

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34802

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

Decided: February 24, 2006

In a decision served on January 26, 2006 (the January Decision), pursuant to 49 U.S.C. 11123(a), we granted the petition of PYCO Industries, Inc. (PYCO), for an order authorizing West Texas & Lubbock Railway Company, Inc. (WTL), to provide interim alternative rail service to PYCO, over the lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX, for the initial statutory period of 30 days. We stated that, under 49 CFR 1146.1(c), there is a rebuttable presumption that the alternative service would need to continue for more than 30 days. The statute allows alternative service to continue for a maximum of 270 days.

In a petition filed under 49 CFR 1146.1(d)(1) on February 9, 2006, SAW asked us to terminate the alternative rail service authorization. On February 16, 2006, PYCO opposed the petition to terminate and requested continuation of the alternative service authorization for the maximum period allowed under the statute (PYCO Opposition). SAW filed a rebuttal on February 22, 2006. We will deny the petition to terminate and authorize alternative interim service by WTL to PYCO for an additional 120 days. This will give SAW an opportunity to make a clear showing that it is prepared to restore service to PYCO at levels needed and requested by PYCO.

BACKGROUND

Until the January Decision, PYCO, a rail-dependent processor of cottonseed oil and related products, was served only by SAW, which provided switching service between PYCO's two plants at Lubbock and the yard of a linehaul carrier, BNSF Railway Company (BNSF). SAW's service to PYCO deteriorated in spring and early summer of 2005, improved for a time, and deteriorated again beginning in mid-November 2005. In the January Decision, we found that PYCO had experienced "a substantial, measurable deterioration or other demonstrated inadequacy in rail service" provided by SAW. After examining the course of dealings between PYCO and SAW, we determined that SAW was unlikely to restore adequate rail service to PYCO within a reasonable time, and authorized WTL to provide alternative rail service to PYCO using SAW's lines for an initial period of 30 days, ending at 11:59 p.m. on February 25, 2006.

We also directed the parties promptly to enter into operating protocols that would allow for safe operations by two carriers on SAW's lines.

The Board's Office of Compliance and Enforcement facilitated telephone conferences among the parties concerning the operating protocols. According to PYCO and WTL, after one of the teleconferences, SAW circulated for signature a proposed operating protocol that did not adequately account for the operational realities at Lubbock or for BNSF's operational needs. WTL stated that it had serious reservations about its ability to adequately serve PYCO under the draft protocol and of SAW's ability to adequately serve the other customers on the lines, but signed the protocol when SAW indicated that it would not participate in any further negotiations on the proposed protocols. Notwithstanding the agreed-upon protocols, service problems arose that prevented adequate service to PYCO.

On February 8, 2006, WTL submitted the agreed-upon protocols to us with a request for imposition of additional terms that would permit adequate service by WTL to PYCO and by SAW to the other shippers on SAW's lines. Also on February 8, 2006, PYCO similarly asked for imposition of additional terms.¹ In a decision served on February 16, 2006, we found that the agreed-upon protocols did not provide for adequate service to all shippers, and we imposed additional terms of the operating protocols giving WTL the right to operate at night, requiring SAW to designate a contact person or persons to be available at all times to resolve operational issues as they may arise, requiring that two SAW tracks remain clear to allow WTL to serve a PYCO plant, and giving WTL authority to use the route between those tracks and the PYCO plant.

While the requests for additional terms in the operating protocols were pending, SAW submitted its petition to terminate, arguing that there is no continuing transportation emergency concerning rail service to PYCO and that SAW is prepared to provide adequate service.

DISCUSSION AND CONCLUSIONS

As stated previously, the Board's regulations provide that, when we authorize alternative interim rail service to resolve a transportation emergency, there is a rebuttable presumption that alternative service will need to continue for more than 30 days unless the Board states otherwise. 49 CFR 1146.1(c). While a further order is required at the end of the initial service period of 30 days, the presumption "is designed to simplify and expedite the 30-day reexamination by avoiding a rehashing of the original inquiry into whether relief is appropriate and limiting the evidentiary presentations and our analysis to the issue of whether the emergency is over so that the relief is no longer needed." See Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 982 (1998) (Service Inadequacies). Our regulations also provide that the incumbent railroad is free to petition to terminate the relief as soon as the emergency is over. 49 CFR 1146.1(d)(1). SAW has invoked that provision and seeks termination of WTL's alternative rail service.

SAW claims that it now is prepared to provide adequate service at PYCO's Plant No. 1 because it has replaced its former president/general manager who resigned and because PYCO is

¹ SAW submitted a reply in opposition to the requests of WTL and PYCO on February 17, 2006.

in the process of constructing additional tracks on its property, which would make it easier for SAW (or any switching carrier) to serve that plant. SAW asks the Board to find that its new manager, Mrs. Delilah Wisener (spouse of the former president/general manager), has made a sincere commitment to provide adequate rail service by inviting PYCO's chief operating officer to meet with her.

PYCO's version of events differs significantly, however. For example, PYCO explains that its existing in-plant tracks had been sufficient until SAW's refusal to provide adequate switching service, which led PYCO to decide to build additional track on its property to avoid dependence on SAW's yard for anything other than through traffic.²

In response to SAW's claim of a new, cooperative attitude on SAW's part, PYCO points to SAW's recent refusal to take part in early morning conference calls to work out service issues.³ We find that this refusal belies SAW's claim of a genuine desire to provide adequate service to PYCO, because daily arrangements between SAW and WTL are critical to providing safe and adequate service to all of the shippers during the period that SAW and WTL both operate on SAW's lines.

PYCO also points out that WTL has been able to work off the backlog of rail traffic⁴ that had arisen prior to the alternative rail service.⁵ Indeed, PYCO asserts that, in the first 17 days of WTL's alternative service, PYCO shipped more than twice as many cars as it was able to ship during the prior 17 days of service under SAW.⁶ Moreover, since WTL began providing service to PYCO, BNSF has been able to load a 70-car unit train every 3 days versus every 5 days when SAW provided service to PYCO.⁷ This quicker loading of unit trains has reduced the number of cars needed by PYCO and has allowed PYCO to move more of its products.⁸

SAW claims that there could not be a continuing emergency at PYCO's Plant No. 2 because PYCO did not ask for any rail service at that plant for 5 business days immediately prior

² PYCO Opposition at 14.

³ Id. at 8-9; Exhibit B (Lacy Verified Statement (V.S.)), paragraph 7; and Exhibit C (Gregory V.S.), 15.

⁴ In SAW's view, the fact that WTL has worked off the backlog of product means that the transportation emergency has ended at Plant No. 1. SAW argues that, under 49 U.S.C. 11123(c), the Board must therefore terminate alternative rail service. We disagree, as discussed below.

⁵ PYCO Opposition at 1.

⁶ Id. at 1 and Exhibit B (Lacy V.S.), paragraph 3.

⁷ Id. at 1; Exhibit A (Kring V.S.), paragraph 8; and Exhibit B (Lacy V.S.), paragraph 3.

⁸ Id. at Exhibit A (Kring V.S.), paragraph 8.

to the commencement of the alternative rail service. But PYCO explains that it had to shut down operations to fumigate cottonseed (a required step in processing) because, prior to commencement of WTL's alternative service, SAW had not delivered rail cars on a regular basis, which disrupted PYCO's regular processing schedule.⁹ PYCO's explanation appears reasonable. Moreover, PYCO has been shipping more cars under WTL's alternative service than it did at the end of SAW's service. The remaining SAW arguments concerning Plant No. 2 question our finding in the January Decision authorizing the alternative interim service, contrary to the direction in Service Inadequacies to avoid rehashing the original inquiry into whether relief was appropriate. We need not discuss again the reasons for our decision to authorize WTL to provide alternative service and will stand by our analysis in the January Decision.

We disagree with SAW's contention that WTL's able handling of the backlog of PYCO's products means that the emergency that led to an order for alternative service must be over. The record shows that, although SAW claims that it is able to provide adequate service to PYCO, its actions belie its willingness to do so. PYCO indicates that it is now in its most rail-dependent season¹⁰ and that this year's cotton crop, like last year's, is a large one.¹¹ If we were to end the alternative service now, and if SAW were not to provide adequate service to PYCO, the situation would be similar to the situation that led to our authorizing interim alternative service in the first place. SAW's recent nonparticipation in the parties' daily conference calls indicates an unwillingness to cooperate in ensuring adequate service to PYCO.¹² The evidence in this case indicates that, while progress has been made, the transportation emergency would continue to exist if WTL were removed as an alternative service provider and, accordingly, we will deny the petition to terminate alternative service and instead permit alternative service to continue for a period of 120 days to enable PYCO to receive adequate rail service as it processes this year's large cottonseed crop. While, in our view, SAW has not met its burden of showing that the emergency is over, or that it could and would provide the same level of service as WTL is providing, we also do not see a need at this time to extend alternative service for the full time period authorized by section 11123 of the statute. However, the need for alternative rail service to continue beyond the time we are authorizing in this decision can be reassessed at the end of the 120-day extension period.

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

⁹ Id. at 17 and Exhibit A (V.S. Kring), paragraph 9.

¹⁰ Id. at 20.

¹¹ Id. at Exhibit A (Kring V.S.), paragraph 11.

¹² We are also concerned about the report of a number of unsafe actions by Mrs. Wisener's son affecting WTL employees, which SAW did not rebut. These alleged actions include shining vehicle headlights toward a WTL crew while it was operating, requiring the crew to stop; taking flash photos of a WTL engineer while he was working, causing distraction and a potential safety hazard; and driving the length of a train, causing delay while the crew awaited a clear track. PYCO Opposition, Exhibit C (Gregory V.S.) (attached SAW Event Log).

It is ordered:

1. SAW's petition to terminate alternative rail service is denied, and PYCO's request for continuation of the alternative service order is granted for an additional period of 120 days.

2. WTL is authorized to provide alternative service to PYCO on SAW's lines for an additional period of 120 days, until 1:59 p.m. on June 25, 2006, under the provisions of 49 CFR 1146.1, and SAW is directed to allow such operations on its lines. The agreed-upon operating protocols, as amended in the decision served on February 16, 2006, continue to apply.

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

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary