

37417
SEC

SERVICE DATE – LATE RELEASE OCTOBER 5, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34890

PYCO INDUSTRIES, INC. – FEEDER LINE APPLICATION –
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 34922

KEOKUK JUNCTION RAILWAY CO. – FEEDER LINE APPLICATION –
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.

Decided: October 5, 2006

These proceedings involve, in STB Finance Docket No. 34890, the feeder line application of PYCO Industries, Inc. (PYCO), under 49 U.S.C. 10907, to purchase all or a portion of the rail lines of South Plains Switching, Ltd. Co. (SAW), in Lubbock, TX, and in STB Finance Docket No. 34922, the competing application of Keokuk Junction Railway Co. (KJRY) to acquire all or a portion of SAW's rail lines. KJRY is a subsidiary of Pioneer Railcorp (Pioneer), a noncarrier. PYCO moved to compel discovery, or alternatively, for a subpoena for Pioneer to appear and produce documents. In a decision served on September 29, 2006, KJRY and Pioneer were directed to file a reply to the motion, which KJRY filed on October 2, 2006. In a pleading filed on October 3, 2006, PYCO asked for clarification of whether the protective order served in STB Finance Docket No. 34890 on July 6, 2006, also covers STB Finance Docket No. 34922. KJRY responded to the request for clarification on October 3, 2006.

PYCO's discovery requests were directed to "Pioneer Railcorp d/b/a Keokuk Junction Railway." KJRY argues that, as a nonparty, Pioneer should not be compelled to respond to discovery absent a subpoena. KJRY also contends that the discovery requests concern only its earlier application to purchase a portion of SAW's rail lines ("Alternative Two"), but not its more recent application to purchase the entirety of those lines. KJRY deems the requests to be directed to KJRY, and indicates that it will respond to them on October 5, 2006. KJRY argues that it would be premature to compel a response to any particular discovery request until it has provided its responses (and any objections) to PYCO.

Clarification of the Coverage of the Protective Order Issued in STB Finance Docket No. 34890. The protective order issued on July 6, 2006, applies to STB Finance Docket No. 34890 and "any proceedings before the Board related to" that docket. See Protective Order at par. 1(f). This is a proceeding related to STB Finance Docket No. 34890. Therefore, the existing protective order covers this proceeding.

Discovery against Pioneer. In its earlier application for Alternative Two, PYCO relied upon the finances of its parent, Pioneer, to make the financial showing under 49 CFR 1151.3(a)(3).¹ In its reply to the motion to compel, KJRY disavows its earlier reliance upon that evidence. For example, KJRY states that it has now provided new evidence of KJRY's financial responsibility (in its Expanded Competing Feeder Line Application) that "replaces and supersedes" the corresponding evidence in KJRY's earlier application. KJRY indicates that its expanded application does not depend upon any cash flow or subsidy from Pioneer or upon the earlier-provided consolidated financial statements of Pioneer and its subsidiaries. KJRY argues that, as a result of its new evidence, Pioneer need not provide responses to PYCO's discovery.

Even in its new, expanded application, however, KJRY relies upon a bank's loan commitment to Pioneer as the source of funds for KJRY to purchase SAW's rail lines. See KJRY's Expanded Competing Feeder Line Application at 7 and attached Verified Statement of J. Michael Carr at Exhibit 1. Thus, Pioneer's responses to PYCO's requests concerning the financial status of Pioneer and its subsidiaries and affiliated companies may provide information reasonably calculated to lead to the discovery of admissible evidence. See 49 CFR 1114.21(a). Accordingly, Pioneer will be directed to respond to all of PYCO's discovery requests, including Exhibit A to PYCO's Motion to Compel filed under seal, to the extent that Pioneer has responsive information to which KJRY does not have access (or that KJRY may not lawfully provide or produce). Pioneer shall have until October 10, 2006, to respond to PYCO's discovery requests.

Requiring Pioneer to respond to the discovery will necessitate some changes in the procedural schedule in these consolidated proceedings, as explained below. PYCO submitted its amended valuations for the entirety of SAW's rail lines on September 28, 2006. Comments on PYCO's amended valuations are due on October 12, 2006.

Comments on KJRY's expanded application currently are due on October 12, 2006. That remains the due date for any party except PYCO, which will not receive either KJRY's or Pioneer's discovery responses in sufficient time to meet that deadline. Accordingly, PYCO will be afforded 14 days after it receives the final responses to its discovery (including any answers that may be compelled by the Board) to submit its comments on KJRY's expanded competing application. Each applicant shall have 7 days after the filing of the latest comments concerning its application to file a rebuttal.

Application(s) to Which PYCO's Discovery Requests Apply. When PYCO initially propounded the discovery requests, the only relevant applications were to purchase a portion of SAW's rail lines. KJRY takes the position that PYCO's discovery requests apply only to Alternative Two of the applications (purchase of a portion of SAW's lines). However, KJRY's

¹ Under that regulation, an applicant must provide information sufficient to demonstrate that it is a financially responsible person, able to purchase the line and to cover expenses with providing services over the line for at least 3 years.

application (like PYCO's) has now been expanded to encompass the entirety of SAW's lines. Accordingly, PYCO's discovery requests shall be deemed to apply, and any or all responses shall apply, to KJRY's expanded competing application to purchase the entirety of SAW's rail lines.

It is ordered:

1. The discovery propounded by PYCO on KJRY and Pioneer applies to KJRY's expanded competing feeder line application, and responses shall also apply to that application.

2. The protective order issued in STB Finance Docket No. 34890 on July 6, 2006, also applies to STB Finance Docket No. 34922.

3. Pioneer shall respond to all of the discovery requests propounded by PYCO, to the extent Pioneer has responsive information to which KJRY does not have access, or that KJRY may not lawfully provide or produce, on October 10, 2006.

4. Comments on PYCO's amended valuation of the entirety of SAW's rail lines are due on October 12, 2006.

5. Comments on KJRY's expanded competing feeder line application are due on October 12, 2006, except that PYCO shall have until 14 days after it receives the final responses to the discovery it propounded on KJRY and Pioneer (including any responses compelled by the Board) to submit comments on KJRY's expanded feeder line application.

6. Each applicant shall have 7 days after the filing of the latest comments on its feeder line application to submit a rebuttal.

7. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary