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SERVICE DATE – LATE RELEASE JANUARY 11, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34889

PYCO INDUSTRIES, INC.–ALTERNATIVE RAIL SERVICE–
SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 34802

PYCO INDUSTRIES, INC.–ALTERNATIVE RAIL SERVICE–
SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 35111¹

SOUTH PLAINS SWITCHING, LTD. CO.–COMPENSATION FOR USE OF FACILITIES IN
ALTERNATIVE RAIL SERVICE–WEST TEXAS AND LUBBOCK RAILWAY COMPANY

Decided: January 10, 2008

After finding serious inadequacies in the rail service provided by South Plains Switching, Ltd. Co. (SAW), over its lines in Lubbock, TX, the Board ordered SAW to allow West Texas and Lubbock Railway Company (WTL) to provide alternative rail service to one of SAW's customers, PYCO Industries, Inc. (PYCO), first on an emergency basis under 49 U.S.C. 11123 and then on a temporary basis under 49 U.S.C. 11102. The lines involved have since been sold to PYCO pursuant to a Board order under the feeder-line forced-sale provisions of 49 U.S.C. 10907. This decision addresses issues arising out of the alternative rail service that was provided prior to the sale of the lines.

In STB Finance Docket No. 34889, the Board dismisses as moot various motions and petitions relating to the Board's temporary alternative rail service order under 49 U.S.C. 11102. In STB Finance Docket No. 35111, a recently instituted proceeding in which SAW has asked the Board to determine compensation under 49 U.S.C. 11123 and 49 U.S.C. 11102 for WTL's use of SAW's facilities, we outline the Board's formula for establishing compensation owed to SAW. The parties will be given an opportunity to submit comments and suggestions regarding the compensation formula, in addition to submitting the information necessary under a procedural schedule that we establish. All future pleadings regarding compensation for the alternative rail service should be filed in STB Finance Docket No. 35111.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

BACKGROUND

PYCO, a processor and shipper of cottonseed and related products, operates two heavily rail-dependent plants in Lubbock, TX. From 1999 to early 2006, these facilities were served only by SAW. Claiming that SAW was providing inadequate rail service, PYCO came before the Board seeking measures to remedy its concerns.

First, PYCO sought emergency alternative rail service under 49 U.S.C. 11123(a) and 49 CFR part 1146. To address what it found to be a measurable deterioration in the rail service SAW provided to PYCO, the Board ordered SAW to allow WTL to provide emergency alternative rail service to PYCO's two Lubbock plants over SAW's rail lines, in decisions served on January 26, February 24, and June 21, 2006, in STB Finance Docket No. 34802.

During the summer of 2006, PYCO believed (correctly, as it turned out) that it would continue to need an alternative service provider for many more months. Because an order under section 11123 may not last more than 270 days, on July 3, 2006, PYCO filed a petition under 49 U.S.C. 10705(a) and 11102(a) and 49 CFR part 1147 for an order requiring SAW to allow WTL to provide temporary alternative rail service to PYCO over SAW's lines. While that petition was pending, SAW agreed to a 30-day extension of the emergency alternative rail service, and, accordingly, we authorized WTL to provide such service to PYCO through November 22, 2006.² In STB Finance Docket No. 34889, the Board issued an order on November 21, 2006, under 49 U.S.C. 11102(a) and 49 CFR part 1147.1, requiring SAW to allow WTL to provide temporary alternative rail service beginning November 23, 2006.

That order spawned a series of motions and petitions. The day after we served the temporary alternative rail service order, SAW moved to terminate temporary alternative service, arguing that there were no serious service problems warranting that relief. In February 2007, SAW filed an emergency petition for partial modification of the operating protocols that governed during the period of alternative rail service. In that petition, SAW again asked the Board to terminate the temporary alternative rail service, arguing (for the first time) that the order was void for having failed to adequately secure compensation before that service began. Subsequently, the parties filed other motions in STB Finance Docket No. 34889, including PYCO's "emergency motion to prevent further retaliatory actions"; PYCO's motion to permit inspection and repair; and SAW's petition to reopen a switch that was closed by WTL in order to serve PYCO.

In March 2007, SAW filed a complaint against the Board in U.S. District Court. SAW alleged that the temporary alternative rail service order was void because the Board had not

² PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802, et al., slip op. at 2 (STB served Aug. 18, 2006).

adequately secured compensation for SAW before WTL began using SAW's facilities. Among other things, SAW sought a writ of mandamus ordering the Board to vacate the temporary alternative service order and an injunction preventing the Board from enforcing that order. The government moved to dismiss the complaint for lack of district court jurisdiction. The district court granted the motion to dismiss, and SAW has appealed that dismissal to the U.S. Court of Appeals for the Fifth Circuit, where it is currently pending.³

Meanwhile, in June 2006, seeking a more permanent solution to its service difficulties, PYCO filed an application to acquire SAW's rail lines under the feeder line provision at 49 U.S.C. 10907, in STB Finance Docket No. 34890. The Board approved that application, as well as a competing application filed by Keokuk Junction Railway Company (KJRY), and allowed SAW to select between the two eligible buyers.⁴ SAW selected PYCO and, on November 9, 2007, the lines were sold to PYCO.

On December 13, 2007, SAW filed a petition in STB Finance Docket No. 35111 seeking compensation for WTL's use of its facilities for both the emergency and temporary alternative rail service. SAW also asks that we set a schedule to govern further filings in that proceeding. PYCO and WTL have filed a joint reply to SAW's petition.

DISCUSSION AND CONCLUSIONS

Pending Requests for Board Action in STB Finance Docket No. 34889.

The parties filed numerous diverse pleadings throughout the period of temporary alternative rail service, some of which are still pending. These include SAW's requests that we terminate alternative rail service, modify the operating protocols under which the alternative service was coordinated, and authorize SAW to reopen a switch to a spur along trackage designated for alternative rail service. They also include PYCO's requests that we stop SAW from taking retaliatory actions during the period of emergency service, and that we order access to SAW's yard in Lubbock for the purpose of inspection and repair of the trackage used for alternative rail service. Now that the lines have been sold to PYCO, there is no longer any temporary alternative service being conducted, and all of these pending requests will be dismissed as moot.⁵

³ South Plains Switching, Ltd. Co. v. STB, No. 5:07-CV-047-C (N.D. Tex. Sept. 25, 2007), appeal docketed, No. 07-11121 (5th Cir. Oct. 25, 2007).

⁴ See PYCO Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., STB Finance Docket No. 34890, and Keokuk Junction Railway Co.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., STB Finance Docket No. 34922 (STB served Aug. 31, 2007) (Feeder Line Decision).

⁵ The numerous motions and counter motions filed by each party regarding these issues are also moot.

Compensation Request in STB Finance Docket No. 35111.

Under sections 11102(a) and 11123, the carriers involved have initial responsibility for attempting to establish the compensation for the use of the facilities. See 49 U.S.C. 11102(a), 11123(b)(2). If the carriers cannot agree, then the Board may determine appropriate compensation. Id. Section 11102 (but not section 11123) further provides that the compensation is to be paid or “adequately secured” before service under that provision begins.

Here, WTL and SAW did not agree on compensation for either type of alternative rail service, nor did they inform the Board that they were unable to do so prior to WTL’s initiation of the temporary alternative rail service under section 11102. SAW’s petition in STB Finance Docket No. 35111, filed December 13, 2007, is the first request the Board has received to determine compensation for WTL’s use of SAW’s facilities.

WTL and PYCO argue that SAW has waived the right to seek compensation because it failed to timely ask the Board to set the terms of compensation, failed to negotiate compensation, and sought a district court order to compel the Board to vacate the temporary alternative service order on the ground that it was void. We disagree. A waiver is the intentional relinquishment or abandonment of a known right.⁶ Because SAW has never indicated to us that it intended to relinquish or abandon its right to ask us to determine appropriate compensation, we find no such waiver.

Nor has SAW forfeited its right to seek compensation by waiting until now to ask us to resolve the issue. Forfeiture is the failure to timely assert a right.⁷ Neither section 11102 nor section 11123 specifies a time frame within which a party must ask the Board to determine compensation. Rather, as noted above, those provisions assign initial responsibility to the carriers to resolve the issue. It can take many months for parties to determine whether or not they can agree on compensation.⁸ Therefore, an order authorizing alternative rail service affords the parties an opportunity to negotiate compensation.⁹ Because negotiations take time and

⁶ United States v. Olano, 507 U.S. 725, 733 (1993); Harris v. Secretary, U.S. Dep’t of Veterans Affairs, 126 F.3d 339, 343 n.2 (D.C. Cir. 1997). A valid waiver must be both voluntary and knowing. Moran v. Burbine, 475 U.S. 412, 421 (1986).

⁷ Olano, 507 U.S. at 733.

⁸ See, e.g., Dardanelle & Russellville Railroad Company—Trackage Rights Compensation—Arkansas Midland Railroad Company, STB Finance Docket No. 32625, slip op. at 3 (STB served June 3, 1996) (Dardanelle) (permitting owning railroad to file request for ICC to set terms of compensation 8 months after agency ordered emergency rail service under section 11123).

because we strongly prefer that the parties resolve issues of compensation between themselves, we did not set a deadline for requests to determine compensation.

WTL and PYCO also argue that the equitable doctrine of laches bars SAW's request for compensation. To prevail on a laches claim, WTL and PYCO must show (1) that SAW unreasonably delayed in asking us to determine compensation, and (2) that SAW's delay prejudiced them.¹⁰ As we have explained, sections 11102(a) and 11123(a) do not anticipate that compensation will necessarily be worked out within a specific time frame. Therefore, the mere passage of time is not inherently unreasonable. WTL and PYCO contend that the delay here was unreasonable because SAW failed to diligently pursue negotiations. It appears that the parties here made only sporadic attempts to negotiate compensation, and that the last correspondence on the matter occurred in February 2007. It thus may well be that SAW should have filed its petition for compensation before December 2007, although we do not rule out the possibility that SAW may have a legitimate explanation for the delay.

But we need not resolve the question of whether SAW's delay was unreasonable because WTL and PYCO have failed to show that the delay prejudiced them. WTL and PYCO argue that, by waiting until the conclusion of all alternative rail service to seek lost profits, SAW has prejudiced them in that they are no longer able to adjust their contractual relationship to take into account paying profits to SAW. At most, however, this is an argument that laches should bar SAW from claiming lost profits, not all compensation.

In any event, we find the argument unpersuasive. WTL and PYCO have long been aware that SAW believes that it is entitled to compensation, including lost profits, for WTL's use of SAW's lines. As they acknowledge, in early March 2006—long before the temporary alternative rail service order—SAW tendered to WTL a request for compensation for the emergency alternative service that constituted a “demand for profit.”¹¹ And, in December 2006, SAW demanded payment from WTL and PYCO of \$75 per carload for the use of its facilities under

⁹ See Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 980 (1998) (Expedited Relief) (rejecting suggestion that Board initially set terms of compensation when ordering emergency or temporary alternative rail service). A request for compensation is not (as WTL and PYCO suggest) a petition for “reconsideration” of such an order and need not be filed within 20 days. And, contrary to WTL and PYCO's claim, SAW appropriately paid a single filing fee of \$200. See 49 CFR 1002.2(f)(88) (setting filing fee of \$200 for STB adjudicatory services not otherwise covered).

¹⁰ See 3750 Orange Place Limited Partnership v. NLRB, 333 F.3d 646, 665 (6th Cir. 2003).

¹¹ Reply to South Plains Switching Ltd's “Petition for Compensation” (Reply) at 8-9.

the alternative service orders¹²—a figure that WTL and PYCO assert included lost profits.¹³ Had WTL and PYCO believed at any time that an agreement with SAW was not possible and that they would be prejudiced by continued uncertainty over SAW's entitlement to lost profits or any compensation at all, they need not have waited for SAW to file a petition for us to set compensation—they could have filed their own petition asking us to establish the terms of compensation or sought a declaration that SAW was entitled to no compensation. We conclude, then, that laches does not bar SAW's request that we determine compensation.

We now outline the appropriate formula for determining the level of compensation owed to SAW, which seeks compensation for both types of alternative rail service. We address each type in turn.

Emergency Alternative Rail Service

It is well established that an incumbent railroad is entitled to fair compensation for the use of its facilities pursuant to an emergency alternative service order, but not for lost profits.¹⁴ In determining what constitutes fair compensation, we do not start from a blank slate. Our predecessor, the Interstate Commerce Commission (ICC), established a formula for determining compensation for the use of a rail line under 49 U.S.C. 11123.¹⁵ As it stated in Dardanelle, slip op. at 3-4, compensation should consist of three components: (1) the variable cost incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks; (2) the tenant carrier's proportionate share of the track's maintenance and operation expenses; and (3) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track.

Under the first element of the Dardanelle formula, the agency has traditionally used regional data from our Uniform Railroad Costing System (URCS) to approximate variable cost.¹⁶ SAW is free to provide fully supported actual cost data, which would be the most accurate information, and if it does, WTL and PYCO may respond to SAW's cost presentation. However, in the absence of such data, the Board will rely on regional URCS data.

¹² Letter from Thomas MacFarland, filed Dec. 28, 2006 in STB Finance Docket No. 34890, Exh. E (requesting the Board's informal assistance in receiving compensation for WTL's use of SAW's facilities, attaching letters to WTL and PYCO demanding compensation).

¹³ Reply at 25.

¹⁴ Expedited Relief, 3 S.T.B. at 980.

¹⁵ ICC precedent applies to the Board unless and until modified by the Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 204(a), 109 Stat. 803, 941.

¹⁶ See Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for all Regulatory Costing Purposes, 5 I.C.C.2d 894 (1989).

The second element incorporates WTL's proportionate share of maintenance and operating expenses during its use of SAW's tracks. This element will factor in any offset due to expenditures made by WTL or PYCO to make repairs to SAW's lines. The parties should provide sufficient proof of those expenditures.

Finally, to apply the third element in the calculation, the Board must determine the value of the line, the appropriate interest or rental rate, and the proportionate usage of the tenant carrier. As noted in Dardanelle, the Board will develop the rental or interest rate by using the current nominal pre-tax cost of capital. There are various methods that could potentially be used to determine the value of the line.¹⁷ Here, we believe that a net liquidation value (NLV) method—the method the ICC used in Dardanelle—is most appropriate. Unlike some other methods, the NLV computation does not require the use of the Board's Uniform System of Accounts, which does not apply to small carriers such as SAW.¹⁸ Moreover, in the related feeder line cases, we recently employed an NLV approach in determining the constitutional minimum value of SAW's Lubbock lines, a portion of which WTL used to provide alternative service to PYCO.¹⁹

None of the parties has discussed the Dardanelle formula. SAW contends that it is entitled to the fair market value of WTL's use of SAW's trackage to provide service to PYCO, which, it claims, is comparable to the value reflected in a contemporaneous agreement that SAW had with BNSF Railway Company (BNSF) for BNSF's use of SAW's trackage located in Burris, TX, to serve a different shipper. But there are many potential differences between BNSF's use of SAW's Burris tracks and WTL's use of SAW's Lubbock tracks. The variable costs, operating and maintenance expenses, and proportionate usage of the tracks, among other things, all may differ. Moreover, WTL and PYCO have submitted evidence that BNSF agreed to pay SAW \$75 per carload to use SAW's Burris tracks to settle a lawsuit in which SAW claimed lost profits,²⁰ which, we have noted, are not recoverable. Because SAW has not demonstrated that the circumstances surrounding the BNSF agreement are similar to the circumstances here, we do not regard that agreement as particularly relevant.

With regard to the position taken by WTL and PYCO, their extensive calculations regarding compensation would appear to pertain to at least some of Dardanelle's elements, but they do not explicitly present their analysis in the Dardanelle framework. Accordingly, to ensure that we have all the evidence we need to resolve the issue of compensation, we will order the

¹⁷ These methods include: capitalized earnings; stand-alone costs; reproduction cost new less depreciation; comparable line segments; and net liquidation value (NLV).

¹⁸ See 49 CFR 1201, General Instruction 1-1(c).

¹⁹ Feeder Line Decision, slip op. at 30.

²⁰ Reply, Exh. G.

parties to submit evidence specifically addressing the three Dardanelle elements as they relate to WTL's use of SAW's Lubbock tracks.²¹ Should the parties wish to submit evidence under some other methodology as well, they should explain why that methodology is superior to the Dardanelle methodology.

Temporary Alternative Rail Service

Under section 11102(a), the Board "may establish . . . compensation for the use of the facilities under the principle controlling compensation in condemnation proceedings." Under this section, we employ a formula similar to the one used to determine compensation under section 11123(a).²² And, as with an emergency alternative service order, the carrier ordered to make its facilities available is not entitled to lost profits.²³

SAW nevertheless claims that it is entitled to the full division of the revenues on each loaded car of PYCO traffic transported by WTL that SAW would have earned had it provided that service. SAW reasons that the Board's alternative rail service order was unlawful because compensation was neither paid nor "adequately secured" before WTL began using SAW's lines, as required by 49 U.S.C. 11102(a). Thus, SAW argues, there was no lawful basis for WTL's use of SAW's facilities, and, accordingly, it was unlawfully deprived of its portion of the revenues on PYCO traffic.

SAW is not in a good position to make this claim given its own conduct. These proceedings arose, and WTL's services were required, only because SAW failed to provide adequate service to PYCO itself in violation of its statutory obligation under 49 U.S.C. 11101. And SAW did not oppose on the merits PYCO's July 2006 request that the Board provide for temporary alternative rail service during the pendency of the feeder line application, nor did SAW raise any issue concerning compensation before we ordered that service. Although SAW is entitled to compensation for the use of its property, it strikes us as disingenuous for SAW to now seek to wholly expropriate the fruits of WTL's good-faith efforts to mitigate the impact of SAW's transgressions. In any event, as we explain below, SAW's argument is based on an

²¹ WTL and PYCO oppose SAW's request that we establish a procedural schedule, arguing that SAW was required to ascertain and collect all of the facts on which it intended to rely before filing its petition for compensation. But the authority on which they rely is not on point. The decision in Burlington Northern Railroad Company—Abandonment Exemption—Between Klickitat and Goldendale, WA, STB Docket No. AB-6 (Sub-No. 346X) (STB served June 8, 2005), involved a request that would have impermissibly allowed the petitioners to file a reply to a reply. Here, SAW has not sought to file a reply to a reply.

²² See St. Louis Southwestern Railway Company—Trackage Rights Over Missouri Pacific Railroad Company—Kansas City To St. Louis, 5 I.C.C.2d 525, 526 (1989).

²³ Expedited Relief, 3 S.T.B. at 980.

erroneous predicate, as compensation was “adequately secured,” and, even if it had not been, a failure to adequately secure compensation would not render our order void.

SAW’s right to compensation has always been protected.²⁴ Compensation is “adequately secured” within the meaning of section 11102(a) when the Board makes it known that it will establish the terms of compensation if the parties are unable to agree. Here, we discharged our duty under section 11102(a) to adequately secure compensation. In Expedited Relief, we made it clear that, in accordance with the statute, the carriers involved in an alternative service order under section 11102(a) must first attempt to negotiate compensation and that we will set compensation only if the parties’ negotiations fail.²⁵ We made clear that, in such circumstances, an “incumbent carrier is entitled to fair compensation.”²⁶ We declined at that time to prescribe a compensation formula applicable to all situations, saying instead that “where appropriate, we will be guided by established precedent, taking into account the circumstances of the particular case.”²⁷ These statements expressed the Board’s commitment to determine compensation if parties affected by an order under section 11102(a) cannot agree on compensation. Thus, although our order here authorizing temporary alternative rail service did not contain an explicit statement that we would address the (as yet unraised) issue of compensation if the parties could not ultimately agree, it was implicit and understood given (1) our policy statement in Expedited Relief, (2) our citation to the statutory provision that entitles SAW to compensation, and (3) our continuing supervision of the alternative service proceeding.²⁸ Under the circumstances, no party could reasonably doubt that we would, if called upon, determine appropriate compensation for WTL’s use of SAW’s facilities.²⁹

²⁴ See Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) (Southern Pacific) (holding that ICC adequately secured compensation under predecessor to section 11102(a) where agency ordered parties to negotiate the terms of compensation and stated that, in absence of agreement, it would determine compensation), cert. denied, 469 U.S. 1208 (1985); Florida East Coast Ry. Co. v. United States, 256 F. Supp. 986, 988 (M.D. Fla. 1966) (Florida East Coast Ry.) (implying that compensation was adequately secured when ICC retained jurisdiction after ordering joint use of terminal facilities under predecessor to section 11102(a)).

²⁵ Expedited Relief, 3 S.T.B at 980.

²⁶ Id.

²⁷ Id.

²⁸ E.g., PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34889 (STB served Aug. 10, 2007).

²⁹ We later reconfirmed, in our decision ordering the sale of SAW’s Lubbock lines, that “the Board will set the compensation for WTL’s use of SAW’s rail lines if the parties cannot agree.” Feeder Line Decision, slip op. at 5 n.13.

SAW nevertheless takes the view that—even though it had not raised compensation issues with the Board in advance—our temporary alternative service order was void and beyond repair for failure to adequately secure compensation before the alternative service began. We disagree. Even if our statement in Expedited Relief, our citation to the compensation provisions, and our retention of jurisdiction were not deemed as adequately securing compensation for purposes of section 11102(a), SAW would not be entitled to lost profits for the period of temporary alternative rail service because, as explained below, our order authorizing that service was not void.

Generally, an agency may validly act after a statutory deadline unless the statute both expressly requires official action within a particular time period and imposes a consequence for failure to comply with that time period.³⁰ This rule promotes the principle of public policy that precludes the public interest from being prejudiced by inadvertent omissions of the officers or agents to whose care the public interest is entrusted.³¹ In general, the proper recourse for a party aggrieved by agency delay that violates a statutory deadline is to apply to the appropriate court for an order compelling agency action.³²

SAW does not explain why these principles should not apply to the situation here, and thus its argument that it is entitled to all profits from WTL’s performance of services that SAW should have performed cannot be accepted. Although section 11102(a) provides that “compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section,” it does not specify that the payment or securing of compensation after rail service begins renders an alternative rail service order void. Rather, section 11102(b) provides that an owning carrier dissatisfied with Board-imposed conditions for the use of its facilities, or which does not receive compensation promptly, may bring a civil action to recover compensation from the alternative service provider.³³ Accordingly, the statutory text indicates that our order authorizing alternative rail service was not void.³⁴

³⁰ United States v. James Daniel Good Real Property, 510 U.S. 43, 63 (1993); United States v. Montalvo-Murillo, 495 U.S. 711, 717-21 (1990); Shenango, Inc. v. Apfel, 307 F.3d 174, 193 (3d Cir. 2002) (“[A] statutory deadline does not, by itself, establish that Congress intended to strip an agency’s authority to act after the deadline has passed.”).

³¹ Brock v. Pierce County, 476 U.S. 253, 260 (1986).

³² Gottlieb v. Pena, 41 F.3d 730, 734 (D.C. Cir. 1994).

³³ 49 U.S.C. 11102(b).

³⁴ Brotherhood of Ry. Carmen Div., Transp. Commc’ns Int’l Union v. Pena, 64 F.3d 702, 704 (D.C. Cir. 1995).

We are aware of nothing in the relevant legislative history that would suggest that Congress intended noncompliance with this timing provision to render void an agency order authorizing alternative rail service.³⁵ Indeed, such a result would make little sense. Under section 11102(a), the Board may authorize alternative rail service only if it finds such service to be in the “public interest.” To conclude that such authorization is void because compensation was paid or secured after temporary alternative rail service began would prejudice the very public interest that section 11102(a) is designed to promote. We do not think that Congress intended such a result,³⁶ especially when less drastic remedies are available, such as seeking a mandamus order from an appropriate court to compel the agency to determine compensation,³⁷ or bringing a civil action to recover compensation.³⁸ In addition, as we noted above, such a rule would result in a windfall to the incumbent carrier while depriving carriers like WTL, which in good faith provided alternative rail service based on a presumptively valid Board order, of all revenues from those services. Again, we do not believe that Congress intended such a result, especially when the incumbent carrier may be made whole simply through an award of appropriate compensation.³⁹

³⁵ The timing language arose in the Transportation Act of 1920, ch. 91, 41 Stat. 456, 480. The relevant committee reports do not suggest that an alternative rail service order would be void if compensation is not paid or adequately secured before alternative rail service begins. See, e.g., H.R. Rep. No. 66-650, at 62 (1920) (summarizing provision allowing ICC to require joint use of terminals and other facilities upon such terms and conditions as the agency might prescribe); H.R. Rep. No. 66-456, at 18 (1919) (summarizing joint-use provision and emphasizing the importance to the public of allowing joint use in appropriate cases).

³⁶ See Brock, 476 U.S. at 260.

³⁷ Gottlieb, 41 F.3d at 734; 5 U.S.C. 706(1).

³⁸ 49 U.S.C. 11102(b).

³⁹ We do not understand SAW to be arguing that section 11102(a) required that we set compensation (as opposed to merely adequately secure it) before WTL began providing alternative rail service. But even if SAW’s petition could be construed as raising such an argument, we would reject it as directly contrary to the statutory language, which requires that compensation be “paid or adequately secured.” Moreover, it would undermine the objectives of the statute. As we have explained, under section 11102(a), the Board does not set compensation until the parties themselves have tried and failed to resolve the issue through negotiations. That whole process can, in practical terms, take many months. Here, barring WTL from continuing to provide alternative service until compensation was not only “secured,” but also set, would have undermined the public interest by leaving PYCO without adequate rail service, contrary to the goals of the statute and our implementing regulations regarding relief available to shippers in circumstances like these.

Accordingly, as with the period of emergency alternative rail service, we direct the parties to submit evidence addressing the Dardanelle elements as they relate to WTL's use of SAW's Lubbock tracks for the period of temporary alternative rail service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The following motions and petitions in STB Finance Docket No. 34889 are denied as moot: SAW's petition to terminate alternative service, filed on November 22, 2006; SAW's supplemental petition to terminate alternative service, filed on February 15, 2007; SAW's second supplemental petition to terminate alternative service, filed on April 18, 2007; SAW's emergency petition for partial modification of the operating protocols, filed on February 15, 2007; PYCO's "emergency motion to prevent further retaliatory actions," filed on August 1, 2007; PYCO's motion to permit inspection and repair, filed on August 8, 2007; SAW's petition to reopen a switch, filed on August 27, 2007; and all motions and counter motions dealing with the aforementioned motions and petitions.

2. STB Finance Docket Nos. 34889 and 34802 are terminated, and the parties are directed to file all future pleadings regarding compensation for the periods of emergency alternative rail service and temporary alternative rail service in STB Finance Docket No. 35111.

3. SAW's request for a procedural schedule in STB Finance Docket No. 35111 is granted as follows. The parties shall have 30 days from the date of service of this decision to file with the Board the evidence necessary for the Board to set compensation for the use of SAW's lines in accordance with the discussion above. Replies shall be due 45 days from the date of service of this decision.

4. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary