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18 May 2006
by Federal Express

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, F.D. 34844

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc. ("PYCO"), enclosed for filing please find an original and ten copies of PYCO's Opposition to a "Petition" for a "Determination" and to "Hold the Feeder Line Application in Abeyance Pending that Determination." The relief sought by incumbent rail carrier South Plains Switching (SAW) is contrary to long-established precedent and highly prejudicial to PYCO.

By my signature below, I certify service by express (next business day) delivery upon Thomas McFarland, counsel for SAW, on the date above at his address of record.

Thank you for your assistance in this matter.

Very truly,

A handwritten signature in black ink, appearing to be 'C. H. Montange'.

Charles H. Montange
counsel for PYCO Industries

Encls. (orig. and 10)

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
FEEDER LINE DEVELOPMENT --) F.D. 34844
SOUTH PLAINS SWITCHING LTD.)



Applicant PYCO's Opposition
to SAW Petition
"(1) For a Determination that Board Consideration...
and (2) To Hold The Feeder Line Application In Abeyance
Pending That Determination

Feeder line applicant (and shipper) PYCO Industries, Inc. (PYCO), opposes the "Petition" filed by incumbent rail carrier South Plains Switching Ltd. (SAW) on May 15, 2006. That Petition on its face seeks a declaratory judgment for what SAW calls "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 before the filing of the feeder line application in this proceeding."

SAW also requests a stay of the proceeding pending this Board's declaration. PYCO opposes any stay as well.

Summary

The "determination" or declaratory judgment which SAW seeks is a blatant attempt to end-run the feeder line process. This Board's precedent has been clear for over a decade: once a feeder line application is filed, an incumbent railroad may not sell its assets until the completion of the feeder line process. Caddo Antoine and Little Missouri Railroad Company -- Feederline Acquisition, ICC F.D. 32479, and embraced case Glenwood and

Southern Railroad Company -- Acquisition and Operation Exemption
-- Arkansas Midland Railroad Company, ICC F.D. 32540, served Oct. 24, 1994, reported at 10 ICC2d 323 (1994). PYCO is prejudiced by any further delay, and opposes any request to hold this proceeding in abeyance.

Facts

As a result of degraded rail service from incumbent rail provider SAW, PYCO filed an alternative rail service petition pursuant to 49 C.F.R. Part 1146 in Finance Docket 32802.¹ This Board granted alternative service authority to West Texas and Lubbock Railroad to provide service to PYCO on January 26, 2006. By further order of this Board, the alternative service order remains in effect until June 25. Given SAW's continued aggressive behavior toward PYCO, PYCO expects to request a continuation of alternative service through and including October 23, 2006, which we understand is the maximum period of alternative service allowed by law (270 days) for Part 1146 relief.

Because SAW management has made clear that it is irredeemably hostile to PYCO, PYCO diligently proceeded to

¹ See PYCO Industries, Inc. -- Alternative Rail Service, STB Finance Dkt. 34802, served Jan. 26, 2006, extended by decision served February 24, 2006. SAW has moved to terminate alternative rail service twice, with SAW's second motion currently pending. In addition to seeking to terminate PYCO's rail service, SAW has taken a variety of other actions to inflict higher costs and operational difficulties upon PYCO's rail dependent business. SAW's consistent conduct to date demonstrates conclusively that should PYCO again become dependent upon SAW for rail service, PYCO would be faced with degraded rail operations and disastrous economic consequences.

prepare the information required for a feeder line application (FLA). PYCO filed its FLA in this docket on May 5, 2006. PYCO requested discovery, but also requested this Board's assistance in pursuing an expeditious schedule so that the FLA could be resolved before alternative rail service is no longer statutorily available.

Since PYCO filed its FLA, SAW has engaged in a barrage of filings to obtain delays. SAW has filed the instant motion here to throw everything off track (May 15); SAW has filed a motion to dismiss one half of the FLA on spurious grounds (May 16)²; and SAW has filed a letter asking for procedural delays (May 18). Our focus here is SAW's May 15 effort to moot the FLA by staying the proceeding while STB issues a "determination" that SAW can consider a proposal from USRP.

According to SAW's May 15 filing, SAW's attorney had been actively soliciting offers for SAW's assets, and one of his clients (USRP) decided to submit an offer. Coincidentally, this client's offer reached SAW on the same day (May 5) PYCO filed its FLA.

Upon receipt of SAW's May 15 filing, PYCO immediately got in touch with USRP (PYCO had never heard of USRP before). According to USRP's counsel, USRP was informed by PYCO on or about May 16 (that is, subsequent to SAW's May 15 filing) that SAW would agree to negotiate with USRP, but only on a non-

² PYCO responded to SAW's motion to dismiss by opposition served May 17, filed May 18.

exclusive basis. Evidently SAW or its attorneys are still trolling for offers.

Long before PYCO filed its FLA, the rumor mill was rife with speculation that SAW was already seeking a "white knight" to file a competing FLA. Thus the only thing surprising about the emergence of USRP and SAW's ostensible agreement to talk to them but "non-exclusively" is that SAW has the temerity to seek to derail the entire FLA proceeding on that basis.

ARGUMENT

In Caddo Antoine, supra, 10 ICC 2d 323 (1994), incumbent rail provider Arkansas Midland Railroad (AMR) entered into a lease/purchase agreement for the Norman Branch to Glenwood and Southern Railroad (GSR), about three months after a FLA had been filed in respect to the Branch. AMR moved to dismiss the FLA as moot. The shippers and the feeder line applicant moved to reject the "notice of exemption" by which GSR sought to acquire the line from AMR. The ICC stayed the notice of exemption in order to consider how to handle FLA's and a transfer of the line for which authority was sought subsequent to the filing of the FLA.

After consideration, ICC rejected the notice of exemption. The Commission's holding was clear and unequivocal:

"At the outset, we note that the Feeder Railroad Development Program was enacted to enable shippers and communities to force the sale of marginal lines that are likely to be abandoned or are receiving inadequate service. IN effect, the feeder line procedures give shippers a self-help remedy for poor service or potential abandonment. Although the statute does not directly speak to the issue raised here, we do not believe that it should be read in a

manner that would permit a line owner, through artful business dealings, to defeat a shipper's exercise of this remedy.

"... We believe that our jurisdiction under [what is now section 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 application."

The Commission accordingly rejected AMR's motion to dismiss the FLA, and also granted the shipper/feeder line applicant motion to reject the GSR notice of exemption "on the grounds that the notice would defeat consideration of the feeder line application."

SAW's efforts to distinguish this decision are fruitless once one reads what ICC said. Indeed, the situation presented in this proceeding is even more compelling for rejection of the incumbent railroad's ploy than the situation in Caddo Antoine.

SAW's chief ground to distinguish the decision is that its attorney had tweaked USRP's interest before PYCO filed its FLA on February 5.³ But that is irrelevant. At the time PYCO filed its FLA, SAW did not have a deal with USRP, much less any authorization from STB for a deal. SAW still has no deal, may well never have a deal (SAW has been playing the field for deals on its Lubbock assets for at least a year and apparently has managed only to alienate potentially interested parties), and of

³ SAW "petition" at 4. SAW claims that the USRP "offer" its attorney solicited is a good faith, arms' length offer. Even if true (we have no way of knowing one way or the other at this point), that is irrelevant. Even if USRP is acting in good faith, SAW may simply be using USRP to delay the FLA and to prejudice PYCO.

course has not filed a request for an authorization for any kind of transfer. All SAW is doing is seeking to delay and effectively to moot PYCO's FLA on the ground that it might/perhaps/maybe get a deal with USRP and, if so, then it may seek an authorization to do the deal.⁴

Indeed, since USRP tells us that SAW management will only negotiate with USRP on a non-exclusive basis, it is perfectly consistent with the facts to conclude that SAW is simply using USRP as an excuse to delay the proceeding. If SAW were serious with USRP, it would presumably be negotiating with that company on an exclusive basis.⁵ SAW simply wants to stay the FLA for whatever play time SAW desires while it claims to be looking for offers. If SAW can get away with that kind of ruse, then nothing is left of the feeder line statute.⁶

⁴ In essence, SAW is asking this Board to determine in advance legal conclusions about a situation that may never arise. SAW's "petition" is obviously flawed on grounds of ripeness for decision. If filed as an independent declaratory judgment proceeding, it would doubtless be denied on that basis. SAW would be told to come back when it could show a real controversy.

⁵ The costs of due diligence are substantial, and if parties are serious, they wish to minimize their risk that their time and money are being wasted. Exclusivity in negotiations is the customary means to minimize the risk of being played with.

⁶ Moreover, PYCO can show that in 2005, SAW circulated requests for proposals. PYCO believes that at least some carriers exhibited interest in acquiring the line. In the alternative service proceeding, filings by SAW indicated that PYCO's alternative service provider (West Texas and Lubbock) showed interest in the line. Under SAW's logic, if any of these carriers expressed an interest at any time before completion of the FLA proceeding, then the FLA proceeding would have to be held in abeyance pending negotiations between SAW and that

SAW says Caddo Antoine is distinguishable because it involved a lease rather than a purchase.⁷ ICC's holding was based on protection of a shipper's right to the feeder line remedy against any effort by the incumbent railroad to slither out of it, whether partial (lease) or complete (sale). Moreover, since SAW has no deal with USRP, we are not dealing with either a lease or a purchase. We are dealing with speculation, non-events, smoke and mirrors.

SAW argues that its proposed destruction of PYCO's right to exercise its FLA remedy is not "unfair," because a competing feeder line application might be filed, and SAW might select the competing applicant as the entity with which it seeks to negotiate. SAW "petition" at 7. At least under the scenario painted by SAW, there would be a governing time line (namely, the time line specified in this Board's feeder line regulations) and SAW would be gone at the end of it, which is better than what would happen here under SAW's proposed indefinite stay while it non-exclusively "negotiates" with USRP. The only thing assured by the process SAW advocates is that the feeder line statute is nullified.

In any event, the feeder line statute does not expressly

party on the ground that they expressed an interest in the SAW assets prior to February 5, 2006. This would be a ridiculous outcome. A carrier cannot inoculate itself from an FLA by soliciting offers in advance.

⁷ The GSR transaction involved a lease with an option to purchase (lease/purchase) agreement.

permit "competing" applications; this Board's regulations do. In the past, competing applications by parties selected by incumbent carriers have not fared well before ICC/STB. The competing application filed by GSR in the Caddo Antoine proceeding was rejected for failure to show financial responsibility. PYCO would certainly reserve its right to contest any competing applications which might contravene its interests. After all, the FLA process is supposed to be a remedy to protect shipper interests, PYCO is a shipper, and PYCO has a right in the FLA process to protect its interests. We are aware of no successful competing feeder line applications after Caddo Antoine without shipper support.

The point to SAW is that even if SAW or its attorney conjure up a spurious competing application, that does not mean that it will remain in the proceeding for SAW to employ to abuse PYCO some more. It is difficult to imagine a serious competing application given the deteriorated condition of SAW's system, the large investment required for rehabilitation of it, and the fact that any applicant would be competing against the shipper (PYCO) which will be its major customer. One would think that bona fide potential competing applicants would be talking to PYCO right now about how PYCO would be better off with them than with itself.

If SAW purports to negotiate a deal with a competing applicant which is unsatisfactory either to PYCO or to BNSF, then a reasonable person could expect that BNSF on its own

initiative or at the request of its major shipper in south Lubbock (i.e., PYCO) might well exercise its right of first refusal as provided in section 7 of its contract with SAW and re-acquire the line.⁸ The switching operation in Lubbock is supposed to be conducted in a fashion to create efficiencies for BNSF and its shippers, and not to subvert those efficiencies in order to cater to the destructive whims of the owners of SAW. One could reasonably expect that BNSF and PYCO are both concerned that the FLA process not be abused by SAW to put some entity in control of switching in south Lubbock who, as SAW did, self-destructs not only to the point of threatening its own customers with irreparable harm but also to the point of so mismanaging traffic as to threaten to shut down BNSF's own yard operations.

SAW's claim that the relief it seeks will not prejudice to PYCO is transparently facetious. PYCO's ability to receive alternative rail service under Part 1146 will end in October 2006. This Board has found that SAW's service to PYCO was inadequate in this Board's decision in Finance Docket 34802 on January 26, 2006. Everything that SAW has done since that date in connection with PYCO has been hostile. SAW has made it plain to PYCO what PYCO can expect from SAW. PYCO can think of no greater prejudice to its interests at this point than for SAW through its machinations to derail this FLA proceeding such that SAW has PYCO under its thumb for the fall cotton rush. PYCO

⁸ PYCO FLA, Exhibit G.

opposes all SAW's continued attempts at obfuscation and delay.

In making its motion to hold the FLA proceeding in abeyance, SAW does not mention the traditional elements which a party must show to obtain a stay (probability of success on the merits, irreparable injury to itself in the absence of a stay, no substantial injury to the other party, and a benefit to the public⁹). SAW meets none of these requirements. Indeed, aside from its erroneous claim that a stay will not harm PYCO, SAW fails to address, let alone produce evidence establishing, any of these elements.

Conclusion

SAW's motion for a determination that it can moot the FLA if it agrees to sell to some third party it selects, and SAW's request to hold the FLA in abeyance while it negotiates with USRP to that end should be denied. SAW's request violates precedent and deprives PYCO of its right to exercise the FLA remedy.

⁹ See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C.Cir. 1958); WMATA v. Holiday Tours, 559 F.2d 841 (D.C.Cir. 1971); Norfolk Southern Railway -- Abandonment Exemption, AB 290 (Sub-no. 123X), served May 27, 1993.

Respectfully submitted,



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