

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34890 - 217949

PYCO INDUSTRIES, INC.
- FEEDER LINE APPLICATION -
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.

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Finance Docket No. 34922 - 217950

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

**REPLY OF BNSF RAILWAY COMPANY
TO SAW'S MOTION TO STRIKE
REPLY OF BNSF RAILWAY COMPANY
TO PYCO'S REVISED VALUATION EVIDENCE
AND TO KJRY'S ALL-SAW APPLICATION**

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Dated: October 25, 2006

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BNSF Railway Company ("BNSF") submits this reply to SAW'S Motion to Strike Reply of BNSF Railway Company to PYCO's Revised Valuation Evidence and to KJRY's All-SAW Application. In its Motion, SAW argues that BNSF's Reply is not permitted by the procedural order set forth in the Board's decision served August 16, 2006 (as modified August 18, 2006). Specifically, SAW contends that, while the Board's procedural order permitted replies to the PYCO and KJRY filings, BNSF's Reply constitutes an unauthorized reply to (i) SAW's September 18, 2006 Statement in Response to PYCO's Feeder Line Application to Acquire All-SAW ("SAW Statement"), and (ii) to SAW's September 20, 2006 Reply in Opposition to

BNSF's Petition for Leave to Intervene ("SAW Intervention Reply"). SAW's Motion to Strike should be denied for the following reasons:

1. The Board's procedural order provided BNSF with the right to reply to "PYCO's amended valuation evidence" and to "KJRY's application concerning . . . the All-SAW option." August 16, 2006 Decision at 6. Inherent in this right to file a reply is the right to address any and all aspects of the issues raised or presented by the two pleadings, and the issues which BNSF addressed in its Reply were related to issues raised and presented by one or both of PYCO's and KJRY's pleadings. Thus, the issue of whether it is proper to include revenues generated in connection with rail service to Jarvis Metals at Burris, TX in calculating the going concern value ("GCV") of SAW's lines is raised and discussed in both pleadings. *See* PYCO's Revised Valuation Evidence at 6-7, 19, and KJRY's All-SAW Application, Verified Statement of William J. Brennan ("V.S. Brennan") at 13-18. Similarly, PYCO and KJRY both addressed the issue of whether it is proper to include in the GCV surcharges on SAW traffic which SAW is contractually authorized to impose. *See* PYCO's Revised Valuation Evidence at 11-12, 19-20, and KJRY's All-SAW Application, V.S. Brennan at 12-13. Further, KJRY addressed the issue of whether BNSF's right of first refusal should be preserved in these proceedings. *See* KJRY's All-SAW Application at 28-30, V.S. Brennan at 26-30. Finally, the issue of whether BNSF's rate making authority under its agreement with SAW should be preserved is presented by KJRY's position that BNSF's right of first refusal should not be permitted to apply to the sale of lines in a FLA proceeding. *Ibid.* This is so since it is through the right of first refusal that the

agreement between SAW and BNSF ensured that BNSF could act to preserve its rate making authority in the event of a sale of the lines.¹

2. Given that BNSF was entitled to address each of the four issues identified in its Reply, BNSF was similarly entitled to do so in a full and complete manner so as to provide the Board with a comprehensive record on which to decide the pending FLA proceedings. This would include addressing SAW's argument and evidence on the issues that BNSF addressed since otherwise BNSF, as the Class I carrier involved in this particular sale of lines, would not be able to provide the Board with the benefit of its views on all aspects of those issues.

3. No harm will accrue to SAW from the denial of its Motion to Strike since SAW has had the opportunity to address (and has in fact addressed) the Jarvis, surcharge, and right of first refusal issues in other pleadings filed in these proceedings. To the extent that SAW desires to make a further submission on those issues or on the issue of the preservation of BNSF's rate making authority, BNSF has no objection to the Board granting SAW the right to do so.² In this regard, SAW's argument that there is not sufficient time in the procedural schedule for it to make a further submission on these issues is without foundation as the schedule provides that the last filing by the parties (KJRY's rebuttal) is not due until October 31, 2006. This is 19 days after

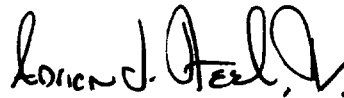
¹ As noted in BNSF's Reply, BNSF believes that the Board can act to directly preserve BNSF's rate making authority since it is in the public interest for Class I railroads to be able to sell rail lines such as those sold to SAW with confidence that the FLA process cannot be used by a shortline to preclude the Class I railroad from receiving its bargained-for GCV and to receive the GCV for lines for which it essentially paid nothing. *See* BNSF Reply at 11-13.

² SAW has complained that BNSF waited until August 31, 2006, to seek intervention and that BNSF's delay supports SAW's Motion to Strike. The Board's procedural order, however, set no time limit for the filing of a petition to intervene nor more generally do the Board's regulations on intervention. Moreover, BNSF timely filed its intervention petition when it became apparent that there would be competing All-SAW FLA applications and that the preservation of its right of first refusal was being challenged.

BNSF's Reply was filed, a period of time in which SAW could (and still can) submit anything further it wants to say on the issues.

4. Under the Board's August 16th procedural order, BNSF had no other opportunity to reply to the SAW Statement, and the Board has not indicated how BNSF should proceed to submit argument and evidence in the event its petition for leave to intervene is granted. In such circumstances, BNSF's Reply is appropriate, and SAW's Motion to Strike should be denied.

Respectfully submitted,



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Dated: October 25, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October 2006, a true and correct copy of the foregoing Reply of BNSF Railway Company to SAW's Motion to Strike Reply of BNSF Railway Company to PYCO's Revised Valuation Evidence and to KJRY's All-SAW Application was served by overnight delivery on the following:

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