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3 July 2007
by express

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20024

219683

Re: PYCO Industries -- Alternative Service -- South
Plains Switching, Ltd., F.D. 34889;

219684

PYCO Industries -- Feeder Line Development --
South Plains Switching, Ltd., F.D. 34890;

219685

PYCO Industries -- Alternative Service -- South
Plains Switching, Ltd., F.D. ~~34985~~ 34802

PYCO reply in Opposition to SAW Petition filed
June 22 for Leave to File a "Supplement" in the
above dockets

ENTERED
Office of Proceedings
Part of
Public Record

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of an Opposition on behalf of PYCO Industries with respect to the South Plains Switching Ltd.'s (SAW's) Petition for Leave to "supplement" the above three dockets.

PYCO notes that on STB's website, the SAW pleading is listed as filed only in F.D. 34889 and 34890. Because the SAW pleading as served upon PYCO also bears the caption for F.D. 34802 and appears to be intended for filing in that docket as well, PYCO asks that its reply tendered herewith be filed in all three dockets. The relief sought by SAW in F.D. 34802 is totally moot, which may be why this Board did not list the pleading as filed in that proceeding.

PYCO finds the SAW pleading very difficult to understand. It appears to argue that Penny-Newman Grain as a major consignee of PYCO must be a party to, or at least support, PYCO's feeder line application. But PYCO's original feeder line application included a letter from Penny Newman in which that company "supports and joins" PYCO's application. See Exhibit K to application in F.D. 34844. This exhibit was incorporated in

F.D. 34890 at page 9 of PYCO's revised application. Thus what SAW claims is "necessary" has been there from the inception.

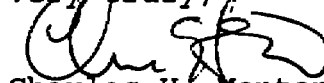
Otherwise what SAW seeks amounts to an effort to overturn prior decisions of this Board. But this being the case, SAW must comply with 49 C.F.R. § 1115.4 governing petitions to reopen final decisions. SAW does not even mention this regulation, much less comply with it. This adds to the confusion and is an independent grounds for rejection.

In our enclosed reply pleading, we try to sort out some of the issues.

In the end, SAW states that it is concerned about delay. Granting relief to SAW to file a confusing pleading contributes to that which SAW seeks to vitiate. Leave to file clearly must be denied. It is difficult to understand what granting leave to file would even mean here.

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. --)
ALTERNATIVE RAIL SERVICE --) F.D. 34802
SOUTH PLAINS SWITCHING LTD.)

PYCO INDUSTRIES, INC. --)
ALTERNATIVE RAIL SERVICE --) F.D. 34889
SOUTH PLAINS SWITCHING LTD.)

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



PETITIONER PYCO INDUSTRIES'
OPPOSITION
to
SOUTH PLAINS SWITCHING, LTD's
"PETITION FOR LEAVE TO SUPPLEMENT"

PYCO Industries, Inc. (PYCO) opposes granting leave to South Plains Switching, Ltd. (SAW) for filing what, in SAW's words, is a "supplement" advancing new argument in the above proceedings. The "new argument" SAW seeks to file is that Penny-Newman Grain (Penny Newman) is a "necessary party" in these proceedings because it is a major consignee of PYCO shipments out of Lubbock.

I. Summary Concerning SAW's Proposed "New" Argument

What SAW means in its new argument is unclear. On the one hand, SAW (SAW Petition at p. 5) seems to suggest that Penny Newman is a major shipper which has failed to express a position against SAW, and that this undermines PYCO's arguments and this Board's findings to date in F.D. 34802, 34889, and 34890. But SAW's assumption that Penny Newman has been silent is incorrect. Exhibit K to PYCO's original feeder line

application in F.D. 34844, filed May 5, 2006, is a letter from Penny Newman indicating that (a) Penny Newman at that point had sustained \$750,000 in damages due to SAW's misconduct, (b) Penny Newman viewed SAW as unreliable, (c) Penny Newman regarded the alternative service remedies as insufficient not because relief was unneeded but because alternative service was "temporary" in nature, and (d) Penny Newman "supports and joins in" PYCO's feeder line application.

In his initial decision, the Director found that the Penny Newman letter supported the position that SAW service to PYCO was inadequate (Decision in F.D. 34844, served June 2, 2006, at p.5). The letter obviously supports this Board's findings of SAW service inadequacy in F.D. 34802, 34889 and 34890.

In short, to the extent SAW is complaining that Penny Newman's position is unknown, either SAW has mistakenly overlooked the letter, or thinks PYCO has forgotten it. To the extent SAW suggests that Penny Newman's position does not support this Board's actions to date, SAW is plainly in error.

If SAW is attempting to argue more broadly that at least one shipper should firmly support a feeder line applicant, PYCO agrees, and notes that the record shows that besides PYCO, many other shippers in addition to consignee Penny Newman support PYCO's application. See FLA Ex. K in F.D. 34844, and "Compilation of Shipper Comments" filed August 2, in F.D. 34890.

SAW's argument makes a claim that Penny Newman is "necessary" to the proceeding, and this sounds like an

"indispensable" party claim under Federal Rule of Civil Procedure 19.¹ If this is SAW's intent, then SAW is claiming that all the proceedings must be reopened for material error in that Penny Newman has not "joined."

The short answer to this claim by SAW is that Penny Newman's letter is plainly adequate to defeat any such argument. Penny Newman has sought joinder against SAW.

A somewhat longer answer is that SAW is seeking reopening without making the required showings under 49 C.F.R. § 1115.4.

And a final dispositive answer is that there is no need for Penny Newman formally to join anything as a party in the first place. As to feeder line proceedings, neither the feeder line statute (49 U.S.C. § 10907) nor this Board's precedent require any shipper, much less a consignee, to participate as a party in feeder line application.²

¹ This Board has no rule like F.R.C.P. 19, providing for mandatory joinder or for dismissal if that is not possible.

² The feeder line statute anticipates that any entity can file a potentially successful feeder line application under the "public convenience and necessity" ("PCN") standard, but STB's discretion is limited in that the agency must find that a "majority" of shippers have received inadequate service. 49 U.S.C. § 10907(c)(1)(B). In particular, the statute provides that the Board must determine that "transportation over [the] line is inadequate for the majority of shippers who transport traffic over the line." But this does not mean that a majority have to file a feeder line application, or participate as parties, much less that a particular consignee must file an application or otherwise participate as a party.

Elements of SAW's argument (e.g., SAW Petition at p. 5) may be read to suggest that a majority of shippers by volume, rather than a numeric majority of shippers, must contend that SAW's service is inadequate for a feeder line application to move forward. If that is what SAW is now saying, this Board clearly rejected that position when it was advanced by PYCO in

As to alternative use proceedings, this Board has already resolved the issue against SAW in a Decision based in part on SAW's own admissions. In F.D. 34802, SAW argued that this Board's orders granting alternative relief were invalid on the ground that this Board lacks jurisdiction over cottonseed (which, incidentally, PYCO ships by rail to Penny Newman). Relying in part on SAW's own claims that segregating cottonseed from other PYCO rail traffic was unsafe and impractical, this Board rejected SAW's argument that STB lacked jurisdiction to order alternative service for cottonseed. This ruling is controlling here. Since SAW has admitted that segregating cottonseed from other shipments at PYCO's Lubbock facilities is unsafe and impractical, it does not matter whether the shipments are to a customer or a customer/consignee for purposes of either F.D. 34802 or 34889.³

Decisions served in F.D. 34844 and F.D. 34890 on June 2 and July 3, 2006. PYCO in any event has already shown that an overwhelming majority of shippers by volume believe SAW's service inadequate and support PYCO's application.

³ More specifically, PYCO sells cottonseed to Penny Newman, and all shipments to Penny Newman are rail-dependent. SAW has already argued in F.D. 34802 that STB cannot order alternative service for such shipments because cottonseed is an "exempt" commodity. The Board rejected this argument for a variety of reasons, including the rationale that it makes no sense to order alternative service for some shipments from PYCO's Lubbock facilities, but not others:

"[W]e conclude that where there is a mix of regulated and exempted commodities being received and shipped and it would not be practical to provide separate service for the two types of traffic, the Board can order alternative rail service as to all the shipments...."

Decision in F.D. 34802, served June 21, 2006, at p. 4. The Board noted that SAW itself argued that the exempt and non-exempt (i.e., the consignee and non-consignee) shipments could

Requiring PYCO customers like Penny Newman to duplicate the administrative litigation in which PYCO has been forced to engage with the local switch railroad in Lubbock would surely cast a heavy pall over PYCO's business. While putting PYCO out of business in Lubbock is certainly consistent with Mr. Wisener's⁴ previous representations to PYCO concerning his intent,⁵ it would not be consistent with any responsible transportation policy. In sum, SAW's substantive argument is a non-starter.

II. SAW's Petition Amounts to a Request to Reopen without Compliance with Reopening Requirements and Must Be Denied

The real issue here is not SAW's "new" argument but that the record in the various proceedings is closed, which is presumably why SAW seeks leave to file. SAW must offer a persuasive justification for reopening. This Board's

not be segregated due to practicality and safety reasons. Decision at p. 3.

If cottonseed shipments are properly included for practicality reasons, it makes no difference whether they are for a consignee. Thus SAW's substantive argument that Penny Newman is somehow necessary to either Part 1146 (F.D. 34802) or Part 1147 (F.D. 34889) proceedings in essence has been overruled by this Board for reasons that SAW itself earlier conceded. A fortiori SAW fails to show that the Penny Newman matter has any relevancy to the results so far reached in F.D. 34802 or F.D. 34889, much less that the Board committed material error requiring reopening of either of those proceedings.

⁴ Larry Wisener during the relevant period was SAW's manager; PYCO believes him still active in SAW; and he is, was, and remains the husband of SAW's alleged current owner.

⁵ Mr. Wisener told PYCO's Mr. Lacy that "PYCO would have figure out how to take care of [itself]." See PYCO's Verified Petition for Alternative Rail Service in F.D. 34802 at p. 9, and related Exhibit C. After that representation, SAW service deteriorated in accordance with Mr. Wisener's representation.

requirements for filing such arguments/petitions are set forth in 49 C.F.R. § 1115.4. SAW's "petition for leave" of course does not mention 49 C.F.R. § 1115.4, much less comply with it. SAW is represented by experienced counsel, and this failure to acknowledge section 1115.4 cannot be charged to someone's learning curve. In the circumstances, 49 C.F.R. § 1115.4 should be enforced, not ignored as SAW seeks. The SAW motion for leave should be categorically denied.

III. Leave to File Is Not Justified

A. No Justification at All for F.D. 34802/34889 Filing

SAW's entire justification for leave to file is wholly set forth on p. 3 of its Petition, and as we read it, it is directed solely at the feeder line proceeding (F.D. 34890). SAW in fact states no grounds for leave to file in F.D. 34802 or F.D. 34889. SAW certainly has no need to reopen F.D. 34802 (Part 1146 alternative service) or 34889 (Part 1147 alternative service) to make the argument it seeks to make on the merits in F.D. 34890. Since SAW does not even attempt to state grounds for leave to file in F.D. 34802 or F.D. 34889, and since SAW does not make any claim or showing that the papers are otherwise permissible filings in those proceedings, leave to file in those proceedings should be denied.

In addition, SAW's argument as to F.D. 34802 is now moot, and petition for leave should be denied for that reason as well. All decisions in F.D. 34802 are long-since administratively final and no requests for relief in F.D. 34802 are pending.

There is therefore no pleading to supplement, and thus to seek leave to supplement, in that proceeding. Furthermore, Part 1146 relief is limited in duration by statute, and the statutory time limit on the applicable relief has now been met. In short, F.D. 34802 is completely over, and SAW's petition for leave in F.D. 34802 is totally moot.

B. SAW's Justification Makes No Sense in F.D. 34890

Turning to the feeder line proceeding, F.D. 34890, where SAW does seem to offer a justification for filing, the crux of SAW's justification begins with a claim that "until now SAW has not opposed the feeder line applications on their merits." SAW says it wishes to begin opposing PYCO's applications due to what SAW perceives as a seven month delay in the issuance of a decision concluding the feeder line proceeding. SAW Pet. p. 3.

SAW suggests that it expected the Board to issue a feeder line decision by the end of November 2006, but that the Board instead authorized alternative rail service by West Texas & Lubbock (WTL) for PYCO under Part 1147. SAW complains that it is entitled to, but is not receiving, compensation for Part 1147 service by WTL to PYCO. SAW argues that this delay coupled with lack of compensation entitle it to offer new arguments against PYCO's feeder line application.

Although SAW relies on delay as a 'justification to file a new argument, allowing SAW to make its spurious Penny Newman argument is hardly going to speed things up. If the Board accepts SAW's pleading for filing, it simply adds another issue,

or set of issues, for the other parties, and this Board, to address. But alleged delay in a decision should not be used as grounds to file something that causes further delay. SAW's remedy if it feels the agency has taken too long is to petition for a writ of mandamus under 28 U.S.C. § 1361.

SAW essentially admits it could have presented the argument earlier (at footnote 1 on p. 3 of its "petition," SAW claims that it is not relying on "additional evidence" because the evidence "is already in the record"⁶). SAW implies that its rationale for not making its argument about Penny Newman earlier is that SAW thought matters would be resolved in November such that it could save some legal fees in not briefing the Penny Newman issue.

This is an inadequate ground to justify late-filing an argument. But we do not think it a correct portrait of SAW's positions in this case. SAW not only failed to raise the question of Penny Newman (actually, there never was a question about Penny Newman, for we have shown that company sided with PYCO at the inception), SAW took exactly the opposite position to what it is now seeking to take: SAW viewed Penny Newman (and other consignees) as irrelevant.

In particular, instead of arguing Penny Newman was

⁶ SAW nonetheless attaches "additional evidence" concerning Penny Newman to establish that Penny Newman in fact is a PYCO consignee. Since SAW acknowledges that the fact that Penny Newman is a PYCO consignee is already in the record, and since the evidentiary record is long since closed, SAW's "additional" evidence should be rejected under 49 C.F.R. § 1115.3(c).

"necessary," SAW excluded Penny Newman (and other consignees) entirely from SAW's customer list. In SAW's "Motion for Rejection of Revised Feeder Line Application" in F.D. 34844, dated June 30, 2006, SAW represented to this Board, to PYCO and to the world that SAW has 23 shippers, and one potential shipper (Weaver Grain).⁷ SAW did not include any consignees (and certainly did not include Penny Newman) in its list.

PYCO and this Board are entitled to rely upon SAW's list in determining whether PYCO's feeder line application was complete. SAW is estopped at this point from attempting to "supplement" the list to claim that a particular consignee, or all consignees, must now be treated as a "shipper," much less joined as parties. In any event, the record shows Penny Newman has been there all along, and requested joinder at the inception.

SAW's new position on Penny Newman appears aimed squarely at two STB final decisions. When the Director rejected PYCO's original application as "incomplete" by decision served June 2, 2006, the Director noted that to meet the public convenience and necessity ("PCN") standard for accepting feeder line applications, an applicant had to demonstrate inadequate rail service for a majority of shippers on the line. The Director's discussion distinguished consignees from shippers for this

⁷ As PYCO pointed out in "Compilation of Shipper Comments" in F.D. 34890, filed August 2, 2006, at p.2 n. 2, one of the shippers listed by SAW is Farm Rail, which is a shortline rail carrier which by its own admission only stores non-revenue cars on SAW trackage. Farm Rail is not a "shipper" for purposes of the feeder line statute.

purpose. In particular, the Director denied PYCO's request for provisional acceptance pending discovery, indicating that PYCO should be able to identify shippers in Lubbock without discovery from SAW (Decision in F.D. 34844 served June 2, 2006, at p. 5 n.9). This of course would be impossible if consignees were shippers for purposes of the feeder line statute because consignees in general would not be located in Lubbock at all, and PYCO would only know its own.

This Board upheld the Director's approach on appeal. Decision in F.D. 34844 and F.D. 34890, served July 3, 2006. In that same decision, this Board determined that there were three "shippers" (PYCO, Compress and Attebury) for purposes of the feeder line statute on the portion of SAW's lines covered by PYCO's "Alternative Two." Decision served July 3, 2006, at p. 5. The Board over SAW opposition allowed the revised feeder line application to go forward as to those shippers. The Board's discussion thus obviously excluded PYCO's consignee Penny Newman⁸ and Compress's consignees Allenberg Cotton and Cargill Cotton⁹ from the "shipper" category for purposes of the feeder line statute.

SAW did not appeal the June 2 decision, and never sought judicial review of either it or the July 3 decision. Both are now administratively final. SAW's "new" position on Penny Newman of course would suggest both STB decisions are in error,

⁸ PYCO FLA in F.D. 34844, exhibit K.

⁹ Id. Exhibit J.

and that the PYCO applications should not have been accepted on that ground. Under 49 C.F.R. § 1115.4, a party seeking to reopen an administratively final decision may petition to do so but must "state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination." SAW disavows new evidence, and its claims about Penny Newman do not show error (contrary to SAW's claim, the evidence shows that Penny Newman sustained losses due to SAW, Penny Newman complained about inadequacy of SAW service, and Penny Newman joined in PYCO's application). SAW shows no germane "changed circumstances," but merely complains of administrative delay in further decisions from this Board.¹⁰ SAW fails to meet the criteria for reopening.

III. Should This Board Grant SAW
Leave to File, then PYCO Requests Certain Relief

1. Identification of shippers. It is not clear what would be meant by granting leave for SAW to file what amounts to a petition to reopen. If it means that this Board in fact is seriously considering reopening to grant SAW relief on the ground that Penny Newman is a consignee, then what is that relief? Penny Newman has already filed a joinder letter. This

¹⁰ There is no statutory or regulatory deadline for setting terms and conditions for transfer of property under 49 U.S.C. § 10907 (feeder lines). Although SAW may have hoped for a decision by the end of November, SAW should have anticipated delay for the reasons stated by PYCO in PYCO's August 2006 response to SAW's letter opposing PYCO's Part 1147 petition in F.D. 34889. See "Rebuttal on behalf of PYCO Industries" dated 28 August 2006, filed in F.D. 34889, at p. 3.

letter was incorporated into PYCO's revised application (see p. 6) in F.D. 34890. It makes no difference if it is now given more importance.

In all events, any new "relief" to SAW must be fair to PYCO. In particular, if Penny Newman must be a party pursuant to section 10907 as claimed by SAW, then to avoid yet another reopening delay, the position of all consignees of all shippers must presumably also be canvassed. But PYCO has no list of all consignees served by SAW, and SAW produced none to PYCO in discovery. PYCO has no way to identify the consignees of other businesses in Lubbock absent discovery from BNSF and SAW. When PYCO filed its original feeder line application in F.D. 34844, PYCO sought discovery on identity of SAW's customers (shippers), and indeed argued that if its application were incomplete on that score, it should be provisionally accepted to permit PYCO to seek discovery on that issue. See F.L. App. in F.D. 34844 at p. 9. But the Director rejected PYCO's request in his Decision served June 2, 2006, and this Board upheld that rejection in its Decision on PYCO's appeal served July 3, 2006. If there is a reopening to revise the definition of who are relevant shippers, then PYCO presumably must be allowed to reopen the Decisions of June 2 and July 3 to provisionally accept its applications in the meantime, to permit both discovery against BNSF and SAW to determine the identity of consignees and any further proceedings

on related issues.¹¹ The better course, in PYCO's view, is not to reopen anything at all, because Penny Newman is already with us, and a fortiori to deny SAW leave to file.

2. Piggyback application. Finally, SAW directs its petition only against PYCO's feeder line applications (F.D. 34890); SAW ignores the piggyback competing application filed by Pioneer Railcorp subsidiary Keokuk Junction Railway (KJRY) and docketed as F.D. 34922 by this Board. Any reversals of the groundrules as now sought by SAW must be applied to the KJRY piggyback as well.

IV. SAW's Claim that Part 1147 Service in F.D.34899 Is Unlawful for Lack of Compensation is Specious

SAW relies heavily (SAW Petition at p. 3) on the argument that it is not receiving compensation for WTL's alternative service to PYCO pursuant to this Board's authorization for such service in F.D. 34889, served November 21, 2006. SAW's discussion of this matter does not justify granting leave to file, or a reopening of the feeder line proceeding, or any rescission of the alternative service order.

Although the Board's regulations admonish incumbent carriers not to file termination petitions prematurely (see 49 C.F.R. § 1147.1(c)(1)), SAW filed one the very day after this Board authorized alternative service. SAW claimed that alternative service was no longer justified. PYCO replied in

¹¹ Such a reopening would suggest that the additional filing fee PYCO paid for F.D. 34890 was not appropriate, because F.D. 34844 should not have been rejected in the first place.

opposition. Before the Board had issued any ruling on SAW's petition to terminate, SAW filed yet another "petition," this one entitled "emergency petition for partial modification of operating protocols," on or about February 15, 2007. This SAW pleading included what amounted to another petition to terminate, this one on the ground that alternative service was unlawful under Part 1147 unless SAW received compensation. PYCO responded to this argument in a pleading filed February 20, 2007. See PYCO's "Notice of Intent to Respond to SAW's Part 1117 Petition ... and PYCO's Opposition to SAW's Latest Effort to Terminate Alternative Service" at pp. 6-12.

To summarize what we explained in more detail in PYCO's February 20 pleading, this Board's precedent indicates that under Part 1147 an incumbent carrier is not entitled to "lost profits" but instead only to compensation for use of its facilities and for any services provided. SAW provides no services to PYCO and alternative service to PYCO requires only a small portion of the SAW system. Consistent with this Board's precedent, PYCO -- through its alternative service provider West Texas & Lubbock (WTL) -- offered SAW \$2.90 per carload in compensation by e-mail dated March 13, 2006.¹² In PYCO's February 20, 2007 pleading, PYCO noted a claim against SAW for a set off for the cost of track repairs (\$23,134.50) and re-

¹² A copy of this email was attached to PYCO's February 20 pleading. As shown in another attachment to PYCO's February 20 pleading, the amount of \$2.90/carload is based on STB condemnation proceeding precedent, consistent with alternative service proceeding precedent.

railing (\$4,625.00) incurred to date by PYCO's alternative service provider due to SAW's failure to maintain its track.¹³

This Board's precedent indicates that the parties should attempt to negotiate on the compensation issue. To date, neither WTL nor PYCO has received a response to the March 13, 2006 offer of compensation or the February 20, 2007 reiteration of it. Moreover, SAW has never asked this Board to establish compensation; SAW merely claims that this Board's orders are unlawful because the Board has not imposed terms for compensation, evidently in an ex parte fashion.¹⁴ In short, SAW is following its customary path of making demands, refusing to negotiate, and then blaming others (its usual targets are BNSF and PYCO, but the latest target seems to be this Board).

SAW's stonewalling of negotiations on compensation does not render Part 1147 alternative service to PYCO invalid from its inception. The amount of compensation is not whatever SAW demands whenever SAW says.

In the face of SAW's belligerence, it is certainly within this Board's authority to set compensation terms. See Expedited Relief for Service Inadequacies, Ex Parte No. 628, served Dec. 21, 1998, slip op. at 14-15. Should this Board

¹³ PYCO's petition for alternative service in Part 1147 included a Declaration by an outside expert that the derailment and repair in question were due to a "defective, poorly maintained switch" on the SAW system. See PYCO Petition in F.D. 34889 Attachment G. Thus SAW was aware of PYCO's claim at the inception of the Part 1147 proceeding.

¹⁴ PYCO can find no pleading in which SAW has requested this Board to set terms.

elect at this time to issue an order setting forth compensation terms under Part 1147, then PYCO notes that despite notice and ample opportunity, SAW has failed to file any opposition to the \$2.90/carload compensation, or to the underlying rationale for that number, offered by WTL and PYCO. PYCO does not object to this level of compensation, provided that it is subject to a set-off for the track repair and re-railing resulting from SAW's failure to maintain its system as set forth in Attachment G of PYCO's Part 1147 petition. Maintenance of track is, after all, the responsibility of SAW, not PYCO or WTL. Neither PYCO nor WTL are authorized to repair SAW's track. In the end, PYCO and WTL must rely on SAW to do its duty, which SAW did not.

As even SAW appears to admit, compensation need not be paid to the incumbent carrier upfront. Instead, as SAW itself says, service under Part 1147 is lawful so long as compensation is "adequately secured." SAW Pet. at 3. Compensation here is adequately secured.

This Board has found PYCO financially responsible to purchase all of SAW in the feeder line proceeding. Compare Decision in F.D. 34890 served July 3, 2006, with id. served August 16, 2006. If PYCO is financially able to buy all of SAW, then PYCO is financially able to ensure that SAW receives such compensation as is required under this Board's precedent for any Part 1147 alternative service. Compensation is thus clearly "adequately secured."

Moreover, it is well established in federal regulation of

railroads that required compensation may be made after the fact.¹⁵

In short, whenever the issue of compensation is worked out, SAW is assured of appropriate payment. There is thus no infraction of the statute or Part 1147 in relation to the compensation issue.

Finally, SAW has sustained no injury at all so far; to the contrary, under PYCO's calculations, reasonable compensation for the number of carloadings under Part 1147 does not exceed the set-off to which PYCO is entitled for costs associated with derailments. SAW at this time owes PYCO, not the other way around.

To the extent SAW is claiming that this Board's November 21 decision authorizing alternative service is invalid ab initio due to failure to provide for compensation, then SAW's pleading is in fact a petition to reopen an administratively final decision. As such, it does not present new evidence, changed circumstances, or material error, and should be denied per 49

¹⁵ See Preseault v. ICC, 494 U.S. 1, 11 (1990). Even were a "taking" involved, the Fifth Amendment does not require that compensation be paid before or even contemporaneously with the taking. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1984). All that is required is a reasonable, certain and adequate provision for determining compensation at the time of a taking. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974). STB has well established approaches developed under 49 U.S.C. § 10904 and § 10907 to determine required compensation in the event a taking may otherwise occur, and SAW does not dispute this Board's authority to require payment of compensation under Part 1147. SAW's only complaint is that it wants the compensation to be contemporaneous, but that as shown above is not the law.

C.F.R. § 1115.4.

Conclusion

SAW's petition for leave makes no argument for leave to file in F.D. 34802, where it is moot anyway, or in F.D. 34889, and therefore should be denied as to those two proceedings. In any event, this Board has rejected an argument by SAW in F.D. 34802 which argument is tantamount to the substantive argument SAW purports to wish to tender in its petition for leave. The grounds for that rejection apply equally to SAW's substantive argument in its petition as applied to F.D. 34889.

As to the petition for leave in F.D. 34890, SAW fails to adduce any reasonable grounds for leave, and the substantive argument which it seeks leave to present is manifestly contrary (1) to the record (although SAW evidently overlooks the point, Penny Newman in fact "supports and joins" PYCO's application), and (2) independently to the relevant statute and STB precedent. Granting SAW leave to file would simply confuse and delay the feeder line proceeding, which is clearly counterproductive for all concerned, including SAW, for SAW says its motivation for filing is because of delays to date.

SAW's petition for leave to file is a kind of wolf in sheep's clothing: it is a petition to reopen administratively final decisions in various dockets without complying with this Board's criteria for reopening set forth in 49 C.F.R. § 1115.4. PYCO of course objects to this latest SAW effort to twist these proceedings up into knots.

SAW's claims about compensation under Part 1147 are irrelevant to the relief SAW seeks (leave to file), and do not justify reopening the November 21, 2006 decision authorizing alternative service in F.D. 34889, or any other decision.

Respectfully submitted,



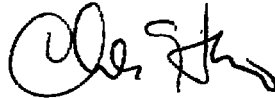
Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
for PYCO Industries, Inc.

Of counsel:

Gary McLaren, Esq.
Phillips and McLaren
3305 -- 66th St., Suite 1A
Lubbock, TX 79413

Certificate of Service

I hereby certify service of the foregoing this 2d day of July, 2007, by express service, next business day delivery, upon all parties per the attached service list from F.D. 34890 derived from the STB website.





Surface Transportation Board



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Docket #: **FD_34890_0**

Case Title: **PYCO INDUSTRIES, INC.-FEEDER LINE APPLICATION-LINES OF SOUTH PLAINS
SWITCHING, LTD. CO.**
10 Service List entries found.

Party Of Record: Montange, Charles H
426 Nw 162Nd Street
Seattle, WA 98177

Party Of Record: Mcfarland, Thomas F
208 South Lasalle St Suite 1890
Chicago, IL 60604

Party Of Record: Mullins, William A
Baker & Miller Pllc
2401 Pennsylvania Ave, Nw-Suite 300
Washington, DC 20037

Party Of Record: Gorsuch, James L.
James L. Gorsuch P.C.
4412 74Th Street, Suite B-102
Lubbock, TX 79424

Party Of Record: Steel Jr, Adrian L
Mayer, Brown, Rowe & Maw, Llp
1909 K Street, N.W.
Washington, DC 20006-1101

Party Of Record: Goldstein, Andrew P.
Mccarthy, Sweney & Harkaway, P.C.
2175 K Street, N. W., Suite 600
Washington, DC 20037

Party Of Record: Heffner, John D
John D Heffner, Pllc
1920 N Street, N.W., Suite 800
Washington, DC 20036

~~Non-Party:~~
Party Michael H Hyer
Hanson Building Materials America Inc.
8505 Freeport Pkwy, Suite 138
Irving, TX 75063

Party Of Record: Floyd, O. E.
Floyd Trucking Inc.
P.O. Box 50
Brownfield, TX 79316

Party Of Record: Hyer, Michael H.
Hanson
P. O. Box 660225
Irving, TX 75266

duplicate SAW

} by U.S. Mail

Same as "non-party"



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