

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34844

PYCO INDUSTRIES, INC.—FEEDER LINE ACQUISITION—  
SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 34890

PYCO INDUSTRIES, INC.— FEEDER LINE APPLICATION—  
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.<sup>1</sup>

Decided: July 3, 2006

In a decision in STB Finance Docket No. 34844 served on June 2, 2006, the Director of the Office of Proceedings (the Director) rejected as incomplete the application of PYCO Industries, Inc. (PYCO), under the feeder line provisions of 49 U.S.C. 10907 and 49 CFR 1151, to acquire all of the rail lines of South Plains Switching, Ltd. Co. (SAW), in Lubbock, TX (the “All-SAW option”). The Director also rejected as incomplete PYCO’s alternative request to acquire a portion of SAW’s rail lines to allow PYCO to provide rail service to itself and to two other shippers located in close proximity to one of PYCO’s two plants in Lubbock, TX (“Alternative Two”).<sup>2</sup> The rejections were without prejudice to PYCO’s filing a new application.

---

<sup>1</sup> These proceedings are not consolidated. A single decision is being issued for administrative convenience. For the same reason, the Board, rather than the Director of the Office of Proceedings, is deciding whether to accept or reject the new feeder line application submitted in STB Finance Docket No. 34890.

<sup>2</sup> PYCO describes the rail lines it seeks to acquire under Alternative Two as follows:

Track 5, SAW yard,	2,400 feet;
(continued...)	
(...continued)	
Track 1, SAW yard,	2,100 feet;
Track 9200,	3,900 feet;
Track 9298, east of BNSF main,	4,320 feet;
Track lead to PYCO plant 2 to 50th St.,	6,280 feet;
Track 231 lead to 9200/9298,	960 feet;
<u>Track 310 through Farmers 1,</u>	<u>5,600 feet</u>
TOTAL:	25,560 feet

On June 12, 2006, PYCO appealed the Director's decision and petitioned to amend its original application with newly tendered evidence. SAW opposed both the appeal and the petition to amend in pleadings filed on June 22 and June 28, 2006, respectively.

In STB Finance Docket No. 34890, filed on June 14, 2006, PYCO has submitted a new feeder line application for Alternative Two, renewed its earlier request for issuance of a protective order, and indicated that it wishes to propound discovery requests tendered with its original application.<sup>3</sup> SAW moved to reject the new feeder line application in a pleading filed on July 3, 2006.

We will deny the appeal of the Director's rejection of the original feeder line application in STB Finance Docket No. 34844; accept the new feeder line application for Alternative Two in STB Finance Docket No. 34890, authorize discovery, and set a procedural schedule; and deny SAW's motion to reject the new feeder line application.

#### BACKGROUND

In 1999, SAW acquired approximately 14.1 miles of rail lines in Lubbock, TX, from The Burlington Northern and Santa Fe Railway Company (BNSF).<sup>4</sup> PYCO, whose rail service was provided only by SAW, experienced a substantial, measurable deterioration in SAW's service in 2005. This led us to issue, under 49 U.S.C. 11123 and 49 CFR part 1146, an alternative service order authorizing West Texas & Lubbock Railway Company, Inc. (WTL), to provide service to PYCO, over SAW's lines, for an initial period of 30 days. PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (STB served Jan. 26, 2006). In two subsequent decisions, we extended the authorization for alternative service to the full 270 days permitted by the statute, through October 23, 2006.<sup>5</sup> During the

---

In addition, PYCO seeks to acquire all of Track No. 6 from the western end of SAW yard to the western clearpoint of the easternmost switch of the "wye" track connecting to Track No. 6 from the south, and also the western branch of said "wye" from its southern clearpoint north to and including its connection with Track No. 6, estimated to be 1,100 feet. Also, PYCO would acquire a crossing right as follows: Crossing right Track 9298 to and through SAW yard, 5,000 feet.

<sup>3</sup> The Director found that the rejection of PYCO's feeder line application rendered moot PYCO's requests for a protective order and a procedural schedule.

<sup>4</sup> BNSF has since changed its name to BNSF Railway Company. We will refer to both entities as BNSF.

<sup>5</sup> See decisions in STB Finance Docket No. 34802 served February 24, and June 21, 2006.

period of alternative service, SAW has continued to provide rail service to the other shippers on its lines.

Seeking a permanent solution to the inadequate rail service it experienced from SAW, PYCO filed a feeder line application in May 2006. The Director found that the application was incomplete for both the All-SAW option and Alternative Two because PYCO had not made a sufficient showing as to all of the required elements of a feeder line application (set forth at 49 CFR 1151.3(a)), and some of these deficiencies would not have been cured by obtaining discovery of information in SAW's possession.

## DISCUSSION AND CONCLUSIONS

### **STB Finance Docket No. 34844**

#### I. Appeal of Rejection of PYCO's Original Application.

PYCO appeals the Director's decision rejecting its application as deficient.

A. Inadequacy of SAW's Rail Service (49 CFR 1151.3(a)(11)). The Director found that PYCO did not provide evidence required under 49 U.S.C. 10907(c)(1)(B) showing that the majority of shippers using SAW's lines experienced inadequate service from SAW. PYCO argues that its application met that requirement by showing that service was inadequate for a majority of the *shipments* on the line. PYCO also claims that other shippers were too intimidated to state that their rail service was inadequate for fear that SAW would retaliate by degrading or cutting off their rail service.

We do not find any error in the Director's interpretation of the statutory language of 49 U.S.C. 10907(c)(1)(B) as requiring evidence to support a finding that there is inadequate service for a majority of the line's *shippers*. We agree with the Director that the statutory language is clear and that to grant a feeder line application, the Board must make a finding that the owning carrier's service is inadequate for a majority of the line's *shippers*, not a majority of the *shipments* by volume. See discussion in the Director's order, slip op. at 6.

There is a fundamental problem with PYCO's argument that silence of a majority of the shippers should be excused because shippers may be reluctant to speak out for fear of retribution by SAW. The other shippers' silence can just as well be read to indicate that they are satisfied with the service that SAW is providing to them.

We contrast this application with another feeder line proceeding cited by SAW in its appeal, Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway, STB Finance Docket No. 34335 (STB served Oct. 28, 2004) (Keokuk Junction). In that case, the initial application included statements from five of the six shippers located on the line and five of ten "overhead" shippers (those not located on the line, but

transporting shipments over the line) that the incumbent's rail service was inadequate. See Keokuk Junction, slip op. at 7 (describing the shipper statements included in the initial feeder line application). In contrast, here, the majority of the shippers on SAW's lines provided no statements at all.

In light of the silence from a majority of the lines' shippers, the Director correctly found that the original application did not provide evidence to permit the Board to find that the transportation over the line is adequate for the majority of shippers who transport traffic over the line, as required by statute and our own regulations at 49 CFR 1151.3(a)(11)(i)(B).

B. Financial Responsibility (49 CFR 1151.3(a)(3)). Citing an early decision in Keokuk Junction (STB served May 9, 2003), PYCO contends that the Director should have conditionally accepted its showing and afforded the opportunity to submit additional financial evidence under a protective order preserving confidentiality.

But the application in Keokuk Junction did not have the "fatal" deficiency in the evidence concerning adequacy of service to a majority of shippers, as discussed above. Given that deficiency, the Director correctly found that PYCO's request for issuance of a protective order was moot and that there was no basis for issuance of a procedural schedule.

Accordingly, PYCO has not met the standard for granting an appeal.

## II. Petition to Allow Amendment of Feeder Line Application.

Together with its appeal, PYCO petitioned to amend the original application, tendering additional evidence that could have been included in the original application. We will not permit PYCO to amend the original application with this evidence, but we will permit PYCO to submit the additional evidence in a new application and will incorporate by reference the information in its original application, as discussed below.

### **STB Finance Docket No. 34890**

In its new feeder line application, PYCO seeks to acquire the rail lines described as Alternative Two in the original application and provides information to make the required showing. The new application also includes newly tendered evidence. This evidence and related issues will be discussed below.

I. Newly Tendered Evidence.

A. Financial Responsibility. The newly tendered evidence<sup>6</sup> clearly demonstrates that PYCO has sufficient financial resources, through its own strong financial position and an operating line of credit, to purchase the rail lines at issue at the higher of net liquidation value or going concern value and to cover expenses associated with providing services over those lines for at least 3 years. 49 U.S.C. 10907(a); 49 CFR 1151.3(a)(3).

B. Inadequacy of Rail Service for a Majority of the Shippers. There are currently three shippers on the portions of the lines comprising Alternative Two: PYCO, Farmers Cooperative Compress, and Attebury Grain, LLC. The revised application includes letters from the latter two shippers indicating that, in light of incidents in which SAW threatened retaliation against, and degraded service to, shippers that questioned the quality of SAW's service, both Farmers Compress and Attebury Grain consider SAW's service to them to be unreliable and inadequate.

SAW contends that service can be considered inadequate to a shipper only if the rail carrier either is unduly late, or fails altogether, in picking up or delivering a specific shipment as requested by that shipper. We disagree. A shipper's affirmative statement that it fears that it could suffer retaliation in the form of poor service for criticizing its rail service provider is sufficient in our view to constitute a showing of inadequate service to the shipper that makes the statement.<sup>7</sup>

When combined with PYCO's convincing statements of the inadequacy of the service it received from SAW (in the original application), the statements of Farmers Compress and Attebury Grain constitute credible evidence of the inadequacy of SAW's rail service for *all* of the shippers in Alternative Two. Thus, PYCO's new application is complete as to that alternative.

---

<sup>6</sup> The new evidence of financial responsibility consists of a letter from PYCO's Chief Financial Officer, a new letter from CoBank of Denver, CO, and PYCO's 2005 Annual Report.

<sup>7</sup> A shipper's affirmative statement is different from shipper silence, from which no inference can be made.

II. SAW's Renewed Motion to Reject Application for Alternative Two and Motion to Reject New Application.<sup>8</sup>

In its opposition to PYCO's appeal, SAW renewed its earlier motion to reject the application for Alternative Two.<sup>9</sup> SAW argues that Alternative Two constitutes less than the entirety of a rail line that is operated as a unit, contrary to the language in the feeder line provision authorizing the sale of "a particular line of railroad," 49 U.S.C. 10907(b)(1)(A)(i). Citing Caddo Antoine and Little Mo. R.R. v. United States, 95 F.3d 740, 747 (8th Cir. 1996) (Caddo Antoine), SAW contends that a feeder line applicant may not "cherry pick" by seeking to acquire only the most attractive part of a rail line, while leaving the incumbent rail line owner with a remaining portion that allegedly cannot be operated successfully.

The Caddo Antoine decision is inapposite, however, because in that case it was the incumbent rail carrier that arguably sought to "cherry pick" the line's heaviest user. Initially in Caddo Antoine, the incumbent listed the entire rail line as subject to future abandonment—a listing that automatically subjects a line to potential acquisition under the feeder line provision at 49 U.S.C. 10907(b)(1)(A)(ii). See Caddo Antoine, 95 F.3d at 742. Preferring to retain the revenue from the line's heaviest shipper, however, the incumbent subsequently removed from that listing the very small portion of the line that was needed to serve that one shipper.

In contrast, PYCO, the heaviest user of SAW's rail services in the past, would like to purchase the entirety of SAW's lines and serve all of SAW's shippers, both large and small. It is only PYCO's inability to make the requisite showing that SAW's rail service is inadequate for a majority of the shippers on the entirety of SAW's rail lines that prevents the All-SAW application from going forward. SAW's claim that PYCO is "cherry picking" therefore falls flat. Rather, in Alternative Two, PYCO seeks to purchase the amount of rail lines necessary to assure adequate rail service to itself and to two other shippers located in close proximity to one of PYCO's two plants in Lubbock. Because we have no doubt that PYCO has demonstrated that SAW's rail service to PYCO was inadequate and has now shown the inadequacy of service to the other two shippers on the lines at issue in Alternative Two as well, its application for Alternative Two lawfully may go forward. For these reasons, we deny SAW's renewed motion to reject the application for Alternative Two.

In its motion to reject the new application for Alternative Two, SAW argues that PYCO's application does not have sufficient evidence to show that sale of the tracks comprising

---

<sup>8</sup> SAW treated PYCO's new feeder line application as encompassing both the All-SAW option and Alternative Two. PYCO contends that the new application is complete only as to Alternative Two. See Cover Letter submitted with new application on June 14, 2006. Therefore, we will not further discuss SAW's arguments directed at rejection of the All-SAW option, which stands rejected.

<sup>9</sup> The motion was filed on May 16, 2006; PYCO submitted a reply on May 18, 2006.

Alternative Two will not have a significant adverse financial effect on SAW. See 49 U.S.C. 10907(c)(1)(C). In the decision rejecting PYCO's original application, the Director found that, with regard to PYCO purchasing the tracks comprising Alternative Two, PYCO's showing was sufficient that the remainder of SAW's system would be viable both financially and operationally. We agree that PYCO has made a sufficient showing in this regard, which of course SAW is free to contest as the new application in STB Finance Docket No. 34890 goes forward. See PYCO's original application in STB Finance Docket No. 34844, at 38-39. For this reason, we will deny PYCO's motion to reject the new application.

### III. Discovery.

PYCO requests discovery against SAW and BNSF (Exhibits P and Q of its original application) and reserves the right to amend its tendered valuations of the rail lines involved in Alternative Two after discovery. PYCO may propound discovery requests under our regulations<sup>10</sup> and may amend its valuations to reflect the responses it receives from SAW and/or BNSF. A protective order issued separately should facilitate discovery responses by ensuring confidentiality. Because PYCO served its original application on the entities from which it seeks discovery, SAW and BNSF, we deem those discovery requests to be propounded as of the date this decision takes effect for the purpose of calculating the time for responses.

### IV. Environmental Issues.

Under the regulations of the President's Council on Environmental Quality and the Board's own environmental rules, actions are separated into three classes that prescribe the level of documentation required in the process under the National Environmental Protection Act (NEPA). As pertinent here, actions whose environmental effects are ordinarily insignificant may normally be excluded from the need to prepare environmental documentation under 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4 and 49 CFR 1105.6(c). Included in this category are rail line acquisitions that will not result in operating changes that exceed certain thresholds: generally, an increase in rail traffic of at least eight trains per day or 100% in traffic volume (measured in gross ton miles annually).

Here, because the acquisition would simply replace the rail carrier serving three shippers (PYCO, Farmers Compress, and Attebury Grain) with either PYCO itself or a rail carrier of PYCO's choosing, it would not result in more than eight additional trains per day or an increase of 100% in rail traffic volume on these lines. Accordingly, we find that PYCO's proposed operations do not exceed the Board's thresholds for environmental review, and that no environmental documentation is required.

---

<sup>10</sup> 49 CFR part 1114.

V. Schedule.

Our regulations set forth time periods that apply for submitting competing applications, verified statements and comments addressing feeder line applications and any competing applications, and replies, unless otherwise provided. In light of the expiration date for alternative rail service to PYCO, October 23, 2006, we shall provide a shortened schedule for the submission of these pleadings in this case, as set forth below. Although our regulations provide that extensions of filing dates may be granted for good cause, 49 CFR 1151.2(k), the parties should be aware that, to facilitate prompt resolution of this application, we will disfavor requests for extensions of filing dates in this proceeding except in the most extraordinary circumstances.

In summary, PYCO has submitted sufficient information in its new application for Alternative Two to meet the requirements of 49 CFR 1151.3. The Board will rule on the merits of the application when the record is complete.

It is ordered:

1. PYCO's appeal of the order rejecting its original application is denied.
2. SAW's renewed petition to reject the application for Alternative Two and motion to reject the new application are denied.
3. PYCO's new application for Alternative Two is accepted. Notice will be published in the Federal Register on July 14, 2006.
4. Competing applications by any person seeking to acquire the rail lines comprising Alternative Two must be filed by July 18, 2006.
5. Verified statements and comments addressing the initial and/or any competing application(s) must be filed by August 2, 2006.
6. Any amendment by PYCO to its valuation of the rail lines, based upon discovery responses, must be filed by 7 days after it receives the discovery responses. If the resulting filing date falls after the submission of the verified statements and comments in paragraph 5, the parties that filed such statements and comments shall have 7 days after the filing of the amended valuations to file any verified statements and comments concerning the amended valuations.
7. Verified replies by applicants and other interested parties must be filed by August 14, 2006, unless parties have filed any verified statements and comments concerning the amendment to valuations referred to in paragraph 6. In the event of such filings, applicants and other interested parties shall have 15 days after the filing of such verified statements and comments to file replies.

8. This decision is effective on July 14, 2006.
9. A copy of this decision will be served on BNSF.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary