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SERVICE DATE – DECEMBER 15, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35111

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

Decided: December 12, 2008

The Board previously authorized West Texas and Lubbock Railway Company (WTL) to provide alternative rail service to PYCO Industries, Inc. (PYCO) over the rail lines of South Plains Switching, Ltd. Co. (SAW) from January 27, 2006, through November 9, 2007. The Board now sets the compensation that WTL must pay for the use of SAW's lines at \$99,087.37, plus interest.

BACKGROUND

Alternative Rail Service. PYCO, a processor and shipper of cottonseed and related products, operates two heavily rail-dependent plants in Lubbock, TX, at which only SAW formerly provided rail service. Because SAW was providing inadequate rail service, PYCO sought emergency alternative rail service under 49 U.S.C. 11123(a) and 49 CFR part 1146. To address the measurable deterioration in the rail service SAW provided to PYCO, the Board authorized WTL to provide emergency service to PYCO's Lubbock plants over SAW's rail lines beginning January 2006.¹ The relevant statutory section limits emergency service to 270 days' duration. 49 U.S.C. 11123(c)(1).

PYCO later filed a petition under 49 U.S.C. 10705(a) and 11102(a) and 49 CFR part 1147 for an order authorizing WTL to provide temporary alternative rail service to PYCO over SAW's lines upon the expiration of emergency service. Upon finding a continuing need for alternative rail service, the Board authorized temporary service.² During both types of alternative rail service, WTL and SAW shared the use of some of SAW's lines; the remainder of SAW's rail lines was divided between those used solely by SAW and those used solely by WTL.

¹ See PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (STB served Jan. 26, Feb. 24, and June 21, 2006).

² See PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34889, et al. (STB served Nov. 21, 2006). Neither the statute nor regulations place a time limit on temporary service.

While alternative rail service was under way, SAW proposed a per-car fee as the compensation owed for WTL's use of SAW's lines.³ PYCO promptly countered with a much lower per-car fee. At this point, negotiations stalled.

Feeder-Line Sale. Meanwhile, seeking a more permanent solution to its service difficulties, PYCO had filed an application to purchase all of SAW's lines under the feeder-line provision at 49 U.S.C. 10907. The Board approved PYCO's application and a competing application filed by Keokuk Junction Railway Company, set the purchase price at \$2.35 million, and allowed SAW to select between the two eligible buyers.⁴ SAW selected PYCO. Consequently, the alternative service ended when the sale closed in November 2007. Since then, WTL has operated all of SAW's former rail lines as the operator chosen by the lines' new owner, PYCO.

This Proceeding. On December 13, 2007, SAW filed a petition seeking compensation for WTL's use of its facilities for both emergency and temporary service. PYCO filed a reply on January 4, 2008.⁵ In a decision served on January 11, 2008 (January 2008 Decision), the Board rejected SAW's proposed \$75-per-car figure for determining compensation, outlined an alternative formula, directed the parties to submit evidence comporting with the formula, and afforded the parties the opportunity to suggest other methods of measuring compensation and to explain why a different method would be superior.

In response, both parties submitted opening statements and replies. In its opening statement, PYCO contended that the Board's proposed formula was proper and yielded an appropriate rental fee for WTL's use of SAW's facilities of just over \$45,000. Claiming an entitlement to even greater offsets for maintenance and repair, however, PYCO argued that SAW was entitled to no net compensation. SAW did not submit evidence under the Board's proposed formula; instead it argued that it was entitled to compensation based on lost hauling revenues and lost rail-car-storage fees, which together, it claimed, amounted to over \$1 million.⁶ In reply,

³ An incumbent railroad is entitled to fair compensation for the use of its facilities by a different carrier. Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 980 (1998) (Expedited Relief).

⁴ PYCO Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., STB Finance Docket No. 34890, et al. (STB served Aug. 31, 2007) (PYCO Feeder Line).

⁵ Throughout this proceeding, PYCO has filed pleadings on behalf of itself and WTL. For brevity, we will refer to these pleadings as PYCO's.

⁶ SAW has designated the amount of its request confidential, presumably because SAW derived it, in part, from possibly commercially sensitive information—the number of loaded cars WTL transported for PYCO during the period of alternative rail service. Accordingly, in this

(continued . . .)

however, SAW changed its position, agreeing to accept PYCO's rental figure of just over \$45,000 "to bring this litigation to an early conclusion."⁷ Six months later, SAW changed its position again, this time in a letter (the SAW letter) withdrawing its previous agreement to the \$45,000 figure, citing the passage of time.

PRELIMINARY ISSUES

SAW Letter. PYCO asks us to strike or ignore the SAW Letter because it constitutes an impermissible "reply to a reply" under 49 CFR 1104.13(c). Alternatively, PYCO argues that, if the SAW Letter were viewed as a motion to reopen the record, the motion should be denied. Yet the letter does not mention reopening the record or admitting additional evidence. Rather, by withdrawing its agreement to PYCO's calculation, SAW instead simply resurrects its position in its opening statement and relies on its earlier evidence concerning the amount owed.

Because the SAW letter does not bring in anything new and in the interest of a complete record, we will deny PYCO's request to strike or ignore the SAW Letter.

PYCO Notice, SAW Motion to Supplement, and PYCO Motion for Leave to File a Subsequent Notice and a Comment. PYCO seeks leave to file a notice informing the Board that: (1) SAW has filed a state-court action against WTL seeking compensation for alternative rail service; and (2) PYCO's post-purchase expenditures for maintenance of SAW's former rail lines now total more than \$600,000. PYCO's notice includes the supplemental declaration of Robert Lacy concerning the maintenance costs. In a reply filed on November 4, 2008, SAW both opposes PYCO's request for leave to file the notice and seeks leave to supplement the record with the Reply Declaration of Larry Wisener, addressing Mr. Lacy's declaration. In a pleading filed on December 3, 2008, SAW opposes PYCO's most recent motion for leave to supplement the record.

We will grant both PYCO's and SAW's requests for leave to supplement the record because the new material contains information that could not have been submitted earlier. For the same reason, we will grant PYCO's motion for leave to file (1) a subsequent notice of recent activity in the state-court action (concerning its removal to Federal court and PYCO's motion to dismiss the action) and (2) a comment on Mr. Wisener's declaration.

(. . . continued)

decision we describe only in general terms the size of SAW's request and its relation to other figures.

⁷ SAW Reply, filed Feb. 25, 2008, at 3.

Finally, SAW asks us to admonish PYCO's counsel for PYCO's many supplemental filings. We decline to admonish counsel in view of the acceptance into the record of both parties' supplemental submissions.

DISCUSSION AND CONCLUSIONS

The rail-line owner and the carrier providing alternative rail service (tenant carrier) are responsible for establishing the compensation to be paid by the tenant carrier for a period of alternative rail service, but when they cannot agree, either party may ask the Board to set the compensation. 49 U.S.C. 11102(a), 11123(b)(2). In adopting the regulations governing authorization of alternative rail service, the Board declined to adopt in the abstract a single method for establishing compensation applicable to all situations because the type of access to an incumbent carrier's facilities could vary widely depending upon the nature of the service inadequacy and the ordered relief.⁸ The Board decided instead that it would be guided by established precedent, while taking into account the circumstances of each case.⁹

The rail-line owner is entitled to fair compensation for the facilities it provides but not for lost profits.¹⁰ Fair compensation consists of the actual costs attributable to, or properly allocated to, a tenant carrier's use of the line, as well as a "rental" component on the value of the line.¹¹ The manner in which the Board calculates these components of compensation may vary with the circumstances and the available evidence.¹²

⁸ Expedited Relief, 3 S.T.B. at 980.

⁹ Id.

¹⁰ Id.

¹¹ See Union Pacific Corporation, Pacific Rail System, Inc. and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company, 366 I.C.C. 462, 589 (1982).

¹² Compare St. Louis Southwestern Railway Company—Trackage Rights Over Missouri Pacific Railroad Company—Kansas City to St. Louis, 1 I.C.C.2d 776, 784, 790-91 (1984) (using (1) incumbent carrier's computation of its actual costs attributable to tenant carrier's use of line in question, and (2) capitalized-earnings approach to calculate line's value) with GS Roofing Products Co. v. STB, 262 F.3d 767, 776-77 (8th Cir. 2001) (GS Roofing) (affirming Board's estimation of costs attributable to tenant carrier's use of rail line based on system-wide averages) and Dardanelle & Russellville Railroad Company—Trackage Rights Compensation—Arkansas Midland Railroad Company, STB Finance Docket No. 32625, slip op. at 3-4 (STB served June 3, 1996) (Dardanelle) (using net liquidation value approach to calculate line's value).

Method for Calculating Compensation in this Case.

Relying on earlier compensation-setting decisions,¹³ in the January 2008 Decision, slip op. at 6, 12, the Board directed the parties to address three components comprising compensation: (1) the variable cost incurred by the owner as a result of the tenant carrier's operations over the owner's track (variable-cost component); (2) the tenant carrier's proportionate share of the expenses for track maintenance and operation (maintenance component); and (3) an interest or rental component designed to compensate the owner for the tenant carrier's use of the owner's capital dedicated to the track (rental component).

SAW's Methodology and Claimed Compensation.

Rather than addressing these three components of compensation, as we directed, SAW proposes a different methodology for calculating compensation that consists of two different components: (1) lost hauling revenue and (2) lost revenue for storing rail cars. Based on these two components, SAW claims that it is entitled to over \$1 million.

Before analyzing SAW's preferred components individually, we note that, when SAW's total claim is considered in context, it becomes clear that SAW cannot be entitled to both components, at least not in the amount that SAW claims. In PYCO Feeder Line, the Board valued the entirety of SAW's rail lines, about 25 miles, at \$2.35 million. Here, SAW seeks over \$1 million for WTL's use for 22 months of about 3.5 miles (or 14%) of those lines. Thus, for WTL's temporary use of a small portion of the lines, SAW seeks about 50% of what PYCO paid to purchase the entirety of the lines. On its face, this strikes us as a greatly inflated claim—one that almost certainly includes lost profits. SAW's willingness earlier in this proceeding to accept a mere \$45,000 as full compensation only reinforces this impression.

Although we do not see how SAW could be entitled to both lost hauling revenue and lost storage fees in the total amount claimed, we must still consider whether SAW is entitled to either of those two components individually. Regarding lost hauling revenue, SAW claims that it is entitled to \$75 for each loaded car that WTL transported for PYCO during the period of alternative rail service. SAW derives the \$75 figure from the per-car fee that BNSF Railway Company (BNSF) agreed to pay SAW for operating over a small portion of SAW's lines referred to as the Burris tracks. SAW seeks to resurrect a methodology for computing compensation for alternative rail service that we have explicitly rejected before. See January 2008 Decision at 7.

¹³ See, e.g., Dardanelle (setting compensation for directed service under 49 U.S.C. 11123); St. Louis Southwestern Ry. Co. Compensation—Trackage Rights, 5 I.C.C.2d 525, 526 (1989) (setting compensation for trackage rights ordered to ameliorate merger-related diminution of competition).

Although we gave SAW the opportunity to persuade us to reconsider, SAW has not convinced us that, in fact, the \$75 per car figure represents “fair compensation . . . but not lost profits”¹⁴ for WTL’s use of SAW’s lines. First, assuming that rental agreements are relevant, SAW does not explain why we should look to the BNSF rental agreement but not to other rental agreements. SAW simply ignores the nearly contemporaneous rental fee of \$1 per year that PYCO paid to lease SAW’s Track 9298 in Lubbock.

Second, even the \$75-per-car fee by itself could include a lost profit, which, as we have noted, is never a valid component of compensation for alternative rail service. SAW argues that the \$75 fee includes no profit because the fee is less than SAW’s per-car costs would be to provide service to a customer located on the Burris tracks. SAW, however, provides no evidence of its own costs to provide this service. Instead, SAW simply argues, without supporting documentation, that its operating ratio (of revenue to costs) is similar to that of another (much larger) rail carrier and that its costs to provide service to the customer on the Burris tracks would “surely” have been higher than \$75 per car. Thus, we cannot rule out the possibility that some profit could be included in the \$75 fee.¹⁵ For these reasons, we reject the claimed per-car fee for calculating the compensation owed in this case.

As for compensation for forgone car-storage fees, SAW argues that the operating protocols governing track use during alternative service prevented SAW from storing cars on 14,180 feet of track.¹⁶ According to SAW, it could have stored 236 railcars on that length of track but for the alternative service. SAW further states—without documentation—that a “reasonable average” storage time is 21 days. As a fee, SAW employs the charges relating to car storage contained in its former tariff (tariff fee). Applying these factors, SAW arrives at a figure of \$923,940 in forgone storage revenue because of WTL’s use of its tracks.

SAW’s argument concerning storage fees is unconvincing. SAW claims that it could have stored cars on tracks that WTL was using either to transport cars or to stage rail cars for one of PYCO’s plants. But PYCO counters that SAW was using the only other routes by which WTL could have gained access to this plant. Because the same tracks cannot simultaneously be used to transport/stage cars and to store cars for other shippers, SAW’s claim lacks merit. PYCO

¹⁴ Expedited Relief, 3 S.T.B. at 980.

¹⁵ See also January 2008 Decision, slip op. at 7 (the \$75 per-car fee settled a law suit in which SAW sought lost profits).

¹⁶ After SAW, PYCO, and WTL agreed on certain operating protocols, the Board imposed additional protocols to help ensure safe operations while two carriers (WTL and SAW) were operating on SAW’s tightly configured rail lines during the period of alternative service. See PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (STB served Feb. 16, 2006).

also points out that, during alternative rail service, WTL did not charge or collect any fees for storing cars on the tracks assigned to it. Thus, WTL did not receive any payments for car storage that otherwise would have gone to SAW. Also, the record lacks any evidence that SAW turned down requests for car storage for lack of capacity. Indeed, PYCO's witness observes that, during alternative rail service, SAW had a significant amount of empty tracks available for car storage because those tracks were not being used to serve SAW's customers or PYCO. Thus, the record contains no evidence from which we could conclude that SAW, WTL, or PYCO has ever collected revenue for the storage of rail cars on the lines that WTL used to provide alternative rail service.

The existence of a tariff fee for storage does not mean that the track at issue was regularly used for storage or could have been so used but for the alternative service. Indeed, SAW provides no evidence that it ever charged or collected this fee from any customers. Nor has PYCO ever charged a storage fee, even though it "adopted" SAW's tariff upon purchasing these lines. Therefore, the existence of the tariff fee at one time does not provide a credible basis for awarding forgone-storage fees as an element of the compensation or for establishing the corresponding amount SAW seeks.

Finally, SAW claims that it is entitled to payment of interest. This contention is discussed below in the Board's calculation of the compensation.

PYCO's Methodology and Claimed Compensation.

In its evidence in response to the January 2008 Decision, PYCO does not address variable costs (first component) because SAW does not claim that it incurred any such costs. Likewise, PYCO does not calculate any amount for maintenance (second component) because, although SAW states that it performed some track maintenance during alternative service, SAW provides no corroborating evidence.¹⁷

PYCO extensively addresses the third component—interest or rental to compensate for the tenant carrier's use of the owner's track. The rental component consists of the value of the physical plant used for alternative service multiplied by the railroad industry's cost of capital.¹⁸ To determine the value of the physical plant, PYCO first calculates the gross salvage value of the track and related materials and deducts removal costs and salvager overhead and profit. PYCO

¹⁷ In a response to a discovery request, SAW claimed that it performed some maintenance on portions of Track 9298, which was assigned solely to WTL. SAW did not provide any documentation of these maintenance expenses and did not rely upon these expenses in its request for compensation.

¹⁸ See Dardanelle, slip op. at 4.

adds the resulting net salvage value of track and materials to the value of the land in the corresponding right-of-way to arrive at the net liquidation value (NLV) for the portion of SAW's rail lines used by WTL. PYCO next multiplies the NLV by the after-tax cost of capital¹⁹ to ascertain the rental owed. We describe PYCO's calculation more fully below.

1. Net Salvage Value. Initially, PYCO ascertains the length of track in the WTL-used rail lines, employing the entire length of the WTL-only tracks and 50% of the length of the shared tracks. See Appendix A. PYCO makes an adjustment concerning Track 310, which nominally was assigned to shared use. PYCO points out that WTL was able to use this track on only two occasions. During the rest of the time, PYCO contends, SAW used the track to serve other shippers. Accordingly, PYCO removes Track 310 from the length of the shared track. SAW does not dispute PYCO's track-length calculation.

Nor does SAW dispute PYCO's values for grade (quality) of the rail and other track materials. See Appendix A. PYCO's expert conducted an on-site inspection of the track used for alternative rail service and observed that it is, at most, 90-pound rail. Nevertheless, PYCO assumes, favorably to SAW, that the rail is entirely 90-pound. PYCO makes another assumption in SAW's favor: that the rail is entirely of re-roll quality, rather than including some scrap-quality rail. Applying these assumptions and the same unit-values used in PYCO Feeder Line, PYCO calculates the gross salvage value of the track used in alternative service.

Likewise, SAW does not dispute PYCO's deductions from gross salvage value: (1) the cost of taking up the track and materials and (2) contractor overhead and profit. Subtracting these figures from gross salvage value yields a net salvage value of \$137,517.94, as set forth in Appendix A.

2. Land Value and NLV. PYCO assumes that the right-of-way is 50 feet wide, which results in 6 acres of land per track-mile.²⁰ PYCO multiplies 6 acres by the length of track used in alternative rail service to yield total acreage.²¹ PYCO next multiplies the total acreage by \$4,000 per acre and deducts a 15% cost of liquidating the property. This calculation yields a total land

¹⁹ The Board uses its annual calculation of the railroad industry's cost of capital in various regulatory proceedings, including prescribing maximum reasonable rate levels, evaluating a proposed rail-line abandonment, and, as here, setting compensation for use of another carrier's line. See Railroad Cost of Capital—2006, STB Ex Parte No. 558 (Sub-No. 10), slip op. at 1 (STB served Apr. 15, 2008) (2006 Cost of Capital).

²⁰ PYCO states that the assumption is generous because many of SAW's former rail lines have a 30-foot wide right-of-way.

²¹ PYCO assigned the full acreage for WTL-only track and 50% of the acreage for shared track.

value of \$83,640. Adding this land value to the net salvage value of track and materials, PYCO arrives at a total NLV of \$221,157.94, as shown in Appendix B, left column.

3. Cost of Capital. PYCO multiplies its NLV figure by the after-tax cost of capital, using the cost-of-capital figure that had most recently been published at the time the alternative rail service was being performed. Consequently, for the alternative service occurring between January 27 and June 19, 2006, PYCO uses the 2004 after-tax cost of capital of 10.1%.²² For the remainder of the alternative service period, from June 20, 2006, through November 9, 2007, PYCO uses the 2005 after-tax cost of capital of 12.2%.²³ PYCO converts the duration of each time period into fractions of a year, as shown in Appendix B, left column.

4. Resulting Compensation. Multiplying the after-tax cost of capital by the corresponding fractions of years and the NLV yields a total compensation of \$45,116.22. But PYCO argues that there should be setoffs to that amount, discussed below.

5. Setoffs for Repairs and Maintenance. PYCO argues that any compensation should be offset by PYCO's and WTL's expenditures for maintenance and repairs to SAW's rail lines.²⁴ PYCO relies on a decision stating that SAW had the responsibility to inspect and adequately maintain the trackage used by WTL during alternative service.²⁵ Subtracting PYCO's claimed maintenance offset (\$97,610.36) from its calculation of compensation (\$45,116.22) would result in WTL owing no compensation for its use of SAW's rail lines during alternative service. See Appendix B, left column.

²² See Railroad Cost-of-Capital—2004, STB Ex Parte No. 558 (Sub-No. 8) (STB served June 30, 2005). The Board authorized alternative service beginning at 11:59 pm on January 26, 2006, effectively making January 27 the first day.

²³ See Railroad Cost of Capital—2005, STB Ex Parte No. 558 (Sub-No. 9) (STB served Sept. 20, 2006).

²⁴ PYCO also contends that, if the Board adopts a per-car method of calculating compensation, PYCO would be entitled to a setoff of WTL's costs of providing certain services to SAW's customers during the period of alternative service. PYCO and SAW made this arrangement to avoid congestion on shared tracks. This issue requires no discussion because we do not use a per-car formula here.

²⁵ PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802, et al., slip op. at 8 (STB served June 21, 2006).

Board's Calculation of Compensation.

We explained in the January 2008 Decision that using the three-component method is appropriate here because it comports with precedent in other compensation-setting cases; uses the NLV method employed in comparable feeder-line cases; and comports with the recent calculation of the NLV of SAW's rail lines in PYCO Feeder Line. As explained above, SAW's reasons for using a per-car method are not convincing and would not produce a result superior to that under the three-component method. Therefore, we adhere to the method outlined in the January 2008 Decision.

In applying that methodology here, however, we address only the rental component because SAW does not claim any variable costs (first component) and does not document any maintenance or repair expenses (second component). We agree with many of PYCO's calculations, although we revise PYCO's figures for land value, cost of capital, and offsets.

1. Net Salvage Value of Track and Materials. We accept PYCO's calculation of the net salvage value of track and materials (\$137,517.94) because it relies on the values of the same tracks established in PYCO Feeder Line, which was decided during the period of alternative rail service. Also, PYCO reasonably excluded Track 310's materials from the shared tracks because PYCO was able to use that track only twice due to SAW's heavy use.

2. Land Value. PYCO assumes that the right-of-way is 50 feet wide. In comparison with the evidence in the related feeder-line proceeding, this assumption is generous to SAW and therefore acceptable. An adjustment to the corresponding amount of acreage is necessary because PYCO does not eliminate the land corresponding to Track 310. As discussed above, it is correct to eliminate Track 310 from the materials in the shared trackage. For consistency, the corresponding land (3.18 acres) must also be removed, as shown in Appendix C.

Turning to the value of the land, PYCO mistakenly uses only one unit-value, \$4,000 per acre. In PYCO Feeder Line, on which PYCO claims reliance, the Board used two unit-values depending on the location of the land, either east or west of Martin Luther King Boulevard in Southeast Lubbock. As the Board explained, id., slip op. at 16, the area west of the boulevard is composed of small-to-medium-sized industrial sites and the comparison sales were expressed in dollars per square foot. Using these sales, the Board calculated an average price of \$0.55 per square foot for the area west of the boulevard. For the land east of the boulevard, the comparison sales were expressed in acres, with an average of \$4,000 per acre.²⁶ (The two figures are not equivalent; \$0.55 per square foot equals slightly under \$24,000 per acre.) Because PYCO does not explain the reason for applying only one of the unit-values, we will use the location based

²⁶ In using these two unit values, we credited evidence presented by PYCO. See PYCO Feeder Line, slip op. at 16, 18.

unit-values employed in PYCO Feeder Line. The corresponding land value is \$207,734.20, as shown in Appendix C.

3. Resulting NLV. Adding the net salvage value of tracks and materials to the land value yields an NLV of \$345,252.14 as shown in Appendix B, right column.

4. Cost of Capital. We disagree in two respects with PYCO’s cost-of-capital figures. First, PYCO uses the after-tax cost of capital. But for consistency with the NLV calculations in PYCO Feeder Line (valuing these rail lines) and Dardanelle (compensation for use of a different carrier’s rail line), we will use the pre-tax cost of capital.

Second, consistent with precedent,²⁷ we will apply the cost of capital corresponding to the years in which the alternative service occurred—2006 and 2007—because those figures are now available.²⁸ The 2006 and 2007 figures more accurately represent SAW’s cost of keeping its assets tied up in these tracks during those years than do the 2004 and 2005 figures PYCO used. The 2006 pre-tax cost of capital is 14.98%; the 2007 figure is 17.24%, as shown in Appendix B, right column.²⁹ In 2006, alternative rail service occurred from January 27 through December 31, a period of 339 days (0.93 year); and, in 2007, from January 1 through November 9, a period of 313 days (0.86 year). Multiplying these fractions by the corresponding year’s pre-tax cost of capital and the NLV results in a total compensation of \$99,087.37, as shown in Appendix B, right column.

5. Interest until Date of Payment. Citing a Board regulation and the law of condemnation, SAW claims entitlement to interest on the amount of compensation until date of payment.

SAW bases its condemnation-law claim on language in 49 U.S.C. 11102(a) providing that, when the parties are unable to agree, the Board “may establish . . . compensation for use of [the owner’s] facilities under the principle controlling compensation in condemnation proceedings.” In a condemnation proceeding, if the government pays the owner at or before the time it takes the property, no interest is due on the award.³⁰ But if payment is delayed, “the

²⁷ See Dardanelle, slip op. at 7.

²⁸ See 2006 Cost of Capital; Railroad Cost of Capital—2007, Ex Parte No. 558 (Sub-No. 11) (STB served Sept. 26, 2008).

²⁹ Applying a 37% total tax rate to the after-tax cost of capital yields the pre-tax cost of capital.

³⁰ Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 11 (1984).

owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.”³¹

Here, when alternative service concluded on November 9, 2007, SAW became entitled to a rental fee of \$99,087.37 to compensate it for WTL’s use of its rail lines. Because payment has been delayed, SAW is entitled to interest sufficient to compensate it for the lost use of that money.³² Although our regulation on interest, 49 CFR 1141.1, applies to investigation and complaint proceedings, we may rely on that regulation as a guide to exercising our authority to establish the terms of compensation for a carrier’s use of a different carrier’s rail line,³³ as the Board has previously done.³⁴

PYCO argues that SAW is not entitled to interest because it failed to negotiate in good faith, it failed to timely request that the Board establish the amount of compensation, and it delayed resolution of the compensation question by pursuing relief in the wrong forum. PYCO argues that SAW should not be rewarded with interest, or held harmless with an award of interest, for its own delays.³⁵ We find this argument unconvincing because depriving SAW of interest here might prompt rail line owners in future cases to file protective petitions for compensation before negotiations have truly reached an impasse. This would undermine our strong preference that the parties in alternative service proceedings resolve compensation issues between themselves. Also, for those cases where the parties cannot agree on compensation, we are reluctant to invite further disputes over which party is responsible for how much delay. Rather than wading into such disputes, we note that any party who believes that negotiations have reached an impasse may ask us to set the terms of compensation or to set a deadline by which such a request must be made. Even in cases where a rail line owner has unnecessarily delayed asking the Board to set compensation, we see no reason why an alternative service provider should receive a windfall in the form of interest-free use of funds that are owed to the rail line owner. Finally, PYCO cites no authority supporting the denial of interest. For these reasons, we will adhere to the general rule that interest on delayed payment is appropriate.

³¹ Id.

³² See id.

³³ See 49 U.S.C. 11102(a); 49 U.S.C. 11123(b)(2).

³⁴ See Caddo Antoine and Little Missouri Railroad Company—Feeder Line Acquisition—Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR, 4 S.T.B. 610, 626 (2000), aff’d in relevant part and rev’d on other grounds in part, GS Roofing.

³⁵ PYCO’s Reply to SAW’s Petition for Compensation, filed Jan. 4, 2008, at 36.

SAW is thus entitled to interest. Consistent with our precedent, SAW will be awarded interest as provided for under 49 CFR 1141.1(a)(2) and 1141.1(b)(2), from the last day of alternative service until the date of payment.

6. Offsets. PYCO claims some \$97,610.36 in offsets against the compensation owed to SAW. A large portion of that figure corresponds to repairs made after the transfer of these lines to PYCO: \$9,729.38 for materials and \$48,813.98 for labor expended on maintenance performed between November 11 and December 27, 2007—after the sale closed. PYCO asserts that SAW also bears financial responsibility for two derailments that occurred after PYCO acquired the lines, at a claimed cost of \$9,515.50. PYCO states that all these repairs were necessary because of SAW's failure to maintain its track during the alternative-service period, but PYCO does not state whether the claimed repairs were on track that WTL used when providing alternative service.

SAW should not be made to pay for maintenance or repairs performed after PYCO took ownership of these rail lines. Under the terms set in PYCO Feeder Line, PYCO purchased the track and related assets “as is.” Therefore, PYCO should bear the cost of any maintenance and repairs performed after it acquired the lines.

PYCO also claims as an offset one documented expenditure that occurred before the sale, during the period of emergency alternative rail service: \$27,759.50 to repair a derailment and rerail the car(s). PYCO asserts that SAW's failure to maintain a switch caused the derailment; SAW counters that WTL operated a train improperly, thus causing the derailment. On this record, we cannot resolve which party, or whether both parties, caused the derailment. Therefore we will not credit this expense as an offset.³⁶

The remaining claimed offsets lack necessary documentation. For example, PYCO states that it expended \$2,000 in 2007 on labor and materials for weed control in 2007, but it neither provides an invoice nor indicates if these expenditures occurred before the closing of the feeder-line sale on November 9, 2007. Thus, we do not consider this expenditure to be SAW's responsibility. PYCO similarly claims it spent \$1,072 to manually spike a switch in the SAW rail yard during the period of temporary alternative rail service, but it provides no invoice to support this claim nor does it document the date of the work. Accordingly, we will allow no offset for these undocumented costs.

³⁶ SAW claims that it may not be held responsible for maintenance during the period of emergency alternative rail service, citing a regulation of the Federal Railroad Administration (FRA) at 49 CFR 213.5. This regulation assigns to a carrier providing “directed service” under a Board order the responsibility for maintenance of track that is (1) used to provide directed service and (2) also subject to FRA track safety standards. We need not address SAW's interpretation of the FRA regulation given PYCO's inability to show on the record before us that SAW caused the derailment.

Summary. Under the established three-component method for calculating the compensation, we determine that WTL must pay SAW \$99,087.37, plus interest, for use of SAW's lines during alternative service. Interest will run from November 9, 2007, until the date of payment. It is to be calculated as provided under 49 CFR 1141.1(a)(2) and 1141.1(b)(2). No offsets will be allowed. We direct WTL to compensate SAW in that amount.

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

It is ordered:

1. PYCO's motion to strike SAW's letter filed August 12, 2008 is denied.
2. PYCO's motions (1) for leave to file a notice and (2) for leave to file a subsequent notice and a comment and SAW's motion to supplement the record are granted.
3. No later than January 29, 2009, WTL shall pay SAW \$99,087.37, plus interest as provided in this decision, as total compensation for WTL's use of SAW's rail lines to provide alternative rail service to PYCO from 11:59 pm, January 26, 2006, through 11:59 pm, November 9, 2007.
4. This decision is effective January 14, 2009.

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

Anne K. Quinlan
Acting Secretary

APPENDIX A

**TRACK SALVAGE and NET LIQUIDATION VALUES
AS CALCULATED BY PYCO/WTL**

Exclusive Usage

	Total Trk Length	Trk Length @ 100%	Weight	Grade	Tonnage	Unit value \$/ton	Total value
Rail by track							
#5 SAW Yard	2400	2400	90	Reroll	72.03	\$330	\$23,768.97
#1 SAW Yard	2100	2100	90	Reroll	63.02	\$330	\$20,797.84
9200	3900	3900	90	Reroll	117.04	\$330	\$38,624.57
9298 BN bridge	4320	4320	90	Reroll	129.65	\$330	\$42,784.14
OTM			90	Scrap	76.35	\$245	\$18,705.46
Ties				Scrap		\$0	\$0.00
Totals		12720			458.09		\$144,680.98
Removal & freight costs at \$75/ton							(\$34,356.96)
Less 15% salvager OH & profit							(\$16,548.60)
Net liquidation value - exclusive track							\$93,775.41

Shared Usage

	Total Trk Length	Trk Length @ 50%	Weight	Grade	Tonnage	Unit value \$/ton	Total value
Rail							
9298 SAW yard	5000	2500	90	Reroll	74.99	\$330	\$24,748.06
231	960	480	90	Reroll	14.40	\$330	\$4,751.63
PYCO lead	6280	3140	90	Reroll	94.19	\$330	\$31,083.56
Tie Plates			90	Scrap	19.90	\$245	\$4,875.50
Angle Bars			90	Scrap	7.44	\$245	\$1,822.80
Ties				Scrap		\$0	\$0.00
Totals		6120			210.93		\$67,281.55
Removal & freight costs at \$75/ton							(\$15,819.75)
Less 15% salvager OH & profit							(\$7,719.27)
Net liquidation value - shared track							\$43,742.53

Total net liquidation value

Exclusive Usage	\$93,775.41
Shared Usage	\$43,742.53
Total net liquidation value track structure	\$137,517.94

**APPENDIX
B**

COMPENSATION: PYCO CALCULATION and BOARD RECALCULATION

			PYCO/WTL	BOARD Adjusted
Track calculations				
Exclusive usage			\$144,680.98	\$144,680.98
Removal costs			(\$34,356.96)	(\$34,356.96)
Salvager OH & profit			(\$16,548.60)	(\$16,548.60)
Subtotal			\$93,775.41	\$93,775.41
Shared usage			\$67,281.44	\$67,281.44
Removal costs			(\$15,819.75)	(\$15,819.75)
Salvager OH & profit			(\$7,719.27)	(\$7,719.27)
Subtotal			\$43,742.53	\$43,742.53
Land calculations				
Exclusive usage			\$98,400.00	\$159,876.14
Shared usage				\$84,517.05
15% disposition costs			(\$14,760.00)	(\$36,658.98)
Subtotal			\$83,640.00	\$207,734.20
Net Liquidation Value			\$221,157.94	\$345,252.14
Cost of Capital rates				
	Days	Years	Cost of	
According to WTL/PYCO	Duration	Duration	Capital	
Jan 27 –June 19, 2006	228	0.625	10.10%	
June 20 - Nov 22, 2006	73	0.2	12.20%	
Nov 23, 2006 - Nov 9, 2007	351	0.962	12.20%	
	Days	Years	Cost of	
According to STB	Duration	Duration	Capital	
Jan 27 - Dec 31, 2006	339	0.931	14.98%	
Jan1 - Nov 9, 2007	313	0.860	17.24%	
Compensation Calculations				
			\$13,932.95	\$47,990.05
			\$5,307.79	\$51,097.32
			\$25,875.48	
Compensation Due			\$45,116.22	\$99,087.37
Off-sets			(\$97,610.36)	\$0.00
Compensation less offsets			(\$52,494.14)	\$99,087.37
Final Compensation Due SAW			\$0.00	\$99,087.37

APPENDIX C

STB RESTATEMENT OF LAND QUANTITIES AND VALUE

	Trk Lengths	applicable lengths	applicable miles	6 ac/mi underlying acres	6 ac/mi underlying sq.ft.	east of MLK	west of MLK	\$4,000 per acre east of MLK	\$0.55 per sq. ft. west of MLK
Exclusive Usage		@ 100%							
#5 SAW Yard	2400	2400	0.454545	2.727273	118,800		X		\$65,340.00
#1 SAW Yard	2100	2100	0.397727	2.386364	103,950		X		\$57,172.50
9200	3900	3900	0.738636	4.431818	193,050	X		\$17,727.27	
9298 BN bridge	4320	4320	0.818182	4.909091	213,840	X		\$19,636.36	
group subtotal	12720	12720	2.409091	14.45455	629,640			\$37,363.64	\$122,512.50
Shared Usage		@ 50%							
9298 SAW yard	5000	2500	0.473485	2.840909	123,750		X		\$68,062.50
231	960	480	0.090909	0.545455	23,760	X		\$2,181.82	
PYCO lead	6280	3140	0.594697	3.568182	155,430	X		\$14,272.73	
310	5600	2800	0.530303	3.181818	138,600	X		\$12,727.27	
less trk 310									
re: non-use	-5600	-2800	-0.530303	-3.181818	-138,600	X		-\$12,727.27	
group subtotal	12240	6120	1.159091	6.954545	302,940			\$16,454.55	\$68,062.50
total applicable track lengths		18840	3.568182					\$53,818.18	\$190,575.00
								grand total	\$244,393.18
								less 15% disposition costs	\$36,658.98
								STB restated net liquidation value of land	\$207,734.20
								PYCO's calculated value	\$83,640.00
								amount of PYCO understatement	\$124,094.20

notes:

assumed 50 foot R/W => 6 acres per mile+ -, Docket 35111 document 221 188 Pyco Reply pg. 33
 track location determined by review of aerial photos in Feeder Line Application, Exhibit Vol. One, from PYCO Industries.
 unit prices from feeder line decision Docket No. 34890