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June 21, 2006

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K. Street. NW
Washington, DC 20423-0001



Re: Finance Docket No. 34844, *PYCO Industries, Inc. -- Feeder Line Development -- South Plains Switching, Ltd. Co.*

Dear Mr. Williams,

Enclosed please find original and 10 copies of Reply In Opposition To Appeal Of Decision Of Director Konschnik Served June 2, 2006, for filing with the Board in the above reference matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for South Plains
Switching Ltd. Co.

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. – FEEDER)
LINE DEVELOPMENT – SOUTH) FINANCE DOCKET
PLAINS SWITCHING, LTD. CO.) NO. 34844



**REPLY IN OPPOSITION TO APPEAL OF
DECISION OF DIRECTOR KONSCHNIK SERVED JUNE 2, 2006**

Pursuant to 49 CFR § 1011.2(a)(7), SOUTH PLAINS SWITCHING LTD. CO. (SAW) hereby replies in opposition to an appeal of Director Konschnik’s decision served June 2, 2006, filed by PYCO Industries, Inc. (PYCO) on June 12, 2006.

APPELLATE STANDARDS

Director Konschnik’s decision rejected a Feeder Line Application (FLA) filed by PYCO on May 5, 2006. The Director’s action was taken pursuant to authority delegated by the Board under 49 CFR § 1011.(b)(8)(i).

Appeals of an action of a Board employee under delegated authority “are not favored.” 49 CFR § 1011.6(b). Such an appeal “will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” Id.

OVERVIEW

PYCO’s appeal does not show “exceptional circumstances” in relation to the Director’s rejection of the FLA. The appeal identifies neither “a clear error of judgment”

on the part of the Director, nor “manifest injustice” resulting from his rejection of the FLA.

In rejecting the FLA, the Director applied the plain meaning of 49 USC § 10907(c)(1)(B) that an FLA based on public convenience and necessity cannot go forward in the absence of sufficient evidence to show that transportation over the rail line under consideration is inadequate for the majority of shippers who transport traffic over such line. That application of the statute is in accordance with the law and is consistent with the record. In contrast, the statutory application argued for in the appeal disregards the language used by Congress and is utterly without a foundation in the evidence. The appeal is required to be denied on that basis.

ARGUMENT

The most widely-accepted rule of statutory construction in the United States is that when the language of a statute is clear and free from ambiguity, a court will apply the statute in accordance with its plain meaning. Faced with a clear and unambiguous statutory provision, a court will refuse to look at supplementary material, such as legislative history and the like in deciding what the statute means. *See e.g. Hammontree v. NLRB*, 894 F. 2d 438, 441 (DC Cir, 1990).

As the United States Supreme Court explained in Connecticut National Bank v. Germain, 503 US 249, 112 S. Ct. 1146 (1992), at 1149:

“(I)n interpreting a statute a court should always turn to one cardinal canon before all others... (C)ourts must presume that a legislature says in a statute what it means and means in a statute what it says there... (W)hen the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete’.”

The Director's decision rejecting the FLA was compelled by that "plain meaning" rule. Congress has provided that the Board must make five findings specified in 49 USC § 10907(c)(1)(A)-(E) in order to determine that public convenience and necessity require or permit sale of a rail line under the feeder statute. The finding in (B) is that "the transportation over such line is inadequate for the majority of shippers who transport traffic over such line."

The plain meaning of "majority" is "more than half." Thus, subsection (B) required that there be evidence in the FLA to show, on a prima facie basis, that the rail service provided by SAW is inadequate for more than half of the shippers on SAW's rail lines. The Director found that the FLA did not contain such evidence. That finding was clearly correct.

Of the 19 shippers on SAW identified in the Director's decision (note 9), the FLA identified only one – PYCO – as having alleged that SAW's rail service is inadequate, or two at the most, if the one-time, isolated instance referred to by Hi-Plains Bag and Bagging Company is counted as an allegation of inadequate service (FLA, Ex. L).¹ Inasmuch as one or two out of 19 is nowhere near "more than half", the Director's finding under subsection (B) is unassailable.

The same is true for Alternate Two in the FLA. Of the three shippers located on SAW rail lines covered by Alternative Two, only one – PYCO – has alleged that SAW's rail service is inadequate. Inasmuch as one out of three is not more than half, the Director's finding under subsection (B) as to Alternative Two is also unassailable.

¹ Floyd Trucking Company (Floyd) has never been a shipper on SAW. SAW did not prevent Floyd from shipping by rail. On the contrary, SAW made a substantial expenditure to restore a switch to Floyd's track to enable Floyd to ship by rail. Floyd's decision not to ship by rail cannot have been based on inadequate rail service offered by SAW.

Under the “plain meaning” rule, this is the end of the matter. The appeal is required to be denied under the “plain-meaning” rule, without regard to legislative history or floor statements by a legislative sponsor of the statute (appeal at 17-21), or attempts by PYCO to distort the record (id at 17, 21-27).

Even if they were entitled to consideration in construing the meaning of subsection (B), the legislative history and floor statements identified in PYCO’s appeal do not establish that Congress intended that an FLA based on public convenience and necessity could go forward with allegations of inadequate service by less than a majority of shippers on a rail line. Certainly, nothing in the Conference Report, which is the official legislative history, supports any such intent.

PYCO’s appeal has reached a new low in unwarranted smear tactics designed to malign SAW at the Board. A brazen example is PYCO’s attempt to compare SAW’s treatment of its shippers to Germany’s treatment of its citizens under Hitler (appeal at 22-23). Come on, PYCO, how low can you go? Another instance is PYCO’s irresponsible assertion that three unnamed SAW shippers have experienced service inadequacies, but won’t come forward for fear of retaliation and intimidation (id, note 16). Baseless innuendo of that kind cannot obscure PYCO’s failure to comply with the feeder line statute. It’s high time for PYCO to stop these unwarranted personal insults, and begin to deal with the facts and the law.

SAW could rebut PYCO’s typically verbose and overblown discussion of SAW’s relationship with its shippers. Likewise, SAW has statements in support of its service from a number of its shippers that it will submit for the record at an appropriate occasion. But those actions would unnecessary lengthen the record on this appeal inasmuch as the

dispositive issue is whether PYCO sustained its burden of proof in the FLA to show that service is inadequate for a majority of shippers on the rail lines under consideration.

Director Konschnik was clearly correct on the facts and on the law that PYCO failed to do so.²

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reason stated, PYCO's appeal is required to be denied.

Respectfully submitted,

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Respondent



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DATE FILED: JUNE 22, 2006

² In the event that PYCO's appeal were to be sustained, SAW would renew its Motion For Rejection Of Alternative Two Of Feeder Line Application, filed May 16, 2006.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2006 I served a copy of the foregoing Reply In Opposition To Appeal Of Decision Of Director Konschnik Served June 2, 2006 on the following by overnight mail:

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