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November 6, 2006

## **VIA ELECTRONIC FILING**

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 and 34922  
*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.*

### **Reply to PYCO's Renewed Request for Sanctions, Motion to Strike and Request for Sanctions**

Dear Secretary Williams:

On October 31, 2006, PYCO Industries, Inc. ("PYCO") filed what it entitled "PYCO Industries, Inc.'s Reply to KJRY Motion to Strike Portions of PYCO's Rebuttal and Renewed Request for Sanctions Against KJRY." Via electronic filing, Keokuk Junction Railway Co. hereby files its "Reply to PYCO's Renewed Request for Sanctions, Motion to Strike New Evidence and Request for Sanctions." If there are any questions about this filing, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



William A. Mullins  
Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**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.**

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**REPLY OF KEOKUK JUNCTION RAILWAY CO. TO PYCO'S RENEWED  
REQUEST FOR SANCTIONS, AND MOTION TO STRIKE NEW  
EVIDENCE AND REQUEST FOR SANCTIONS**

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**Attorneys for Keokuk Junction Railway Co.**

**DATED: November 6, 2006**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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REQUEST FOR SANCTIONS, AND MOTION TO STRIKE NEW  
EVIDENCE AND REQUEST FOR SANCTIONS**

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Keokuk Junction Railway Co. ("KJRY") objects to the "renewed" request of Pyco Industries, Inc. ("PYCO") for sanctions against KJRY, moves to strike new evidence contained in PYCO's most recent filing, and as discussed below, urges the Board to impose sanctions against PYCO for inappropriate disclosure of highly confidential information provided in response to discovery and for filing irregularities.

**SUMMARY**

On October 24, 2006, KJRY moved to strike certain portions of the rebuttal filed by PYCO in connection with PYCO's feeder line application ("FLA") in STB Finance Docket No. 34890 to acquire the entire rail assets of South Plains Switching, Ltd. Co. ("SAW") in Lubbock, TX. On October 31, 2006, PYCO responded to KJRY's motion to strike ("October 31 filing").

Included in PYCO's October 31 filing is yet more new evidence that PYCO is attempting to introduce into the record, along with a "renewed request for sanctions against KJRY."<sup>1</sup>

PYCO's renewed request that KJRY be punished hinges on an utterly fictitious depiction of discovery in these proceedings. In fact, PYCO's wholly unwarranted attack underscores the very reason why its sanctions request is a ridiculous waste of time. Furthermore, PYCO has inexplicably and inexcusably attempted to introduce into the record yet more evidence that must be stricken. Finally, PYCO's October 31 filing discloses information that KJRY had requested be handled as highly confidential pursuant to the protective order applicable to these proceedings, and contains irregularities, both of which warrant sanctions against PYCO.

### **ARGUMENT**

As the Board well knows, the above-docketed proceedings and Pyco Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co., STB Finance Docket No. 34802, relate to a prolonged and very ugly dispute between PYCO and SAW that well predates KJRY's participation in the feeder line process. It was because of the acrimony between shipper and carrier that KJRY perceived an opportunity as a neutral party to defuse the situation by acquiring and operating All-SAW.<sup>2</sup> In actuality, KJRY has been drawn into the vortex of what had come

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<sup>1</sup> PYCO previously requested that the Board strike certain critical evidence and argument from KJRY's submissions in support of its expanded competing FLA ("Expanded CFLA") in STB Finance Docket No. 34922 and impose as yet unspecified monetary sanctions against KJRY. See PYCO Reply filed on October 25, 2006.

<sup>2</sup> Throughout these proceedings, PYCO has made the scurrilous and totally baseless accusation that SAW and KJRY are in cahoots. This is completely untrue. KJRY is not SAW's proxy, nor is it here at SAW's request. In fact, KJRY had hoped to negotiate the purchase of SAW's Lubbock assets before the initiation of feeder line proceedings by PYCO, and only reluctantly agreed to file a competing feeder line application, when it was clear that the transfer of All-SAW was more likely to take place through such a process. PYCO's conspiracy theory – that SAW and KJRY have some sort of a side deal for KJRY to be a stalking horse in these proceedings – is the sort of thing that might do motion picture director Oliver Stone proud, but it is completely

before: the procedural equivalent of a street brawl, in which PYCO has regularly and flagrantly defied the Board's regulations in the interest of "winning" at any cost. PYCO has characteristically made its *modus operandi* to carp and harangue most, loudest, and, above all, *last*. PYCO's October 31, 2006 filing is but more proof of all of this.

Preliminarily, PYCO's October 31 filing is not a response to the merits of KJRY's motion to strike, but rather is an attempt to highlight what PYCO considers key points in the evidence that it has already improperly submitted. The contested evidence's admissibility, however, must be resolved according to objective standards articulated in the Board's regulations and clarified in its decisions (such as those set forth in KJRY's original motion to strike).

Such preliminary comments aside, KJRY will focus upon PYCO's renewed request to have the Board punish KJRY, the new evidence that PYCO has inadmissibly attempted to introduce on October 31, which such evidence should be stricken from the record, PYCO's inappropriate disclosure of highly confidential information, which provides a legitimate basis for imposing sanctions against PYCO, and the irregularity in the manner in which PYCO's October 31 filing was submitted.

**PYCO's unwarranted, renewed request for sanctions against KJRY**

The essence of PYCO's renewed (and unprecedented) request for sanctions is this:

(1) KJRY's original refusal to supply responses to PYCO's discovery from Pioneer is the end-all and be-all of discovery misdeeds that may be used as a bludgeoning instrument whenever PYCO deems it useful to use it in that way, never mind that Pioneer has since responded to discovery

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and utterly false. For example, among PYCO's discovery requests were requests about whether SAW had agreed to reimburse KJRY or Pioneer Railcorp ("Pioneer") for its costs in pursuing its competing FLA (reflecting PYCO's assumption that such a nefarious scheme existed). KJRY and Pioneer have verified that no such agreement exists.

pursuant to the Board's decision on October 5, 2006; and (2) the limited timeframes of these proceedings preclude the ordinary resolution of discovery disputes, and thus PYCO has license to demand that KJRY be punished instead. Both underpinnings to PYCO's actions here are invalid.

PYCO's renewed request for sanctions is little more than a rehash of the same arguments and accusations included in its October 25, 2006, reply to KJRY's Expanded CFLA, to which KJRY responded in detail at pages 23-30 of KJRY's rebuttal filed on November 1, 2006.<sup>3</sup> In this case, PYCO's renewed attack focuses on whether KJRY and Pioneer were sufficiently responsive to discovery requests about whether KJRY or Pioneer or Pioneer's various subsidiaries frequently have been defendants in litigation, and, if so, how that might affect All-SAW customers.<sup>4</sup> KJRY has already admitted that, despite responding substantively and in full to the preponderance of PYCO's discovery requests, it objected to this particular line of questions because they sought from KJRY and Pioneer information that PYCO could get from other sources and were not relevant to the issues in these proceedings.

PYCO has now proven the validity of KJRY's objection. PYCO's October 31 filing is laden with material relating to Board and Interstate Commerce Commission ("ICC") proceedings

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<sup>3</sup> Underlying PYCO's request to have KJRY punished is an assumption that the Board's decision on October 5 found all of PYCO's discovery requests to be valid, that it prevented KJRY and Pioneer from asserting legitimate objections to any one particular interrogatory or document request, and that it compelled full responses to *all* of PYCO's requests by KJRY, Pioneer and all of the Pioneer corporate family. As KJRY has previously noted, the Board's October 5 decision disproves PYCO's assumption. See KJRY Rebuttal at 24 n. 17, 29.

<sup>4</sup> Assuming, of course, that PYCO's pet issue is relevant to these proceedings at all, KJRY adds the following: Pioneer is a short line holding company in control of many short line railroads. The number of carriers multiplies the chances that one short line or another under Pioneer's control may find itself involved in matters before the Board. Even so, PYCO has not once provided any evidence that members of the Pioneer family are more frequently before the Board than are carriers under the control of other short line holding companies.

in which KJRY or one of its corporate affiliates has been involved – including an instance where KJRY, although a participant, was neither the complainant nor the defendant. Indeed, the mere presence of these documents in PYCO’s filings establishes the legitimacy of KJRY’s objections and fully shows that they were obtainable without the need for discovery. In that regard, KJRY refers the Board to page 26-27 of its previously filed rebuttal comments.

Most laughable about PYCO’s request to punish KJRY is the double standard inherent in PYCO’s feigned inability to resolve any remaining discovery disputes following Pioneer’s substantive responses to PYCO’s discovery on October 10. Speciously, PYCO insists that it had no time for resolving discovery issues and that it therefore had “no choice” but to try to bring the hammer down on KJRY. The Board’s handling of discovery matters in this proceeding and PYCO’s own remarks reveal that PYCO clings to a convenient, but bogus, excuse to short circuit the proper course of discovery and the resolution of disputes arising from it.

When KJRY’s declined to provide discovery responses for Pioneer, PYCO promptly tendered a motion to compel on September 26, 2006, to which the Board, on September 29, 2006, ordered KJRY to respond by no later than October 2, 2006. The Board acted on PYCO’s motion on October 5, 2006, three days after KJRY had filed its reply. Thus, the Board has demonstrated that it can act with alacrity when the need arises, and it easily could have done the same to address the very few remaining issues following Pioneer’s submission of discovery answers on October 10. Furthermore, in defense of its inclusion of additional testimony by PYCO’s witness, Mr. Davis, on rebuttal, PYCO states as follows: “Mr. Davis provided [testimony] when PYCO filed its all-SAW valuation on September 28. Neither before *nor after* did KJRY or any other party seek any discovery on the question.” PYCO October 31 filing at 7 (emphasis added). By PYCO’s own logic in seeking sanctions, however, *there was no time* after

September 28 for KJRY to engage in discovery, because that would have unfairly extended the proceedings to the alleged detriment of All-SAW shippers. But PYCO now insists that KJRY could have and should have done what PYCO says it had no time to do – engage in discovery and file a motion to compel. PYCO is clearly applying a different standard (and a different logic) to KJRY than it applies to itself. On this issue, KJRY need not say more.

In the end, PYCO's "renewed request for sanctions" is just another attempt to have the last word and confuse the Board about KJRY's and Pioneer's discovery responses. KJRY and Pioneer fully complied with the discovery requests, produced hundreds of pages of documents, and answered every single interrogatory and document request. While KJRY and Pioneer did not produce information relevant to litigation, it did not do so because such information was publicly available and was not relevant to these proceedings. PYCO's own recent filing proves that KJRY's and Pioneer's were precisely on point. PYCO's renewed request for sanctions should be denied.

**PYCO's October 31 filing contains new evidence which must be stricken**

PYCO has no business including yet more new evidence on the merits of a FLA in reply to a motion to strike inadmissible rebuttal evidence, but PYCO does just that. In fact, PYCO's October 31 filing so thoroughly commingles specific references to previously objected to evidence and newly offered evidence that the whole thing should be stricken. Exhibit A to PYCO's October 31 filing, for example, is a copy of emails between PYCO's counsel and BNSF's Weldon Hale (who offered verified testimony on behalf of BNSF earlier in this proceeding) that appear to have taken place on October 26, 2006. Passages are also quoted in PYCO's October 31 filing at page 12. PYCO tries to introduce this material because KJRY previously had criticized certain of PYCO's inadmissible new evidence as "self-promotion."

That is no reason to toss in new evidence now. Accordingly, Exhibit A and all referenced to Mr. Hale's email exchange with PYCO's counsel in PYCO's October 31 filing must be stricken.

All of PYCO's October 31 filing from the bottom of page 12 through and including its exhibits A through E must also be stricken. Exhibits B through E were simply copies of public documents that PYCO could have produced at any time but waited until now to do so. All of this material was available to PYCO from the outset of the case, and PYCO's only excuse for not having offered it earlier is its view that KJRY should have furnished it to PYCO rather than PYCO having to obtain it itself. The fact is, PYCO's attempt to introduce this evidence at this point without the slightest plausible reason for doing so reflects a chronic PYCO malady – there is no end to PYCO's obsession with having the last word.<sup>5</sup> There is absolutely no justification for this material to be introduced into the record at this juncture and it should be stricken.

**PYCO should be sanctioned for inappropriate disclosure and filing irregularities**

PYCO has violated the protective order governing these proceedings. Specifically, in materials designated as highly confidential in KJRY's original FLA to acquire the SAW lines constituting "Alternative Two," KJRY referred to, and included, financial statements related to Pioneer. Within those highly confidential materials was a reference to a "major customer" of KJRY. Later, in discovery, PYCO obtained the identity of this major customer, but, because that information directly related to information KJRY provided pursuant to the protective order, KJRY had every reason to expect, and PYCO had every reason to understand, that this

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<sup>5</sup> It is possible that PYCO has opted to include inadmissible new evidence in its rebuttal filing and in its October 31 filing out of a cavalier attitude that no harm will befall it if it does so. PYCO's conduct may therefore reflect its belief that, even though it is flaunting the Board's rules in impermissibly introducing new evidence, that evidence nevertheless could be prejudicial to opposing parties, and Board staff will have read it and therefore could be influenced by it even if

information would be treated as highly confidential information and would not be disclosed. The identity of KJRY's shippers is not itself a secret, but, in this case, the information PYCO disclosed is directly linked to, and reveals information contained in, highly sensitive financial documents filed under seal.

Nevertheless, PYCO has identified that shipper, tying it to Pioneer's highly confidential financial statements. See PYCO October 31 filing at 15. Thus, PYCO has openly disclosed information relating to Pioneer's financial statements contrary to the protections of the protective order. For this reason, the Board should strike all materials that PYCO has submitted in its October 31 filing related to this shipper and find PYCO in violation of the terms of the protective order and thus subject to appropriate sanctions.

Finally, PYCO's October 31 filing is not signed by PYCO's counsel, Mr. Montange, or by an employee of PYCO's counsel authorized to sign on his behalf. Rather it is signed by an individual with the initials "JDH." As it turns out, this JDH is John D. Heffner, who KJRY has been told is counsel for the West Texas & Lubbock Railway. Mr. Heffner also has signed the certificate of service for PYCO's filing. If Mr. Heffner is PYCO's surrogate counsel or has been retained for such filing and signature purposes, then PYCO should so state. His and Mr. Montange's failure to clarify the association between them here represents a lack of candor and fairness in dealing with other litigants (49 CFR 1103.27) and suggests an impermissible fee-splitting arrangement contrary to the standards of ethical conduct (49 CFR 1103.11). It also does not appear to be in keeping with the attestation and verification requirements at 49 CFR 1104.4. For these reasons also, PYCO should be found subject to appropriate sanctions.

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it is formally stricken thereafter. It is hard to imagine any other reason why PYCO is behaving as it is now.

## CONCLUSION

This may not be the last time that KJRY has to respond to PYCO's attempts to "pummel" KJRY with "motions practice," and to pointless, time-wasting requests for sanctions, although it should be. As shown above, PYCO's renewed request for sanctions is unwarranted and must be denied. Moreover, if PYCO's October 31 filing is not entirely stricken, then certainly Exhibits A-E and all references and discussion of them in that filing should be. Finally, PYCO's carelessness in its handling of highly confidential information and its disregard for appropriate conduct in proceedings before the Board has caught up to it, and, as discussed above, PYCO should be found subject to appropriate sanctions.

Respectfully submitted,



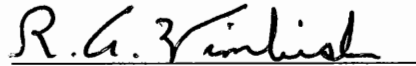
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Attorneys for Keokuk Junction Railway Co.

November 6, 2006

### **CERTIFICATE OF SERVICE**

I, Robert A. Wimbish, hereby certify that on November 6, 2006, I caused a copy of the foregoing Reply of Keokuk Junction Railway Co. ("KJRY") to PYCO's Renewed Request for Sanctions, Motion to Strike and Request for Sanctions to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in Finance Docket Nos. 34890 and 34922.

  
Robert A. Wimbish