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May 12, 2006

By UPS overnight mail
(Monday delivery)

Office of the
ENTIRE

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34844, *PYCO Industries, Inc. -- Feeder Line Development -- South Plains Switching, Ltd. Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Petition (1) For A Determination That Board Consideration Under 49 U.S.C. §10901 and § 10902 Of A Purchase Offer Initiated Prior To The Filing Of A Feeder Line Application Is Not Precluded By The Filing Of A Feeder Line Application; and (2) To Hold The Feeder Line Application In Abeyance Pending That Determination, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioner

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BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- FEEDER)
LINE DEVELOPMENT -- SOUTH) FINANCE DOCKET
PLAINS SWITCHING, LTD. CO.) NO. 34844

**PETITION (1) FOR A DETERMINATION THAT
BOARD CONSIDERATION UNDER 49 U.S.C. § 10901 OR § 10902
OF A PURCHASE OFFER INITIATED PRIOR TO THE FILING
OF A FEEDER LINE APPLICATION IS NOT PRECLUDED BY THE
FILING OF A FEEDER LINE APPLICATION; AND
(2) TO HOLD THE FEEDER LINE APPLICATION IN
ABEYANCE PENDING THAT DETERMINATION**

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

Petitioner

THOMAS F. McFARLAND
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Attorney for Petitioner

DATE FILED: May 15, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- FEEDER	)	
LINE DEVELOPMENT-- SOUTH	)	FINANCE DOCKET
PLAINS SWITCHING, LTD. CO.	)	NO. 34844

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FILING OF A FEEDER LINE APPLICATION; AND
(2) TO HOLD THE FEEDER LINE APPLICATION IN
ABEYANCE PENDING THAT DETERMINATION**

Pursuant to 49 C.F.R. § 1117.1, SOUTH PLAINS SWITCHING, LTD. CO. (SAW)

hereby petitions:

(1) for a determination that Board consideration under 49 U.S.C. §§ 10901 or 10902 of an arms'-length offer to purchase all of SAW's rail lines initiated by U.S. Rail Partners (USRP) in good faith long before the filing of a feeder line application in this proceeding, and without knowledge or reason to believe that such an application would be filed, is not precluded by virtue of the later filing of a feeder line application; and

(2) for an order holding the feeder line application in abeyance pending that determination.

The facts in this Petition are verified by Mrs. Delilah Wisener, owner of SAW, whose verification is attached. SAW submits the following in support of its petition.

THE USRP PURCHASE OFFER

In mid-March, 2006, Mrs. Delilah Wisener, owner of SAW, decided to investigate sale of SAW's rail lines. Litigation before the Board concerning alternative rail service to PYCO

Industries, Inc. (PYCO), a major shipper on SAW's lines, had been active since December, 2005. Sale of SAW's rail lines was seen as a means to bring that litigation to an end.

As one means of investigating whether there were prospective purchasers for SAW's rail lines, Mrs. Wisener asked SAW's attorney, Thomas F. McFarland, whether he knew of any shortline rail carriers or entities desiring to get into the shortline railroad business who might be interested in purchasing SAW's rail lines for continued rail operation.

One of the shortline rail carriers that was contacted by Mr. McFarland in that respect was USRP through its President, Mr. John Howell. USRP had recently undertaken its first shortline rail operation by lease of a rail line in Oklahoma and Kansas through USRP's subsidiary, Blackwell Northern Gateway Railroad Company. USRP is entirely independent of SAW from a corporate and financial standpoint and in every other respect. The only thing that USRP and SAW had in common is that Mr. McFarland acted as attorney for both of them.^{1/}

Mr. McFarland contacted Mr. Howell on March 20, 2006 about SAW's availability for purchase. Mr. Howell immediately expressed interest in a potential purchase of SAW's rail lines. On the same day that he was contacted by Mr. McFarland, Mr. Howell contacted Mr. Dennis Olmstead, SAW's Transportation Consultant, to obtain more information about SAW's rail lines.

On March 22, 2006, Mr. Howell in behalf of USRP signed a confidentiality agreement in regard to detailed traffic and financial information to be furnished to him by SAW.

On March 31, 2006, SAW submitted a formal sale proposal to USRP.

^{1/} Mr. McFarland withdrew as attorney for USRP when the feeder line application was filed.

On April 6, 2006, Mr. Howell and several additional directors of USRP conducted a physical inspection of all of SAW's rail lines at Lubbock, TX.

On the basis of review of SAW's sale proposal and physical inspection of SAW's rail line assets, Mr. Howell in behalf of USRP expressed to SAW an intent to submit a purchase offer for SAW's rail lines, subject to USRP's ability to obtain financing.

USRP thereupon undertook to secure financing for purchase of SAW's rail lines.

By letter dated May 5, 2006, USRP made a formal offer for purchase of all of SAW's rail lines. That offer was made without knowledge or reason to know that a feeder line application would be filed in regard to SAW's rail lines. The formal USRP purchase offer was the culmination of an expression of intent to submit an offer that was communicated to SAW shortly after USRP's inspection of the SAW property in early April, 2006.

PYCO's feeder line application was filed at the Board on May 5, 2006. While that is the same date as the date of USRP's formal offer to purchase SAW's rail lines, USRP had expressed its intent to SAW to purchase the SAW rail lines long before PYCO's feeder line application was filed.

It is clear from the foregoing that USRP's offer to purchase SAW's rail line is an arms'-length offer that was initiated in good faith long before PYCO's feeder line application was filed, and without knowledge or reason to believe that such an application would be filed. The Board should so find.

ARGUMENT

I. The Board Should Determine That Consideration Of USRP's Offer To Purchase SAW's Rail Lines Under 49 U.S.C. §§ 10901 or 10902 Is Not Precluded By Virtue Of A Feeder Line Application Filed Long After The USRP Offer Was Initiated

Where, as here, an arms'-length offer for purchase of a rail line has been initiated in good faith long before the filing of a feeder line application as to that rail line, and without knowledge or reason to believe that such an application would be filed, the Board should determine that consideration of that offer under 49 U.S.C. §§ 10901 or 10902 is not precluded by virtue of the feeder line application. Instead, if such an offer results in an agreement for purchase and sale of the rail line, the parties should be able to implement the purchase and sale by virtue of a notice of exemption from 49 U.S.C. §§ 10901 or 10902 for acquisition and operation of the line for continued rail service.

Such an acquisition would take precedence over the feeder line proceeding, but in no way would it be inconsistent with that proceeding. The feeder line proceeding seeks the provision of adequate rail service by a carrier other than the incumbent rail carrier. The acquisition and operation pursuant to 49 U.S.C. §§ 10901 and 10902 would achieve that overriding purpose.

Indeed, acquisition of SAW's rail lines by USRP under 49 U.S.C. §§ 10901 or 10902 would be likely to achieve that goal more completely than would PYCO's feeder line application. Pursuant to USRP's acquisition, all of SAW's rail lines would be operated by a rail carrier other than SAW. Pursuant to Alternative Two of PYCO's feeder line application, there would be an inefficient split-up of SAW's lines between SAW and a rail carrier other than SAW.

There is no just cause to prevent USRP's purchase offer from being considered regardless of the filing of the feeder line application. The decision of the Interstate Commerce Commission

(ICC) in *Caddo Antoine et al. - Feeder Li. Acq. - Arkansas Midland RR*, 10 I.C.C.2d 323 (1994), is clearly distinguishable. In that case, a feeder line application for a rail line was filed on March 18, 1994. More than three months later, while the feeder line proceedings were pending, a notice of exemption from 49 U.S.C. § 10901 was filed for a proposed lease and operation of the same rail line by a rail carrier other than the carrier that had filed the feeder line application. The ICC rejected the notice of exemption for the lease and operation, stating (at 326):

... We believe that our jurisdiction under section 10910 (now 10907) vested when the feeder line application was filed, and that a lease arrangement entered into after the feeder line application has been filed does not defeat our jurisdiction to consider the feeder line acquisition . . .” (emphasis in original, footnote omitted).

The ICC stated that the feeder statute should not be read “in a manner that would permit a line owner, through artful business dealings, to defeat a shipper’s exercise of (the feeder line) remedy.” (at 325).

In contrast to the situation in the *Caddo Antoine* decision, USRP’s purchase offer was initiated prior to the filing of the feeder line application, and was submitted without knowledge or reason to believe that a feeder application would be filed. It cannot be successfully argued, therefore, that the USRP offer was the result of an “artful business dealing” by SAW and USRP to defeat PYCO’s feeder line application. That application was not even in existence when USRP’s proposed purchase of SAW’s rail lines was negotiated and processed.

Moreover, the lease in the *Caddo Antoine* decision would have permitted the rail line owner in that case to remain in ownership of the rail line. That would not be consistent with a feeder line application, which seeks to replace the owner of the line. In contrast, USRP’s offer is

to purchase the SAW rail lines. That would result in replacement of SAW as owner of the rail line, a result consistent with the goal of a feeder line application.

For those reasons, the *Caddo Antoine* decision does not prevent USRP's offer from being considered regardless of the later-filed feeder line application.

If, in ruling on this Petition, the Board were to determine that it will not consider USRP's purchase of SAW's rail lines because of the feeder line proceeding, USRP could file a competing feeder line application under 49 C.F.R. § 1151.2(c) and, pursuant to 49 C.F.R. § 1151.2(h)(i), SAW, as rail line owner, could select USRP as the feeder line applicant to which it will sell the rail lines. Thus, it cannot be successfully argued that a ruling that USRP's purchase of the rail lines can be considered pursuant to an exemption from § 10901 or § 10902 would unfairly deprive PYCO of a right to purchase the rail lines under the feeder line statute. By virtue of 49 C.F.R. § 1151.2(h)(i), *supra*, it is clear the PYCO does not have such a right where a competing feeder line application is filed, and SAW selects a competing applicant other than PYCO as the entity to which it will sell the lines.

It would make no sense, therefore, to go through a lengthy and expensive feeder line proceeding to force SAW to sell its rail lines at market value when SAW has already taken steps to sell its rail lines; when SAW already has an offer in hand for purchase of the rail lines at market value; and when SAW would be able to select that offeror as the purchaser of its lines at the end of a feeder line proceeding.

It follows from the foregoing that the Board should determine that consideration of USRP's offer to purchase SAW's rail lines is not precluded by virtue of a feeder line application that was filed long after the USRP offer was initiated.

II. The Board Should Hold The Feeder Line Application In Abeyance Pending The Determination Sought In This Petition

The Board should hold the feeder line application in abeyance pending disposition of this Petition because a Board determination as requested in Part I of this Argument may well have the effect of rendering the feeder line proceeding unnecessary. Thus, there would be no need of a lengthy and costly feeder line proceeding if USRP were to acquire and operate the rail lines at issue by virtue of accelerated class exemption procedure under 49 C.F.R. § 1150.31 (exemption from § 10901), or under 49 C.F.R. § 1150.41 (exemption from § 10902) outside the feeder line process.

It may not be possible for the Board to rule on this Petition before the Director of the Office of Proceedings is required to accept or reject PYCO's feeder line application under 49 C.F.R. § 1151.2(b). Consequently, the Board should hold the feeder line application in abeyance pending disposition of this Petition. There are no statutory timetables for processing feeder line applications that, absent an exemption from the statute, would preclude Board action to hold a feeder line application in abeyance for good cause. On the contrary, the statute precludes Board action on the merits of a feeder line application without a hearing on the record. *See* 49 U.S.C. § 10907(c)(1).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should:

- (1) determine that Board consideration under 49 U.S.C. §§ 10901 or 10902 of an arms'-length offer to purchase all of SAW's rail lines initiated by U.S. Rail Partners (USRP) in good faith long before the filing of a feeder line application in this proceeding,

and without knowledge or reason to believe that such an application would be filed, is not precluded by virtue of the later filing of a feeder line application; and

(2) order that the feeder line application be held in abeyance pending that determination.

Respectfully submitted,

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

Petitioner

Thomas F. McFarland

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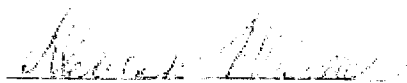
Attorney for Petitioner

DATE FILED: May 15, 2006

VERIFICATION

STATE OF TEXAS)
) SS:
COUNTY OF LUBBOCK)

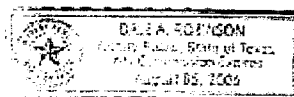
DELILAH WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.


DELILAH WISENER

SUBSCRIBED AND SWORN to
Before me this 11th day
of May, 2006.


Notary Public

My Commission Expires:



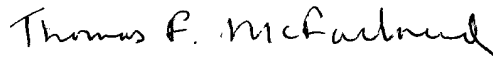
CERTIFICATE OF SERVICE

I certify that on May 12, 2006, I served the foregoing document, Petition (1) For A Determination That Board Consideration Under 49 U.S.C. § 10901 or § 10902 Of A Purchase Offer Initiated Prior To The Filing Of A Feeder Line Application Is Not Precluded By The Filing Of A Feeder Line Application; and (2) To Hold The Feeder Line Application In Abeyance Pending That Determination, by UPS overnight mail, on the following:

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Thomas F. McFarland