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SERVICE DATE – LATE RELEASE SEPTEMBER 20, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34890

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

STB Finance Docket No. 34922

KEOKUK JUNCTION RAILWAY CO.—FEEDER LINE APPLICATION—  
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.

Decided: September 20, 2007

By decision served on August 31, 2007 (August 31 Decision), the Board granted the feeder line application of PYCO Industries, Inc. (PYCO) and the competing feeder line application of Keokuk Junction Railway Co. (KJRY) to acquire the rail lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX. On September 10, 2007, PYCO filed a pleading seeking reconsideration of the August 31 Decision and also seeking a stay of the effectiveness of that decision insofar as it granted KJRY's application. In a pleading filed on September 13, 2007, SAW opposed the petition for reconsideration but did not address the stay request. KJRY opposed the stay request in a pleading filed on September 14, 2007. The request for stay will be denied. The petition for reconsideration will be addressed in a future decision.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether there is a strong likelihood that petitioner will prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Admin., 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). As discussed below, PYCO has not made the showing required under these standards.

Likelihood of Success on the Merits. Concerning the merits, PYCO raises three issues, which will be discussed in turn.

1. PYCO argues that the grant of KJRY's competing application was unlawful because the Board had not formally accepted that application. This argument seeks to elevate form over substance because the statute, 49 U.S.C. 10907, does not require such a formal acceptance and it was clear from Board orders that KJRY's application to acquire SAW's rail lines was accepted for further consideration.

A Board regulation provides that the Director of the Board's Office of Proceedings will accept or reject a competing application within 15 days of its filing. 49 CFR 1151.2(c)(2). The Director's notice informs the parties whether the competing application will be decided on its merits.

In this proceeding, each of the applicants pursued two applications. For both PYCO and KJRY, the first application was to acquire a portion of SAW's Lubbock lines, called "Alternative Two" and the second was to acquire all of the lines, called the "All-SAW option." Eventually, all parties agreed that it would be preferable for all of SAW's lines at Lubbock to be owned by one entity, and the proceeding focused on the All-SAW option.

Here, the handling of PYCO's two applications caused various pleadings to overlap and necessitated a flurry of procedural orders. In one such order, served on August 16, 2006 (August 16 Decision), in STB Finance Docket No. 34890, PYCO's application for the All-SAW option was accepted as complete. The August 16 Decision also provided that, if the Director of Proceedings (in a future order) accepted KJRY's competing application for Alternative Two (partial acquisition), KJRY would have the right to expand its application to encompass all of the Lubbock lines.<sup>1</sup> This constituted an implicit acceptance of KJRY's All-SAW application so long as its application for Alternative Two was accepted. The Director of Proceedings, in an order served August 17, 2006 (August 17 Decision), in STB Finance Docket No. 34922, accepted KJRY's application for Alternative Two.<sup>2</sup> Therefore, PYCO had notice that KJRY's expanded application to acquire all of the Lubbock lines was accepted.

If any party harbored any doubts that the Director had accepted KJRY's competing All-SAW application, those doubts should have been dispelled by the Board's decision served on October 5, 2006 (October 5 Decision). There, the Board said that "KJRY's application (like PYCO's) has now been expanded to encompass the entirety of SAW's lines," and that, accordingly, PYCO's discovery requests were deemed to apply to KJRY's expanded competing All-SAW application.<sup>3</sup> Similarly, the Board imposed deadlines for SAW and PYCO to submit comments on KJRY's All-SAW application.<sup>4</sup> The Board would not have issued these rulings unless it was satisfied that KJRY's All-SAW application was complete.

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<sup>1</sup> See August 16 Decision, slip op. at 6, paragraph 5.

<sup>2</sup> See August 17 Decision, slip op. at 4, paragraph 1.

<sup>3</sup> October 5 Decision, slip op. at 2-3.

<sup>4</sup> Id., slip op. at 3, paragraph 5.

But, more fundamentally, even if PYCO were correct that the Director never formally “accepted” KJRY’s competing All-SAW application, that would not deprive the Board of the authority to grant that application. The purpose of the Board’s regulation providing for the Director to accept or reject a competing application is to save agency resources by weeding out incomplete applications.<sup>5</sup> The regulation thus serves to promote the efficient administration of the feeder line statute. But nothing in the feeder line statute or regulations deprives the Board of authority to rule on the merits of a feeder line application in the absence of the Director’s acceptance of an application.<sup>6</sup>

For these reasons, PYCO is unlikely to succeed on the merits of its claim regarding the need, in this case, for a formal acceptance of KJRY’s All-SAW application.

2. PYCO questions the evidentiary basis for the Board’s finding, under 49 U.S.C. 10907(c)(1)(E), that the sale of the line to KJRY will be likely to result in improved railroad transportation for shippers that transport traffic over these lines. This finding is required for the grant of a feeder line application under the “public convenience and necessity” standard at 49 U.S.C. 10907(b)(1)(A)(i).

There was a substantial evidentiary basis for the assailed finding. The Board was fully aware that, in an earlier feeder line sale, KJRY had been found likely to improve service on a rail line in Illinois. See Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335 (STB served Oct. 28, 2004, and Feb. 7, 2005), aff’d sub nom. Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734 (7th Cir. 2006), cert. denied, 127 S. Ct. 1829 (2007) (cited throughout the August 31 Decision). Moreover, if KJRY were to acquire the line, KJRY would be unlikely to act against its own interest by providing less than adequate rail service to PYCO, which is a major shipper on these rail lines and hence a major contributor to the revenues that KJRY would earn from the line. Thus, there was ample support for the Board to find that KJRY would improve the rail service on these lines. August 31 Decision, slip op. at 14.

PYCO claims, however, that it was prevented from demonstrating that KJRY would not provide good rail service by KJRY’s failure to provide certain discovery responses concerning

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<sup>5</sup> See Dr. Daniel R. Fiehrer—Feeder Line Application—Line of BNSF Railway Company Between Helena and Great Falls, MT, STB Finance Docket No. 34947, slip op. at 2 (STB served Aug. 29, 2007).

<sup>6</sup> See United States v. James Daniel Good Real Property, 510 U.S. 43, 65 (1993) (“[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.”); Brock v. Pierce County, 476 U.S. 253, 266 (1985) (holding that statute providing that Secretary of Labor “shall” issue a final determination within a specified time period did not divest Secretary of jurisdiction to act after that time).

KJRY's involvement in litigation with shippers on its other lines. PYCO faults the Board for not sanctioning KJRY when it did not produce this information, citing its public availability. PYCO argues that it would have been difficult to obtain publicly available litigation records. The fact remains that litigation records are available outside of discovery, and PYCO simply did not make a convincing argument that KJRY's involvement in litigation shows that it would not provide improved rail service to the shippers on the lines.

PYCO essentially argues that a shipper such as itself necessarily would provide better service than a rail carrier such as KJRY. Of course, a rail carrier depends upon providing adequate service or its business would fail. And, contrary to PYCO's suggestion, neither the statute nor the regulations require the Board to rank applicants to determine which would improve service more. Therefore, PYCO is unlikely to succeed on the merits of its claim that it was an error to find that rail service would improve under KJRY.

3. PYCO claims that the Board erred in denying, without discussion, PYCO's motion to void any property transfers from SAW to a related company, Choo Choo Properties (Choo Choo), that occurred between January 9 and May 4, 2006. In particular, PYCO points to the March 2006 transfer to Choo Choo of SAW's interest in PYCO's utility easements and crossing rights concerning these lines.

The Board already had voided similar property transfers that SAW made to Choo Choo after May 5, 2006—the date on which PYCO filed its initial feeder line application. See decision served August 3, 2006, slip op. at 6. The Board acted in that decision to ensure that SAW would transfer to the successful feeder line applicant all the property necessary to provide adequate rail service to the lines' shippers.

A stay is not necessary because the Board retains jurisdiction to void the transfer of SAW's interest in PYCO's utility easements and crossing rights to Choo Choo, should PYCO convincingly demonstrate that this transfer would be necessary for the purchaser to perform adequate rail service on these lines. See Railroad Ventures, Inc. v. STB, 299 F.3d 523, 555 (6th Cir. 2002) (in an analogous sale of a rail line under 49 U.S.C. 10904, the seller is required to transfer all of its property interests associated with the rail line where the purchaser acquires a fee simple interest in the real estate underlying the line).

Irreparable Harm to Petitioner in the Absence of a Stay. PYCO claims that it will suffer irreparable harm in the absence of a stay because, if the SAW lines are sold to KJRY, the latter rail carrier would not provide adequate rail service to the lines' shippers. This claim is based on two suppositions. The first is that SAW will choose to sell its rail line to KJRY rather than PYCO. The second is that KJRY would not provide adequate rail service. Clearly, no harm would occur if PYCO purchases this rail line and arranges for its own rail service through a contract operator. But even if KJRY were the purchaser, it would be against KJRY's economic interest to provide poor service to PYCO, a major shipper on the lines and therefore a source of

significant revenue to KJRY. PYCO has not demonstrated that KJRY would act so irrationally as to provide inadequate service.

Harm to Others if a Stay is Granted. A stay would prevent the sale of these rail lines, on which, by PYCO's own demonstration, SAW has been providing inadequate rail service to shippers. PYCO is the only shipper on these lines that is receiving rail service from an alternative carrier.<sup>7</sup> All of the other shippers continue to be served by SAW. These other shippers would suffer harm if a stay were granted because they would continue to be subjected to SAW's demonstrably inadequate rail service.

The Public Interest. PYCO claims that it would harm the public interest to allow this rail line to be sold to KJRY because no shippers provided statements of support for KJRY's application. The statute does not require a demonstration of shipper support, but rather a demonstration that the applicant would likely improve the present, inadequate rail service. Both PYCO and KJRY made that showing. The prompt sale of these rail lines is in the public interest because it will improve rail service to the lines' shippers.

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

It is ordered:

1. The request for stay is denied.
2. The petition for reconsideration will be addressed in a future decision.
3. This decision is effective on its service date.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams  
Secretary

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<sup>7</sup> See PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34889, et al. (STB served Nov. 21, 2006).