

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34890

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

Decided: January 24, 2007

In this proceeding, PYCO Industries, Inc. (PYCO) seeks to acquire the entire rail system of South Plains Switching, Ltd. Co. (SAW), in Lubbock, TX, under the feeder line development provision at 49 U.S.C. 10907.<sup>1</sup> At Lubbock, Hanson Aggregates (Hanson) operates a transload facility located on a leased railroad track<sup>2</sup> at which Hanson receives rail deliveries from SAW. Hanson provided a letter in support of PYCO's feeder line application.<sup>3</sup>

In a letter filed on December 21, 2006, Hanson complains that SAW recently cancelled Hanson's track lease, in contravention of an order that the Board served on August 3, 2006 (August 3 Order),<sup>4</sup> in response to SAW's similar actions toward another shipper, PYCO. The August 3 Order (slip op. at 9 (ordering paragraph 4)) expressly prohibits SAW from rescinding its leases and agreements with "any shipper that supports a feeder line application" to acquire SAW's lines. Hanson asks us to enforce the August 3 Order by voiding both SAW's purported transfer of the leased track and the cancellation of Hanson's track lease. Hanson also seeks an order requiring SAW to provide rail service to Hanson on the leased track.

SAW filed a reply in opposition to Hanson's request on December 28, 2006, explaining that, on April 28, 2006, SAW had conveyed the land and track in question to Choo Choo Properties, Inc. (Choo Choo). SAW claims that Choo Choo is the entity that has cancelled

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<sup>1</sup> In a related proceeding, STB Finance Docket No. 34922, Keokuk Junction Railway Co.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., Keokuk Junction Railway Co. has filed a competing application to purchase SAW's rail system. The two applications are pending.

<sup>2</sup> As explained below, the leased track belongs to SAW.

<sup>3</sup> The Hanson letter was included in PYCO's Shipper Comments, filed on August 2, 2006.

<sup>4</sup> The August 3 Order was issued in this and a number of related proceedings.

Hanson's lease. On January 12, 2007, Hanson filed a motion seeking the same relief as in its December 21 request, as well as additional relief.<sup>5</sup>

We will void SAW's transfer of the property to Choo Choo and the cancellation of the lease, and will order SAW, upon reasonable request, to provide rail service to Hanson's facility on the leased track until either a feeder line purchase is consummated or all feeder line applicants whose feeder line applications are approved have notified the Board in writing that they do not wish to go forward with purchasing SAW's rail lines.

## BACKGROUND

SAW's Acquisition of Rail Lines in Lubbock. In 1999, SAW, a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to acquire approximately 74,384 feet of rail lines from The Burlington Northern and Santa Fe Railway Company.<sup>6</sup> See South Plains Switching, Ltd. Co.—Acquisition Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33753 (Sub-No.1) (STB served July 15, 1999). After the acquisition, SAW provided rail service to a number of shippers' facilities, including those of Hanson and PYCO.<sup>7</sup>

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<sup>5</sup> In a letter also filed on January 12, 2007, SAW states that it will submit a timely reply to the petition for additional requested relief: the authorization of emergency alternative rail service under 49 CFR 1146 to Hanson. That petition will be handled in a separate decision. In the same letter, SAW also expressed its intent to respond to those parts of Hanson's January 12, 2007 filing that reiterated Hanson's earlier request for relief. Because SAW has indicated that its response to that aspect of the filing might not be submitted until 20 days after January 12 and SAW has already responded (on December 28) to that request for relief by Hanson, we will not delay issuance of this decision to await that further reply.

<sup>6</sup> The Burlington Northern and Santa Fe Railway Company has since changed its name to BNSF Railway Company.

<sup>7</sup> PYCO, a processor of cottonseed oil and related products, has two plants located on SAW's rail lines.

Alternative Rail Service to PYCO. In decisions issued in PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (Alternative Rail Service) (STB served Jan. 26, Feb. 16, Feb. 24, and June 21, 2006), the Board found that SAW's service to PYCO had become inadequate and authorized West Texas & Lubbock Railway Company, Inc. (WTL) to provide emergency alternative rail service under 49 CFR 1146 to PYCO over SAW's lines.<sup>8</sup> In a pleading filed in STB Finance Docket No. 34802 on January 9, 2006, PYCO stated that it would file a feeder line application under 49 U.S.C. 10907 to acquire all or a portion of SAW's rail lines, after the Board resolved its request for emergency alternative rail service.

PYCO's Feeder Line Applications. Seeking a permanent solution to the inadequacy of SAW's rail service, PYCO filed, on May 5, 2006, an application to acquire the entirety of SAW's rail lines under the feeder line provision at 49 U.S.C. 10907. That application was rejected as incomplete, without prejudice to PYCO filing a complete application. See PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co., STB Finance Docket No. 34844 (STB served June 2, 2006). PYCO promptly submitted, on June 14, 2006, a new application that was accepted as complete to acquire a portion of SAW's rail lines. See PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co., STB Finance Docket No. 34844, et al. (STB served July 3, 2006). PYCO subsequently expanded its feeder line application to seek acquisition of the entire SAW rail system.

SAW's Transfers of Certain Portions of Its Rail Property to Choo Choo in June 2006. PYCO filed a motion in July 2006, asking the Board to take several actions to prevent SAW from evading the Board's orders and authority in various proceedings concerning SAW. PYCO stated that, on June 12, 2006, SAW had transferred the real estate, tracks, and certain other property interests in portions of its rail lines to Choo Choo. PYCO explained that, during the pendency of PYCO's feeder line application, Choo Choo had notified PYCO that Choo Choo was cancelling eight PYCO-related leases and agreements beginning on August 5, 2006. Concerned that these cancellations would prevent it from shipping by rail and from operating its cottonseed-processing plants, PYCO asked the Board to void the cancellations.

August 3 Order. In response to PYCO's request, the Board noted that Mr. Larry Wisener, the sole officer and shareholder of Choo Choo, was, until early 2006, the president and

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<sup>8</sup> Shortly before that emergency authorization expired, the Board authorized WTL to provide temporary alternative rail service under 49 CFR 1147 to PYCO, in PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket Nos. 34889, et al. (STB served Nov. 21, 2006). Thus, WTL's service to PYCO continues at present. Other than PYCO, the shippers located on SAW's rail lines continue to be served by SAW.

general manager of SAW and that Mr. Wisener's wife, Mrs. Delilah Wisener, owns SAW.<sup>9</sup> In the August 3 Order (slip op. at 6), the Board found that the marital connection between the owners of SAW and Choo-Choo undercuts the claim that the two entities are separate and independent. In addition, the Board stated that the record showed that Choo Choo had purchased some of SAW's property for possible future construction of a facility that Choo Choo might lease to SAW. These facts led the Board to conclude that SAW had sold the real estate, track, and interests in related leases and agreements on certain portions of its lines to evade the Board's authority and to prevent that property from being acquired in a feeder line sale.

Accordingly, the Board voided any transfers of SAW's rail properties that occurred after May 5, 2006 (filing of the original feeder line application), including any transfers to Choo Choo. The Board also voided the rescissions of the eight PYCO-related agreements. To prevent a diminution in the utility of the rail properties to be acquired in this feeder line proceeding, the Board ordered SAW not to transfer any property interests in or rescind any leases or agreements that concern PYCO or any other shipper that supports the feeder line applications, until either a feeder line purchase is consummated or both feeder line applicants have notified the Board that they do not wish to go forward with purchasing SAW's rail lines. August 3 Order (slip op. at 9 (ordering paragraph 4)).

SAW's Recent Evidence of the Extent of Its Rail System. To establish the value of its rail system—a necessary predicate to a feeder line sale—SAW filed, on September 18, 2006, evidence of the extent of the rail lines and trackage it owns.<sup>10</sup> Included in the list of track that SAW owns and operates is "ATSF Crawford Industrial Properties AT 269," which is the track that Hanson leases. As a consequence of listing that track, SAW also included Track No. 269 in its estimation of the constitutional minimum value of its rail system in the feeder line case.

#### THE HANSON TRACK LEASE

In 1991, a railroad predecessor of SAW (The Atchison, Topeka and Santa Fe Railway Company) leased to a predecessor of Hanson (Western Rock Products, Inc.) ATSF Track No. 269, authorizing the lessee to use the leased track to transload rock (also known as aggregates) from rail cars to trucks. In its reply to Hanson's complaint, SAW furnished a quitclaim deed, dated April 28, 2006, indicating that it conveyed Track No. 269 to Choo Choo, and states that the conveyance was subject to the lease of that track to Hanson.

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<sup>9</sup> In a related decision served on February 24, 2006, in Alternative Rail Service, the Board explained that, upon Mr. Wisener's resignation from his positions with SAW, Mrs. Wisener had taken over as general manager of SAW.

<sup>10</sup> This information was included in an attachment titled "Summary South Plains Switching, Ltd. Co. Trackage Owned & Operated" to the verified statement of Edward W. Landreth, included in SAW's pleading entitled "Statement in Response to PYCO's Feeder Line Application to Acquire 'All-SAW'."

In a letter on SAW stationery dated December 5, 2006, Mrs. Wisener gave Hanson 30 days' notice of the cancellation of the lease of Track 269. Hanson states that it received this letter a few days after submitting a bid (also on December 5) to supply aggregates to a highway project in Lubbock that would require rail delivery of aggregates to the leased track beginning in mid-January 2007.

According to Hanson, Mr. Wisener still controls and directs SAW's operations. Hanson states that it informed Mr. Wisener about the bid and its need for rail service to Hanson's leased track, and indicates that Mr. Wisener replied that SAW would not provide the requested rail service and had transferred the leased trackage to another party. Hanson then filed this request for enforcement of the August 3 Order.

SAW claims that it sent Hanson the original cancellation notice on Choo Choo's behalf. To remove any doubt, Choo Choo issued a new cancellation notice to Hanson on December 27, 2006.<sup>11</sup>

#### DISCUSSION AND CONCLUSIONS

SAW argues that the lease cancellation was permissible because it had transferred Track 269 to Choo Choo prior to May 5, 2006 (the date after which the August 3 Order stipulated that SAW was not permitted to transfer any of the property that comprised its rail system). SAW also points out that the August 3 Order barred only SAW (and not Choo Choo) from rescinding leases and agreements aimed at shippers that supported a feeder line application to acquire SAW's rail system. SAW contends that Choo Choo, therefore, was free to cancel Hanson's lease under the terms of that order.

SAW's position lacks merit. SAW's claim that the transfer of the track to Choo Choo was lawful is not supported by the evidence. First, the transfer occurred after SAW was on notice that PYCO intended to file a feeder line application for SAW's rail lines.<sup>12</sup> Second, there is a very close connection between SAW and Choo Choo. In the August 3 Order, slip op. at 6, the Board voided other transfers of SAW's rail property to Choo Choo on that basis. Third, this record shows that SAW treats Choo Choo as a separate entity only when it is convenient for regulatory purposes, and otherwise ignores Choo Choo's supposedly separate status. For example, the initial cancellation notice to Hanson, dated December 5, 2006, was written on SAW letterhead and signed "Delilah Wisener, Owner, South Plains Switching, Ltd. Co." This letter, sent more than 7 months after the track supposedly was transferred to Choo Choo, neither mentioned Choo Choo nor purported to act on Choo Choo's behalf. Rather, acting as SAW's

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<sup>11</sup> In its reply, SAW asks for certain affirmative relief concerning a different track (9200) that is assigned to WTL for the provision of alternative rail service to PYCO. See Alternative Rail Service (STB served Feb. 16, 2006). That request will be handled separately.

owner, Mrs. Wisener informed Hanson that the lease was cancelled. Moreover, SAW's purported cancellation of Hanson's lease was in clear contravention of the Board's August 3 Order barring such cancellations. Only after Hanson brought this prohibited action to the Board's attention on December 21, 2006, did Choo Choo endeavor to send a cancellation notice to Hanson in Choo Choo's own name.

Finally, as discussed above, SAW included Track 269 in its September 2006 evidence of the trackage it owns and for which SAW seeks compensation in the feeder line sale. If the leased track had been lawfully transferred, SAW would have no basis upon which to seek compensation for that track from the feeder line applicants. For all these reasons, we will void the transfer to Choo Choo, and treat SAW as the owner of Track 269.

Turning to the lease cancellations, the December 5 notice, in which SAW acted on its own behalf, violates the terms of the Board's August 3 Order because it was sent after Hanson supported PYCO's feeder line application. Consequently, that cancellation notice is void. Further, because it appears to us that Choo Choo never lawfully owned or controlled Track 269, Choo Choo's purported December 27 "cancellation notice" is ineffective.

In light of Mr. Wisener's statements that SAW would not provide requested rail service to Hanson, we remind SAW that it continues to have the common carrier obligation to serve Hanson's transload facility on the leased track, and we will order SAW to provide service to Hanson, upon reasonable request, until the closing of a feeder line sale or the Board's receipt of notice that the feeder line applicant(s) have decided not to go through with the sale.

It is ordered:

1. SAW's transfer of Track 269 to Choo Choo is void and SAW remains the owner of Track 269.
2. SAW's and Choo Choo's attempted cancellations of Hanson's lease of Track 269 are void.

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<sup>12</sup> While our August 3 Order noted that SAW was on notice of the feeder line application by May 5, 2006, SAW was aware of PYCO's intent to file a feeder line application as early as January 9, 2006.

3. SAW shall provide rail service to Hanson's transload facility on the leased track, upon reasonable request, until either a purchase under 49 U.S.C. 10907 is consummated or all feeder line applicants whose feeder line applications are approved have notified the Board in writing that they do not wish to go forward with purchasing SAW's rail lines.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary