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19 July 2006
by 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. 34890

Reply to KJRY Motion filed July 18

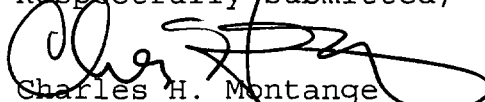
Please Distribute Immediately

Dear Mr. Secretary:

Enclosed please find the original and ten copies of PYCO's Opposition to KJRY's Motion for an Extension filed on July 18 in this proceeding. Because KJRY requested immediate handling, so must we.

Thank you for your assistance in this matter.

Respectfully submitted,


Charles H. Montange
for PYCO Industries, Inc.

ENTERED
Office of Proceedings

JUL 20 2006

Part of
Public Record

Encls.

cc. counsel per cert/serv. (w/encl)
Gary McLaren, Esq. (for PYCO) (w/encl.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
FEEDER LINE DEVELOPMENT --) F.D. 34890
SOUTH PLAINS SWITCHING LTD.) (revision of F.D. 34844)



PYCO Industries, Inc.'s
OPPOSITION
to
Keokuk Junction Railway Company's
Motion for Extension of Time
to File Competing Application

ENTERED
Office of Proceedings

JUL 20 2006

Part of
Public Record

PYCO Industries, Inc., hereby opposes Keokuk Junction Railway Company's (KJRY's) Motion for Extension of Time to File Competing Application. The KJRY Motion was filed on July 18, the due date for competing feeder line applications (FLA's) per this Board's July 3 decision in this proceeding. In its Motion, KJRY asks for an extension of time until August 14 to file a "competing" FLA for all lines belonging to incumbent railroad South Plains Switching, Ltd (SAW). On July 19, SAW e-filed and served a letter stating it "strongly supports" KJRY's motion.

KJRY's filing is indeed an odd one if intended as a bona fide effort preparatory to a filing an FLA. Although KJRY's adversary is presumably incumbent railroad SAW, KJRY hardly mentions SAW. Instead, KJRY in its Motion fires all its ammunition at PYCO (which presumably would be its largest customer if it prevailed). That is rather an odd way to begin enlisting shipper support.¹

¹ If KJRY intends (as it claims) to file an FLA for the entire SAW system, then KJRY must show that a majority of shippers on the entire system have received inadequate service from SAW. This Board has indicated that to make such a showing,

But SAW on July 19 made an odd motion even odder. SAW's letter e-filed in this proceeding on that date states that SAW "strongly supports" KJRY. If SAW supports KJRY in the latter's quest to file an FLA for the entire SAW system, this must mean that SAW now admits SAW is not adequately serving a majority of shippers on its entire system.² This is a complete reversal of SAW's previous position that an FLA for its entire system is not permissible based on its argument that it was adequately serving all its shippers, much less a majority.

Preliminary statement. KJRY is an affiliate of Pioneer Railcorp. Pioneer's General Counsel (Mr. LaKemper) on July 18 telephoned PYCO's Lubbock counsel (Gary McLaren) and said things quite different from what KJRY represents in its pleading. Mr. LaKemper told PYCO that KJRY had been invited by SAW to get involved in this proceeding (explaining that US Rail Partners had dropped out of the picture), and that KJRY would make a filing in order to have a look, but that if legal expenses got too high, KJRY might drop out. In all events, so far as PYCO is aware, KJRY prior to July 18 had never heretofore been in touch with any shipper in Lubbock, much less PYCO. KJRY's involvement appears to be as a stalking horse for SAW, and not

an FLA applicant must submit letters attesting to such inadequacy from a majority of shippers. KJRY has evidently to date sought no such letters, and presumably KJRY would want PYCO's support, as the major shipper, rather than go out of its way to alienate PYCO.

² Otherwise SAW is just wasting the Board's time, much less ours.

as a representative of any shipper interests.

I. Opposition to KJRY Motion as a
Petition for Reconsideration

KJRY's motion for an extension fundamentally mischaracterizes the relief KJRY is seeking. KJRY's motion is a motion for reconsideration of this Board's July 3 decision in F.D. 34844 and F.D. 34890 declining to accept PYCO's FLA for the entirety of SAW's lines in Lubbock. In the July 3 decision, the Board noted that PYCO sought to acquire all of SAW's lines through the FLA process (decision, pp. 1 & 3), but in the Board's view had not been able to produce sufficient evidence that a majority of shippers had received inadequate service for the All-SAW alternative (decision, p. 3). On the other hand, the Board concluded that PYCO had made the requisite showing as to "Alternative Two" (lines serving PYCO, Attebury and Compress). Decision served July 3, at 5. The Board thus accepted PYCO's FLA for filing only as to Alternative Two. In its July 18 motion, KJRY does not propose in this proceeding to file an application as to Alternative Two. KJRY instead seeks to file an application relating to all of SAW's lines. See KJRY Motion, p. 3 (second sentence). In order for KJRY to have such an application accepted, KJRY must persuade this Board to reconsider its July 3 decision limiting this FLA proceeding to Alternative Two. Otherwise KJRY's motion for an extension is irrelevant or moot, because KJRY is not proposing to file an FLA competing for Alternative Two which is the only property at issue.

As a motion for reconsideration, the KJRY motion is timely³ but still must meet the requirements of 49 C.F.R. § 1115.3. That regulation requires KJRY to satisfy this Board that this Board's July 3 decision (1) either will be affected materially by changed circumstances or new evidence, or (2) that the July 3 decision contains material error.

KJRY in its Motion does not argue new evidence or changed circumstances, much less purport to present any new evidence or changed circumstances. However, if SAW's subsequent e-filed letter of July 19 is treated as an admission by SAW (as PYCO believes it is) that SAW has provided inadequate service to a majority of its shippers, then SAW's acknowledgement of its past sins is arguably at least a changed circumstance.⁴

Although KJRY does not make the argument, PYCO believes that the Board on the Board's own initiative could view SAW's admission as sufficient grounds to reconsider its July 3 decision and determine that SAW's service to a majority of its shippers on its entire system is inadequate. In that event, the Board would have to grant PYCO's appeal in F.D. 34844 (although KJRY failed even to make a filing in that docket), and this would then open the way for other entities to file competing FLA's for all of SAW's lines. If the Board takes this

³ Any petitions for reconsideration must be filed within 20 days of the Board's order pursuant to 49 C.F.R. § 1115.3(e).

⁴ SAW's admission is not new evidence, because SAW all along has known it is providing inadequate service to a majority of its customers, and could have made this admission months ago.

approach, then PYCO requests this Board do so only on conditions that ensure the FLA process is concluded such that PYCO can acquire the lines by October 23 (expiration of the current Part 1146 alternative service authorization in F.D. 34802), or such that PYCO receives alternative service from October 23 onward pursuant to its Part 1147 petition in F.D. 34889.⁵ We will speak to relief needed to protect PYCO from further injury in this proceeding, particularly flowing from SAW-instigated delays, later in this pleading as well.

The sole grounds advanced by KJRY for reconsideration seems to be that the Board's decision of July 3 "involves material error." KJRY says that PYCO is "cherry-picking" the SAW lines (KJRY Motion at p. 5), and that "the Board should be skeptical of PYCO's proposal to grab the majority of traffic on the line while allowing the remaining shippers to twist in the wind." KJRY Motion at 5 n. 2, citing Caddo Antoine and Little Missouri RR Co. v. U.S., 95 F.3d 740 (8th Cir. 1996). This Board dealt with KJRY's argument at page 6 of its July 3 opinion:

"In contrast [to the situation in Caddo Antoine], PYCO, the

⁵ If this Board reconsidered its JULY 3 decision based on SAW's implicit admission of July 19 that it provides inadequate rail service to a majority of its shippers, then any FLA proceeding will not be completed by October 23, 2006, when PYCO's alternative service order in F.D. 34802 expires. PYCO expects that SAW will retaliate against PYCO on October 23, 2006, and as our July 17 filing in F.D. 34802, 34890 and other dockets indicates, SAW (and Choo Choo) are in fact retaliating against PYCO at this moment such that PYCO's ability to continue in business, much less ship by rail, is in danger well before October 23. PYCO thus must oppose any delay sought by SAW, KJRY, or some other SAW-surrogate that might prejudice PYCO's ability to obtain relief effective by that date.

heaviest user of SAW's rail services in the past, would like to purchase the entirety of SAW's lines and serve all of SAW's shippers, both large and small. It is only PYCO's inability to make the requisite showing that SAW's rail service is inadequate for a majority of the shippers on the entirety of SAW's rail lines that prevents the All-SAW application from going forward. SAW's claim that PYCO is 'cherry-picking' therefore falls flat...."

KJRY's cherry argument is duplicative of the one SAW made which this Board rejected, and is as unpersuasive now as it was on July 3.⁶ KJRY makes no showing justifying reconsideration.

II. Opposition to Extension Per Se

Since granting the motion for extension would make sense only if the Board intended to reconsider its July 3 decision to the extent of accepting PYCO's FLA for the "All-SAW" alternative, and since KJRY makes no showing justifying such reconsideration, KJRY's motion for an extension must be denied. The whole thing is clearly a ruse to create delay. KJRY admitted to PYCO on July 18 that KJRY is in this at SAW's invitation, and may end up dropping out. As PYCO indicated in its pleadings to date, SAW hopes through delay and its various machinations (including sale of property to Larry Wisener d/b/a Choo Choo Properties), to disable PYCO from receiving adequate rail service on or before October 23, 2006, and indeed to shut

⁶ PYCO notes that KJRY evidently would have PYCO "hanging by the neck" as well as "twisting in the wind." See PYCO motion in this docket filed July 17.

down PYCO's ability to operate completely. That is consistent with Larry Wisener's (SAW's then President) statements to PYCO on and around November 18, 2005, threatening economic retaliation and deteriorated service to PYCO (which statements SAW proceeded to implement), which precipitated the proceedings in F.D. 34802, this docket, and other dockets as PYCO struggles for a legal remedy in order to continue its rail-dependent business in Lubbock.

While KJRY's motion must be denied on this basis, PYCO does take this opportunity to respond to some of KJRY's general claims.

a. KJRY says "PYCO forced an abbreviated schedule upon the Board." KJRY p.3; see also id. p. 6. This comment has no support. PYCO proceeded as quickly as possible consistent with providing quality evidence while dealing with PYCO's urgent need for alternative and adequate rail service through F.D. 34802 and related proceedings. If KJRY thinks PYCO (against intense SAW opposition) should have proceeded more quickly, then why is KJRY (which SAW supports) in need of, or entitled to, so much additional time? After all, KJRY (which represents itself as a savvy rail operator) is presumably an avid reader of the STB website, and has been on notice since at least May 4 that shippers in Lubbock are trying to invoke the feeder line remedy.

b. KJRY says that an extension "would not harm any individual party." KJRY p.3. One wonders if PYCO and KJRY share the same planet when one sees such statements. This

Board has repeatedly found that SAW service to PYCO is inadequate. In response, this Board has authorized alternative service under Part 1146 in F.D. 34802. That service order expires on October 23, 2006 pursuant to statute. On that date, absent relief in this feeder line proceeding or elsewhere, PYCO will have to rely on service from SAW this Board has found inadequate. In any event, PYCO has just filed a motion in this and other dockets for relief against measures SAW and its owners are taking to put PYCO out of business well before that date.⁷ To say, as KJRY does, that an extension here would not harm PYCO ignores the record. PYCO will sustain very grave damage if there is any delay, unless this Board before October 23 grants PYCO's Part 1147 petition in F.D. 34889, or revokes SAW's acquisition exemption in F.D. 33753 (sub.no.1) returning the lines to BNSF.

If this Board grants any motion by SAW or KJRY or both for delay here or anywhere else affecting PYCO, then that order should be conditioned (1) on SAW (and Wisener/Choo Choo) stipulating (a) to rescind all SAW to Choo Choo property sales, all lease and license terminations, and all crossing blockades that in any way affect PYCO, (b) to cease all other retaliatory actions against PYCO, and (c) to continued alternative rail service relief under Part 1147 post-October 23; and (2) on KJRY stipulating to hold PYCO harmless from all losses, including

⁷ See PYCO's motion in F.D. 34890 and other dockets filed July 17, 2006.

attorneys fees, if SAW breaches its part of the stipulation.

c. KJRY says, in effect, that PYCO is just a shipper and implies it cannot provide adequate rail service. KJRY Motion at 4. PYCO is large enough and astute enough to know (1) how to own a railroad, (2) how to contract with knowledgeable operators acceptable to BNSF, and (3) how to coordinate with BNSF. PYCO, after all, is a BNSF customer, and believes that it shares BNSF's wish for efficient, cost-effective, and non-disruptive service to shippers in Lubbock. PYCO so far is receiving excellent service from West Texas & Lubbock (WTL), PYCO's alternative service provider pursuant to this Board's orders in F.D. 34802. BNSF continues to represent to PYCO that BNSF is well-satisfied with WTL's cooperation. Mr. Ed Ellis, president of WTL, has reviewed KJRY's assertions and has furnished the attached email (Appendix A) indicating his company is willing and able to continue to operate any portion (or all) of the SAW system acquired by PYCO on a permanent basis. Although some modifications may be necessary in order to accommodate the Alternative Two scenario, PYCO understands that service in Lubbock will continue under the terms and conditions set forth in the BNSF/SAW contract (already on file with this Board), with WTL as operator and PYCO as owner in the shoes of SAW for all the Alternative Two service and lines. There is nothing mysterious or risky in this. WTL not only is experienced, but also has shown its ability to operate the lines, and PYCO is far far more interested in assuring adequate service and

rehabilitated tracks to permit same than SAW or anyone else who has been advanced as a candidate-owner to date. There is no need for KJRY's participation in this proceeding from the perspective of protection of shipper interests under any plausible scenario.

d. KJRY says the Board's order of July 3 did not afford adequate opportunity for competing applications. KJRY is not seeking to file a competing application on Alternative Two; as already noted, KJRY seeks to file an FLA covering all the SAW system. KJRY is thus in reality seeking reconsideration of this Board's order declining PYCO's appeal of the Director's refusal to accept the All-SAW alternative for filing in F.D. 34844. If this Board refuses to grant KJRY's implicit request for reconsideration, then KJRY's claim of inadequate time is both specious and moot, because KJRY is not proposing to file anything competing for Alternative Two. KJRY seeks something else.⁸

So far as PYCO is aware, KJRY has yet to contact any shipper in Lubbock other than PYCO, and its first contact with PYCO was perfunctory and on July 18. KJRY has supplied no evidence of shipper support for the relief it seeks, or for an application by it that might lead to it becoming the local switch provider in Lubbock. The only support KJRY has mustered to date is from SAW (SAW e-filed a letter of support for KJRY on

⁸ As indicated in the text elsewhere, if the Board grants KJRY's implicit request for reconsideration, then the Board must accept PYCO's FLA for the All-SAW scenario.

July 19), but that is a dubious basis on which to claim that the relief KJRY seeks is in the interests of any shippers, much less the public. KJRY presumably must agree with PYCO that the incumbent railroad (SAW) is the culprit providing inadequate rail service. Something helpful to the culprit must a fortiori be unlikely to benefit shippers or the public.

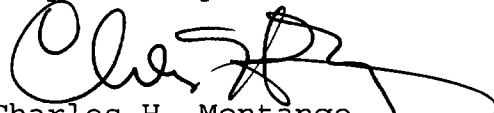
e. KJRY claims it has financial capacity. KJRY Motion at 7. Until KJRY files an application of some sort, this issue is premature, certainly for expedited treatment by PYCO at this time.

f. KJRY makes a number of other assertions and mischaracterizations in its Motion. PYCO's failure to respond should not be construed as an admission to any of KJRY's claims or assertions, except as expressly set forth herein.

III. Conclusion

KJRY's motion for an extension must be denied. Among other things, it implicitly requires that this Board reconsider its July 3 decision restricting PYCO's FLA to Alternative Two. But KJRY does not present a basis for such reconsideration. KJRY's motion is otherwise highly prejudicial to PYCO, lacks merit, and serves only to delay.

Respectfully submitted,



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Appendix A: WTL e-mail

Certificate of Service

By my signature below, I certify service upon the following by express (next business day) delivery by placing same with an appropriate service on July 19, 2006:

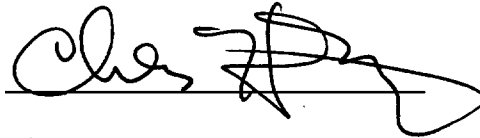
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A handwritten signature in black ink, appearing to read "Chris Heffner", written over a horizontal line.