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September 28, 2007

VIA E-FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

RE: 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.*

Dear Secretary Williams:

Attached hereto is the “Reply of Keokuk Junction Railway Co. (“KJRY”) in Opposition to the Petitions for Reconsideration of PYCO Industries, Inc., Floyd Trucking, Inc., and West Texas & Lubbock Railway Company, Inc.” KJRY’s Reply responds to the petitions for reconsideration which were filed in the above-captioned proceedings on September 10, 17, and 20, 2007.

If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record

**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 COMPANY
— FEEDER LINE APPLICATION—
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**REPLY IN OPPOSITION TO PETITIONS FOR
RECONSIDERATION OF PYCO INDUSTRIES, INC., FLOYD TRUCKING, INC.,
AND WEST TEXAS & LUBBOCK RAILWAY COMPANY, INC.**

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DATED: September 28, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34890

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

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— FEEDER LINE APPLICATION—
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**REPLY IN OPPOSITION TO PETITIONS FOR
RECONSIDERATION OF PYCO INDUSTRIES, INC., FLOYD TRUCKING, INC.,
AND WEST TEXAS & LUBBOCK RAILWAY COMPANY, INC.**

On September 10, 2007, PYCO Industries, Inc. (“PYCO”) filed in the above-captioned proceedings what it entitled a “Petition for Reconsideration in F.D. 34890 and 34922 and Stay in F.D. 34922 on Behalf of PYCO Industries, Inc.” As relevant here, PYCO’s petition seeks reconsideration of a Board decision in these proceedings served on August 31, 2007 (“August 31 Decision”), in which, among other things, the Board granted the competing feeder line application of Keokuk Junction Railway Co. (“KJRY”). PYCO’s Petition was followed on September 17, 2007, and September 20, 2007, respectively, by extremely similar petitions from Floyd Trucking, Inc. (“Floyd”) and West Texas & Lubbock Railway Company, Inc. (“WTL”).¹

¹ Collectively, PYCO, Floyd, and WTL will be referred to as the “petitioners.” Also, the respective petitions of for reconsideration of PYCO, Floyd, and WTL will be referred to collectively as the “petitions.”

KJRY replied in opposition to the stay component of PYCO's Petition on September 14, 2007, and indicated in that filing that it would respond separately to the merits of PYCO's reconsideration request at a later date.² In the interim, in a decision served on September 20, 2007 ("September 20 Decision"), the Board denied PYCO's stay request. Also on September 20, South Plains Switching, Ltd. Co. ("SAW") advised the Board that it had selected PYCO, rather than KJRY, to purchase SAW's lines in Lubbock, TX, along with other property owned by SAW and/or affiliated companies.

Circumstances appear to have overtaken the PYCO, Floyd, and WTL reconsideration petitions. PYCO, Floyd and WTL all object to the Board's approval of KJRY's competing feeder line application and the resulting possibility that SAW might select KJRY to acquire the All-SAW property, but now that SAW has selected PYCO to purchase the lines, the issues may be moot.³ Nevertheless, none of the petitioners has withdrawn its respective petition for reconsideration. Because KJRY wishes to protect its interests should PYCO be unable to consummate its purchase, KJRY hereby responds in opposition to the petitions.

As suggested above, the Floyd and WTL petitions for reconsideration appear to have been modeled closely after the PYCO petition for reconsideration. The essence of all three petitions is that – (1) as a procedural matter, the Board could not have granted KJRY's All-SAW feeder line application because the Board did not first "accept" it; (2) the Board erred in

² Although 49 CFR 1115.3 provides for petitions for reconsideration, that regulation does not prescribe a deadline for the filing of replies to such a petition. Because it is not otherwise provided for, the reply provision of 49 CFR 1104.13(a) governs here, and affords KJRY 20 days to respond to PYCO's reconsideration request.

³ By letter of September 21, 2007, KJRY informed the Board of its views regarding the selection of PYCO as the purchaser and noted that there may be potential irregularities with respect to that selection and that KJRY stood willing and able to purchase the lines in the event PYCO's purchase was found not to be consistent with the feeder line statute. As such, it is possible that the matter is not moot at this time.

determining that KJRY would provide improved service to All-SAW customers; (3) the Board failed properly to apply the public convenience and necessity ("PC&N") standard of 49 U.S.C. 10907 because the Board should have balanced of the relative merits of PYCO's and KJRY's competing applications and should have approved only PYCO's application.

For the reasons set forth in the Board's September 20 Decision, KJRY's September 14 reply to the stay component of PYCO's Petition,⁴ and herein, the subject petitions for reconsideration should be denied as utterly meritless. The Board committed no material error in granting KJRY's feeder line application for All-SAW. Rather, the September 20 Decision entailed a thorough and correct application of the feeder line statute that the Board is entrusted to administer.

ARGUMENT

A petition for reconsideration must state in detail the respects in which the petition raises material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3. Petitioners allege that the Board has committed material error in granting KJRY's competing feeder line application for All-SAW. Little should need to be said in response to the merits of these petitions that was not already set forth in the Board's September 20 Decision or in KJRY's reply to the stay component of PYCO's Petition. In denying PYCO's stay petition by applying the usual four-part standard,⁵ the Board thoroughly assessed the merits of PYCO's request for reconsideration and concluded that PYCO was not likely to prevail. In effect, the Board's September 20 Decision has already thoroughly disposed of PYCO's reconsideration petition as

⁴ KJRY hereby requests that its September 14 reply to PYCO's stay request in these proceedings be incorporated into, and be considered as part of, this reply to the petitions for reconsideration.

⁵ Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Admin., 259 F.2d 921, 925 (D.C. Cir. 1958).

well as those later filed by Floyd and WTL. KJRY supports the Board's September 20 Decision and adds the following for the record:

I. The Board Committed No Procedural Error In Granting KJRY's Application

Petitioners now argue that the Board could not have granted KJRY's competing All-SAW feeder line application because that application, allegedly, was never accepted. Of course PYCO did not raise this argument during the course of the proceeding and brings it up only now on reconsideration. The failure to raise this argument in the proceeding is grounds for the Board to decline to consider it. See, e.g., Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, __ S.T.B. __ (2004), STB Docket No. 42056, slip op. at 3 (STB served Sept. 27, 2004) ("the Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding"). Regardless, even if timely raised, which it was not, the Board's prior decision demonstrates that the argument is nonsense. The September 20 Decision commits over a page to discrediting petitioners' specious argument, which, as the Board noted, not only elevates form over substance, but also entirely misses the point of the Board's procedures.

Neither the statute nor the regulations require the Director to issue a separate Director's Order specifically "accepting" KJRY's "All-SAW feeder line application," especially, as is the case here, where the Director had already issued a decision accepting KJRY's application for less than the All-SAW alternative and noted that the Board would also process KJRY's All-SAW application if KJRY wanted to proceed with that alternative. It was clear from many decisions from both the Board and the Director that KJRY's All-SAW competing application had been accepted for consideration. PYCO knew this or it would not have sought discovery or even have

bothered to address the merits of KJRY's All-SAW application. Clearly the Board and the Director had accepted KJRY's application and there was no error in failing to issue another Director's order specifically "accepting" the All-SAW applicant when it was clear from the prior decisions that the All-SAW application had been accepted.

II. The Board Did Not Err In Its Application of 49 U.S.C. 10907(c)(1)(E)

Their first argument for reconsideration being baseless, petitioners next allege that the Board erred by failing properly to apply the PC&N standard at 49 U.S.C. 10907(b)(1)(A)(i), particularly because, according to the petitioners, the record evidence does not support a finding that KJRY would provide improved service to All-SAW shippers. In a clumsy effort to make this point, petitioners resort to two tactics – semantics and character assassination. But neither obscures the fact that the Board had more than enough evidence to conclude, as it did, that KJRY was capable of providing adequate service to All-SAW shippers, and that such service would be an improvement over the inadequate service of the incumbent, SAW, against whose service a feeder line applicant's proposed service is to be measured under 49 U.S.C. 10907(c)(1)(E).⁶

First, petitioners purposely misinterpret the "improved railroad transportation" phrase of section 10907(c)(1)(E) by claiming that the measure of improvement is not whether KJRY's service would be "improved" over the service that had been provided by SAW, but rather, whether KJRY could provide service that would be better than that which PYCO promised to provide. Unfortunately for PYCO, that is not the statutory test. The statutory test is whether KJRY's service would have been an improvement over the service provided by SAW, and there is no dispute in the record that KJRY had met that test.

⁶ PYCO argues that "KJRY could not meet its burden of 49 U.S.C. 10907(c)(3)," and later that "the Board must construe 49 U.S.C. 10907(c)(3)(E)... generally." PYCO Petition at 7 and 10. Either PYCO is sloppy or it is concocting new feeder line statutory provisions all its own. There is no 49 U.S.C. 10907(c)(3).

Petitioners' semantic argument regarding KJRY's alleged burden to prove that it could provide "improved service" versus PYCO's service is simply contrary to the statute and Board precedent. PYCO does concede that KJRY would provide adequate service, but having so conceded that KJRY could "in theory" provide adequate service where SAW has not, PYCO then argues to change the Section 10907(c)(1)(E) standard to require the Board to decide who would offer *more improved* service as between the two competing feeder line applicants. Such an application of the statute would be contrary to precedent and inappropriate. The statute merely requires a feeder line applicant to prove that it could provide "improved service" compared to the service shippers have been receiving from the incumbent carrier. The statute does not direct the Board to determine among competing feeder line applicants which one of the competing feeder line applicants would be more likely to provide the most improved service. No party, not even PYCO, disputes that KJRY has proven that it could provide improved service over that provided by SAW.

Second, petitioners insist that the Board erred by failing to address PYCO's over-the-top argument that KJRY would be an unsuitable replacement for SAW. But this is nothing more than a continuation of petitioners' ceaseless, unsupported efforts to impugn KJRY's reputation. KJRY, as the Board has noted, is an experienced short line railroad with a long history of providing adequate service to its customers. KJRY previously acquired a line through the feeder line process,⁷ and it has been providing improved service to customers on that line ever since. This is arguably the best evidence of KJRY's capacity and ability to provide both adequate and improved service to shippers. Moreover, there is no evidence to show that KJRY, or any of its

⁷ Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335 (STB served Oct. 28, 2004, and Feb. 7, 2005), aff'd sub nom. Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734 (7th Cir. 2006), cert. denied, 127 S. Ct. 1829 (2007).

short line affiliates for that matter, is providing, or has ever provided, inadequate service to shippers elsewhere.

If KJRY were as unsuited to operate All-SAW as petitioners insist, then surely PYCO would have provided solid evidence of this apart from all of the name calling. PYCO makes much of the fact that the Board declined to compel responses to certain of PYCO's discovery requests that were intended to address this issue. Id. at 6 n.3 (in which, incredibly, PYCO claims that it could not have obtained evidence of the service misdeeds of KJRY or other Pioneer Railcorp affiliates without "canvassing courts" or "flying to Washington to spend a week combing through the Board's records").⁸ But if there really were any basis for PYCO's sweeping allegations that KJRY and its affiliates are such bad actors which regularly provide inadequate service elsewhere (as PYCO claims is essentially a matter of common knowledge), then surely PYCO could have produced some evidence of this even without responses to its discovery. KJRY's successful track record and proven resources demonstrates KJRY ability to

⁸ In its September 20 Decision, the Board addresses PYCO's discovery issue again, confirming, as KJRY had asserted, that the information PYCO sought could have been obtained through "publicly available litigation records." September 20 Decision, slip op. at 3-4. PYCO laments that the task of uncovering evidence of KJRY alleged wrongdoing from public sources would be an undertaking of enormous proportions. Given the various on-line resources available to PYCO's counsel and other attorneys, such as westlaw.com, lexis.com, the online web sites of various state and federal courts, google.com, and the Board's own website – www.stb.dot.gov –, it is laughable to suggest that the only way (absent the ability to obtain such information in discovery) that PYCO's counsel could have obtained such publicly available information was to "canvass the courts" or "spend a week in Washington, D.C." The reality is that the information PYCO hoped to get through discovery to discredit KJRY simply does not exist. In any event, the Board only compelled Pioneer Railcorp ("Pioneer"), KJRY's corporate parent, to respond to discovery after Pioneer initially declined to do so. The Board never ordered KJRY or Pioneer to respond to *all* specific discovery requests propounded to it, as PYCO alleges. And even if PYCO had filed a subsequent motion to compel responses to all of its discovery requests, the September 20 Decision makes clear that the Board would not have ordered Pioneer or KJRY to provide evidence related to litigation, service claims and the like due to the fact that such information was publicly available.

provide improved service to All-SAW shippers, and PYCO has failed anywhere to dispute this point with any specific evidence.

III. The Board Did Not Err By Allowing SAW To Select An All-SAW Purchaser

Ultimately, petitioners' reconsideration requests entail the Board's application of a new interpretation of Section 10907(c)(1)(E), under which competing feeder line applicants should be measured against each other, and under which the Board would approve only the "best" application.⁹ The Board properly declined to embrace such an interpretation of the statute.

Both Floyd and WTL openly contend that the Board, rather than the line owner, should select the "superior candidate" among competing feeder line applicants, and that the Board erred in not doing so here. Most notably, Floyd, whose petition appears to have been cribbed from PYCO's Petition, bases its argument on what one can only hope is a seriously botched reading of Cheney R. Co. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990) ("Cheney")¹⁰ – a decision that specifically *upheld* the agency's practice of allowing the rail line owner to select among competing, financially responsible feeder line applicants. The reviewing court in Cheney stated as follows:

⁹ Included in the new standard that petitioners would have the Board employ on reconsideration is a "popularity contest," under which shipper support for any given feeder line applicant is incorporated into the Board's PC&N factoring. Either petitioners are advancing a brand new element to the PC&N standard at 49 U.S.C. 10907(c)(1), or they are misreading 49 U.S.C. 10907(c)(1)(B), which requires evidence that the incumbent railroad's service to a majority of shippers on a given line is inadequate (and says nothing about shipper support or opposition to a given feeder line applicant). KJRY points out in passing that such a "popularity contest" would be ripe for abuse by the participants making off-the-record "campaign promises" regarding rates and service.

¹⁰ Floyd's reliance on Cheney involves either a careless reading of the quoted passages or it constitutes a knowing and purposeful effort to quote passages out of context and thereby mislead the Board. Because Floyd's filing is attributed to and signed by a Mr. O.E. Floyd, who appears to be a manager of Floyd, not an attorney, perhaps Floyd's Petition is the product of his inexperience with legal materials or is the result of incomplete or inadequate legal advice.

[The predecessor provision to Section 10907] does not drive the agency to a general “public interest, convenience or necessity” standard for its decisions. ... Where that aspiration is imposed, an agency is arguably required to adopt procedures that result in the selection of superior candidates. ... [Section 10907]’s mandate to certify “a financially responsible person” carries no such message.

Cheney, 902 F.2d at 69 (citations omitted).

The passage above makes three points, all of which run counter to petitioners’ arguments. First, Section 10907 does not mandate the Board’s application of a “general PC&N standard.” Second, were the Board entrusted to apply a general PC&N standard here – which, again, is not the case – the agency should be expected to select a “superior” candidate. Three, because Section 10907 contains no such general PC&N standard, the Board’s only mandate, once the standards of 10907(c) have been met, is to find that each competing applicant is a “financially responsible person,” which the Board has done. The Board’s action in this case was thus fully consistent with the requirements as set out in Cheney.

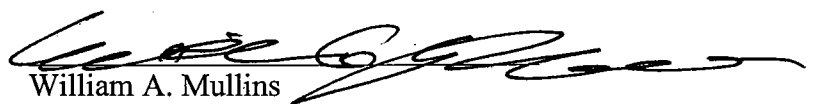
Similarly, WTL’s Petition relies on a short passage taken from the legislative history behind the adoption of the feeder line provision – which states that the statute is designed as a remedy for shippers and communities – and upon a passage excerpted from a dissenting opinion in a prior feeder line case – to try and make the case that the Board should have selected one applicant over another. Such feeble efforts cannot carry the day on reconsideration. Because the Board found both KJRY and PYCO to be financially responsible and capable of providing improved service to All-SAW shippers, both applicants would fulfill the purpose of the feeder line statute – to remedy service problems for shippers or communities. Accordingly, the Board’s decision to grant KJRY’s feeder line application is contrary to neither congressional intent nor the feeder line statute itself. In addition, the Board has committed no material error simply

because it has implicitly declined to abide by the policy preferences contained in a dissenting opinion in an earlier agency feeder line decision.

CONCLUSION

The Board has committed no material error to warrant reconsideration of its August 31 Decision granting KJRY's competing feeder line application for All-SAW. The Board faithfully observed the letter and spirit of the feeder line provisions, and there is no procedural defect in its approval of KJRY's application. Moreover, the Board properly found that KJRY's application satisfied the PC&N criteria set forth at 49 U.S.C. 10907. Finally, the Board did not err in declining its abandon feeder line precedent in favor of a "superior applicant" standard under which the Board, not the incumbent rail line owner, would select the purchaser of a rail line. Because petitioners have failed to provide any basis upon which the Board should revisit its August 31 Decision and deny KJRY's competing feeder line application, the respective petitions of PYCO, Floyd, and WTL should be denied.

Respectfully submitted,



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Attorneys for Keokuk Junction Railway Co.

September 28, 2007

CERTIFICATE OF SERVICE

I, William A. Mullins, hereby certify that on September 28, 2007, I caused a copy of the foregoing filing to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in STB Finance Docket Numbers 34890 and 34922.



William A. Mullins