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19 August 2008
express

Memorandum for Anne Quinlan, Acting Secretary
Surface Transportation Board
395 E St., S.W., Room 1149
Washington, D.C. 20024

Re: South Plains Switching - Compensation for Use of Facilities,
F.D. 35111; *223326*
PYCO Industries, Inc. - Feeder Line Application, F.D. 34890

From: Charles Montange,
for PYCO Industries, Inc. *[Signature]* *223326*

Enclosed please find replies on behalf of PYCO Industries to
letter pleadings filed by South Plains Switching Ltd. on or about
August 12, 2008, in the two proceedings noted above.

Thank you for your assistance in this matter.

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AUG 21 2008

Part of
Public Record

Encls.

cc. Counsel per cert. of service.

223327

BEFORE THE SURFACE TRANSPORTATION BOARD

Pyco Industries, Inc. --)
Feeder Line Application -) F.D. 34890
South Plains Switching, Ltd. Co.)



Reply to SAW Letter Pleading of August 12

This is a Reply by PYCO Industries (PYCO) to the letter pleading filed by South Plains Switching (SAW) dated August 12, 2008 in this proceeding. In that letter pleading, SAW requested that PYCO's Motion for Enforcement or Clarification dated February 8, 2008, be denied. SAW purported to offer a new argument (namely a reference it had not previously made to an STB decision pre-dating PYCO's February 8 motion). SAW's letter pleading is merely an impermissible reply made well outside of the time provided for replies in 49 C.F.R. 1104.13(a). Moreover, it is an incorrect and ultimately irrelevant reference. SAW's letter should be stricken or ignored.

Background

PYCO's February 8 Motion requested this Board to clarify that

-- all relevant switches connecting its trackage to the BNSF trunk in Lubbock conveyed to PYCO (SAW claimed it retained ownership of the mainline switches and sought to bar PYCO's use of a critical switch to track 310);

-- SAW must convey to PYCO the "Burris trackage" (SAW asserted it still owned the trackage despite the fact that SAW and PYCO

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both included in their valuation estimates, and this Board included in its valuation, in this proceeding, PYCO paid for the property, SAW's counsel represented to PYCO's counsel that the deed he prepared for SAW conveyed all property to PYCO that SAW had received from BNSF, and the trackage at issue is inside Lubbock city limits with the rest of the formerly SAW assets); and

-- that certain additional trackage in Lubbock (in particular, portions of the Acme Lead off the former SAW yard) which SAW evidently conveyed to Choo Choo (owned by the manager of SAW, Mr. Wisener) should be conveyed to PYCO.

All three matters remain in contention between PYCO and SAW.

Since SAW's August 12 letter pleading focuses on the Burris issue only, PYCO will so focus as well.

Argument

At the time of this feeder line proceeding, BNSF by contract had been paying \$75 per carload to SAW so that BNSF could go over the Burris trackage to serve its customer Jarvis Metals in Lubbock.¹ As PYCO's prior pleadings demonstrate, "Burris, TX" is

¹ It is PYCO's understanding that BNSF originally took the position that the "Burris trackage" had never been conveyed to SAW. However, SAW sued BNSF in state court, which determined that BNSF conveyed SAW the Burris trackage. But BNSF's customer Jarvis Metals was served over the Burris trackage. In order to discharge its common carrier obligation to Jarvis, BNSF evidently felt compelled to settle the litigation by agreeing to pay SAW a "rent" of \$75 per carload in order to use the property necessary to service Jarvis.

not a separate city, but is inside the city limits of Lubbock. SAW, PYCO and this Board included it in their valuation calculations in this proceeding. Pursuant to this Board's valuation of "all-SAW" in its August 31, 2007 decision in this proceeding, PYCO paid for the Burris trackage along with the other SAW tracks in Lubbock and accepted a deed which SAW's counsel represented to PYCO conveyed to PYCO all that SAW got from BNSF. But shortly after PYCO accepted the deed, SAW disputed its counsel's representation, and SAW's own inclusion of the asset in its inventory to this Board (relied upon by this Board in its valuation). SAW instead claimed that all it got from BNSF did not include all, and that SAW arbitrarily still owned the so-called Burris trackage (as well as all the mainline switches and so forth.)

As a result of SAW's threats directed at BNSF over the Burris trackage, BNSF has been accruing the \$75/carload it agreed to pay (see note 1) for use of the "Burris trackage" until this Board resolves who now owns the trackage, PYCO or SAW. If the Board rules for SAW, BNSF will pay the funds to SAW. If the Board rules for PYCO, BNSF will pay the funds to PYCO. SAW's August 12 letter is a reflection of the anxiety that continued accumulation of these funds is causing SAW's management. But the accrual of the funds does not justify unjust enrichment of SAW. PYCO continues to invest heavily in rehabilitating the decrepit

physical plant that it acquired from SAW in this proceeding. The money if paid to PYCO will actually contribute to improving rail service for shippers in Lubbock and not just further fattening of pockets for SAW's owners by paying them funds accruing for BNSF's use of property after PYCO purchased the property. Any such "further fattening" would amount to a kind of double payment.

Argument

SAW's August 12 letter is contrary to this Board's regulations, and should be ignored or stricken. Under 49 C.F.R. 1104.13, replies are due in 20 days and replies to replies are forbidden. SAW's latest reply is either manifestly untimely, or SAW is seeking, without leave, to file an impermissible reply to a reply.

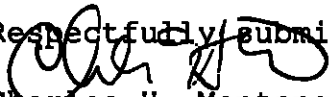
SAW's August gives no basis on which leave to file its letter either could or should be granted. The August 12 letter pleading begins by reiterating SAW's claim to the Burris trackage. This is not only untimely but also duplicative of SAW's earlier position. We all know SAW still claims what it sold. This is hardly grounds to file another pleading. However, the letter also purports to make a new argument; namely that SAW's view is supported by a Board Decision served January 11, 2008, in F.D. 34889, at p. 6. But there are no references to Burris trackage at p. 6 of the January 11 Decision. There are

references at p.7, but they are not to the point.² Since they are not to the point, they are neither evidence nor argument, even if one could treat the references as "new" for purposes of record reopening. One of course cannot treat them as "new" for they pre-date PYCO's original filing, and SAW could have and should have presented them long ago if it felt them germane, which they are not. Thus SAW's letter states no grounds for leave to file, let alone grounds for the substantive result SAW seeks.

Conclusion

The SAW pleading is impermissible, states no grounds for leave to file, and adds nothing substantive. It should be stricken or ignored.

Respectfully submitted,


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Attorney for PYCO Industries, Inc.

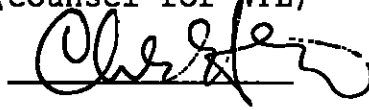
² Although the Board referred to Burris trackage and to Lubbock trackage, this appears to be shorthand for referring to the unusual situation at Burris (relied on for valuation purposes by SAW) in which BNSF paid SAW so BNSF could serve its own customer. See note 1. SAW included the Burris trackage as part of its track inventory in the valuation proceeding, and PYCO and the Board followed suit. SAW cannot exclude it after all included it and PYCO bought it.

Certificate of Service

By my signature below, I certify service by U.S. Mail, postage pre-paid first class, unless otherwise indicated, this 19th day of August, 2008, upon

Thomas F. McFarland
208 South LaSalle St., Suite 1890
Chicago, IL 60604-1112 (counsel for SAW) (by express, next day delivery)

John Heffner
1920 N Street NW, Suite 800
Washington, D.C. 20036 (counsel for WTL)

A handwritten signature in black ink, appearing to read "John Heffner", is written over a horizontal line.