"is revocable, in whole or in part at any time. ... The potential for total or partial reimposition of regulation is always present. (Indeed, one could view the right of any person to seek selective or complete revocation of an existing exemption as the functional equivalent of a Section 11701 complaint.)"

Consolidated Rail Corporation -- Declaratory Order--
Exemption, 1 ICC 2d 895, 1986 ICC Lexis 412 at *11 (1986).

In light of the above, once SAW claims that a commodity exemption applies, it is entirely appropriate for PYCO to seek partial revocation of the exemption as to the service and rail provider in question. PYCO could request that its Complaint be treated as a petition for partial revocation (ICC indicated that Complaints in the circumstances here were the functional equivalent of petitions for partial revocation), but in an abundance of caution, PYCO also petitions for partial revocation. In particular, PYCO petitions to revoke the exemption in 49 C.F.R. § 1039.10(a) in connection with all non-rate matters pertaining to cottonseed, hulls and linters, as applied to SAW's operations in Lubbock, including but not

⁵ The exemption for cottonseed, linters and hulls was originally adopted in Rail General Exemption Authority -- Misc. Agricultural Commodities, Ex Parte 346 (Sub-no. 14), 367 ICC 298 (1983).

limited to revocation of the exemption with respect to all duties and obligations on the part of SAW arising under 49 USC §§ 11101, 10702, 10741, 11121, 11103, and 11902.⁶

As ICC said, requests for revocation of commodity exemptions and complaints are functional equivalents. Moreover, this Board's decision in FMC Wyoming, supra, indicates that petitions for revocation of a commodity exemption and complaints may proceed simultaneously in similar circumstances.

Under 49 U.S.C. § 10502(d), this Board may revoke an exemption in whole or in part as to any "person" when it finds that revocation "is necessary to carry out the transportation policy" of 49 U.S.C. § 10101 (national Rail Transportation Policy or "RTP"). Under § 10502(b), this Board may commence a proceeding on its own initiative or on application of a party. SAW's conduct set forth in PYCO's Complaint violates most of the RTP provisions that SAW could violate in respect to its relationship with a shipper.

49 USC § 10101(3) seeks to encourage rail competition; § 10101(5) calls for fostering sound economic conditions in

⁶ The referenced sections are the statutory provisions that PYCO raises in the various counts of its Complaint.

In addition, PYCO specifically seeks partial revocation of the 1039.10 exemption for cottonseed, linters and hulls in respect to 49 U.S.C. § 11123. We do not think the commodity exemption has any application to a provision like section 11123, but assuming arguendo that it does, PYCO also specifically (but without limitation or admission) petitions to revoke any exemption claimed by SAW in respect to that provision, in light of SAW's argument that the commodity exemption somehow renders relief under 49 C.F.R. Part 1146 unavailable. See SAW's "Supplement to Petition to Terminate Alternative Rail Service" in F.D. 34802, filed May 24, 2006.

transportation and ensuring effective competition and coordination between rail carriers; § 10101(9) calls for encouragement of honest and efficient management; and § 10101(12) seeks to prohibit predatory practices and unlawful discrimination. SAW in its policies, practices and actions as alleged in the Complaint has violated all these RTP provisions. In addition, 49 USC § 10101(6) calls for maintaining reasonable rates where there is an absence of competition. While PYCO's complaint is not rate-based, section 10101(6) in effect necessarily suggests a national policy of reasonable practices where there is an absence of competition. It makes no sense to talk about reasonable rates when the carrier simply refuses adequate service regardless of rate. Thus, we believe SAW has breached RTP across the board.

PYCO is a major shipper (approximately 7000 carloads in 2005). In order to access its markets, it depends on rail; trucks are not an option. This applies not simply to non-exempt cottonseed oil and meal, but also to cottonseed, linters and hulls. If PYCO cannot reach customers by rail, it loses sales, and its customers incur additional costs. We will focus here on cottonseed. PYCO ships approximately 4000 carloads of cottonseed per year. Due to unreliable rail service by SAW, PYCO could not ship cottonseed to Penny Newman Grain, and Penny Newman incurred \$750,000 in additional costs. Letter, Appendix II. PYCO also incurred damages due to lost sales.

SAW controls PYCO's access to BNSF Railway. BNSF Railway

cannot compete for PYCO's business, indeed, BNSF cannot even reach PYCO, if SAW refuses adequate rail service. SAW's strategic position -- its ability to choke off PYCO rail service -- is the very kind of market power that Mr. Wisener relies upon to implement his threats to PYCO for what would happen when PYCO refused his demand for a \$5.5 million payment for unspecified SAW assets in the autumn of 2005.⁷

SAW is using its strategic position to thwart competition, to disrupt sound economic conditions, to destroy coordination among railroads, to discourage efficiency, to reward predatory practices, and to secure a monopoly rent through otherwise unlawful discrimination between shippers.

49 U.S.C. § 10502(a) allows an exemption only when the application of regulation "is not needed to protect shippers from the abuse of market power." In Garden Spot & Northern Limited Partnership and Indiana Hi-Rail Corporation, ICC Finance Dkt. No. 31593, consolidated for purposes of decision with Archer-Daniels-Midland Co., et al., v. Indiana Hi Rail, ICC Finance Dkt. 40857, served Dec. 20, 1994, this Board's predecessor refused to apply an exemption where the rail "shippers ... have no alternative but to use [the incumbent switch railroad] whenever their customers are located on [the main line railroad's] extensive service area." 1994 ICC Lexis 265 at *15. ICC stated that "in view of the [switch railroad's]

⁷ All these facts are set forth in Complaint Exhibit B, and attachments (including sworn statements) in Exhibit B. See also Appendix I ¶ 6.

strategic position and its apparent proclivity to abuse it, we could not make the requisite finding under [what is now 49 U.S.C. § 10502(a)(2)] even if we were to find that the exemption would otherwise be consistent with the RTP." Id.

The exact same logic applies here. SAW stands in a strategic position vis a vis PYCO and is abusing that position.

This Board has already found that SAW is providing PYCO with inadequate rail service, and has authorized an alternative rail service provider on that basis. PYCO Industries -- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, served Jan. 26, 2006 (Complaint, Exhibit C). This Board's ruling is tantamount to a finding not simply of abuse, but that the abuser stands in a strategic position such that it has the power to abuse. The basis for immediate revocation of the exemption claimed by SAW thus exists as to SAW's service to PYCO in Lubbock.

b) Partial reopening. PYCO also meets the standards for a partial reopening of the exemption due to changed circumstances. When ICC adopted the exemption on which SAW relies in 1983, ICC indicated that most cottonseed moved by unregulated truck or water carrier, and that "[a] shift to truck in the event of a freight car shortage or of unfavorable treatment by the railroads would appear to present no substantial difficulties for shippers, and thus enable them to avoid any potential abuse." 367 ICC 298, 1983 ICC Lexis 61 at *19. The Commission pointed to the "short distance" of the haul, "impl[pying] at

least the potential of motor carrier competition." 1983 ICC Lexis 61 at *9.

In contrast, ICC retained regulation over sunflower seeds, noting that absolute rail tonnage and rail share of shipments appeared to be increasing (from roughly 28% to around 60% as unloaded at Minneapolis and Duluth), and 3700 railcars (about 1/3 of total shipments) to Mexico by rail.

Whatever the situation was in the early 1980's, it is vastly different now for cottonseed and byproducts. Cottonseed mills have been steadily consolidating since World War II. In 1950, the total number of mills was 310. By 1980 -- about the time the cottonseed exemption was adopted by this Board's predecessor -- the number had dropped to 74. Even at 74, trucking was economic for distribution of product because mills were located closer to their markets. However, by 2004, the number of mills had dropped to 13. PYCO (PYCO is a co-operative) owns three of these: two are located in Lubbock, Texas, and the third is in Mississippi. ADM has four mills, one of which is also in Lubbock, and the others at scattered locations. There are six other plants (four owned by co-operatives and two by private companies). PYCO estimates that its total market share is roughly 30%, that ADM encompasses a similar share, and the other producers have the remainder of the market. See Declaration of Gail Kring, Exhibit I, ¶ 2.

At the same time mills have consolidated, cottonseed production has increased. The increase itself is dramatic:

from about 3,076,000 short tons in 1983/84 to a forecast 8,501,000 short tons for 2005/06. Cottonseed mills in general do not convert all their product into cottonseed oil and byproducts. Cottonseed not converted is sold chiefly as cattle feed. Most of the dramatic increase in cottonseed production in the past two decades has not been converted into increased oil production, but instead is used as cattlefeed. While some of this is sold to local feedlots and transported by truck, the consolidation of the industry coupled with the volumes produced have significantly shifted cottonseed traffic onto rail. In the case of PYCO and other producers, a major market is California, where the California dairy industry uses cottonseed as feedstock for their dairy herds. USDA data indicate that feedstock use has expanded roughly sevenfold (from 698,000 tons to almost 5,000,000 tons between 1983/84 and 2005/06). Appendix I, ¶ 4. In 2005, PYCO shipped approximately 3754 carloads to California and expects that level to increase in 2006. Appendix I, ¶ 3. PYCO had to turn down sales to Penny Newman due to inadequate rail service in 2005. Id. and Appendix II. Since Texas is the closest major cottonseed producer to California and since Texas shipments are rail dependent, it follows that those from other cottonbelt states are also rail dependent.

As an oil crop, cottonseed oil is a significant market player. The largest oilseed crop is, of course, soybeans with an estimated 20 billion pounds of oil. Next is corn and then, at 990 million pounds, cottonseed. Cottonseed is followed by

canola (776,000,000, and mostly imported) and sunflower (588,000,000). Appendix I, ¶ 5. Soybean, corn, and sunflower traffic is not exempt under Part 1039. Cottonseed traffic is more significant than sunflower traffic at this time, and thus clearly an appropriate candidate for partial revocation of exemption in cases such as that presented here.

As a result of industry consolidation, increases in plant size, and growth in production, cottonseed mills like PYCO must be able to compete in distant markets to survive, and are increasingly dependent on rail for that purpose.

PYCO estimates that 85% of its cottonseed oil moves by rail. Appendix I, ¶ 2. When cottonseed oil is produced from cottonseed, other products are also produced, the most significant being meal and linters. These also move by rail. Thus, PYCO shipped 1321 tankcars of cottonseed oil in 2005, and also moved 384 cars of meal and 526 of linters. Appendix I, ¶ 3. Cottonseed mills have become so rail dependent that they have their own fleets of tank cars. Id. PYCO leases a fleet of 120 tankcars. Id. PYCO believes that ADM has a similar if not larger fleet. Id. Other producers have their own tankcars. Id. Based on its experience in the industry and knowledge of location of customers and producers, PYCO believes that its level of rail dependency is characteristic of the industry. Id.

In sum, cottonseed/cottonseed oil industry conditions are substantially and significantly different now from the situation in 1983. The industry has consolidated; a major portion

(believed in excess of 50%) of the cottonseed transported from mills is hauled rail-dependent distances; rail dependence for cottonseed oil continues, and has probably increased, with producers owning or leasing their own fleets of tank cars; and the nature of major markets for cottonseed mills is such that rail dependence is not likely to be reduced in the future. In the circumstances, trucks are not an economic substitute, and producers cannot readily divert to trucks in the event of a car shortage for any of the commodities which they produce. Thus, circumstances in 2005 are far different than they were in the early 1980's in respect to the cottonseed and related markets.

Rail dependency in respect to cottonseed shipments can be evaluated in terms relative to factors ICC found relevant in connection with providing for continued regulation of sunflower seeds in 1983. At that time, ICC determined not to exempt sunflower seeds because of a trend of increasing rail dependency in that industry. 367 ICC 298, 1983 ICC Lexis 61 at *15. PYCO believes that overall industry dependence on rail for cottonseed transport has risen to something in excess of 50% and is unlikely substantially to decline due to the location of cottonseed mills and their major markets. PYCO's cottonseed movement by rail (over 3700 cars in 2005) is alone comparable to (actually a bit greater than) the total volume of sunflower seed transported to Mexico which ICC found significant when ICC decided not to exempt sunflower seeds in 1983. In addition, as with sunflower seeds, the cottonseed industry is non-trivial.

It is the third largest oilseed crop, outranked only by soybeans and corn (neither of which are exempt commodities) and outranking sunflowers (which are also not exempt).

SAW's inadequate rail service threatened continued operation of PYCO's Lubbock facilities. A closure of PYCO's facilities would have a ripple effect throughout the 25 Texas counties, threatening the economic viability of many of PYCO's member cotton gins, and thus disruption of the Texas cotton industry. Cotton is the second most important agricultural sector in Texas. Texas in turn is the largest producer of upland cotton in the U.S., accounting for more than 25% of U.S. production of upland cotton. Appendix I, ¶ 5. SAW through its abuse of its strategic position is thus putting a major industry at risk. SAW's kind of abusive conduct in the circumstances here must not be immunized from oversight.

Since any exemption claimed by SAW is claimed for purposes of abuse, and since the exemption as applicable to SAW is both inconsistent with RTP and incompatible with changed circumstances, the exemption in Part 1039 claimed by SAW should not be applied in the case of SAW. This Board should immediately revoke the exemption as to SAW. At the very least, this Board should reopen the exemption proceeding for consideration of revocation of the exemption as to SAW simultaneously with PYCO's complaint against SAW.

4. SAW's motion as to specific Causes of Action. The remainder of SAW's motion seeks dismissal of specific complaint

allegations. SAW's entire motion in this regard is obviously premature. This Board strives "to ensure that participants have a full and fair opportunity to meet their burdens of proof," and thus "as a general rule" denies "motions to dismiss prior to the submission of evidence...." Grain Land I, supra, p.4.

In addition, the principle factual allegations in the Complaint are in paragraphs 3(a)-(x). Paragraph 3(a)-(x) of the Complaint also incorporates the BNSF-SAW contract (Complaint Exhibit A), a petition for alternative rail service with detailed verified statements of fact (Complaint Exhibit B), and this Board's decision in F.D. 34802 determining that PYCO had demonstrated the SAW's rail service is inadequate (Complaint Exhibit C). All of this is incorporated by paragraph 3(y) into each separate Cause of Action. All these facts must be construed in a light most favorable to the complainant. Grain Land II, supra, p. 2.

a) First Cause of Action (Complaint ¶¶ 4-5). Turning specifically to SAW's motion, SAW calls for dismissal of section 4 (basically PYCO's first cause of action) for failing to state a violation of 49 U.S.C. § 11101(a). SAW Motion 4-6. But SAW admits that 49 U.S.C. § 11101(a) is violated when "a rail carrier ... inadequately provides ... reasonably requested rail service." SAW Motion at 4.

That being admitted, SAW's logic escapes PYCO. PYCO's Complaint incorporates the basis for the Board's finding of inadequacy of service (Complaint Exhibit B) as well as the

Board's finding of inadequacy of service (Complaint Exhibit C).

It also follows that SAW's Motion (pp. 5-6) against Complaint "section 5" (seeking relief under the First Cause of Action) must also fail. In its motion as to Complaint ¶5, SAW seems to want more detail on damages and perhaps some other issues. But 49 C.F.R. § 1111.1(a) calls for a "brief" statement of facts, and this Board has ruled that motions to dismiss prior to submission of evidence are highly disfavored. SAW needs to await the completion of discovery. Motions to dismiss are not to be used, as SAW seems to be doing here, as a discovery tool.

b) Second Cause of Action (Complaint ¶¶ 6-7). SAW's motion against PYCO's Second Cause of Action (Complaint ¶ 6) not only ignores Complaint ¶ 3, but also is predicated on the notion that the only practices that are reached under 49 U.S.C. § 10702 relate to rates. That is not what the statute says and SAW cites no case in support of its unsupported claim to the contrary. This Board has previously rejected the view that complaints alleging unreasonable practices in violation of § 10702 are limited to "rates, tariffs and tangible aspects of train operations." Grain Land II, p. 4.

SAW's motion (pp. 8-9) against the relief sought by PYCO in Complaint ¶ 7 must therefore also fail.

c) Third Cause of Action (Complaint ¶¶ 8-9). SAW's motion at pp. 9-10 against PYCO's Third Cause of Action (discrimination) is based on the claim that PYCO does not indicate any "like kind of traffic." The case at bar is

unusual, in that we are dealing with a switching railroad whose services as germane here fall into two categories, and two categories only. Under the SAW/BNSF contract (Complaint ¶3 and Exhibit A, ¶ 17 on p. 24), all SAW "traffic" is either single car or block of 27 or more. SAW gets the same division from BNSF for all single car service, and a different division all blocks of 27 or more another. (The single car service division is much more favorable to SAW than the block division.) SAW ships under the single car rate. The "like kind" traffic for SAW is essentially all SAW's other single car customers. Moreover, PYCO believes that one of SAW's other customers in Lubbock (ADM, which owns the other cottonseed mill in Lubbock, see Appendix I, ¶ 2) ships the same kinds of products as PYCO and thus would be an exactly identical comparison. In all events, SAW's motion to dismiss misfires again. For similar reasons, SAW's motion (pp. 10-11) against any relief under the Third Cause also falls.

d) Fourth Cause of Action (Complaint ¶¶ 9-10). SAW's motion at pp. 11-12 against PYCO's Fourth Cause of Action (violation of § 11121) boils down to the claim that SAW does not breach a duty to provide car service when it refuses to provide such service because it is only a switching railroad. There is no exception to section 11121 for switching railroads. PYCO alleged SAW said it would take care of PYCO's car needs but did not intend to do so (Complaint ¶3(h)), and instead denied necessary facilities (e.g., space for the cars) for car service

to PYCO. This violates "several statutory provisions, including section 10702." Grain Land II, supra, at 4. Again SAW simply ignores the allegations of the Complaint. SAW's motion at p. 12 against relief under the Fourth Cause is similarly defective.

e) Fifth Cause of Action (Complaint ¶¶ 12-13). SAW's motion at pp. 12-13 against PYCO's Fifth Cause of Action (violation of § 11103 requirement to operate a switch and furnish cars) is that failure to provide cars is handled under 49 U.S.C. § 11121(a). That being admitted, then the Complaint states a cause of action either (i) under its Fourth Cause of Action (in that we alleged that SAW failed to provide cars), or (ii) under its Fifth Cause of Action, or (iii) under both. Since PYCO alleged it has private sidings, and since SAW unquestionably refused to switch on at least one of them, and since 49 U.S.C. § 11103 provides that refusal to switch and to furnish cars in such circumstances is contrary to law, PYCO's Fifth Cause of Action must survive a motion to dismiss. 49 U.S.C. § 11103 "historically has been applied only to situations involving shipper-owned track." Minnesota Northern Railroad v. Canadian National Railway Co., STB Dkt. No. 42080, served March 18, 2005. PYCO has alleged a failure to switch to shipper-owned track, so § 11103 appears directly applicable. Just as SAW's motion at pp.12-13 fails, SAW's motion (p. 13) against PYCO's request for relief under its Fifth Cause of Action (Complaint ¶ 13) fails.

In its motion against PYCO's request for relief under the Fifth Cause, SAW claims that relief under 49 U.S.C. § 11103 is limited to installation of a switch. 49 U.S.C. § 11103(b) specifically provides a mechanism to provide relief in terms of installation of a switch, but it does not limit the relief to construction of switches. It simply makes clear that STB may allocate costs in the event of a construction remedy.

f) Sixth Cause of Action (Complaint ¶¶ 14-15). SAW's motion (pp. 14-15) against PYCO's Sixth Cause of Action (violation of 49 U.S.C. § 11902) claims that the action of an "employee of SAW" in demanding that PYCO pay SAW \$5.5 million or face the consequences (PYCO recounts this episode in more detail in Exhibit B to its Complaint) is not a violation of § 11902. According to SAW's counsel, PYCO should be "admonished" for thinking that rail carriers may not demand that their shippers buy unspecified assets for huge sums on pain of loss of rail service, and then implement their threats.

If individual A threatens to burn down individual B's house unless B pays A \$5.5 million for the "right" to continue to live there, and B refuses, and then A attempts to burn down B's house, being prevented from doing so only by the intervention of a magistrate, most would say that an unlawful shakedown was attempted. 49 U.S.C. § 10902 provides a remedy for the equivalent of unlawful shakedowns in connection with railroad transportation. PYCO understands Mr. Wisener, after threats, to have demanded that PYCO pay \$5.5 million or face degraded

service and problems with SAW.⁸ Had he not proceeded to degrade service, then SAW might be right that the Sixth Cause is not appropriate. But SAW did degrade its service, PYCO was saved only by intervention of STB pursuant to 49 C.F.R. Part 1146, and SAW continues to take all possible actions it can to harm PYCO. Indeed, SAW argues that its path of misconduct is perfectly appropriate, most recently on the ground that because PYCO ships some products which are exempt, SAW can do whatever it wishes to PYCO whenever it wishes, with impunity from the law. In short, SAW claims that shakedowns are now lawful conduct in the rail industry by switch railroads, and that it has the rail equivalent of a "double oh seven" license to kill.

As already indicated, PYCO does not understand that to follow from a commodity exemption, even assuming arguendo that it is applicable to some of PYCO's shipments. But if SAW's behavior flows from its perception that it no longer has any duties or obligations by reason of 49 C.F.R. § 1039.10, then the point is not that Part 1039 justifies SAW's behavior but instead is that SAW's behavior requires a partial revocation of Part 1039 as it pertains to SAW.

This Board has already recognized that PYCO has shown that SAW degraded its rail service to PYCO to the point that the service was inadequate (Complaint Exhibit C). Rail service in

⁸ See Appendix I, ¶ 6. PYCO understands that other shippers in Lubbock ostensibly served by SAW have also been faced with demands to pay money to SAW before they can obtain service.

Lubbock should not be run like a protection racket on a television crime show. SAW's practice, including its non-negotiable demand for \$5.5 million on pain of degraded service, is predatory. Thus, PYCO's Sixth Cause of Action states a cause of action. SAW's motion (p. 15) against relief under the Sixth Cause must also fail.

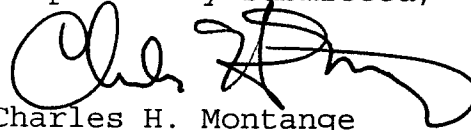
g) Other relief. SAW also moves (SAW Motion at 15) against PYCO's general request (Complaint ¶16) for any other appropriate relief. This portion of SAW's Motion is premature. PYCO simply asked the Board to consider other appropriate relief. Moreover, it is germane to the Complaint given that an appropriate response to SAW's claim of a commodity exemption is a petition for partial revocation of the claimed exemption as to SAW.

Conclusion

SAW's motion to dismiss must be denied. Should this Board believe that the commodity exemption in Part 1039 stands as an obstacle to any portion of the Complaint, the Board on its own motion or pursuant to the instant petition by PYCO either (a) should immediately revoke the exemption as applied to SAW on all non-rate matters, or (b) should revoke the exemption as to SAW on all non-rate matters in a proceeding conducted simultaneously with the Complaint proceeding. A revocation proceeding and a complaint proceeding are functional equivalents if a Part 1039 exemption is raised as a defense, and may be heard simultaneously under this Board's precedents in situations such

as that at bar. In any event, PYCO is a major shipper of cottonseed oil and meal, neither of which are exempt commodities, and the Complaint stands as to them. SAW's other claims have no merit.

Respectfully submitted,



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25 May 06

Appendix I

Gail Kring Declaration

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC.	)	
V.	)	F.D. 34838
SOUTH PLAINS SWITCHING LTD.	)	

DECLARATION OF GAIL KRING

I, Gail Kring, make this Declaration in support of the Reply filed by PYCO Industries (PYCO) to the Motion to Dismiss filed by South Plains Switching ("SAW") in this proceeding. The Declaration also serves to support PYCO's petition for an immediate partial revocation of the exemption in 49 C.F.R. Part 1039 with respect to cottonseed, linters and hulls as applied to SAW and to the extent claimed by SAW in its motion to dismiss.

1. I am the Chief Executive Officer and General Manager of PYCO Industries, Inc., and have been employed by PYCO for 39 years. PYCO is a large rail dependent cottonseed mill with two plants in Lubbock, Texas and another plant in Mississippi. PYCO is a co-operative owned by approximately 100 member cotton gins, and is contractually bound to accept a minimum of 55% of the cottonseed produced by those gins. PYCO processes roughly two-thirds of the cottonseed which it receives into cottonseed oils, meal, linters and other by-products. PYCO sells the remaining cottonseed primarily as animal feed. PYCO also markets cottonseed by-products (in particular cottonseed oil) for two other cottonseed mills at the current time. As chief executive officer of PYCO, and as a

PYCO employee for 39 years, I am very familiar with the cottonseed industry, marketing patterns of the industry, and transportation needs of the industry. Moreover, I of course am familiar with PYCO's own practices and transportation needs.

2. The nature of the cottonseed industry has changed dramatically since the early 1980's. The number of cottonseed mills has decreased from 74 in 1980 to only 13 today. Three of those mills are owned by PYCO (two at Lubbock and one in Mississippi). Four mills are owned by ADM, including one at Lubbock. Of the remaining six mills, four are cooperatives and the remaining two are owned by private companies. PYCO markets the cottonseed oil for two of these remaining six mills. PYCO believes that it encompasses roughly 30% of the cottonseed mill industry; ADM a comparable share; and the others the remaining 40%. I attach a table [Nat'l Cottonseed Products Ass'n (NCPA), Statistical Database, Feb. 2006] showing mill consolidation.

3. The decline in the number of cottonseed mills has a major impact on transportation needs and modalities employed in our industry. Because the industry is more concentrated, mills are much more remote from their markets. The transportation distance from mill to customer is much greater, with the result that the industry's rail dependence has steadily increased. At this point in time, PYCO is dependent on rail for 85% or more of its cottonseed oil shipments. We believe that the situation is

similar for other mills in our industry. Indeed, because of our rail dependency for cottonseed oil shipments (1321 tankcars in 2005), we lease our own fleet of 120 rail tankcars. It is our understanding that other major cottonseed concerns, like ADM, also own or lease tankcar fleets as well. In the event rail is unavailable, trucks would not be readily substitutable. It would be extremely difficult to assemble an adequate fleet of trucks that would meet requirements to be treated as kosher, and the fleet would not be economic for the distances in question. PYCO is also rail dependent for virtually all our production of linters, shipping approximately three boxcars per weekday (526 cars in 2005). Again, trucks are no longer a substitute. Finally, although some of PYCO's cottonseed stocks are sold locally to local feedlots as cattlefeed, well over one half are transported by rail to California for use in the dairy industry. PYCO shipped 3754 carloads of cottonseed by rail to the California dairy industry in 2005. We expect this level to increase. This entire movement is rail dependent. When PYCO began experiencing service inadequacy from SAW in 2005, PYCO could not sell some of its product to Penny Newman Grain. Penny Newman indicates that securing alternative supplies elsewhere cost an additional \$750,000. In 2005, PYCO also shipped 384 carloads of cotton meal or mash (residual from oil production) as feed. We cannot economically substitute trucks for these products. Since most other cottonseed mills are to the east

of PYCO, we believe their cottonseed sales are equally rail dependent. To summarize, based on our knowledge and experience (which includes marketing oil for two co-op mills other than ourselves), we believe that other mills are now dependent on rail for movement not just of cottonseed oil but also linters and cottonseed to market. This is a substantial and permanent change, not a passing event, and has arisen since the early 1980's.

4. Another factor in the changed market is the increase in production of cottonseed due to improved crops. According to NCPA data (based upon USDA data), total cottonseed production in 83/84 was 3,076,000 tons. The 2004-05 figure is 8,242,000 tons. USDA's estimate is for over 8,500,000 tons for 2005-06. The amount of cottonseed shipped for animal feed (primarily to dairies) increased from 1983-04's 698,000 tons to 2004-05's 4,777,000 tons -- about seven-fold. The California dairy industry has become a major market for cottonseed. I attach another NCPA (Feb. 2006) table outlining this data. Not only has the industry become more concentrated and more rail dependent, but total industry volume has increased. There has not only been a shift from trucks to rail for transportation, but also overall need has increased.

5. Disruption of the cottonseed industry would have much wider effects. PYCO, for example, is contractually bound to absorb a minimum of 55% of the cottonseed produced by its member gins. We believe that but for these sales to us, many of our member gins

would not survive. Texas (in particular 25 cottonbelt counties in Texas) accounts for roughly 25% of U.S. cotton production and SAW's tactics thus threaten to disrupt a major segment of the national cotton market. Another way to gauge the cottonseed industry is in comparison to other oilseed crops. Soybeans are of course the largest oilseed crop, with about 20 billion pounds of oil production. However, after corn, the next oilseed crop is cottonseed, with 990,000,000 pounds of oil, followed by canola (776,000,000) and then sunflower (588,000,000) pounds. Again, I attach an NCPA table showing the relevant data.

6. PYCO's plant no. 1 was located adjacent to, and essentially to surround, the old Fort Worth and Denver rail yard in Lubbock for ease of rail shipment. Due to rail mergers and consolidations, that yard is no longer on a mainline through Lubbock. Thus, although PYCO is a BNSF customer, paying a tariff to BNSF for transport of its product on a through route established by BNSF, PYCO is dependent on a local switching railroad to deliver its product to BNSF. The local switch provider is South Plains Switching, Ltd. ("SAW"). The management of SAW in the person of Mr. Larry Wisener has developed a reputation of making demands and threatening retaliation if his demands are not met. He also is known to employ "colorful metaphors" and his hefty size in a fashion that many characterize as consistent with an effort to intimidate. This business style would perhaps be bearable in a

railroad management if adequate rail service were provided, but that is not the case with SAW in Lubbock. SAW has arbitrarily refused to deal with some potential customers, and in early 2005, PYCO began itself to sustain a severe deterioration in service. The second episode of inadequate service commenced in November 2005, shortly after SAW demanded that PYCO pay SAW \$5.5 million for assets used to provide rail service to PYCO. When PYCO asked for an opportunity to do due diligence, Mr. Wisener blew up, indicating that henceforth PYCO would have to figure out how to take care of itself. SAW service to PYCO was curtailed to the point that PYCO was facing a shutdown. Mr. Lacy and I have detailed PYCO's experience in verified statements filed in connection with PYCO's Petition for alternative rail service in STB Finance Docket 34802. This Board granted PYCO's petition on January 26, 2006. Alternative service provider West Texas and Lubbock was able to work off PYCO's inventory, virtually doubling service levels over those provided by SAW. In particular, our records indicate that in the first 17 days of alternative service (January 30 to February 15), we shipped 369 cars; in the preceding 17 days under SAW, we shipped 164 -- less than half as many. Our shipping people tell me that we could have shipped even more in the first 17 days under WTL, but SAW was hoarding boxcars and we had to reorder from BNSF and WTL. BNSF informs us that it can now assemble a 70 unit train in 3 rather than 5 days, and that has to be beneficial not only to

us but to other BNSF shippers. While SAW attempts to explain away its service inadequacies, blaming BNSF, PYCO or others, the fact remains that WTL has been able to provide consistently excellent service to PYCO. This itself belies SAW's "explanations." SAW has continued to take actions against SAW for the purpose of threatening irreparable harm to PYCO's business despite the alternative service order, including most recently blockading PYCO's traditional method of transporting its seed stockpile to its Plant No. 1 facility for processing.

7. In addition, PYCO has become, and I personally have become, increasingly concerned with SAW's repeated violations of the service protocol. Under the protocol, WTL is supposed to have control of the yard tracks to serve PYCO plant No. 1 between 7 AM and 10 AM each day. Yet SAW operates on that track during those hours in violation of the protocol. This endangers PYCO personnel, who operate PYCO switching equipment on PYCO private track (the shop and scale tracks) immediately adjacent to SAW yard track. Yesterday, Wednesday, May 24, PYCO employees were conducting switching operations on PYCO track adjacent to SAW yard track using PYCO's trackmobile. At approximately 8 AM, the SAW locomotive approached without warning, seriously endangering PYCO's employee operating PYCO's trackmobile on PYCO's track.

8. SAW's tactics are not consistent with efficient transportation or sound practices. They are harmful not just to

PYCO, its customers and its suppliers, but also to BNSF and BNSF customers at large. SAW is abusing its strategic position to prevent PYCO from obtaining transportation services from BNSF. To the extent that SAW relies on a commodity exemption to allow it to pursue its irrational, disruptive, and destructive tactics, that commodity exemption should be revoked.

Pursuant 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 5-25-06.

Paul Krueger

Attachments:

- Exhibit -- NCPA Statistical Database, Number of Operating
 Cottonseed Crushing Mills (Feb. 2006)
- Exhibit -- NCPA, Cottonseed: Supply and Discontinuance
 (Feb. 2006)
- Exhibit -- NCPA, US Supply of Fats & Oils
 (Feb. 2006)

Statistical Database of the Cottonseed Processing Industry



*The Most Complete Source of Data for
the Cottonseed Industry*

February 2006



Table 3

**NUMBER OF OPERATING COTTONSEED CRUSHING
MILLS AND TONS OF SEED CRUSHED
IN THE U.S. FOR SELECTED YEARS**

Crop Year start Aug 1	No. of Mills	Tons Seed Crushed (000)	Crop Year start Aug 1	No. of Mills	Tons Seed Crushed (000)
1859	7	-	1950	320	3,723
1869	26	-	1960	181	5,352
1871	-	53	1970	105	3,382
1879	45	181	1980	74	3,698
1889	119	874	1985	58	3,447
1899	369	2,479	1992	35	3,629
1904	715	3,345	1993	32	3,470
1909	817	3,269	1994	33	3,947
1914	882	5,780	1995	33	3,882
1921	610	3,008	1996	28	3,860
1925	535	5,558	1997	29	3,885
1927	574	4,654	1998	24	2,719
1929	553	5,016	1999	21	3,079
1931	504	5,328	2000	21	2,753
1934	478	3,550	2001	17	2,791
1937	447	6,326	2002	14	2,495
1940	369	4,398	2003	13	2,643
1944	382	4,253	2004	13	2,923

*many
mills
Tracking
possible.*

*Rail has to be
out to crushed
to*

Source: Jones, L.A., C.C. King, "Cottonseed Oil", Chap. 4, Y.H. Hui, ed., in Bailey's Industrial Oil & Fat Products, Fifth Edition, Volume 2, 1996; NCPA data and US Census.

Table 4

Cottonseed: Supply & Disappearance

(1,000 short tons)

Year	SUPPLY		DEMAND				Ending Stocks	
	Beginning Stocks	Production	Total *	Crush	Exports	Feed, Seed & Residual		Total
83/84	371	3,076	3,447	2,583	50	698	3,331	116
84/85	116	5,149	5,265	3,514	60	1,285	4,859	406
85/86	406	5,279	5,685	3,417	9	1,912	5,338	347
86/87	347	3,801	4,148	2,520	17	1,422	3,959	189
87/88	189	5,769	5,958	3,396	50	2,153	5,599	359
88/89	359	6,062	6,421	3,730	40	1,986	5,756	665
89/90	665	4,677	5,342	2,964	46	1,966	4,976	366
90/91	366	5,969	6,337	3,369	53	2,264	5,686	651
91/92	651	6,926	7,579	3,981	161	2,977	7,119	460
92/93	460	6,230	6,690	3,629	192	2,504	6,325	365
93/94	365	6,343	6,708	3,470	157	2,649	6,276	432
94/95	432	7,604	8,036	3,947	232	3,306	7,485	551
95/96	551	6,849	7,399	3,882	114	2,886	6,882	517
96/97	517	7,144	7,661	3,860	116	3,182	7,158	523
97/98	523	6,935	7,553	3,885	149	2,957	6,990	563
98/99	563	5,365	6,135	2,719	68	2,955	5,742	393
99/00	393	6,354	7,055	3,079	198	3,505	6,781	274
00/01	274	6,436	7,084	2,753	235	3,669	6,657	427
01/02	427	7,452	8,206	2,791	274	4,742	7,807	400
02/03	400	6,184	6,688	2,495	371	3,475	6,341	347
03/04	347	6,665	7,013	2,643	354	3,594	6,592	421
04/05 (e)	421	8,242	8,664	2,923	379	4,770	8,072	592
05/06 (f)	592	8,501	9,118	3,100	425	4,963	8,488	630

High

f - forecast Feb. 2006 * includes imports

Source: Oil Crops Outlook & Situation Report, USDA

Seed shipped to dairies

U.S. SUPPLY OF FATS & OILS

(Oct.-Sep marketing year; million lbs.)

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004 (e)	2005 (f)
Stocks October 1																	
Cocunut	152	279	277	188	279	188	251	164	163	84	150	393	152	136	260	227	216
Corn	99	127	138	196	150	118	241	116	129	102	135	267	117	104	119	153	156
Cottonseed	147	80	137	78	81	106	82	94	66	79	76	49	93	39	37	109	76
Lard	42	23	24	27	26	34	24	23	20	40	21	18	14	10	9	11	13
Palm	37	29	53	44	52	44	33	36	16	31	47	36	46	57	61	53	49
Palm Kernel	86	110	53	49	54	48	89	72	55	22	50	63	74	48	155	93	59
Peanut	38	24	25	51	50	25	40	65	86	41	40	31	31	32	77	99	60
Safflower	62	42	28	28	18	31	21	44	27	38	48	35	21	8	10	24	11
Soybean	1,715	1,305	1,786	2,239	1,555	1,103	1,137	2,015	1,520	1,382	1,520	1,993	2,767	2,359	1,489	1,076	1,699
Sunflower	82	38	47	100	56	65	82	147	93	60	121	157	136	23	27	40	22
Canola	20	24	41	71	71	67	137	54	77	65	112	169	206	110	52	68	91
Tallow - edible	36	33	41	33	41	36	52	34	48	46	43	40	49	24	26	21	22
Totals	2,516	2,114	2,650	3,104	2,433	1,865	2,188	2,865	2,300	1,990	2,364	3,250	3,706	2,951	2,321	1,974	2,476
Production																	
Corn	1,470	1,656	1,821	1,878	1,906	2,227	2,139	2,231	2,335	2,374	2,501	2,403	2,461	2,453	2,386	2,392	2,450
Cottonseed	1,039	1,154	1,280	1,126	1,119	1,312	1,229	1,216	1,224	832	938	847	876	725	874	957	990
Lard	909	934	1,016	1,011	740	725	690	671	732	740	723	716	743	744	775	775	785
Peanut	193	213	356	286	212	314	321	221	176	145	229	179	231	286	173	126	219
Canola	130	18	32	49	49	406	299	356	342	451	548	617	641	582	496	601	776
Safflower	103	78	69	87	111	115	126	103	115	111	91	88	76	84	92	56	56
Soybean	13,004	13,408	14,345	13,778	13,991	15,613	15,240	15,752	16,143	18,078	17,825	18,420	18,898	18,430	17,080	19,360	20,040
Sunflower	475	536	911	730	580	1,165	860	840	959	1,177	1,046	873	673	345	595	285	588
Tallow - edible	1,193	1,202	1,515	1,414	1,535	1,550	1,559	1,407	1,517	1,677	1,792	1,764	1,932	2,068	1,781	1,779	1,760
Totals	18,516	19,199	21,345	20,359	20,204	23,427	22,463	22,797	25,543	25,585	25,685	25,906	26,531	25,717	24,263	26,311	27,694
Imports																	
Cocunut	1,038	946	841	1,163	999	1,100	874	1,108	1,438	791	926	1,115	1,093	862	796	924	1,030
Corn	na	na	na	na	7	10	11	14	28	42	18	27	61	66	66	49	60
Cottonseed	13	3	18	38	26	0	0	0	0	48	8	0	0	21	0	2	0
Lard	na	na	na	na	3	2	2	1	2	2	2	3	6	9	5	5	5
Olive	192	211	216	253	273	281	251	326	355	375	417	468	480	485	540	548	580
Palm	249	284	220	267	368	217	236	323	282	284	345	400	473	385	621	762	1,102
Palm Kernel	370	306	342	302	304	280	262	393	359	400	393	364	310	489	575	520	400
Peanut	5	10	1	0	11	187	5	14	8	73	13	79	39	70	127	33	35
Canola	391	583	815	861	861	982	938	1,086	1,075	1,088	1,060	1,139	1,193	1,108	981	1,223	1,134
Safflower	31	22	22	15	16	26	35	30	47	51	33	35	33	28	34	58	60
Sesame	na	na	na	15	15	15	16	15	16	16	18	19	22	22	23	26	27
Soybean	22	17	1	10	68	17	95	53	60	83	83	73	46	46	306	26	65
Sunflower	5	33	9	0	7	1	2	22	8	5	4	8	36	61	25	75	30
Tallow - edible	na	na	na	na	15	18	8	5	2	3	10	32	7	8	1	1	1
Totals	2,316	2,415	2,484	2,908	2,858	3,040	2,725	3,466	3,678	3,258	3,321	3,732	3,794	3,653	4,100	4,251	4,528
TOTALS	23,348	23,728	26,479	26,371	25,596	28,331	27,377	29,128	31,522	30,833	31,380	32,888	34,031	32,321	30,684	32,535	34,698

Source: USDA ERS, Mar. 2006
P - preliminary; f - forecast

Appendix II
Penny Newman Letter

PENNY NEWMAN

MANUFACTURERS • WHOLESALERS • RETAILERS

April 25, 2006

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: PYCO Industries, Inc. - Feeder Line Application
-- South Plains Switching, Ltd., F.D. 34844

Dear Mr. Secretary:

Penny-Newman Grain is a Fresno, California based commodity trading company that specializes in supplying whole cottonseed to California dairies. California dairies feed 1.4 million tons of cottonseed each year of which 750,000 tons are imported from outside the state, and Texas is responsible for providing 650,000 of the 750,000 tons. Penny-Newman is a consignee of the shipments, and thus shipper of record for hundreds of carloads per year from PYCO's Lubbock facility.

Unfortunately, this crop year, October 2005 through September 2006, has not begun in a way that will allow these tons to be fully shipped due to PYCO's inability to get regularly scheduled switches from South Plains Switching, the local switch into PYCO's facilities. The result is that PYCO has chosen to sell to Penny-Newman a total of 350,000 tons for this crop year rather than the normal 500,000 tons. PYCO stated that they are unable to physically load the additional 150,000 tons due to poor switching by South Plains. This has resulted in Penny-Newman having to source cottonseed elsewhere at a cost that totaled \$750,000.

It is my understanding that the Surface Transportation Board has appointed a temporary switcher to maintain PYCO's daily needs. This is a great step in the right direction, however, the out of pocket costs incurred by Penny-Newman, let alone the opportunity costs, is a small percentage of the overall damages caused by one person at South Plains Switching. Penny-Newman supports and joins in the feeder line application filed by PYCO Industries in the above docket. In the alternative, Penny-Newman supports revocation of the acquisition exemption granted in STB docket 33753 (Sub-no. 1), so that the rail lines in question may be returned to BNSF for proper operation. Dependable rail service must be restored in Lubbock. SAW is not providing that service at the current time, and Penny-Newman is aware of nothing to suggest that SAW will do so in the future.

Thank you for your attention to this matter.

Sincerely,



Todd Parker
Penny-Newman Grain

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