

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc.)
)
v.) F.D. 34870
)
South Plains Switching, Ltd.)

PYCO Industries, Inc.)
)
 -- Alternative Rail Service --) F.D. 34889
)
 South Plains Switching, Ltd.)

Comment on STB Power to "Disregard"
a State Court Order

By pleading filed August 15, 2007, in these proceedings, South Plains Switching, Ltd. ("SAW") claims that this Board "does not have authority to set aside or to disregard a valid order of a State Court." While this statement is suspect generally, all that needs to be determined here is whether it is true as applied to a state court injunction barring PYCO Industries, Inc. (PYCO) from use of a private industrial crossing at a "we" on the south side of SAW's Lubbock yard. The state court injunction at issue is in direct contradiction to this Board's order served August 3, 2007, in PYCO Industries, Inc. -- Feeder Line Application -- Lines of South Plains Switching, Ltd., F.D. 34890 and related dockets F.D. 34802 (Part 1146 alternative rail service), F.D. 34870 (the PYCO Complaint against SAW), F.D. 34889 (Part 1147 alternative use), and F.D. 33753 (sub-no. 1) (SAW's exemption to acquire the lines in the first place).

PYCO requests leave to file this reply so that the record is clear in this matter. Moreover, to the extent that SAW seeks to reopen this Board's August 3, 2006 order, PYCO is entitled to a reply.

This Board has already determined not only (1) that a state court lacks jurisdiction to hear claims regarding failure of a railroad to carry out its common carrier obligation, but also (2) that this Board has exclusive jurisdiction over such matters. Greenville County Economic Development Corporation -- Petition for a Declaratory Order ("GCEDC"), F.D. 34487, served July 27, 2005.

This Board has repeatedly determined in PYCO's alternative service proceedings (F.D. 34802 and F.D. 34889), as well as in PYCO's feeder line docket (F.D. 34890) that incumbent rail carrier SAW has provided inadequate rail service to PYCO Industries (PYCO).¹ These determinations are tantamount to a determination that SAW has failed to carry out common carrier obligations. State courts lack jurisdiction over such matters per Greenville County Economic Development Corporation, supra, and instead the Board has exclusive authority in that respect.

The question then is simple: what happens when a state court nonetheless issues a conflicting order. The answer is clear: this Board has authority, and has exercised such authority, to overrule

¹ E.g., Decision in F.D. 34889, served Nov. 21, 2006, at p. 4.

the conflicting state order. E.g., Groome & Associates v. GCEDC, STB Dkt. No. 42087, served July 27, 2005 (STB awards damages for inadequate service even though state court found no liability).

In this Board's decision in these proceedings served August 3, 2006, this Board invalidated all deeds from SAW to Choo Choo Properties issued after May 5, 2006. Slip op. at p. 9, ¶ 2. It is uncontested that Choo Choo's deed from SAW, on which the state injunction rests, was dated June 13, 2006. Since the state court injunction was issued in favor of Choo Choo, whose deed is invalid, the state court injunction is invalid.

This Board further ordered that all lease or agreement rescissions by SAW or Choo Choo after May 5, 2006, are void. Order served August 3, 2006, slip. op. p. 9 ¶ 3. Assuming arguendo that PYCO's private industrial crossing was only an oral license agreement, this Board's order in any event bars its rescission regardless whether the SAW to Choo Choo deed were valid. STB acted in order to ensure the adequacy of its remedies addressing inadequate common carrier service from SAW. State court lacks jurisdiction in such matters; STB's jurisdiction is exclusive. 49 U.S.C. § 10501(b).

SAW, or Choo Choo, or whatever name Mr. Larry Wisener chooses to act under, cannot indirectly attack this agency's jurisdiction, and thwart this agency's orders, by running to state court and obtaining orders that are in direct conflict with what this Board

is attempting to do.

In his statement filed August 15, Mr. Wisener says that he can do what he wishes with his property. But what he refuses to recognize is that the property is a federally regulated railroad with a common carrier obligation. SAW, Choo Choo, and Mr. Wisener cannot do what as they wish with SAW property when what they wish violates common carrier obligations or this Board's orders. If SAW, Choo Choo and Mr. Wisener did not wish to obey this Board's order served August 3, 2006, at least one of them should have petitioned for review within 60 days of the order's issuance. See 28 U.S.C. § 2334. No one did. The order is now final and cannot be collaterally attacked by SAW, Choo Choo, or anyone else in state court.

To the extent that SAW, Choo Choo, or Mr. Wisener are seeking a reopening of this Board's order served August 3, 2006, on the ground that Mr. Wisener should be able to do whatever he wants as a matter of Texas property law, SAW, Choo Choo and Mr. Wisener collectively fail to show new evidence, changed circumstances, or material error. Absent any showing, there is no basis to reopen, and reopening should be denied.

SAW's reliance on Mid-America Locomotive and Car Repair, Inc. -- Petition for Declaratory Order, F.D. 34599, served June 6, 2005, is misplaced. That case merely held that issues of prescriptive rights across rail property could be heard in the first instance by

state courts. In all events, the decision did not say that STB would never disagree with a state court on that or similar issue. To the extent Mid-America somehow applies, all that has happened is that STB has effectively disagreed with the state court. Once that happens, STB's view overrules the state court. See Supremacy Clause, U.S. Constitution; 49 U.S.C. § 10501(b), GCEDC, supra. In any event, PYCO did not file suit in state court for a determination of prescriptive rights. Choo Choo sued PYCO. PYCO's point all along has been that assuming arguendo PYCO had only a terminable oral license to use the crossing (as SAW appears to assert), and even if this could be terminated under Texas property law (as Choo Choo claims), the railroad (be it SAW, Choo Choo, or some other manifestation of Mr. Wisener) cannot exercise this "right" in retaliation against PYCO for seeking relief from this Board, or otherwise to hobble PYCO's rail dependent operations or the effectiveness of this Board's remedies. This is an issue for this Board. SAW had no rail purpose for the sale; Choo Choo certainly has none for the termination of the crossing right. It was, is, and forever will be pure and willful retaliation against PYCO for seeking relief from this agency, part and parcel of SAW's determined efforts to hamstring PYCO's rail dependent operations, and an attempted end-run around this Board's jurisdiction.

Respectfully submitted,

Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-2936
Counsel for PYCO Industries,
Inc.

Of counsel:
Gary McLaren
Phillips & McLaren
3305 66th St., Suite 1A
Lubbock, TX 79413
(806) 788-0609

Certificate of Service

I certify service by tendering this document by e-mail and express delivery (next business day) upon counsel of record for SAW, Thomas McFarland, 208 South LaSalle St., Suite 1890, Chicago, IL 60606-1112 with a courtesy copy by e-mail to counsel for WTL, John D. Heffner, 1750 K Street, N.W., Suite 350, Washington, D.C. 20006.

Charles H. Montange