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September 5, 2006

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket Nos. 34890, 34922, and 34802.
PYCO Industries, Inc. — Feeder Line Application — Lines Of South Plains Switching, Ltd. Co.; Keokuk Junction Railway Co. — Feeder Line Application — Lines of South Plains Switching, Ltd. Co.; PYCO Industries, Inc. — Alternative Rail Service — South Plains Switching, Ltd. Co.

Reply to PYCO's Appeal of Decisions Served on August 16, 17, and 18, 2006

Dear Secretary Williams:

I am enclosing herewith an original and eleven copies of the Reply of Keokuk Junction Railway Co. ("KJRY") to PYCO's Appeal of Decisions Served on August 16, 17, and 18, 2006, filed on August 23, 2006.

Please acknowledge the receipt and filing of the enclosed Reply by time stamping the eleventh copy and returning it to the courier for delivery to me. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

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Respectfully submitted,

[Handwritten signature]

William A. Mullins
Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. 34890
STB DOCKET NO. 34922
STB DOCKET NO. 34802**



**• PYCO INDUSTRIES, INC. — FEEDER LINE APPLICATION —
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

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

**PYCO INDUSTRIES, INC. — ALTERNATIVE RAIL SERVICE —
SOUTH PLAINS SWITCHING, LTD. CO.**

**REPLY TO PYCO'S APPEAL OF DECISIONS SERVED
ON AUGUST 16, 17, AND 18, 2006**

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Attorneys for Keokuk Junction Railway Co.

DATED: September 5, 2006

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**REPLY TO PYCO'S APPEAL OF DECISIONS SERVED
ON AUGUST 16, 17, AND 18, 2006**

On August 23, 2006, PYCO Industries, Inc. ("PYCO") filed what it has entitled as an "Appeal from Acceptance of Feeder Line Application of Pioneer Railcorp and Appeal for Clarification/Reconsideration of Yet Another Round of Competing Applications, and Motions for Correction and Petition for Clarification" (referred to herein as the "appeal" or "PYCO's appeal") in response to decisions served in the above-captioned proceedings on August 16, 17, and 18, 2006 (collectively the "three decisions"). Keokuk Junction Railway Co. ("KJRY") hereby replies in opposition to PYCO's appeal and requests the Surface Transportation Board ("STB" or "Board") to deny the appeal. As will be discussed below, PYCO's multi-faceted appeal fails to articulate the applicable standards of review, much less to explain how those standards, applied to the facts here, support a reversal of the three decisions. In any event, the challenged decisions are well-reasoned, consistent with Board regulations and precedent, and

carefully designed to afford all interested parties a full and fair opportunity to participate in the proceedings.

BACKGROUND¹

On August 16, 2006, the Board served a decision by the Director of the Office of Proceedings (“Director”) in Finance Docket Nos. 34890 and 34922 (“August 16 Decision”) accepting PYCO’s feeder line application (“FLA”) for all of the rail lines of South Plains Switching, Ltd. Co. (“SAW”).² That decision also amended the procedural schedule and provided an opportunity for KJRY to expand its FLA to include an All-SAW alternative. On August 17, 2006, the Board served another Director’s decision in Finance Docket No. 34922 (“August 17 Decision”) accepting KJRY’s competing application for Alternative Two. On August 18, 2006, pursuant to SAW’s request, the Board served a decision by the Secretary in Finance Docket Nos. 34890, 34922, and 34802 (“August 18 Decision”) tolling the alternative service period for West Texas & Lubbock Railway Company (“WTL”) to provide alternative service on SAW’s lines, and extending the procedural deadlines previously ordered for these proceedings, for a period of 30 days.

By its filing of August 23, 2006, PYCO challenges the three decisions. PYCO’s appeal purports to be many things: (1) an appeal of the acceptance of KJRY’s competing FLA for the Alternative Two lines; (2) a petition for reconsideration of the August 16 and August 17 Decisions concerning the filing of competing FLAs; and (3) a motion to correct and/or petition

¹ These three intertwined but separate proceedings have a long procedural history, and the record in each is growing at an unusual pace. Rather than revisit those histories at length here, KJRY will focus exclusively on the issues essential to its response to PYCO’s appeal.

² The Director had previously accepted PYCO’s application to acquire a portion of SAW, generally described as the “Alternative Two” lines. PYCO’s revised FLA covers the so-called “All-SAW” option.

for clarification of the August 18 Decision adjusting the procedural schedule in the various proceedings. PYCO calls upon the Board to “revisit” these decisions to render them “more coherent.” PYCO Appeal at 1.

PRELIMINARY MATTER – STANDARDS FOR APPEAL

By using a variety of terms to describe its requests for relief, PYCO’s appeal is the filing equivalent of a blunt instrument. PYCO nowhere identifies the provisions under which it seeks review of the three decisions. It never articulates the standards for obtaining the relief it requests, nor does it cite to any supporting precedent, regulations, or statutes. Rather, PYCO’s appeal is a general critique of the handling of these proceedings and contains another grossly inaccurate and unwarranted attack on KJRY’s business decision to be a competing feeder line applicant. Such criticisms and attacks, of course, are no basis for reversal of well-reasoned decisions.

Turning to the particulars of the appeal, PYCO seeks review of the August 18 Decision issued by the Secretary of the Surface Transportation Board (“Secretary”) pursuant to his authority at 49 CFR 1011.6(c)(3). PYCO also appeals the August 16 and August 17 Decisions, which were issued by the Director pursuant to his authority at 49 CFR 1011.7(b)(8). Although it never cites 49 CFR 1011.6(b) and 1115.1(c), PYCO appears to be seeking entire Board review of the August 18 Decision under those rules, which state that appeals are not favored and will be granted only in “exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.”

As with its appeal of the August 18 Decision, KJRY is left to decipher for itself the applicable standard of review for PYCO’s challenge to the August 16 and August 17 Director’s Decisions. PYCO depicts its request for review of the August 16 Decision as a “motion to reconsider” and a “point of reconsideration.” PYCO Appeal at 3. Yet, *petitions* for

reconsideration or reopening are only permitted under the Board's rules for entire Board decisions, not for Director's decisions. *See* 49 CFR 1115.3. Thus, to the extent PYCO's "motion" is intended to be a "petition," it was improperly filed and should be denied. Nonetheless, even if the standards for reconsideration or reopening under 49 CFR 1115.3 and 1115.4 were applicable here, which they are not, the discussion below makes clear that there is no new evidence or changed circumstance materially affecting the prior actions taken by the Secretary or the Director so as to justify reopening or reconsideration.

On the other hand, the Board might believe that the standards set forth at 49 CFR 1115.2(a), which govern appeals of the initial decisions of an administrative law judge, individual Board Member, or employee board, also apply to the Director's decisions issued pursuant to section 1011.7(b)(8). If that is the case, then the Board's procedural rules on this issue are confusing and incomplete at best.³ Regardless, applying the section 1115.2(a) standards here, PYCO has failed to show that – (1) any necessary finding of fact was omitted, erroneous, or unsupported by substantial evidence of record; (2) that a necessary legal conclusion or finding is contrary to law, Board precedent, or policy; (3) that an important question of law, policy or discretion is involved which is without governing precedent; or (4) that prejudicial error has occurred. Moreover, appeals of initial decisions must be accompanied by a filing fee to be accepted – 49 CFR 1002.2(61) as clarified by Regulations Governing Fees for Service, STB Ex Parte No. 542 (STB served Apr. 4, 1996), slip op. at 8-9 – and there is no evidence here that

³ There is evidence that section 1115.2 does not interrelate with appeals of Director's decisions under section 1011.2(a)(7). Specifically, section 1011.2(a)(7), which is discussed below, does not refer to section 1115.2 at all, and requires that appeals must be filed within 10 days of the decision, and replies 10 days thereafter. By comparison, section 1115.2, which likewise makes no reference to section 1011.2(a)(7) or to the Director, allows at least 20 days for appeals and 20

PYCO has filed such a fee here. On that basis alone, PYCO's appeal, if it falls under section 1115.2(a), should be rejected.

PYCO's "appeal" of the August 16 and August 17 Decisions would be most appropriately based upon 49 CFR 1011.2(a)(7), which provides for appeals of decisions issued by the Director. None of the provisions at 49 CFR parts 1011 and 1115, however, make clear the applicable standard of review for such appeals. The close relationship between the section 1011.7 and section 1011.6 delegations, including the identical procedural schedules for appeals of Secretary's decisions and Director's decisions, strongly suggest that the most appropriate standard of review for an appeal of the Director's decision is that found at 49 CFR 1115.1(c), which provides that such appeals are not favored, and will be granted only in exceptional circumstances upon showing of clear error of judgment or to prevent manifest injustice.⁴

Although KJRY opposes PYCO's appeal based on what it considers to be the most appropriate

days for replies. By comparison, the procedural schedules for appeals of Secretary's decisions under section 1011.6 are the same as they are for Director's decisions under section 1011.7.

⁴ Board precedent indicates that this is the appropriate standard for appeals under 1011.2(a)(7). See *Charles M. Sotelo – Petition for Declaratory Order – Line Relocation in Cochise County, AZ*, STB Finance Docket No. 34191 (STB served Aug. 11, 2003) (individual seeking review of Director's decision pursuant to his authority at 49 CFR 1011.7(b)(6) must show that reversal is necessary to correct a clear error of judgment or to prevent manifest injustice; an apparent reference to the standard at 49 CFR 1115.1(c)); cf. *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, STB Finance Docket No. 34335 (STB served Sept. 26, 2003) ("*Keokuk Junction-TP&W*"), slip op. at 3-4 (the Board, in denying TP&W's appeal of the Board's acceptance of KJRY's FLA, did not mention the section 1115.2(a) standards, but instead considered TP&W's arguments that the Board erred in accepting the FLA, and that acceptance of the application was unjust; apparently applying the standards under 1115.1(c)); but see also *New York & Greenwood Lake Railway – Feeder Line Acquisition – A Line of Norfolk Southern Railway Company*, STB Finance Docket No. 34649 (STB served July 27, 2005) ("*New York & Greenwood Lake*"), slip op. at 3 (applying the section 1115.2 review standards in denying the appeal of a Director's decision rejecting a FLA).

standard of review, the following section demonstrates equally that PYCO's appeal fails under any of the possible standards of review.

ARGUMENT

As discussed above, appeals of the three decisions should not be favored; a heavy burden of proof rests on the party seeking to overturn decisions rendered by the Secretary and the Director. PYCO, however, characterizes its appeal as an invitation for the Board to revisit the three decisions to see if they could be "rendered more coherent." It asks for another chance to litigate KJRY's financial responsibility even though that issue has already been developed adequately. PYCO also seeks to re-present arguments about public convenience and necessity ("PC&N") that the Board has either already accepted or deemed premature. Finally, PYCO questions the procedural schedules for the subject matters as prescribed in the three decisions. In each case, PYCO has not met its burden. Accordingly, the Board should uphold the three decisions and the procedures that it has prescribed therein, and it should move forward with the FLAs process.

In its appeal, PYCO tries again to have the Board eliminate KJRY as a competing feeder line applicant. In so doing, PYCO challenges the Board's decision accepting KJRY's FLA for Alternative Two and permitting KJRY to file additional material to expand its FLA to cover the entire SAW system. Despite the tenor of PYCO's objections, however, the Board properly accepted KJRY's Alternative Two FLA and has appropriately acted within its discretion by allowing KJRY to submit expanded information on the All-SAW alternative, just as the Board did in allowing PYCO to do so.

KJRY's competing FLA fully complied with section 1151.3 and it was reasonable for the Board to so find. KJRY's competing FLA was modeled upon PYCO's own Alternative Two

FLA. Specifically, KJRY relied on PYCO's evidence with respect to Sections 1151.3(1)(description and location of lines), (3)(ii)(operating costs for three years), (7)(operating plan, in part), and (11)(A)-(E)(public convenience and necessity findings with respect to failure to operate the line, service inadequacy for the majority of shippers, no material impact on SAW, no material impact on operations, and improvement in service). If this evidence was sufficient for acceptance of PYCO's Alternative Two FLA, then KJRY's competing application relying in part on this evidence was likewise sufficient and it was not a clear error for the Director to have reached that conclusion with respect to this evidence.

As to Sections 1151.3(a)(2)(identification of applicant),(4)(estimate of NLV or GCV), (5)(offer to purchase), (6)(dates proposed for operation), (7)(operating plan, in part), (8)(insurance), (9)(preconditions), (10)(subsidy), (12)(exemption election), (13)(trackage rights), (14)(joint rates), (15)(employees), 16(service requirements), KJRY supplied its own information. It was reasonable for the Board to accept this information, and in fact, PYCO does not dispute that KJRY supplied this information in accordance with the Board's regulations.

The only substantive attack on KJRY's FLA seems to be that KJRY did not establish that it was a "financially responsible person" in accordance with section 1151.3(a)(3). Yet, PYCO does not dispute that KJRY provided sufficient financial information in the form of a letter from the National City Bank of Michigan/Illinois ("Bank") and a verified statement from KJRY's President, J. Michael Carr. The Bank letter and the Carr statement more than demonstrated that KJRY had sufficient funds to acquire the Alternative Two lines and operate them for three years.⁵ Rather than addressing the merits, PYCO simply complains that KJRY's audited

⁵ PYCO argues that this information does not prove that KJRY was a "financially responsible person" for the All-SAW alternative. But KJRY did not proffer its evidence for that purpose.

financial information from 2005 was filed under seal, that PYCO's counsel did not receive that information until a few days after KJRY filed it, and that PYCO had not time to review that information and reply to it.

PYCO ignores the fact that the financial statement information was not needed to establish KJRY's financial responsibility. Rather, this information was filed in reply to PYCO's motion to reject KJRY's competing FLA, specifically in response to PYCO's criticism that KJRY had not included any annual report information in its FLA. Because this was information contained in a reply, PYCO had no right to file a reply to KJRY's reply. Furthermore, it is ironic that PYCO complains about KJRY filing information that PYCO itself requested KJRY to file.

In any event, the Board has thoroughly examined KJRY's information, has found KJRY to be financially responsible for the Alternative Two option, and properly has made provision for KJRY to expand its application to cover the All-SAW option. Almost certainly upon the filing of KJRY's additional valuation evidence for All-SAW, PYCO will take the opportunity afforded it under the Board's procedures to once again challenge KJRY's financial responsibility. It will be free to do so, but PYCO was not prejudiced with respect to the previously filed information. In short, the Director's finding that KJRY had established that it was a financially responsible person was not a "clear error of judgment." The Director's decision on the issue of financial responsibility is not manifestly unjust, nor does it contain reversible error under any other standard of review. *See Keokuk Junction-TP&W, supra.*

Rather, its evidence to date, establishes that it had sufficient funds to acquire and operate the Alternative Two lines. In offering evidence to support its forthcoming All-SAW application, KJRY will present financial information necessary to establish that it is a "financially responsible person" for the All-SAW alternative. If it considers it necessary to do so, PYCO may test that evidence after it is presented.

As it has done before, PYCO also insists that KJRY's Alternative Two application is not consistent with the public convenience and necessity ("PC&N"). PYCO claims that the Director ignored PYCO on this issue. PYCO's evidence and argument on this issue were not ignored. The Director acknowledged PYCO's argument, but noted that PYCO was assailing the merits of KJRY's application, not its completeness. Furthermore, since KJRY relied upon the same evidence on this issue as PYCO had in filing an FLA for Alternative Two, it would have been arbitrary to find that PYCO's PC&N showing was acceptable and not to do the same for KJRY. For these reasons there is no error of judgment or other reversible error in the Director's decision.⁶ *See New York & Greenwood Lake*, slip op. at 3 (merely reiterating arguments raised in earlier phases of a proceeding are not grounds for reversal of a Director's decision).

The balance of PYCO's appeal focuses upon Board-ordered adjustments to the procedural schedules. Those adjustments were made with due regard for the interests of all involved parties, including the continuation of adequate service on the SAW lines, and properly and fairly accommodate each competing interest. Moreover, the schedule adjustments were well within the discretion of the Secretary and the Director, and, PYCO has failed to articulate how the Board has committed any manifest injustice or clear error of judgment. *See, e.g., Tongue River Railroad Company – Construction and Operation – Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (Board found no clear error of judgment or manifest injustice in the prescription of a procedural schedule that was issued as a result of the applicant rail line builder's submission of updated evidence). Indeed, it would have been unfair and unjust if the Director had not made the adjustments. In fact, any further adjustments, as requested by PYCO,

⁶ On the other hand, it would be manifestly unjust if the Board were to bar interested parties from submitting competing FLAs for the exact same lines that PYCO has been permitted to pursue.

would be prejudicial to KJRY (and presumably also to SAW) in preparing the valuation evidence that it has been permitted to file in connection with an All-SAW application.

Finally, KJRY objects to PYCO's false and inflammatory characterization of KJRY's participation in these proceedings.⁷ KJRY was not "invited" by SAW to file a competing application, and it is not SAW's "alter ego." Rather, KJRY chose to file a competing FLA on the basis of a sound business determination that, through an FLA-induced acquisition of the line, KJRY could bring its operating experience to bear to restore reliable service to shippers on SAW's lines. It intends to operate the SAW lines for the long term, and to earn a profit while fulfilling its common carrier obligations. While KJRY questions the scope of rehabilitation that PYCO asserts is needed to operate SAW's lines, KJRY's comments cannot reasonably be construed as "an admission by [KJRY] that it seeks to acquire the assets [of SAW] to milk them further and to run these lines into the ground." PYCO Appeal at 10. KJRY is very serious in its desire to serve SAW shippers. It is not "just fooling around," (*id.* at 19) and views PYCO's allegations to the contrary as irrelevant, unsupported, and irresponsible. PYCO's false allegations, repeated and bloated filings, and other diversionary tactics are an abuse of the Board's processes.⁸

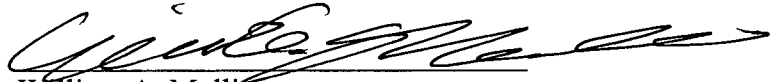
⁷ Habitually, PYCO equates KJRY with its corporate parent, Pioneer Railcorp ("Pioneer"). The two entities are legally distinct from one another, as PYCO knows. Pioneer does not do business under the trade name "Keokuk Junction Railway," it is not an applicant or a co-applicant in KJRY's FLA, and, accordingly, it is not a party to any of the subject proceedings.

⁸ The Board's rules at 49 CFR 1013.11 require parties appearing before the agency to "conform ... to the standards of ethical conduct required of practice before the courts of the United States." KJRY understands the quoted passage to refer to the Federal Rules of Civil Procedure ("FRCP"). PYCO's continuous unscheduled filings, supplementations, replies to replies, and continued false assertions about KJRY's relationship with SAW may violate Rule 11 if the FRCPs apply to this proceeding. As it stands here, PYCO's actions appear more about needlessly increasing the costs of litigation than they do about following the Board's rules and procedures.

CONCLUSION

The Board should not view favorably PYCO's appeals of the three decisions. As KJRY has shown above, the Board has committed no clear error of judgment, and the challenged three decisions are not manifestly unjust. PYCO points to no necessary finding of fact by the Director that was omitted, erroneous, or unsupported by the record. There is no evidence that the Director's legal conclusions or findings were contrary to law, Board precedent, or policy. To the contrary, the decisions accurately assessed the evidence KJRY provided in support of its application and came to a correct legal conclusion. Moreover, the Director's decisions did not involve an important question of law, policy, or discretion that was without governing precedent. Lastly, there is no evidence of prejudicial procedural error here. For those reasons, PYCO's appeal should be denied in its entirety.

Respectfully submitted,



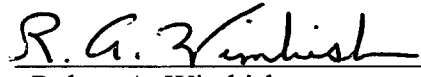
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Attorneys for Keokuk Junction Railway Co.

September 5, 2006

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that on September 5, 2006, I caused a copy of the foregoing Reply to PYCO's Appeal of Decisions Served on August 16, 17, and 18, 2006 to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in Finance Docket Nos. 34890, 34922, and 34802.


Robert A. Wimbish