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June 27, 2006

By UPS overnight mail

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 Reply In Opposition To Allow Amendment Of Feeder Line Application, for filing with the Board in the above referenced matter.

ENTERED
Office of Proceedings

JUN 28 2006

Part of
Public Record

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for South Plains
Switching, Ltd. Co.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**REPLY IN OPPOSITION TO PETITION TO ALLOW
AMENDMENT OF FEEDER LINE APPLICATION**

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: June 28, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**REPLY IN OPPOSITION TO PETITION TO ALLOW
AMENDMENT OF FEEDER LINE APPLICATION**

Pursuant to 49 C.F.R. § 1114.13(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies in opposition to “Petition To Allow Amendment Of Feeder Line Application” (Petition), filed by PYCO Industries, Inc. (PYCO) on June 12, 2006. The Petition was combined with an appeal of a decision of Office of Proceedings Director Konschnik, served June 2, 2006. The Director’s decision rejected a Feeder Line Application (FLA) filed by PYCO on May 5, 2005. SAW replied in opposition to that appeal on June 22, 2006.

REPLY

PYCO’s Petition should be denied. The Director acted in accordance with Board regulations in rejecting the FLA without providing for amendment or supplementation. The Director followed the procedure set out in 49 C.F.R. § 1151.2(b)(2), viz.:

The Board, through the Director of the Office of Proceedings, will reject an incomplete application by serving a decision no later than 30 days after the application is filed. The decision will explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference. (emphasis added).

That regulation is generous to an applicant whose FLA is rejected. The applicant need not refile everything in the prior FLA. It can submit a revised application, and incorporate selected parts of the prior FLA by reference.

However, the applicant has no right to act as if rejection of the FLA had never occurred by simply submitting an amendment to the prior FLA. It is certainly not unfair nor unduly harsh to require that a revised application be filed.^{1/}

The decision in the *Keokuk Junction Railway* case,^{2/} cited at pages 11 and 12 of the Petition, is not inconsistent with the foregoing. The Board there provided an opportunity for a feeder line applicant to amend an FLA to comply with Board regulations in feeder line cases. *Id.* at *8-12 (e.g., by providing an estimate of the line's going concern value, as required by 49 C.F.R. § 1151.3(a)(4)). In the case at hand, PYCO's omission relates to a statutory requirement (i.e., to prove that transportation is inadequate for a majority of shippers who ship traffic over the line, as required by 49 U.S.C. § 10907[c][1][B]). Failure to comply with a statutory requirement requires rejection and a revised application.

Even if the proposed amendments were to be allowed, the FLA still would be required to be rejected. That is so because the letters from Farmers Cooperative Compress (Farmers) and Attebury Grain, LLC (Attebury), submitted as Exhibit B of the Petition, do not even come close

^{1/} It is disturbing that PYCO consulted Board staff as to whether an amendment to the FLA could be filed (Petition at 11). SAW happens to agree with the advice of Board staff in this instance, but that does not lessen concern over an ex parte contact between a party and Board staff in a contested proceeding.

^{2/} *Keokuk Junction Ry. Co. -- Feeder Line Acq. -- Line of Toledo, Peoria & Western Ry. Corp. bet. LaHarpe and Hollis, IL*, 2003 STB LEXIS 238 (Finance Docket No. 34335, decision served May 9, 2003).

to sustaining PYCO's initial burden of proof under 49 U.S.C. § 10907(c)(1)(B). That is the case as a matter of simple mathematics as to the FLA as a whole. Inclusion of those two companies, along with PYCO and arguably Hi-Plains Bag and Bagging Co. as shippers alleging inadequate service, would bring the total to 4 out of 19 shippers -- still decidedly short of a majority. It is true as to Alternative Two of the FLA as well because those letters clearly are not legitimate allegations of inadequate rail service as to those shippers. Alternative Two is required to be rejected on the additional ground that it constitutes impermissible "cherry-picking" of SAW's rail lines under the decision in *Caddo Antoine and Little Missouri R. Co. v. United States*, 95 F.3d 740, 749 (8th Cir. 1996).^{3/}

Section 10907(c)(1)(B) requires a *prima facie* showing in an FLA that transportation is inadequate for the majority of shippers who transport traffic over such line. As commonly understood in the railroad industry, transportation is inadequate when on reasonable request a rail carrier fails to pick up and/or deliver a shipper's traffic on a timely basis, or does not pick up and/or deliver that traffic at all. It follows that in order to prove that transportation is inadequate, a shipper must prove that despite its reasonable request a rail carrier failed to pick up and/or deliver specific shipments on a timely basis, or failed to pick up and/or deliver such shipments at all. Such proof must be specific: date and time requested for pick up and/or delivery by specific car number, and date and time actually picked up and/or delivered, or that such car was not picked up and/or delivered at all.

There is no way that transportation provided by SAW to Farmers or Attebury can be found to be inadequate under that standard. Neither Farmers nor Attebury has ever complained

^{3/} SAW will resubmit its motion for rejection of Alternative Two on that basis.

to SAW that SAW failed to pick up and/or deliver a specific shipment as requested by those shippers, or was unduly late in such pick-up or delivery -- not once in the seven years that SAW has been providing transportation in Lubbock. The letters of those shippers in the rejected FLA did not allege that SAW failed to provide adequate transportation on that basis. Neither do the letters of those shippers in the Petition! It follows that the FLA as proposed to be amended continues to lack essential evidence that SAW has provided inadequate transportation for the majority of shippers on either the rail line as a whole or on the trackage comprising Alternative Two. Thus, the FLA would be subject to rejection even if amended as proposed.

The letters of Farmers and Attebury instead refer to allegations by Hi-Plains Bag & Bagging, Floyd Trucking (a nonshipper) and PYCO to the effect that SAW treated those companies harshly in the past. The allegations of inadequate service by Farmers and Attebury are predicated on that treatment of other companies, not on allegations that SAW ever failed to pick up and/or deliver a shipment of their own on a timely basis, viz. (Petition, Ex. B, pp. 1-2).

... When a switching railroad takes these kinds of actions toward some of its shippers, it can no longer be regarded as reliable by any of its shippers because they may become the subject of similar retaliation or service degradation ...

SAW has denied that it treated Hi-Plains, Floyd and PYCO in the harsh manner alleged, but even if it did such would not constitute inadequate transportation under the statute. The statute requires that requested rail service be provided in a timely manner, not that it also be provided in a cordial manner. Even if such alleged harsh treatment amounted to inadequate transportation under the statute, it would be inadequate only as to the shippers having alleged to have experienced such harsh treatment (Hi-Plains and PYCO), not as to Farmers and Attebury

(nor as to nonshipper Floyd). Thus, the Farmers and Attebury letters do not establish inadequate transportation as to the majority of shippers located on trackage constituting Alternative Two.

Here, as in the *Keokuk Junction Railway* case, *supra*, the Farmers and Attebury letters “can only be viewed as a novel attempt to circumvent the statutory requirement” of 49 U.S.C. § 10907(c)(1)(B) that transportation be shown to be inadequate for a majority of shippers on a rail line before sale of that line can be ordered under the public convenience and necessity provisions of the feeder line statute.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Petition should be denied. If the Petition is granted, the FLA nevertheless should be rejected for the reasons stated.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
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Petitioner



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DATE FILED: June 28, 2006

CERTIFICATE OF SERVICE

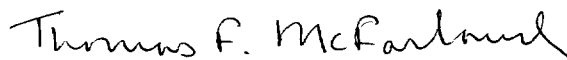
I certify that on June 27, 2006, I served the foregoing document, Reply In Opposition To
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