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SEP 20 2007

TRANSPORTATION BOARD

HAND DELIVERY

September 20, 2007

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, NW
Washington, DC 20423-0000

ENTERED
Office of Proceedings

SEP 20 2007

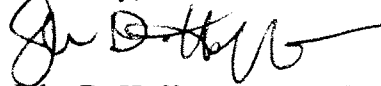
Part of
Public Record

RE: STB Finance Docket No. 34922, Keokuk Junction Railway Co. – Feeder
Line Application – Lines of South Plains Switching, LTD. Co.

Dear Mr. Williams:

On behalf of West Texas & Lubbock Railway Company, Inc., I am filing an original and ten copy of its Petition For Reconsideration of the Board's decision in above-captioned proceeding. Please date stamp and return one copy for our files.

Sincerely,



John D. Heffner

FILED

SEP 20 2007

SURFACE
TRANSPORTATION BOARD

Enclosed

cc: All parties
Mr. Ed Ellis

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34890

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

STB Finance Docket No. 34922

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

PETITION FOR RECONSIDERATION
OF
WEST TEXAS & LUBBOCK RAILWAY COMPANY, INC.

ENTERED
Office of Proceedings

SEP 20 2007

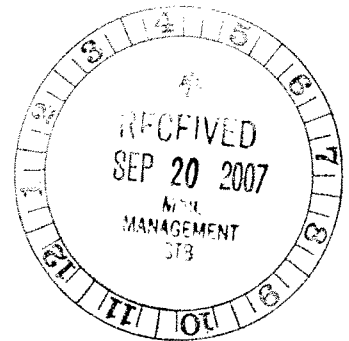
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Public Record

Respectfully submitted,

John D. Heffner
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(202) 296-3334

Dated: September 20, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34890

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

STB Finance Docket No. 34922

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

PETITION FOR RECONSIDERATION
OF
WEST TEXAS & LUBBOCK RAILWAY COMPANY, INC.

INTRODUCTION

Pursuant to 49 CFR 1115.3(a), West Texas & Lubbock Railway Company, Inc. ("WTL"), files this Petition for Reconsideration of the Board's decision served August 31, 2007, insofar as it granted the competing application filed by Keokuk Junction Railway Co. ("KJRY") in STB FD. No. 34922. For the reasons stated in detail by PYCO Industries, Inc. ("PYCO") in its combined Petition for Reconsideration and Petition for Stay filed on September 10, 2007, WTL believes that the Board erred in finding that

KJRY's application meets the statutory public convenience and necessity standard of 49 U.S.C. 10907. Accordingly, WTL seeks reconsideration and supports the reconsideration and stay requests sought by PYCO.¹

BACKGROUND

By now the facts of this long running proceeding are well known and need only be repeated to the extent relevant to WTL's request.

As the Board will recall, WTL is the class III common carrier short line railroad designated by PYCO to provide service in connection with its Petitions for Alternative Rail Service filed under 49 CFR 1146 and 1147 and in connection with the two feeder rail applications PYCO filed in 2006. Aside from the service it currently provides for PYCO, WTL owns and operates over 100 miles of track west

¹ This case is also appropriate for the grant of a "housekeeping stay." The Board has issued housekeeping stays in proceedings involving difficult questions and voluminous evidence and/or argument to allow it to give proper consideration to the issues before it. See, New York City Economic Development Corporation - Adverse Abandonment New York Cross Harbor Railroad in Brooklyn, NY, STB Docket No. AB-596 (served June 10, 2003) (housekeeping stay granted "to permit the orderly consideration of the arguments raised in the railroad's petition for reconsideration").

from Lubbock to Seagraves and Whiteface, TX. WTL has been providing service on its Texas lines for the past five years and alternative rail service for the account of PYCO since January 25, 2006.

ARGUMENT

The Board's rules provide that a petition for reconsideration will only be granted upon a showing of one or more of the following points:

- (1) The prior action will be affected materially because of new evidence or changed circumstances.
- (2) The prior action involves material error. 49 CFR 1115.3(b).

WTL supports and endorses PYCO's position that the Board's decision contains material error insofar as it approved KJRY's application as meeting the statutory public convenience and necessity test. However, the Board's decision contains two errors so substantial as to motivate WTL to submit its own petition for reconsideration. They are:

1. While The Board accepted PYCO's "All-SAW" application before approving it, it approved KJRY's application without ever accepting it.

The regulations that the Board's predecessor, the Interstate Commerce Commission (ICC), published years ago in connection with the Feeder Rail Development Program clearly provide for the acceptance or rejection of an application. 49 CFR 1151.2. Those regulations state:

(b) Acceptance or rejection of an application.

(1) The Board, through the Director of the Office of Proceedings, will accept a complete application no later than 30 days after the application is filed by publishing a notice in the Federal Register. An application is complete if it has been properly served and contains substantially all information required by section 1151.3, except as modified by an advance waiver. The notice will also announce the schedule for filing of competing applications and responses.

(2) The Board, through the Director of the Office of Proceedings, will reject an incomplete application by serving a decision no later than 30 days after the application is filed. The decision will explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference.

(c) Competing Applications.

...

(2) The Board, through the Director of the Office of Proceedings, will issue a decision accepting or rejecting a competing application no later than 15 days after it is filed. A competing application will be rejected if it does not substantially contain the information required by section 1151.3, except as modified by advance waiver.

Here the Board appears to have applied one regulatory standard for PYCO and a different one for KJRY without any

explanation for this disparate treatment. PYCO initially submitted two applications, one for just that trackage required to serve PYCO facilities and a second one ("the ALL-SAW Application") for the entire SAW [South Plains Switching Ltd. Co.] operation. The Board initially published a decision *rejecting* those applications for failure to show that a majority of shippers found SAW's service to be inadequate.² Subsequent decisions accepted a more limited application known as "Alternative Two" and PYCO's ALL-SAW Application.³

By contrast, KJRY initially filed an application to serve the PYCO facilities which the Board accepted in a decision served August 18, 2006.⁴ But after the Board served its decision accepting PYCO's ALL-SAW Application and inviting competing applications, it never - to the best of WTL's knowledge - published a second decision "accepting" the KJRY ALL-SAW application. Moreover, WTL has searched the four corners of the Board's August 31,

² Pyco Industries, Inc - Feeder Line Acquisition - South Plains Switching, Ltd. Co., STB FD No. 34844, decision served June 2, 2006.

³ Pyco Industries, Inc.- Feeder Line Acquisition - South Plains Switching, Ltd. Co , STB FD No. 34844, decision served July 3, 2006, and Pyco Industries, Inc.- Feeder Line Application -Lines of South Plains Switching, Ltd. Co , STB FD No. 34890, decision served August 16, 2006.

⁴ Keokuk Junction Railway Co., - Feeder Line Application - Lines of South Plains Switching, Ltd. Co , STB FD No. 34922, decision served August 17, 2006.

2007, decision looking for either a reference to a decision *accepting* KJRY's application or a statement in the decision *accepting* that application. It found neither. The Board's failure to follow consistently its own very clear rules constitutes material error and arbitrary and capricious decision-making requiring reconsideration.

2. The Board failed to find that KJRY's application met the statutory public convenience and necessity standard because it had no evidence that KJRY's service would result in improved transportation for the online shippers.

The second basis for review is the Board's finding that KJRY's application and service would meet the public convenience and necessity standard for approval under 49 U.S.C. 10907(c)(1) because "the sale will likely result in improved rail transportation for shippers that use the line." Once again, the Board uses one test for PYCO and a second, lower standard, for KJRY. A comparison of the Board's findings under its section entitled "Improved Rail Transportation for Shippers" is very telling. There the Board stated, "we are satisfied that, under PYCO's ownership, rail service likely would improve for all of the

shippers on these lines." But for KJRY the Board conjectured, "there *should* be improved a rail service in the hands of KJRY..." Decision at 14. There is a world of difference between the words "would" and "should."

Without burdening the record, PYCO provided ample evidence of shipper support for its application as well as unanimous agreement that WTL has provided excellent service under contract to PYCO. These statements reflect the majority of traffic on the Line as the Board itself has found.⁵ Conversely, PYCO submitted numerous statements and letters from shippers supporting its application. Not a single statement or letter indicated any support for KJRY, a point apparently overlooked by the Board in its ruling. Moreover, PYCO presented evidence suggesting that KJRY owner Pioneer Rail Corporation has at times had a contentious relationship with its customers, connecting railroads, and affected public agencies. In concluding that "there is no evidence that KJRY is not providing adequate rail service to its existing shippers or that it would not provide adequate rail service to PYCO or other shippers on these lines" or that "KJRY's service would

⁵ The Board itself found that a majority of the shippers found SAW's service inadequate. Decision at 12.

likely result in improved rail transportation for shippers," the Board took a tremendous leap of faith. Rational decision-making requires more.

The Board's decision finding that KJRY's application meets the statutory public convenience and necessity test is not a mere "beauty contest" between two competing short line applicants. Rather the Board's decision approving KJRY's application under the unique facts of this case has the practical effect of subverting the intent of Congress.

The first sentence of the decision's "Discussion and Conclusions" section correctly described the purpose behind the feeder program: "Congress established the feeder forced sale program **to enable shippers and communities** [emphasis supplied] to rescue rail lines that are otherwise likely to be abandoned or over which rail service is inadequate." Decision at 10. It is a self-help provision intended to benefit shipper applicants.

It is inconceivable that the Board would allow SAW to pick its own successor in view of all of the evidence presented in this proceeding. Such a conclusion not only runs counter to Congressional intent that the feeder program be a shipper remedy for improved rail service but is contrary to an opinion by one former ICC Commissioner.

In Caddo Antoine Et Al.-Feeder LI. Acq.-Arkansas Midland RR, 10 I.C.C. 323 (1994), the ICC faced a situation where it rejected a lease exemption filed by a carrier that was handpicked by the incumbent railroad for the line that was also the subject of a feeder application but stated that it would allow the other railroad to late file a competing feeder application (none was filed). Former Commissioner Simmons objected vehemently. The gist of his dissent is very pertinent here:

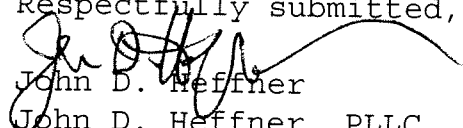
To do so [allow a feeder application by a carrier handpicked by the incumbent railroad in competition with the shipper supported applicant] circumvents the intent of the feeder line program. Section 10910 is designed as a shipper-relief provision, where shippers, acting on their own initiative, make arrangements for alternative rail service..

after failing in its responsibilities for most of the Norman Branch, AMR now attempts to manipulate the feeder line program and frustrate the self-help initiative of the shippers. By allowing GSR to file [a feeder] application, we contribute to this manipulation and set a precedent where other carriers will attempt to frustrate the feeder line program for their own reasons. This is particularly true since we permit the owning carrier to choose between two competing applicants. 10 I.C.C.2d 327-8.

Simply stated, the Board must not be an enabler for SAW's tricks. PYCO believes that approving KJRY's application will result in a transfer of the line to KJRY and a perpetuation of an inadequate rail service cycle with

the likely prospect of yet another feeder application or even a possible transfer back to SAW. Clearly that is not the result Congress intended. Surely, the Board does not want that result either.

Respectfully submitted,


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Dated: September 20, 2007

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the Petition For Reconsideration of West Texas & Lubbock Railway Company, Inc. was served on September 20, 2007 to the following:

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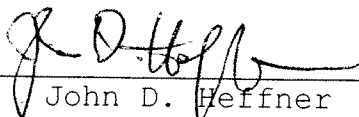
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