

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34890

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

Decided: June 9, 2010

South Plains Switching, Ltd. Co. (SAW) seeks the partial reopening of two earlier decisions that required SAW to sell to PYCO Industries, Inc. (PYCO), under the “feeder line” provision of 49 U.S.C. § 10907, SAW’s entire rail line in Lubbock, Tex., including certain tracks known as the Burris tracks. SAW claims that the Board materially erred in directing it to sell the Burris tracks because, with those tracks as part of the sale, the Board could not make certain findings required under § 10907. We will deny SAW’s reopening request for two reasons. First, SAW is estopped from contradicting the position it took earlier in this proceeding that, if the Board were to order the sale of any of its rail line, then the feeder line provision required the entirety of the line to be sold. Second, SAW expressly waived its current argument that the Board could not properly make all of the required findings to order the sale of the entirety of the rail line.

BACKGROUND

1. SAW’s Rail Line and Service. In 1999, SAW obtained Board authority to acquire from The Burlington Northern and Santa Fe Railway Company (now known as BNSF Railway Company) (BNSF) approximately 14 miles of tightly configured rail line in the southern portion of Lubbock.<sup>1</sup> SAW believed that the sale included BNSF’s Burris tracks, which are located in the far southeastern section of Lubbock and are separated from the remainder of SAW’s then-newly acquired tracks by BNSF’s main line. BNSF disagreed that the Burris tracks were included and continued to provide rail service over them to Jarvis Metals. In 2004, a Texas State court rejected BNSF’s argument that the parties made a mutual mistake by including the Burris tracks in their purchase and sale agreement, effectively finding that the Burris tracks had been sold to SAW.<sup>2</sup> Ultimately, the parties settled the issue with an agreement, effective September 18, 2006, permitting BNSF to continue to serve Jarvis Metals on the Burris tracks in

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<sup>1</sup> S. Plains Switching, Ltd.—Acquis. Exemption—Burlington N. & Santa Fe Ry., FD 33753 (Sub-No.1) (STB served July 15, 1999). The sale occurred pursuant to an agreement between SAW and BNSF.

<sup>2</sup> Burlington N. & Santa Fe Ry. v. S. Plains Switching, Ltd., No. 348-192452-02, slip op. at 3 (Texas Dist. Ct., Tarrant County, 348th Jud. Dist., Aug. 23, 2004), reproduced in App. 2 to SAW Pet. for Partial Reopening and Recons., Aug. 11, 2009 (SAW Pet.).

exchange for paying SAW \$75 for each car BNSF delivered to Jarvis Metals on those tracks.<sup>3</sup> As a consequence, only BNSF has provided any rail service on the Burris tracks since the time SAW purchased them.

2. Feeder Line Applications and the 2007 Decision. PYCO, a shipper and processor of cottonseed oil and related products, depends heavily on rail service. After experiencing periods of inadequate rail service from SAW, which was the only rail carrier serving 2 PYCO plants in Lubbock, PYCO filed an application under the feeder line provision of § 10907. As pertinent, this provision authorizes the Board to order the sale of a rail line that has not been adequately served by its owner if the Board finds that the buyer is financially responsible and that the public convenience and necessity (PC&N) require or permit the sale. 49 U.S.C. § 10907(b); Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 736 n.2 (7th Cir. 2006). To find that the PC&N require or permit the sale, the Board must find that 5 criteria are met. 49 U.S.C. § 10907(c)(1). If the Board finds that these criteria are met, the Board must set the sale price for the rail line at “not less than the constitutional minimum value,” which is statutorily defined as the net liquidation value (NLV) or the going concern value (GCV), whichever is greater.<sup>4</sup> 49 U.S.C. § 10907(b)(2).

In its feeder line application, PYCO sought to acquire all of SAW’s rail line (All-SAW option) or, in the alternative, the portion of SAW’s line needed to serve PYCO’s plants and 2 nearby shippers (Alternative Two). Keokuk Junction Railway Co. (KJRY) submitted a competing application for Alternative Two, which it later expanded to encompass the All-SAW option. During this time, SAW stated that it did not object to a finding that the PC&N permitted the “All-SAW” sale, which it repeatedly acknowledged referred to all of its rail line.<sup>5</sup> In contrast, SAW adamantly resisted Board approval of the sale of some, but not all, of its rail line, arguing that dividing its line as proposed in Alternative Two would be an operating disaster for SAW and would impair rail service to its remaining shippers. SAW also argued that such a sale would run afoul of the principle in Caddo Antoine and Little Missouri Railroad v. United States, 95 F.3d 740 (8th Cir. 1996) (Caddo Antoine) that, when a rail line is operated as a unit, it should not be divided up in a feeder line sale in a manner that separates, or “cherry picks,” a more easily and profitably served segment of the line from the remainder of the line. SAW argued that,

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<sup>3</sup> SAW Pet., App. 3.

<sup>4</sup> NLV consists of the salvage value of tracks and materials plus the value of the real estate; GCV is the value of the rail line as an ongoing business.

<sup>5</sup> SAW Mot. for Rejection of Alternative Two of Feeder Line Application (filed in FD 34844), May 16, 2006 (SAW Rejection Mot. ) 4 (stating that the All-SAW option “seeks a forced sale of the totality of SAW’s rail lines” and “encompasses . . . SAW’s rail lines as a whole”); SAW Mot. for Rejection of Revised Feeder Line Application (filed in FD 34844), July 3, 2006, 11 (incorporating argument from SAW Rejection Mot.); SAW Statement in Response to PYCO’s Feeder Line Application to Acquire “All-SAW,” Sept. 18, 2006 (filed in FD 34890) (SAW Response Statement) 1 n.1 (“All-SAW’ refers to all of SAW’s rail lines.”).

because it had always operated its entire rail line as a single unit, a feeder line application based on PC&N “must encompass SAW’s rail line in its entirety.”<sup>6</sup>

The Board agreed that there would be fewer operational difficulties if only one carrier were to operate on SAW’s tightly configured tracks.<sup>7</sup> In a decision served August 31, 2007 (2007 Decision), the Board found that the PC&N required or permitted the sale of SAW’s entire rail line. The agency set the purchase price at the NLV of \$2.35 million, which was higher than the GCV of SAW’s line. In view of the competing applications, the Board directed SAW to select the applicant to which it would sell its rail line. SAW selected PYCO, and the sale closed on November 9, 2007. After the sale, BNSF began paying PYCO the \$75 fee that BNSF formerly had paid to SAW for each car BNSF handled on the Burriss tracks for Jarvis Metals.

3. 2008 Decision. In 2008, PYCO asked the Board either to enforce or to clarify the 2007 Decision because of actions taken by SAW that indicated SAW had not transferred certain tracks, including the Burriss tracks, to PYCO. PYCO maintained that these tracks had been included in the feeder line sale and should have been transferred. As relevant here, SAW replied that the Board explicitly had allowed it to retain the disputed Burriss tracks, relying upon a parenthetical statement in the 2007 Decision which SAW claimed indicated that, after the closing of the sale, SAW would retain its tracks at Burriss. According to SAW, the Board ordered the sale only of its “Lubbock” line, whereas “Burriss” is a separate location in the The Official Railway Guide. Finally, SAW pointed out that its Burriss tracks were separated from the rest of SAW’s tracks by the BNSF mainline, and argued that therefore the Burriss tracks should not be considered part of its Lubbock tracks. PYCO argued to the contrary, that SAW’s own position during the feeder line proceeding required the inclusion of the Burriss tracks.

In a decision served on September 8, 2008 (2008 Decision), the Board clarified that the Burriss tracks had been included in the sale. The Board based this conclusion primarily on the following:

- PYCO had sought to acquire SAW’s entire rail line, and SAW had explicitly acknowledged that the All-SAW option referred to all of its rail line;
- the parties—including SAW—agreed that it would be preferable for all of SAW’s line to be included in the sale;<sup>8</sup>

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<sup>6</sup> SAW Statement in Opp’n to Revised Feeder Line Application, Aug. 2, 2006, App. 6 at 2.

<sup>7</sup> PYCO Indus., Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd., FD 34890 et al., slip op. at 4 (STB served Aug. 16, 2006).

<sup>8</sup> 2008 Decision, slip op. at 6-7.

- in calculating the line's NLV, the Board relied on SAW's track inventory, which listed the Burris tracks as part of the line to be sold;<sup>9</sup> and
- in calculating the line's GCV, the Board agreed with SAW that it was proper to include the revenue SAW earned from BNSF's operations on the Burris tracks.<sup>10</sup>

The Board acknowledged having misstated in a parenthetical in the 2007 Decision that SAW would retain the Burris tracks after the sale, but explained that it was clear from the context of the Board's entire decision that the Burris tracks had been included in the "All-SAW" sale.<sup>11</sup> Finally, the Board ordered SAW to convey the Burris property to PYCO by quitclaim deed, retroactive to the date of the closing of the sale.<sup>12</sup>

4. SAW's Petition for Review of the 2008 Decision and Voluntary Dismissal. SAW petitioned for judicial review of the 2008 Decision in the United States Court of Appeals for the District of Columbia Circuit. In response to PYCO's request for clarification, SAW had argued that the Board had not directed SAW to sell the Burris tracks. In court, however, SAW argued that the Board could not make the statutory findings necessary to direct SAW to sell the Burris tracks. After the Board (joined by the United States) argued that SAW had forfeited this argument by failing to raise it before the Board, SAW sought voluntary dismissal of its petition, which was granted in South Plains Switching, Ltd. v. STB, No. 08-1309 (D.C. Cir. June 22, 2009).

5. This Petition. In August 2009, SAW filed this petition to reopen the 2007 and 2008 decisions, alleging that the Board committed material error by including the Burris tracks in the feeder line sale. SAW now challenges the Board's finding that 2 of the 5 PC&N criteria were met with respect to the Burris tracks: (1) that "the rail carrier operating" the line at issue refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over the line, § 10907(c)(1)(A); and (2) that the transportation over the line is inadequate for the majority of shippers who transport traffic over the line, § 10907(c)(1)(B). SAW argues that the Board's finding that the first criterion was met rested on the erroneous premise that SAW provided service on the Burris tracks, when, in fact, BNSF provided that service exclusively. SAW also argues that the Board's finding on the second criterion was erroneous because, if the Burris tracks are included in the sale, then the number of SAW shippers would be higher and rail service could not be found inadequate for a majority of them. For relief, SAW asks the Board to order PYCO to reconvey the Burris trackage to SAW, provided

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<sup>9</sup> Id. at 6.

<sup>10</sup> Id. at 7.

<sup>11</sup> Id.

<sup>12</sup> Id. at 8, 11.

that SAW repay to PYCO an amount equal to the NLV of the Burris trackage. PYCO opposes the petition.

## DISCUSSION AND CONCLUSIONS

SAW's petition to partially reopen the Board's 2007 and 2008 decisions will be denied for 2 reasons. First, to protect the integrity of the Board's processes, SAW is estopped from arguing, in direct contradiction of its prior consistently held position, that the Board could not properly direct it to sell the entirety of its rail line. Second, SAW waived its current arguments concerning the PC&N and has given no sound reason for the Board to relieve it of that waiver, particularly at this late date.

### Estoppel

Prior to the issuance of the Board's 2007 Decision ordering the sale of SAW's line, SAW consistently argued that, if any of its line were ordered to be sold, its entire line should be included in the sale. In now arguing the opposite—that the feeder line provision precludes the inclusion of the Burris tracks in the sale—SAW runs afoul of the doctrine of judicial estoppel, which “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (New Hampshire).

Although the Board is not a court, it acted in a judicial capacity in this case when it ordered the sale and established the purchase price of SAW's rail line. Consequently, the doctrine of judicial estoppel is instructive here, and may be applied in the context of agency adjudication. In an action analogous to this situation applying judicial estoppel, the Board's predecessor agency, the Interstate Commerce Commission, held that a party was estopped from advocating a position directly opposite to the position it had taken earlier. Del. & Hudson Co.—Lease & Trackage Rights—Springfield Terminal Ry. (Arbitration Review), FD 30965 (Sub-No. 4), slip op. at 9 (ICC served Sept. 29, 1995) (Delaware & Hudson).<sup>13</sup>

The Supreme Court has set forth 3 factors to consider when invoking the doctrine of judicial estoppel: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether acceptance of the party's later, inconsistent position would create the perception that either the first or the second court was misled; and (3) whether the party asserting an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. New Hampshire, 532 U.S. at 750-51. In that case, the Supreme Court found that, some years earlier in a case concerning the border between New Hampshire and Maine, “New Hampshire [had] agreed without reservation” on an interpretation of a term in

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<sup>13</sup> See also Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co., 3 I.C.C.2d 926, 933 (1987) (declining to reopen a decision to accommodate changes in litigation strategy).

the 1740 boundary determination of a British monarch. Id. at 745. Consequently, the Court held that New Hampshire's later attempt to argue that the border was not at the agreed location was judicially estopped. Id. at 756.

All 3 of the New Hampshire factors indicate that SAW should be estopped from asserting its new position in a reopened proceeding. First, excluding the Burriss tracks, as SAW now advocates, would be inconsistent with its earlier position that, if a sale were ordered, it should include all of SAW's rail line. SAW prevailed in that argument when the Board ordered the sale of its entire line. Second, if the Board were now to hear SAW's new arguments, it would create the perception either that the Board was misled initially, when SAW told the Board that the entirety of its rail line should be included in the sale, or that the Board is being misled now, when SAW asserts that the Burriss tracks may not be included in the sale. And finally, if SAW were not estopped from arguing that the Burriss lines should have been excluded, the resulting reopening of the 2007 and 2008 decisions would impose an unfair detriment on PYCO, which relied on SAW's concession in not further developing the record on whether the PC&N would allow a sale that included the Burriss tracks.

Like the State of New Hampshire in the Supreme Court, SAW is now attempting to avoid the consequences of an earlier position that it had freely asserted, that it succeeded in persuading the Board to accept, and that benefitted it. It would undermine the integrity of the Board's processes to allow SAW now to take a contradictory position to obtain further advantage at PYCO's expense. See, e.g., Delaware & Hudson, (in an earlier appeal to the Board of an arbitrator's decision, railroad had taken the position that dispatchers were management employees not covered by a collective bargaining agreement (CBA); on railroad's later petition to reopen the Board's decision, railroad was estopped from asserting contrary position that dispatchers were covered by a CBA).

### Waiver

SAW seeks partial reopening under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4. Under these provisions, the Board may reopen a proceeding because of material error, new evidence, or substantially changed circumstances. Here, SAW claims only material error, specifically, that the Board erred in not considering the argument that the PC&N did not require or permit the sale of the Burriss tracks.<sup>14</sup> An agency, however, does not commit "material error" by accepting a party's waiver of a legal argument. Just as a litigant cannot argue that an agency committed material error when the error "was induced by [the litigant's] own failure to raise the argument in good time," BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006), a litigant cannot argue that an agency erred in not considering an argument when the litigant itself affirmatively waived the argument it now claims the agency did not consider.

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<sup>14</sup> SAW Pet. 3-4, 9.

That is precisely what SAW did here. SAW clearly and knowingly waived the argument that the PC&N did not justify an order directing the sale of All-SAW, including the Burris tracks. First, SAW conceded that a majority of shippers favored the line's sale.<sup>15</sup> Later, in a pleading section entitled "Statement of Position on PC&N of sale of All-SAW," submitted in response to PYCO's feeder line application to acquire all of SAW's rail line, SAW stated: "SAW does not oppose a finding that PC&N permits the sale of All-SAW."<sup>16</sup>

SAW suggests that its waiver did not apply to the Burris tracks because the "All-SAW" option referred only to SAW's contiguous tracks and did not include the Burris tracks at all. This claim is contradicted by the record and does not withstand scrutiny. In its application, PYCO defined the All-SAW option as encompassing "all the lines of SAW." In its reply, SAW acknowledged that "All-SAW" referred to "all of [SAW's] rail lines."<sup>17</sup> SAW also confirmed that it knowingly counted the Burris tracks as part of the All-SAW option. To support its position on the line's NLV, SAW included a track inventory, which listed the Burris tracks as part of the trackage to be sold.<sup>18</sup> In addition, concerning the line's GCV, SAW insisted that the Board include the stream of revenue that SAW received from BNSF for permitting that carrier to handle traffic for Jarvis Metals on the Burris tracks.<sup>19</sup> SAW thus expressly, clearly, and knowingly waived any objection to a finding that the PC&N permitted the forced sale of All-SAW, including the Burris tracks.

Some 9 months after it waived the PC&N issue but shortly before the Board issued the 2007 Decision, SAW sought to withdraw its concession. The Board, however, rejected this maneuver on the ground that SAW had offered no persuasive reason for its last-minute attempted about-face.<sup>20</sup> SAW does not challenge that aspect of the 2007 Decision. Similarly, here, SAW offers no explanation for its latest attempted reversal on the PC&N issue. SAW states that, following the 2007 Decision, there was confusion about whether SAW was required to sell the Burris tracks. But as explained above, SAW conceded the PC&N issue knowing that the All-SAW option involved the entirety of its rail line, including the Burris tracks. Moreover, even if

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<sup>15</sup> Letter of SAW's counsel, Thomas McFarland, Aug. 4, 2006.

<sup>16</sup> SAW Reply to (1) KJRY Expanded Competing Feeder Line Application; and (2) PYCO's Amended Valuation Evidence, Oct. 12, 2006 (SAW Reply) 3.

<sup>17</sup> SAW Response Statement 1 n.1.

<sup>18</sup> Id., Verified Statement (V.S.) of E. Landreth, Attach. 1 at 21.

<sup>19</sup> Id. at 3 (stating that, in determining the GCV of All-SAW, the Board was required to "tak[e] into account . . . revenues of \$75 per car on traffic for Jarvis Metals Company at Burris, TX that BNSF has agreed to pay SAW pursuant to a haulage agreement"); see also SAW Reply, Reply V.S. of J. Plaistow at 9 ("There is no basis for [PYCO or KJRY] to exclude the revenue from [the Burris] traffic in any calculations of SAW's going concern value.").

<sup>20</sup> 2007 Decision, slip op. at 9.

language in the 2007 Decision left SAW unsure about whether it was required to sell the Burris tracks, SAW fails to explain why it did not raise the PC&N argument then. Thus, even apart from its waiver, SAW forfeited the issue by not raising it in response to PYCO's petition for clarification. See BNSF Ry., 453 F.3d at 479 (argument raised for the first time after Board's final decision "came too late to command the attention of the Board"). Moreover, in finding that a party had forfeited an argument, the D.C. Circuit recently reasoned that "a reviewing court generally will not consider an argument that was not raised before an agency 'at the time appropriate under its practice.'" BNSF Ry. v. STB, No. 09-1092, 2010 U.S App. LEXIS 9609, at 20-21 (D.C. Cir. May 11, 2010), quoting BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006) and United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952).

The orderly disposition of cases by the Board requires that parties make their arguments at the appropriate time. SAW failed to do this. The administrative process might never end if parties could come back to the Board years after a final decision to try out a new theory or to change its mind about a prior concession. Indeed, "nothing in the statute or the Board's regulations obliges the [Board] to rethink its decisions whenever an affected party changes its mind at a late stage in the process." Conn. Trust for Historic Preservation v. ICC, 841 F.2d 479, 484 (2d Cir. 1988). The agency is not expected to "behave like Penelope, unraveling each day's work to start the web again the next day." W. Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1984). We decline to open the door to such results by entertaining SAW's new arguments at this time.

For the reasons discussed above, we decline to reopen the 2007 and 2008 decisions on SAW's purported material error grounds. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. SAW's petition to partially reopen the 2007 Decision and the 2008 Decision is denied.
2. This decision is effective on its service date.

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