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9 November 2006
by express

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

Re: PYCO Industries -- Feeder Line Application --
South Plains Switching, Ltd., F.D. 34890
and related F.D. 34922

PYCO's Reply to KJRY Motion to Strike/Motion for
Sanctions filed November 6

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of PYCO's Reply to KJRY's November 6 Motion to Strike under seal, and an original and ten copies of the same for the public website.

In its November 6 filing, KJRY alleges that PYCO breached the protective order in this proceeding by disclosing the identity of KJRY's largest customer. As PYCO indicates in its Reply furnished herewith, this is not true. KJRY's attorney, Mr. Mullins, failed to designate as confidential any of KJRY/Pioneer's written response to interrogatories and document requests, which are attached as Exhibit B to PYCO's October 19 Rebuttal. In that Exhibit, KJRY discloses the identity of its major shipper.

In order to cut what we believe is a charade by KJRY short, we are supplying a sealed and a public version of our response. However, this is without waiver of our position that KJRY waived confidential treatment of any information in its written discovery response by not stamping or designating it confidential. In addition, it is without waiver of the fact that the identity of KJRY's major shipper turns out previously to have been made public by KJRY's major shipper itself, so the identity is not confidential in any event.

PYCO has been scrupulous to file under seal anything Pioneer and KJRY actually stamp as "confidential" or "highly confidential," or anything PYCO derives from something Pioneer or KJRY so stamp.

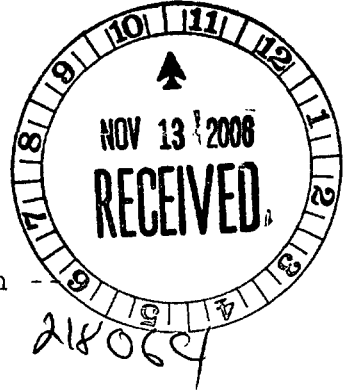
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Thank you for your assistance.

Very truly,


Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. counsel per certificate of service (w/encl.)

Mr. McLaren (for PYCO) (w/encl.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	and F.D. 34922

PYCO Industries, Inc.'s
Opposition to Pioneer/KJRY Motion to Strike
and Sanctions Request

The Pioneer Railcorp and Keokuk Junction Railway (Pioneer/KJRY) motion to strike and request for sanctions aimed at PYCO Industries, Inc.'s (PYCO's) October 31 pleading in this case must be denied.

Background

PYCO Industries, Inc., properly sought relevant discovery from Pioneer Railcorp and its subsidiary Keokuk Junction Railway (KJRY), including discovery on complaints and litigation involving Pioneer or its subsidiaries and shippers, Class I's, and local communities. Counsel for Pioneer and KJRY informed PYCO's counsel that Pioneer and KJRY would not provide anything if PYCO insisted on a response encompassing any entity other than KJRY. Since PYCO desired information on Pioneer subsidiaries generally as relevant to what amounts to a centrally controlled enterprise, PYCO attached all the correspondence to a motion to compel which PYCO filed with this Board. KJRY/Pioneer filed an opposition. In this Board's October 5 order, this Board ordered Pioneer and KJRY to respond, including specifically to PYCO's document requests (ordering paragraph 3 at p. 3 of slip opinion). The Board's October 5

order further provided that PYCO would have fourteen (14) days from receipt of Pioneer's and KJRY's "final responses" to provide PYCO's comments on the KJRY "competing" feeder line application. Order ¶ 5. At KJRY's request, the Board later issued an order (served October 17) deeming KJRY's and Pioneer's "final response" to have been made on October 10, making PYCO's final comments due on October 24.

In the Pioneer/KJRY written response, which PYCO attached as Exhibit B to PYCO's Comments dated October 24, 2006, in F.D. 34890/34992, Pioneer and KJRY objected to providing any responsive information for Pioneer or its subsidiaries other than KJRY, and supplied no responsive information on litigation between KJRY and shippers/Class I's/communities either. The Pioneer/KJRY "final response" was in effect a non-response, and thus a direct and across-the-board violation of this Board's order to Pioneer and KJRY to produce the documents.

This is an expedited proceeding, and there simply is not time for parties to "fool around." Under STB's regulations, sanctions are appropriate when Pioneer and KJRY fail to provide documents in the face of a Board order. 49 C.F.R. § 1114.31(b)(2). Sanctions should be employed when a parties like Pioneer and KJRY stonewall orders compelling discovery in expedited proceedings. PYCO so moved in our Comments filed October 24 at pp. 3-10.

The ink was hardly dry on PYCO's October 19 Rebuttal when KJRY moved to strike portions of it. On October 31, PYCO filed

(among other things) a Reply to KJRY's "Motion to Strike Portions of PYCO's Rebuttal." The Reply also renewed PYCO's motion for sanctions, and appended a series of exhibits which PYCO had managed to assemble documenting that indeed Pioneer subsidiaries including KJRY have been engaged in a multitude of disputes with shippers, Class I's, and communities. This corroborates that Pioneer's and KJRY's refusal to produce responsive documents in derogation of this Board's October 5 order was not merely theoretically but instead actually prejudicial to PYCO. The documents demonstrate that KJRY and Pioneer were concealing information that undercut any claim they could make to be reliable suppliers of rail service, and also information that undercuts KJRY reliance on its own or Pioneer's financial responsibility.

I. Opposition to Motion to Strike

1. Exhibit A (BNSF statement). The gravamen of the KJRY argument to strike Exhibit A (an email from BNSF stating inter alia that WTL had improved service and was "up to the task" of providing service to all SAW customers) and related discussion is that the Exhibit is surrebuttal. KJRY in its motion to strike launched a scurrilous attack on WTL. Either that attack by KJRY was itself an impermissible reply (49 C.F.R. § 1114.13(c)) to PYCO's Rebuttal, or it is a motions argument to which PYCO is entitled to reply. Giving KJRY the benefit of the doubt (something which we are learning should not be done), PYCO simply replied to KJRY's venting, doing so in the form of the

BNSF email. BNSF in the email succinctly refutes all doubts as to WTL's competency or ability to improve and to provide service in Lubbock. Exhibit A is directly to the point of KJRY's off-the-wall remarks. The KJRY motion to strike Exhibit A and related discussion should be denied. KJRY brought the matter up and upon itself.

To the extent leave is required to file Exhibit A, PYCO hereby requests it in order to provide a complete record for decision in this proceeding.

2. Exhibits B-E (pleadings, letters, and decisions in disputes between KJRY and other Pioneer subsidiaries and shippers/Class I railroads/communities). Boiled to its core, the KJRY argument to strike Exhibits B to E of PYCO's October 31 "Reply to KJRY Motion to Strike" and "Renewed Request for Sanctions" is that Pioneer's and KJRY's failure to provide that information in the face of this Board's October 5 order did not prejudice PYCO because PYCO could have or should have assembled the documents from other sources for filing by October 24.¹

PYCO proceeds expeditiously, but expedition has its limits, even in an expedited proceeding. Even if PYCO did not have other pleadings to file prior to October 24,² PYCO would

¹ PYCO would not have been required to file the documents any sooner than October 24, for PYCO's "case-in-chief" (objections) to KJRY's competing feeder line application were not due until that date pursuant to this Board's orders of October 5 and 17, 2006.

² PYCO did have other filing deadlines: initial comments on KJRY due October 12 and PYCO's Rebuttal due October 19. In addition, PYCO filed a motion to invalidate three property

not have had time between receipt of Pioneer's and KJRY's stonewall "final response" (on October 11) to PYCO's discovery to identify all the disputes in which Pioneer subsidiaries (including KJRY) have been engaged with shippers, Class I's, and communities, much less obtain documentation of those disputes.

Pioneer and KJRY clearly have the best records of disputes in which Pioneer subsidiaries and KJRY have been engaged. The only other sources for that information to a shipper like PYCO are STB, court records, and private parties. But the only way to request the Board to assemble all Pioneer subsidiary complaints and litigation is to file a Freedom of Information Act (FOIA) request, and there was insufficient time to do so between October 11 (receipt of KJRY document response) and October 24 (due date of PYCO final comments per Board order of October 17).³ Moreover, this merely shifts the burden of production from Pioneer and KJRY to the Board. PYCO has no ready means to identify the courts or the shippers, Class I's and communities with whom Pioneer subsidiaries have been or are in dispute. And if PYCO did so identify these courts and private entities, or adversely affected communities, PYCO could not compel responses from them.

transfers by SAW to Choo Choo in 2006 which PYCO learned about only in the course of evaluation of SAW's discovery responses subsequent to receipt of those responses on September 21.

³ Under 49 C.F.R. § 1001.1, not all the germane documents are even available in the "reading room," and under § 1001.3, the FOIA officer has ten business days to respond to a records request.

Clearly Pioneer and KJRY are the most efficient and best source for records of the germane disputes. On October 5, this Board in the circumstances properly ordered production of the relevant information. Under STB's regulations and contrary to KJRY's insinuations, PYCO does not have to seek a second order to compel or otherwise beg KJRY and Pioneer to comply with the Board's first order, even assuming there were time to do so. Instead, the Board's regulations provide for sanctions. See 49 C.F.R. § 1114.31(b). PYCO was entitled to rely upon this Board's October 5 order; sanctions are the appropriate response to the Pioneer and KJRY stonewall.

In order to protect the integrity of its processes, this Board should appropriately sanction KJRY and Pioneer (not PYCO) by barring KJRY and Pioneer from submitting any evidence or argument to the effect that KJRY is likely to improve service to shippers, or that KJRY has demonstrated financial responsibility. Exhibits B to E demonstrate that in fact KJRY and Pioneer were concealing evidence that KJRY and Pioneer were not likely to improve service to shippers, and that KJRY was in a dispute with its major customer. This demonstrates that PYCO was prejudiced by the Pioneer/KJRY stonewall. The evidence must remain in the record as support for PYCO's motion for sanctions, and as evidence (a) that KJRY has not shown, and cannot show, that it is likely to improve service to shippers and (b) that KJRY's reliance on Pioneer for financial responsibility is misplaced.

In a fair game, the party which showed it was fouled is not the subject of a sanction; the party that fouled is the subject of the sanction. PYCO through Exhibits B - E shows that PYCO was clearly fouled by Pioneer and KJRY. To strike Exhibits B to E, or to fail to sanction Pioneer and KJRY by excising their claims concerning service and financial responsibility would be a denial of due process to PYCO. KJRY's motion to strike Exhibits B - E and related discussion must be denied.

In all events, if leave is required to place Exhibits B to E into the proceeding, we so request in order to provide a complete record for decision and review. If the submission of the documents were somehow tardy, the fault is with KJRY and Pioneer, not PYCO.

KJRY's FLA should be dismissed for failure to show financial responsibility (and for stonewalling discovery germane to this issue), and for failure to show that KJRY would likely improve service to shippers in Lubbock (and for stonewalling discovery germane to this issue). 49 U.S.C. § 10907(b)(1)(B); § 10907(c)(1)(E); 49 C.F.R. § 1114.31(b). Shippers in Lubbock are entitled to something better than incumbent railroad SAW; the purpose of the feeder line statute is not to swap one bad actor for a somewhat bigger bad actor. That accomplishes nothing.

II. Alleged Violation of Protective Order

KJRY claims PYCO violated the protective order in disclosing publicly that [REDACTED] was KJRY/Pioneer's major

customer and requests sanctions. Mr. Heffner, counsel for West Texas & Lubbock, has already submitted a reply by letter, which PYCO hereby adopts. The relevant protective order was entered by this Board at PYCO's request by order served July 6, 2006. In order to violate that protective order, PYCO must disclose only documents and information KJRY designated or stamped as "confidential" or "highly confidential." See Order ¶¶ 3 & 4.

The written discovery response which KJRY and Pioneer tendered PYCO was nowhere designated or stamped "confidential" or "highly confidential." See Exhibit B to PYCO Comments on KJRY dated October 24. Instead, the written discovery response expressly indicates that KJRY and Pioneer intended to, and were, claiming protective order treatment only for certain documents attached to the written response. See id. (Exhibit B) p. 2, n.1. At page 24 of KJRY/Pioneer's written discovery response (Exhibit B to PYCO October 24 comments), KJRY and Pioneer state that the identity of the major customer is [REDACTED],

[REDACTED] In its motion, KJRY does not claim that Exhibit B is entitled to "confidential" treatment, and it cannot, because Exhibit B was never stamped or designated confidential. If Exhibit B is not entitled to protective order treatment, then neither is its progeny. By their own actions, KJRY and Pioneer effectively waived and continue to waive any claim for general confidentiality that they otherwise could conjure up as to the

identity of their major customer.⁴

Since there is no violation of the protective order by reason of PYCO's October 31 pleading, Pioneer/KJRY's request for sanctions for violation of the protective order is a non-starter.

Pioneer and KJRY are simply trying to obscure the message by trying to slander the messenger. This might work in politics and attack ads, but it is illegitimate practice here, and rather boring since KJRY does it so much.

III. KJRY Miscellany

KJRY objects to assistance WTL's counsel provided PYCO's counsel in filing PYCO's October 31 reply, and sprinkles more "attack ad" material at various places, like its footnote suggestion that PYCO conjures up I.F. Stone conspiracy theories. PYCO certainly has not made a secret that WTL is going to operate the SAW lines for PYCO should PYCO be enabled to acquire those lines, and it is hardly surprising that WTL's counsel (in Washington, D.C.) from time to time assists PYCO's counsel (in the other Washington) with filings. That is normal civilized

⁴ In any event, KJRY in effect argues that its dispute with [REDACTED] is public information, and [REDACTED] discloses at p. 3 of its petition in F.D. [REDACTED] 9000 carloadings for 2005. Mr. Heffner in his letter of November 8, 2006, in this docket notes other pleadings where [REDACTED] identity has been disclosed. It would appear that the fact that [REDACTED] is KJRY's major customer has long been, under KJRY's arguments, public knowledge. Any claim of confidentiality is thus misplaced. KJRY is trying to have it both ways (no identification of [REDACTED] while arguing PYCO already should have known all about [REDACTED] and its problems with KJRY), when KJRY should have it neither.

and ethical practice (not some unholy I.F. Stone conspiracy as KJRY attempts to conjure), and it is a practice customarily used by responsible companies and legal practitioners across America. KJRY claims to the contrary are not worth more than a general denial, which PYCO hereby makes.

Any failure to comment on the remainder of KJRY's paper should not be deemed an admission but part of the general denial.

IV. Conclusion

KJRY's motion to strike must be denied. It only serves to underscore the prejudice to PYCO flowing from the failure of Pioneer and KJRY to obey this Board's October 5 order to provide responsive information to PYCO's discovery requests.

KJRY's motion for sanctions for violation of the protective order must be denied because there was plainly no violation. The KJRY assertions to a contrary are a diversion.

Respectfully submitted,

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Certificate of Service

I hereby certify service of the foregoing Opposition upon the following counsel of record by express service, next business day delivery, this 9th day of November 2006:

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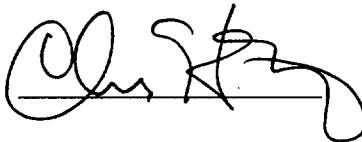
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A handwritten signature in black ink, appearing to read "Andrew Goldstein", written over a horizontal line.