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SERVICE DATE – JUNE 21, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34802

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 COMMODITIES—PYCO INDUSTRIES, INC.
PETITION FOR PARTIAL REVOCATION

Decided: June 20, 2006

In a decision served on January 26, 2006 (January Decision), we granted the petition of PYCO Industries, Inc. (PYCO), for an order pursuant to 49 U.S.C. 11123(a) and 49 CFR part 1146 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 ordered amendments to the parties' operating protocols governing the use of SAW's lines for the duration of alternative rail service in a decision served on February 16, 2006 (February 16 Decision). We extended alternative service for an additional 120 days (until 1:59 p.m. on June 25, 2006) in a decision served on February 24, 2006 (February 24 Decision). SAW continues to serve the other shippers located on its lines.

SAW asked us to terminate alternative service in a petition filed on March 30, 2006 (Petition). In a pleading filed on April 6, 2006, PYCO opposed the termination request and asked us to continue alternative service at least through June 25, 2006 (the current expiration date), and to modify the existing operating protocols by requiring SAW to keep certain track clear.

SAW opposed PYCO's requested modification, asked for a different modification of the operating protocols, and responded to PYCO's opposition to termination of the alternative rail service, in a pleading filed April 13, 2006 (SAW Rebuttal). PYCO objected to SAW's Rebuttal as untimely and opposed SAW's requested modification, in a pleading filed April 19, 2006.

PYCO filed a Petition for Immediate Injunctive Relief or to Expedite a Protocol Modification to Address a Retaliatory SAW Blockade on May 17, 2006. SAW filed a reply on May 26, 2006.

On May 22, 2006, WTL filed a letter-request dated May 17, 2006, to modify the operating protocols. Having received that letter-request by facsimile copy, SAW filed a reply to it on May 19, 2006.

On May 24, 2006, SAW filed a Supplement to its Petition (Supplement), arguing that alternative rail service should not extend beyond the current expiration date because the majority of rail shipments to and from PYCO involve commodities that have been exempted from regulation, and SAW is prepared to provide all necessary rail service. On May 26, 2006, PYCO filed a partial reply to SAW's Supplement.

Also on May 26, 2006, US Rail Partners, Ltd. (USRP) sought leave to file the verified statement of its president.

On June 7, 2006, PYCO filed a Motion for Extension of Alternative Rail Service.

On June 13, 2006, SAW filed a Second Supplement to its Petition (Second Supplement).

On June 19, 2006, PYCO asked us to strike SAW's Second Supplement and also replied to it.¹

We will deny SAW's requests to terminate alternative service and to modify the operating protocols. As explained below, we find that we have regulatory authority to order alternative service as to PYCO and will extend the alternative rail service authorization for an additional 120 days beyond the current expiration date, for a total of 270 days. Also, to remove any doubt, we will revoke the exemption from regulation for commodities shipped to, or received by, PYCO, to the extent necessary to allow the alternative service.

To promote safe operations on SAW's rail lines during the period of WTL's alternative service, we will grant the requests of PYCO and WTL for a modification of the operating protocols to require SAW to keep a specific section of its tracks clear. In light of this modification, we will deny PYCO's request for injunctive relief as unnecessary.

PRELIMINARY ISSUES

Citing 49 CFR 1146.1(d)(3), PYCO argues that SAW's Rebuttal was filed 2 days late. We will treat PYCO's request as a motion to strike the rebuttal. Because the rebuttal was SAW's first opportunity to reply to PYCO's request for modification of the operating protocols, we will deny the motion to strike.

Because no party will be harmed and it will lead to a more complete record, USRP's request for leave to file the verified statement of its president will be granted and the statement will be made part of the record.

¹ In that June 19, 2006 filing, PYCO also sought revocation of the exemption in STB Finance Docket No. 33753 (Sub-No. 1), through which SAW acquired the trackage that is at issue in this proceeding. The revocation request will be addressed separately.

In light of PYCO's having taken the opportunity to reply to SAW's Second Supplement, we will deny the motion to strike it.

BACKGROUND

In 1999, SAW acquired approximately 14.1 miles of rail lines in Lubbock, TX, formerly owned by The Burlington and Northern and Santa Fe Railway Company (BNSF).² From that time until recently, PYCO, a rail-dependent processor of cottonseed oil and related products, was served only by SAW, whose rail lines connect only with those of BNSF.

In the January Decision, we found that PYCO had experienced a substantial, measurable deterioration in rail service and that SAW was unlikely to restore adequate rail service to PYCO within a reasonable time. We authorized WTL to provide alternative rail service to PYCO for a 30-day period, and we noted that there was a rebuttable presumption that alternative rail service would need to continue beyond that period.

In the February 24 Decision, we found that the transportation emergency would continue to exist if alternative service were terminated, and we therefore ordered an additional 120 days of alternative rail service by WTL. SAW petitioned to terminate alternative rail service about a month after we ordered the 120-day extension.

DISCUSSION AND CONCLUSIONS

We will first address the Board's regulatory authority to order alternative service to PYCO. Then we will discuss our reasons for not terminating, but instead continuing, the alternative service and granting some of the requested modifications of the operating protocols.

I. Regulatory Authority to Order Alternative Service for PYCO.

SAW states that approximately 74% of the rail traffic to and from PYCO's plants consists of commodities (cottonseed, cottonseed hulls, and cotton linters) that have been exempted from regulation, in Rail General Exemption Authority, 367 I.C.C. 298, 310-12 (1983) (General Exemption) and 49 CFR 1039.10. SAW argues that because the exemptions at issue are essentially from the entirety of the Interstate Commerce Act, as amended (the Act), and because the statutory provision for alternative service is part of the Act, the Board lacks authority to extend (or initially to have ordered) alternative service to transport these commodities for PYCO. Concerning the remaining 26% of PYCO's traffic that does not involve exempt commodities, SAW contends that "it would not be practical [] or safe to provide for alternative rail service for a distinct minority of shipments from the same facility." Supplement at 5.

PYCO responds that the commodity exemptions do not preclude alternative rail service because the rail transportation for PYCO of regulated commodities is not segregated from the transportation of exempted commodities. Alternatively, PYCO seeks partial revocation of

² BNSF has since changed its name to BNSF Railway Company. We will refer to both entities as BNSF.

General Exemption so as to permit alternative rail service for all of the commodities PYCO ships and receives by rail at Lubbock.

We find no merit to SAW's contention that, where the majority of shipments comprise exempt commodities, we may not authorize alternative service even as to commodities that are not exempt. SAW's argument would not give effect to our authority to prescribe alternative rail service under 49 U.S.C. 11123(a) whenever we determine that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy of rail service provided by the incumbent carrier. 49 CFR 1146.1(a). Therefore, we conclude that where there is a mix of regulated and exempted commodities being received and shipped and it would not be practical to provide separate service for the two types of traffic, the Board can order alternative rail service as to all of the shipments, so long as the criteria for alternative rail service are met, as they plainly have been in this case. Thus, we conclude that we lawfully authorized, and lawfully may extend, alternative rail service as to all of the rail service to PYCO without having to first revoke the exemption for the otherwise unregulated transportation.

In any event, we may revoke an exemption, in whole or in part, at any time under 49 U.S.C. 10502(d), if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. See Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 976 (1998) (Expedited Relief).

Even if partial revocation of General Exemption were considered necessary, we conclude that the standard for revocation has been met here. The exemptions at issue were predicated on railroads not abusing their market power in transporting the exempted commodities. We view SAW's rail service as having been so inadequate as to amount to an abuse of market power. Therefore, to remove any doubt, we can and will revoke the exemptions, to the extent required to provide for alternative rail service. This action will ensure the continuation of a sound rail system to meet the needs of the shipping public. See 49 U.S.C. 10101(4).

In its Second Supplement, SAW claims that the tracks that are used to serve PYCO are excepted switching tracks and argues that, as a result, we lack authority to order alternative service over those tracks. We disagree that the tracks at issue are switching tracks that fall within 49 U.S.C. 10906. SAW sought and received authority under 49 U.S.C. 10901 to acquire these tracks. Moreover, the tracks are used by more than one shipper. Even if these tracks constitute switching tracks, however, such tracks are given an exception only from the entry and exit provisions at 49 U.S.C. 10901-10905 governing the construction, acquisition, operation, abandonment, or discontinuance of rail lines. 49 U.S.C. 10906. SAW relies upon Battaglia Distributing Co., Inc. v. Burlington Northern, 2 S.T.B. 323 (1997) for the proposition that, when track is within the exception at 49 U.S.C. 10906, the Board lacks authority to order alternative rail service over the track. Battaglia is distinguishable, however, because in that case the rail carrier asserted that it had previously abandoned the track and the case presented a request to restore service that already had ended lawfully. 2 S.T.B. at 326. Likewise, service previously had ended in another case on which SAW relies, Valley Feed Company v. Greater Shenandoah Valley Development Company d/b/a/ Shenandoah Valley Railroad Company, Docket No. 41068 (ICC served Dec. 21, 1995). Here, of course, the tracks have not been abandoned and service has been continual, even if inadequate for a period.

II. Merits of Termination or Continuation of Alternative Rail Service for PYCO.

SAW contends that the emergency that led to the need for alternative service has ended because PYCO's demand for rail service has returned to normal levels. SAW states that it is prepared to provide PYCO with whatever rail services are needed, that BNSF (rather than SAW) is at fault for the rail service problems PYCO has experienced, and that SAW has been punished enough by losing revenue from not providing PYCO's rail service.

PYCO counters that it has been operating its plants at full capacity because it still has a large cottonseed crop to process and that its corresponding demand for service is either the same or greater than when it filed its original petition for alternative service in December 2005. In light of recent actions taken by SAW,³ PYCO questions the sincerity of SAW's claimed willingness to provide adequate rail service. PYCO also argues that BNSF is not responsible for the service inadequacies PYCO experienced from SAW, noting that WTL has coordinated with BNSF to provide adequate service. Finally, PYCO contends that SAW's loss of revenue is not an adequate basis to terminate alternative rail service. Accordingly, PYCO seeks the continuation of WTL's alternative rail service to the statutory limit of a total of 270 days. We discuss these arguments below.

PYCO has demonstrated that, throughout the alternative service period, it has been operating its plant nonstop. The statement of PYCO's general manager shows that PYCO's demand for service continues to be as high as when it originally sought alternative service. Therefore, we find that PYCO has a continuing need to ship a high number of rail cars of cottonseed products.

We now turn our attention to SAW's contention that it sincerely desires to provide adequate service to PYCO. We are concerned that SAW still has not taken any responsibility for the service failures that led to the January Decision in which we initially authorized alternative rail service. As stated previously, SAW contends that BNSF's actions have been a major cause of the service difficulties experienced by PYCO. However, as discussed above, these allegations have been convincingly rebutted by PYCO. Until it acknowledges its past service lapses, SAW is unlikely to be able to avoid the difficulties it experienced in the past in providing service to PYCO.

Moreover, SAW's continued actions belie its claimed willingness to now provide adequate service to PYCO. It is unrefuted that, until March 2006, SAW permitted PYCO to move PYCO equipment over a long-existing industrial crossing of the wye track separating PYCO's outdoor cottonseed stockpile from its Plant No. 1, at which cottonseed is processed. PYCO states that the stored cottonseed has a value of \$11 million. During the period of alternative service, however, SAW has stored empty rail cars on the wye track in a location that prevents PYCO's equipment from using the industrial crossing to get to the seed stockpile.

SAW would have us excuse its recent blockage of the industrial crossing because there is no document granting PYCO the right to cross SAW's tracks at that crossing. SAW also claims

³ See discussion of SAW's actions in the January Decision and February 24 Decision.

that it needs the revenue it earns from storing the rail cars at issue and states that it would have placed these cars on Track 9298 but for the protocol provision requiring that track to be kept clear for the staging of cars for PYCO. But as PYCO explains, SAW has other locations available to place these stored cars. The fact that SAW may have the right to store rail cars in a position that blocks the industrial crossing does not justify its doing so when the blockage harms PYCO and SAW has other locations in which to store the cars.

In addition, SAW evidently still does not participate in the daily telephone conference calls by which PYCO and BNSF address any service issues that arise, including congestion on SAW's rail lines or yard. A rail carrier that is committed to providing good rail service likely would participate. Taken together, the blockage of the industrial crossing and nonparticipation in the daily telephone calls give us good reason to question the credibility of SAW's assertion that it would provide adequate service to PYCO if alternative service were terminated now.

As for SAW's claim that it has been punished enough by the earlier alternative service orders, we note that an alternative rail service order is not to be viewed as a punitive measure against the incumbent rail carrier. Expedited Relief, 3 S.T.B. at 974. Rather, alternative service is intended to temporarily replace a rail carrier that is not providing adequate service until that carrier shows that it is once again able to provide such service.⁴

In light of these facts, we find that PYCO's transportation emergency will continue after June 25, 2006, and we will extend the alternative service to the maximum (270-day) period allowed by the statute, through October 23, 2006. Under the regulations at 49 CFR part 1146, alternative rail service to PYCO will not be available after October 23, 2006. We encourage the parties to work together before that time to reach a satisfactory solution to PYCO's continuing need for adequate rail service.

III. Modifications of the Operating Protocols.

A. Unblocking the Industrial Crossing. PYCO asks us to order injunctive relief: that SAW immediately remove its blockage of the industrial crossing of the "wye" track separating PYCO's seed stockpile from its plant for the duration of alternative service. Alternatively, PYCO and WTL request modification of the existing operating protocols to prevent SAW from placing any equipment on the wye coming out of the south side of SAW's yard during the operating hours allocated to alternative service provider WTL. According to PYCO, either of these remedies would restore the wye to its status quo.

PYCO contends that keeping the wye clear of SAW equipment is needed not only to free the blockage but also to protect PYCO's and WTL's workers. PYCO documents occasions on which its workers felt endangered by SAW operations on the wye during the hours assigned to WTL for using the adjoining SAW yard. According to PYCO, the requested modification of the

⁴ SAW contends that alternative service should be terminated because it is a small railroad and cannot long sustain the loss of revenue from not transporting PYCO's traffic. We note, however, that this is not a reason to terminate alternative rail service. See 49 CFR 1146.1(d)(1).

protocols would enhance the safety of operations while there are two rail operators using SAW's lines.

PYCO explains that the nearby public road is not a feasible alternative to reach the stockpile because it would apparently require the approval of the Texas Department of Transportation (Texas DOT) as well as the City of Lubbock's authorization to construct a new road access. PYCO's request to Texas DOT is pending. But even if the necessary approval is obtained, the City or State could limit the hours in which PYCO could use any newly constructed road access. In any event, the public road access would not likely be available in time to prevent the loss of PYCO's stored cottonseed.

Accordingly, in light of the lack of a feasible alternative to reach the stockpile and the safety benefits from keeping the wye track clear, we will modify the current operating protocols to provide that, during the WTL operating hours, SAW may not place or have any equipment on the wye coming out of the south side of its yard. PYCO's request for immediate injunctive relief is rendered unnecessary because the modification would achieve the same result.

B. Preventing WTL From Storing Cars for PYCO on SAW's Main Track. SAW contends that WTL is "permanently" storing rail cars for PYCO on SAW's main track, Yard Tracks 1 and 5, and Tracks 9298 and 9200. SAW states that the operating protocols do not give WTL around-the-clock use of those tracks. SAW therefore asks us to modify the operating protocols to require that all of the tracks covered by the protocols shall be kept clear by WTL when not in use by WTL in providing rail service to PYCO and during SAW's operating window.

PYCO counters that the tracks assigned to it under the existing protocols historically have been used to stage cars for PYCO. In addition, it states that SAW does not need these tracks to serve any other shippers, that SAW has not shown harm to SAW or any of its shippers from WTL's use of these tracks, and that SAW has not complained to PYCO about WTL's use of these tracks.

We agree that SAW has not demonstrated any harm from WTL's use of the tracks to stage cars for PYCO. Accordingly, we will deny this requested modification of the operating protocols.

C. Requiring SAW to Observe the Protocols' Time Allotments and to Repair Tracks. PYCO and WTL express concern for the safety of WTL and PYCO personnel when SAW performs switches in its yard at the same time that WTL is supposed to be switching there, according to the operating protocols. SAW denies that its operations on Tracks Nos. 2, 3, 6, and a short portion of the main track at its east end create a safety hazard or interfere with WTL's service to PYCO, which is performed in the west end of the yard. However, we are concerned about the potential danger to all of the personnel involved when the protocols' time allotments are not followed. We expect SAW to observe the operating protocols by not performing any operations in its yard during the hours that the protocols provide for WTL to operate in SAW's yard.

WTL and PYCO claim that, during the period of alternative service, SAW has not inspected or repaired the sections of its trackage used by WTL to provide service to PYCO. PYCO claims that the SAW lead into PYCO's Plant No. 1 requires repair in order to avoid derailment. Both WTL and PYCO ask us to order SAW to inspect and repair all of its trackage used by WTL for the duration of alternative service. SAW replies that it has performed inspections and maintenance of trackage used by SAW and WTL as required.

In authorizing the extension of alternative service, we act to ensure the provision of adequate service to PYCO for the duration of the alternative service period. As the owner of the track that WTL is using to serve PYCO, SAW has the responsibility to inspect and adequately maintain the trackage used by WTL. We expect that SAW will adequately maintain the involved trackage. If WTL or PYCO continues to be concerned that track conditions are unsafe, the Federal Railroad Administration should be contacted to request an evaluation of the track.

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

It is ordered:

1. USRP is granted leave to file the verified statement of its president.
2. SAW's petition to terminate alternative rail service and request for a modification of the operating protocols are denied.
3. PYCO's requests to strike the SAW Rebuttal and SAW's Second Supplement and for immediate injunctive relief are denied.
4. 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 alternative rail service for all of PYCO's rail traffic.
5. The operating protocols attached to WTL's February 8, 2006 request, as modified by the decision served on February 16, 2006, are further modified by adding the following term, which shall apply for the same duration as the existing operating protocols:

During the hours allocated to WTL under these protocols, SAW may not place or have any equipment on the wye coming out of the south side of its yard.

6. WTL is authorized to provide alternative service to PYCO on SAW's lines for an additional period of 120 days, until 11:59 p.m. on October 23, 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 this decision and the decision served on February 16, 2006, shall continue to apply.

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

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary