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SERVICE DATE – NOVEMBER 21, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34889

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

STB Ex Parte No. 346 (Sub-No. 14C)

RAIL GENERAL EXEMPTION AUTHORITY – MISCELLANEOUS
AGRICULTURAL PRODUCTS – PYCO INDUSTRIES, INC.
PETITION FOR PARTIAL REVOCATION

Decided: November 20, 2006

On July 3, 2006, PYCO Industries, Inc. (PYCO), a processor and shipper of cottonseed and related products, filed a petition under 49 U.S.C. 10705(a) and 11102(a) and 49 CFR part 1147 for an order authorizing West Texas & Lubbock Railway Company, Inc. (WTL), to provide temporary alternative rail service to PYCO over the lines of South Plains Switching, Ltd. Co. (SAW), in Lubbock, TX. PYCO also asked the Board to partially revoke the exemption granted for miscellaneous agricultural products in Rail General Exemption Authority, 367 I.C.C. 298, 310-12 (1983) (General Exemption),¹ to the extent necessary for entry of an order authorizing temporary alternative rail service by WTL for all of PYCO's incoming and outgoing shipments.

In a reply filed on August 14, 2006, SAW asked that the petition either be dismissed as moot or held in abeyance pending a decision in a related feeder line proceeding described below. PYCO submitted a rebuttal on August 29, 2006. This decision grants PYCO's petition and authorizes temporary alternative rail service by WTL.

BACKGROUND

In Lubbock, PYCO has two heavily rail-dependent plants at which it processes cottonseed. The only rail lines that serve the plants are SAW's, whose lines connect only to one linehaul carrier, BNSF Railway Company (BNSF). To address a measurable deterioration in the rail service SAW provided to PYCO, the Board, in decisions served on January 26, February 24, and June 21, 2006, in PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (PYCO Industries), authorized WTL, under 49 U.S.C. 11123(a) and 49 CFR part 1146, to provide emergency alternative rail service to PYCO's two

¹ See 49 CFR 1039.10.

Lubbock plants over SAW's rail lines. Under that statutory provision, an authorization for alternative service may not last more than 270 days.

Seeking a more permanent solution to its service difficulties, PYCO filed an application in STB Finance Docket No. 34890, PYCO Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., to acquire SAW's rail lines under the feeder line provision at 49 U.S.C. 10907. That application is pending, along with a competing application filed by a rail carrier.²

PYCO filed this petition for temporary alternative service under 49 CFR part 1147 because the feeder line applications may not be decided prior to the expiration of the 270-day period for the current authorization for emergency alternative service under 49 CFR part 1146. PYCO argues that a grant of temporary alternative service under 49 CFR part 1147, which provides temporary relief but is not limited to a specific duration, is needed to provide it with adequate service during the processing of the 2006 cottonseed harvest.³ PYCO also asks us to impose a condition on any authorization that would allow a qualified inspector access to SAW's lines to inspect the trackage and a qualified independent contractor access to make any required repairs.

PRELIMINARY MATTERS

SAW asks that we hold this petition for part 1147 relief in abeyance pending a decision on the feeder line applications. SAW does not oppose PYCO's petition for temporary alternative rail service on the merits, but asks that this petition be dismissed as moot if, prior to the expiration of the current emergency alternative rail service, its rail lines have been transferred pursuant to a grant of either of the pending feeder line applications. Likewise, SAW argues that the petition should be dismissed as moot if we deny both of those applications.

As a result of requests by some parties for additional time, the filing of the records in the feeder line proceedings has been delayed; the last pleading we authorized was filed on November 1, 2006, but subsequent pleadings continue to be submitted. The Board will endeavor to decide the feeder line applications as quickly as possible, but even if a decision were to be issued very promptly, it is highly unlikely that a sale (if authorized) could be consummated by November 22, 2006, the expiration date of the emergency alternative rail service the Board has

² The competing application was filed in STB Finance Docket No. 34922, Keokuk Junction Railway Co.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co. The two feeder line applications will be decided together in a future decision.

³ The processing of the 2006 harvest runs from autumn 2006 through much of 2007. Our regulations specifically contemplate that to obtain complete relief, proceedings under both 49 CFR part 1146 and 49 CFR part 1147 may be required. See Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 973 (1998).

authorized under part 1146.⁴ For that reason, we will deny the requests to dismiss this petition or to hold it in abeyance, and will address the petition.

DISCUSSION AND CONCLUSIONS

Statutory Basis. PYCO contends that both 49 U.S.C. 10705(a) and 49 U.S.C. 11102(a) provide a basis for authorization of temporary alternative rail service by WTL over SAW's rail lines. We discuss each statutory provision below.

Joint Rates/Through Routes. The provision at 49 U.S.C. 10705(a) authorizes the Board to prescribe a joint rate and through route by ordering a rail carrier, operating over its own rail lines, to establish a joint rate with a connecting rail carrier. In this case, however, PYCO asks us to authorize a rail carrier (WTL) to operate over a different rail carrier's (SAW's) rail lines, as an alternative participant in an existing joint rate/through route with connecting carrier BNSF. Section 10705(a) does not give the Board authority to authorize a carrier to operate over another carrier's rail lines. Therefore, this provision does not furnish a basis for the temporary alternative rail service that PYCO seeks.

Terminal Trackage Rights. In contrast, in 49 U.S.C. 11102(a), Congress gave the Board authority to authorize a rail carrier to operate over the rail lines of a different carrier in "terminal facilities," including main line tracks for a reasonable distance outside of a terminal. There is no dispute here as to whether this proposal involves "terminal facilities;" SAW agrees with PYCO that the rail lines at issue constitute a terminal area.⁵

The Merits. Under 49 U.S.C. 11102(a) and 49 CFR 1147.1(a), temporary alternative rail service will be authorized if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. To be entitled to that finding, PYCO must show the following:

⁴ By consent, the emergency service authorization was tolled for a period of 30 days. See Pyco Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., STB Finance Docket No. 34890, et al. (STB served Aug. 18, 2006).

⁵ See STB Finance Docket No. 34844, PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co., SAW Motion for Rejection of revised Feeder Line Application, filed July 3, 2006, at p. 9 ("SAW's tracks are located within the Lubbock, Texas switching limits and terminal area. * * * SAW is exclusively a switching rail carrier operating within the Lubbock terminal . . .").

1. *Inadequacy of SAW's rail service.* As explained above, the emergency alternative service we authorized in PYCO Industries to address the substantial, measurable deterioration in the rail service that SAW provided to PYCO in 2005⁶ will expire on November 22, 2006.

PYCO contends that, if alternative rail service were to end prior to the closing of an authorized feeder line sale, it would again be subject to inadequate rail service and retaliation from SAW. The records in this proceeding and the related proceeding under 49 CFR part 1146 involving PYCO and SAW support that contention. In a decision served on August 3, 2006, in this proceeding (and other related proceedings) (August 3 Decision), the Board responded to various retaliatory actions taken by SAW and ordered that PYCO has the right to operate its own equipment on its own property; that SAW must participate in a daily telephone conference call to discuss and arrange the safe use of SAW's tracks during the period of alternative rail service; and that any transfers of SAW's rail property that occurred after May 5, 2006, were void, including interests in leases and agreements concerning PYCO. PYCO reports that SAW has not participated in the daily conference call, notwithstanding the Board's order.

The history of the relations between SAW and PYCO since early 2005 convinces us that, if alternative rail service were to end while SAW owns these rail lines, SAW would not provide adequate rail service to PYCO. We therefore find that there was a measurable deterioration in the rail service SAW provided to PYCO and that there is a demonstrated need for WTL's alternative rail service to continue on a temporary basis.

2. *Discussions with Incumbent and Reasons Why Restoration of Adequate Service is Unlikely.* There were many contacts between PYCO and SAW personnel in the months prior to PYCO's filing its initial petition for emergency alternative rail service, as the Board found in PYCO Industries, slip op. at 5-6 (STB served Jan. 26, 2006). In that decision, we also found that SAW was unlikely to restore adequate rail service to PYCO within a reasonable time. Id. at 8. We incorporate those findings here.

More recently, PYCO and WTL have attempted to discuss with SAW issues relating to the provision of rail service to PYCO, especially (1) requests that SAW cease blocking a crossing over the SAW trackage that separates PYCO's cottonseed stockpile from its processing plant and (2) requests that SAW inspect and repair SAW tracks that WTL uses to serve PYCO.

⁶ That year, PYCO experienced a significant deterioration in SAW's rail service in March and April and again in November and December, including: SAW's refusal to allow PYCO to operate its rail car mover on SAW's property; SAW's cancellation of the lease of a track on which PYCO stored rail cars; SAW's refusal to switch cars on a scale track inside PYCO's fence (which would allow PYCO to load more cars); a period in November 2005 when SAW performed no switching for PYCO; and a daily shortfall of 14 carloads for switching at one of PYCO's plants. The Board found that as a consequence of these service inadequacies, PYCO faced imminent curtailment of its operations at Lubbock. See Pyco Industries, slip op. at 3, 5 (STB served Jan. 26, 2006).

PYCO states that SAW refused to discuss these requests, and SAW has not refuted that statement. In addition, PYCO has provided evidence that, during the period of WTL's emergency alternative rail service, SAW transferred to a related company (Choo-Choo Properties) certain property rights in its rail lines, and Choo-Choo Properties attempted to assert those rights to impede PYCO's operations. Consequently, the Board voided those property transfers in the August 3 Decision. We find that SAW is not likely to promptly restore adequate service to PYCO because of PYCO's unsuccessful attempts to discuss these issues with SAW and SAW's attempted transfers of property rights. Moreover, SAW did not oppose on the merits PYCO's request for temporary alternative rail service under 49 CFR part 1147.

3. *Commitment from Another Railroad to Provide Alternative Service.* PYCO provided a written commitment from WTL to provide temporary alternative rail service to PYCO on and after the date that the current emergency alternative service authorization ends.

4. *Interference with Operations.* An applicant must explain how the alternative service would be provided safely without degrading service to the existing customers of the alternative service provider and without unreasonably interfering with the incumbent's overall ability to provide service. See 49 CFR 1147.1(b)(1)(iii). In this regard, PYCO stated that WTL has been providing alternative rail service to PYCO over SAW's rail lines since late January 2006, without adversely affecting the service WTL provides to other shippers on WTL's own lines. Likewise, WTL attests that it can continue to provide alternative rail service to PYCO without adversely affecting SAW's service to the other shippers on its lines. These unrefuted statements satisfy the requirement.

In sum, the criteria have been met for PYCO to obtain temporary alternative rail service.⁷ Accordingly, we will grant PYCO's request for an order authorizing WTL to provide PYCO with temporary alternative rail service on SAW's rail lines, beginning at 12:00 a.m. on November 23, 2006, and continuing until either (1) a future authorized sale of SAW's rail lines under the feeder line provision at 49 U.S.C. 10907 is closed or (2) a petition by SAW under 49 CFR 1147.1(c)(1) to terminate the temporary alternative rail service is granted.

Partial Revocation of Exemption. As discussed in the decision served June 21, 2006, in PYCO Industries, the rail traffic to and from PYCO's plants consists in part of commodities that have been exempted from regulation: cottonseed, cottonseed hulls, and cotton linters.⁸ As explained in that decision, slip op. at 4, the Board may authorize alternative rail service where the rail traffic at issue consists of both regulated and exempt commodities and it would not be practical to provide separate service for the two types of traffic. Nevertheless, we conclude that

⁷ In addition, the applicant is required to show that it served a copy of the petition, by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration (FRA). 49 CFR 1147.1(b)(1)(iv). PYCO's petition initially was served on WTL and FRA, and later was served on SAW (July 12, 2006).

⁸ See General Exemption, 367 I.C.C. at 310-12.

the standard for revocation of an exemption has been met here. See id. Thus, we will partially revoke the exemption to the extent required to provide for temporary alternative rail service.

Inspection/Repair Condition. In light of the Board's expectation to promptly decide the pending feeder line applications, we will not impose the requested condition allowing PYCO to arrange for independent entities to inspect and repair SAW's rail lines.

Operating Protocols. As there are operating protocols currently governing the operations of WTL on SAW's rail lines, the protocols, as modified by the Board in the decisions served in PYCO Industries, shall continue to govern WTL's and SAW's operations during 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. SAW's motion to dismiss the petition is denied.
2. The exemptions for any and all of the commodities that PYCO ships or receives by rail are revoked to the extent necessary to allow the provision of temporary alternative rail service for all of PYCO's rail traffic.
3. WTL is authorized to provide temporary alternative rail service to PYCO on SAW's lines, beginning at 12:00 a.m. on November 23, 2006, under the provisions of 49 U.S.C. 11102(a) and 49 CFR 1147.1, and SAW is directed to allow such operations on its lines.
4. The existing operating protocols shall continue to apply during the temporary alternative rail service.
5. PYCO's request for a condition allowing inspection and repair of SAW's lines is denied.
6. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary