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SERVICE DATE – JANUARY 26, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34802

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

Decided: January 25, 2006

On December 20, 2005, PYCO Industries, Inc. (PYCO) filed a petition under 49 U.S.C. 11123 and 49 CFR part 1146,¹ seeking an order authorizing interim alternative rail service, for an initial period of 30 days and a total period of not more than 270 days, over the lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX, by West Texas & Lubbock Railway Company, Inc. (WTL) to all shippers on the line including PYCO, and by PYCO to itself. Alternatively, PYCO seeks an order authorizing WTL to provide interim service exclusively to PYCO. WTL has certified that it is willing to provide interim rail service to PYCO and all other shippers on SAW's lines.

SAW filed a reply in opposition to the petition on December 28, 2005. PYCO filed a rebuttal on January 3, 2006, and SAW filed a letter in "clarification" of a matter contained in PYCO's rebuttal on January 6, 2006. On January 9, 2006, PYCO replied to the clarification letter, asking the Board to strike it from the record. On January 10, 2006, WTL joined in the request to strike. Also, SAW and PYCO filed letters on January 19, 2006, and January 20, 2006, respectively.

We will grant the alternative request for WTL to provide service to PYCO.

PRELIMINARY MATTER

SAW submitted its clarification letter under 49 CFR 1117.1, which authorizes a party to seek relief not otherwise provided in another rule. PYCO asks us to strike the clarification from the record on grounds that it does not request any relief and constitutes an impermissible reply to the final pleading allowed under the applicable rule, a petitioner's rebuttal under 49 CFR 1146.1(b)(3). PYCO correctly notes that the purported clarification constitutes an additional reply that is not contemplated in the rule. However, the additional information in the clarification will be instructive in our analysis, and for that reason we will not strike it from the record. Rather, in the interest of fairness and a complete record, we will also accept into the record PYCO's January 9, 2006 reply to the clarification and the letters filed on January 19 and 20, 2006.

¹ These rules were adopted in Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998) (Service Inadequacies).

BACKGROUND

In 1999, SAW received authority to acquire and operate approximately 14.1 miles of rail line from The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF),² in Lubbock, TX, and approximately 3 miles of incidental trackage rights over BNSF's main line to a BNSF yard, where SAW interchanges with BNSF.³ Since that time, SAW has switched rail cars for shippers located on this line and transported the cars to and from BNSF's yard for interchange with that linehaul carrier. PYCO, a large processor of cottonseed oil, is heavily rail dependent and is served only by SAW.⁴

At Lubbock, PYCO has two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Previously, SAW permitted PYCO to operate a rail car mover⁵ on a portion of SAW's track, which allowed PYCO to move rail cars between tracks located on PYCO's property. Through this means of operation, PYCO could load 26 cars per day at its Plant No. 1. It could also load 12 cars per day from Plant No. 2. Because of a record cottonseed harvest, PYCO advised SAW that, beginning on April 1, 2005, PYCO would have an increased need for switching of rail cars.

Mr. Robert Lacy, PYCO's senior vice president of marketing, recites problems with SAW's service beginning in March 2005 that led PYCO to seek solutions from both SAW and BNSF. When these discussions did not resolve the service deficiencies, PYCO complained to the Board's Office of Compliance and Enforcement (OCE) about SAW's slow switching of rail cars. According to PYCO, after OCE's intervention, it received satisfactory service from SAW from July through October 2005, a period in which PYCO continued to need large numbers of rail cars to handle the record harvest.

PYCO states that, in September 2005, SAW inquired whether PYCO was interested in purchasing SAW's Lubbock rail lines. According to PYCO, when it expressed interest, SAW tendered a draft "Letter of Intent" that would have bound PYCO

² Effective January 20, 2005, The Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company.

³ South Plains Switching, Ltd. Co.—Acquisition Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33753 (Sub-No. 1) (STB served July 15, 1999).

⁴ PYCO asserts that it is the largest shipper served by SAW.

⁵ A rail car mover is a vehicle equipped with sets of both steel rail wheels and rubber tire road wheels, which allows the vehicle to move rail cars along rail lines as well as travel on surface roads. Its operating functions are controlled from within an operator's cab much like a locomotive.

to purchase these rail lines for \$5.5 million. Considering its negotiations to be in the early stages, PYCO states that it requested an addition to the draft letter of intent to make the purchase contingent upon PYCO's completing a due diligence examination and obtaining satisfactory financing. PYCO asserts that SAW then cut off sale negotiations.

PYCO states that, shortly thereafter, SAW's president, Mr. Larry Wisener, demanded that PYCO immediately cease operating its rail car mover on SAW's property. On November 17, 2005, SAW placed a derail device on the track to prevent PYCO's equipment from entering onto SAW's rail line. PYCO's representative, Mr. Lacy, asked Mr. Wisener to remove the device but declined Mr. Wisener's request to meet in person, due to what he asserts was his past experience with Mr. Wisener's confrontational demeanor and profane language.

PYCO also contends that SAW has engaged in other conduct that severely hampers its ability to obtain adequate transportation. PYCO reports that on November 17, 2005, SAW cancelled PYCO's lease of a track on which PYCO stored rail cars, stating only that SAW was not obligated to provide storage.⁶ According to PYCO, since that date, SAW has switched cars for PYCO at Plant No. 1 only on a shop track outside PYCO's fence, which greatly reduces the number of cars that PYCO can load. PYCO indicates that it asked SAW to instead switch cars on a scale track inside PYCO's fence or on both the shop and the scale tracks, to allow PYCO to load more cars. PYCO relates that SAW responded that it would switch cars only on the shop track and that SAW now claimed that it would be unsafe to continue to use the scale track because PYCO personnel had to cross the track and it was close to buildings—which is true in many industrial plants. PYCO emphasizes that, in any event, the shop track cannot accommodate the number of rail cars that PYCO needs to ship.

SAW did not switch any cars at all at PYCO's Plant No. 2 between November 22 and November 28, 2005, because of "a locomotive breakdown."⁷ SAW also admits that it has not recently provided as many boxcars as PYCO requests at that plant because SAW lacks sufficient cars to meet PYCO's needs. See Reply, Appendix LDW-8. According to PYCO, since November 2005, SAW has billed PYCO for surcharges, switch charges, and storage fees that SAW has not billed its other Lubbock shippers for comparable services.

PYCO asserts that it is now able to load only about 12 cars per day at Plant No. 1, instead of the 26 cars it formerly was able to load. In addition, PYCO claims that SAW's lack of delivery of sufficient boxcars continues to limit loading of a product at Plant No. 2. PYCO complains that the resulting shortfall of switched cars has caused lost sales, delayed shipments, and an inventory accumulation such that PYCO soon will be forced to curtail operations for lack of storage for its products.

⁶ Petition, Exhibit C, Verified Statement (V.S.) Lacy at 3 and Exhibit 4 (entry of Nov. 17, 2005).

⁷ Reply, V.S. Wisener at 7.

DISCUSSION AND CONCLUSIONS

1. Interim Alternative Service to Shippers Other Than PYCO.

The claim of inadequate service to shippers other than PYCO is not well supported. One potential shipper, Floyd Trucking, Inc., submitted a letter supporting PYCO's petition and indicating that SAW's response to its service requests has been inadequate. But the record here suggests that, ultimately, Floyd Trucking has other transportation alternatives and has chosen not to use rail service because of the cost.

The record shows that there are numerous other shippers served by SAW on these lines, and the "service and support comments" attached to SAW's reply rated SAW's service favorably.⁸ Although PYCO's witness, Mr. Gail Kring, states that some of the other shippers told him informally that they supported PYCO's petition, none of the other shippers has provided a statement criticizing SAW's service. Nor is there anything else in the record to establish a measurable deterioration in the service SAW has provided to them. Accordingly, we find that PYCO has not demonstrated a substantial deterioration in service to the other shippers on SAW's line. For this reason, there is no basis to grant PYCO's request to authorize WTL to serve the other customers currently served by SAW in Lubbock.

2. PYCO's Rail Car Mover.

We turn next to PYCO's request that we authorize PYCO to operate its rail car mover on SAW's line. SAW has the right to bar PYCO from operating on its line, especially in light of derailments that occurred in the last year (nine in the 12-month period ending in November 2005). PYCO does not dispute that it caused these derailments, that the derailments damaged SAW's track and equipment, or that a crane was needed to repair three of the derailments. Indeed, PYCO paid for the crane.⁹ Therefore, we deny PYCO's request for an order directing SAW to allow PYCO to operate its own switching equipment on SAW's line. However, should WTL and SAW agree that PYCO may safely move railcars to and from its facilities, they may permit such activities.

3. Interim Alternative Rail Service By WTL for PYCO.

We have established procedures under which shippers receiving poor service may obtain interim relief. Under 49 CFR 1146.1, a petition seeking such relief must: (1) show substantial, measurable service deterioration or service inadequacy;

⁸ One shipper, Goetz, gave SAW the lowest numerical rating but also commended SAW's crew, which indicates it may have meant to give a high rating.

⁹ Rebuttal, V.S. Kring at paragraph 9d.

(2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time; and (3) contain a commitment from an alternative carrier to meet current transportation needs and show that this service can be performed safely without hurting service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's service.¹⁰ We discuss these criteria below.

Substantial and Measurable Deterioration in Service. The procedures at 49 CFR 1146.1 are for localized immediate service relief. Service Inadequacies, 3 S.T.B. at 972 n.11. PYCO is a rail-dependent shipper with two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Moreover, PYCO is served only by SAW. Here, the daily shortfall of 14 carloads for switching at Plant No. 1 (more than half of the 26 carloads that PYCO previously could load there), the continued lack of delivery of sufficient boxcars to serve Plant No. 2, and the period in November 2005 during which SAW performed no switching at all at Plant No. 2 indicate a serious deterioration in SAW's service to PYCO. PYCO has demonstrated through ample, credible evidence that, as a consequence of these service inadequacies, it will soon run out of storage capacity for its cottonseed oil and related products, and will be forced to curtail or close operations.¹¹ Consequently, we find that PYCO has shown, as to itself, "a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."¹² 49 CFR 1146.1(a).

Discussions with the Incumbent and Reasons Why Restoration of Adequate Service Is Unlikely. The purpose of requiring pre-filing discussions is to ensure that the shipper and the carrier have done all that they can do to resolve the service issues before coming to the Board for relief. American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad, STB Finance Docket No. 33795, slip op. at 2-3 (STB served Dec. 7, 1999) (American Plant Food) (denying alternative service request where the shipper had not contacted the incumbent carrier in the 9 months prior to filing the petition). This is not a case where the parties sought relief from us prematurely, before attempting to resolve the service issues themselves. Rather, there were many discussions between PYCO and SAW representatives in 2005 concerning the decline in SAW's service.¹³

¹⁰ The petition must be served, by hand or overnight delivery, on the incumbent and proposed alternative carriers and the Federal Railroad Administration. PYCO has certified that it served its petition on the required parties by overnight delivery.

¹¹ See Rebuttal, V.S. Kring and appended charts; PYCO's January 9, 2006 reply, Supplemental V.S. Kring.

¹² See Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc., STB Finance Docket No. 34479 (STB served Mar. 11, 2004) (authorizing alternative, interim rail service after two weeks of service problems on a rail line that generated about 6,000 carloads of traffic per year).

¹³ See Petition, Exhibit A and attached Exhibits 7, 8; Exhibit C, V.S. Lacy and Exhibit 4.

It is true that, after SAW barred PYCO from operating its rail car mover, Mr. Wisener invited a PYCO representative to discuss in person alternative ways of loading PYCO's rail cars. But PYCO's explanation as to why its personnel declined to meet with Mr. Wisener in person—because the relationship had become acrimonious—was not unreasonable. According to Mr. Lacy, in previous meetings in his office, Mr. Wisener had become progressively more profane and threatened to “throw out” people with opposing opinions, and his “bullying attitude” had worsened after SAW cut off negotiations for PYCO to purchase the line, at which point SAW cancelled the lease of the track on which PYCO had stored rail cars.¹⁴ In any event, it does not appear that another meeting would have been productive. Mr. Wisener now states that, had PYCO managers agreed to meet with him in person, he would have offered the option of ordering a second daily switch for a \$500 surcharge.¹⁵ However, SAW ultimately provided that option to PYCO in its December 2005 reply, as revised in its January 2006 clarification. Thus, another in-person meeting was not necessary.

The record here shows that, unlike the situation in American Plant Food, there were many contacts between PYCO personnel and SAW personnel in the months prior to filing the petition.¹⁶ Given the evidence showing a history of communications between the parties during the course of the events that led to the filing of this petition, we find that PYCO has made adequate attempts to work with SAW to try to resolve the service deficiencies.

The second part of this criterion requires a showing that the incumbent is unlikely to restore adequate rail service within a reasonable time. We find that the requisite showing has been met in this case. At the outset, we note that PYCO experienced a series of problems with SAW's service in March through June 2005: slow service because of SAW's failure to spot and pick up cars on reasonable request; two threats to terminate service at Plant No. 2; suspension of service to Plant No. 1; and threats of imposing surcharges on service SAW had been providing in the past without surcharges.¹⁷ Mr. Wisener has not refuted the fact that SAW's service deteriorated during that period. SAW's principal response was to offer to sell the line to PYCO. But short of that potential resolution, which evidently came to naught when SAW refused PYCO's request to make the sale contingent upon PYCO's completion of due diligence

¹⁴ See Petition, Exhibit C, V.S. Lacy.

¹⁵ Reply, V.S. Wisener at 4.

¹⁶ Petition, V.S. Lacy at paragraphs 12-15 and Exhibit 4 (notes showing conversations between Lacy and other PYCO personnel and Wisener and other SAW personnel).

¹⁷ See Petition at 5-6 and Exhibit A at Exhibit 8, Railroad Switching Log.

and the obtaining of financing, it took intervention by OCE before SAW itself restored adequate service to PYCO in the period from July through October 2005.¹⁸

In any event, the service problems began to recur in mid-November 2005. SAW did not provide any switching for 6 days at Plant No. 2 because of a breakdown experienced by one locomotive. While equipment failure might be a valid basis for a temporary service interruption, SAW states that it has six locomotives, and it has not provided any reason why one of the other five could not have been used to switch cars at Plant No 2 during that time.¹⁹ Nor has SAW given any reassurances that it will provide switching regularly for PYCO should there again be difficulty with a locomotive.

Since mid-November 2005, PYCO plainly has not received enough empty railcars to load its products that are ready for transport. PYCO uses tank cars, gondolas, hopper cars, and boxcars to ship its products. PYCO itself owns a fleet of tank cars, and its customers provide PYCO with privately owned gondolas, but SAW has not delivered a sufficient number of these privately owned cars. Concerning boxcar supply, SAW claims that it cannot provide enough boxcars because of BNSF's decision in August 2005 not to store boxcars on SAW's lines for free. Nevertheless, SAW provided sufficient boxcars to PYCO during September and October 2005, after BNSF's policy change. Therefore, BNSF's action does not explain SAW's more recently claimed inability to provide sufficient boxcars.

A major reason for this inadequate railcar supply is SAW's refusal of PYCO's repeated requests for SAW to deliver empty railcars to PYCO's scale track. SAW claims that it would be unsafe to use that track because PYCO personnel must cross it and the track is very close to some of the plant buildings. We question the sincerity of that claim in this case, however, because WTL recently inspected the scale track and concluded that it is safe.²⁰

SAW now asserts that all PYCO needs to do to receive adequate rail service at Plant No. 1 is to request a second daily switch. According to PYCO, SAW initially claimed that it lacked sufficient personnel to provide a second daily switch,²¹ and only after PYCO filed this petition did SAW express any willingness to provide a second daily switch.²² Thus, this offer, which could have been made much sooner,²³ appears to have

¹⁸ See Petition at 6-7 and Exhibit A at Exhibits 3-7; Exhibit B.

¹⁹ SAW January 6, 2006 clarification letter at 2.

²⁰ Rebuttal, V.S. Ellis at 2 (“WTL has inspected the tracks in question and believes service can be safely provided over these tracks. The idea that close clearances or crossings without warning devices within industrial areas could be used as a reason for not occupying those tracks is inconsistent with industry practice.”).

²¹ Rebuttal, V.S. Kring at paragraph 9f.

²² Reply, V.S. Wisener at 1-2, 5.

been made only to avoid an order from the Board authorizing alternative service by a different carrier.

SAW suggests that PYCO simply is unwilling to pay the surcharge that would be imposed if the second daily switch were outside the crew's regular 12-hour day, and that PYCO's real complaint is that the charges it must pay are too high. Rates or charges that shippers believe are too high are not a basis to order alternative, interim rail service. See Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003) (denying alternative service order because “[r]ate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123”). Here, however, PYCO has made clear that it wants the service it needs, even if it has to pay the surcharge, as that would be less costly to it than the current situation.²⁴ Thus, we do not view PYCO's request for alternative service as driven by dissatisfaction with the level of charges.

If we were persuaded that SAW's eleventh-hour offer to provide a second daily switch would fully resolve the service inadequacies for PYCO, we would not need to order the alternative service requested by PYCO. But, given SAW's broader pattern of conduct—including its unexplained abrupt cancellation of the lease of the track on which PYCO had been storing its cars and SAW's refusal to allow continued use of the scale track—we are not persuaded that SAW will do what is necessary and what it has done in the past to provide satisfactory service to PYCO, which is served only by SAW, and is heavily dependent on rail service. Therefore, based on all of the circumstances presented here, we find that PYCO has made the required showing that SAW is unlikely to restore adequate rail service to PYCO within a reasonable time and that formal intervention by the Board is appropriate.

Interference with Operations. SAW does not dispute WTL's statement that WTL can provide safe, adequate transportation service to the shippers on SAW's line without degrading service to WTL's customers on its other lines.

Because we find no need to authorize alternative service to the other shippers, we must also consider whether WTL can provide PYCO with service without unreasonably interfering with SAW's service to the other shippers on this line. To address concerns raised by having two operators on SAW's lines in Lubbock, PYCO has suggested that we authorize WTL to control dispatch over the line weekdays from 9 a.m. to 2 p.m. While we agree that two operators can safely and efficiently share this line, we will not dictate

²³ For example, when Mr. Wisener of SAW telephoned Mr. Lacy on November 17, 2005, to inform PYCO that SAW was installing the derail device, SAW could have offered to make a second daily switch, but did not do so. Instead, per Mr. Wisener's direction, SAW provided only one daily switch at Plant No. 1. Petition, Exhibit C, V.S. Lacy at Exhibit 4 (entry of Nov. 22, 2005: “Larry [Wisener] would only allow [SAW's crew] to do one pull per day.”).

²⁴ Rebuttal at 3 and V.S. Kring at paragraph 9f.

specific terms at this point. Rather, we will order the two carriers promptly to enter into operating protocols that will allow for safe joint operations on this line. We recognize that it will require good faith on the part of both SAW and WTL for this arrangement to work, and we expect both parties to act in that manner. Accordingly, both SAW and WTL will be required to report to the Board that the required protocols are in place.

In sum, the criteria have been met for PYCO to obtain interim alternative rail service. Accordingly, we will grant PYCO's request for an order authorizing WTL to provide it with alternative service on SAW's line on an interim basis.

Under 49 CFR 1146.1(c), there is a rebuttable presumption that alternative service will need to continue for more than 30 days, but that presumption can be rebutted by the incumbent carrier, and a further Board order will be needed for alternative rail service to continue at the end of the 30-day period.

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 clarification of January 6, 2006, is denied. SAW's January 6, 2006 clarification, PYCO's January 9, 2006 reply to the clarification, the letter submitted by SAW on January 19, 2006, and the letter submitted by PYCO on January 20, 2006, are accepted into the record.

2. WTL is authorized to provide alternative service to PYCO on SAW's lines, beginning at 11:59 p.m. on January 26, 2006 until 11:59 pm on February 25, 2006, under the provisions of 49 CFR 1146.1, and SAW is directed to allow such operations on its lines.

3. PYCO and SAW shall promptly enter into operating protocols that will allow for safe joint operations on this line, and they shall report to the Board that the required protocols are in place.

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

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary