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September 14, 2007

VIA E-FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 34890
*PYCO Industries, Inc.— Feeder Line Application—Lines Of South Plains
Switching, Ltd. Co.*

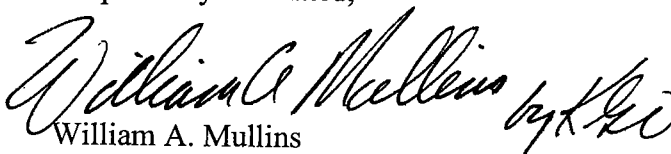
STB Finance Docket No. 34922
*Keokuk Junction Railway Co.— Feeder Line Application—Lines Of South Plains
Switching, Ltd. Co.*

Dear Secretary Williams:

Attached hereto is the Reply of Keokuk Junction Railway Co. ("KJRY") to the request for stay contained in the "Petition for Reconsideration in F.D. 34890 and 34922 and Stay in F.D. 34922 on Behalf of PYCO Industries, Inc." ("PYCO Petition") filed in the above-captioned proceedings on September 10, 2007. KJRY's attached reply addresses only the stay request contained in the PYCO Petition. KJRY will respond separately and at a later date to PYCO's request for reconsideration of the Board's decision in the above-captioned proceedings served on August 31, 2007 ("August 31 Decision"), which is also contained in the PYCO Petition.

If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins

Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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 COMPANY
— FEEDER LINE APPLICATION—
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**REPLY IN OPPOSITION TO PETITION FOR
STAY OF PYCO INDUSTRIES, INC.**

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Attorneys for Keokuk Junction Railway Co.

DATED: September 14, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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.**

**REPLY IN OPPOSITION TO PETITION FOR
STAY OF PYCO INDUSTRIES, INC.**

On September 10, 2007, PYCO Industries, Inc. (“PYCO”) filed in the above-captioned proceedings what it has entitled a “Petition for Reconsideration in F.D. 34890 and 34922 and Stay in F.D. 34922 on Behalf of PYCO Industries, Inc.” Although PYCO does not specifically refer to the regulation or regulations upon which its petition is based, PYCO appears, among other things, to be requesting, alternatively, a “housekeeping stay,” a stay subject to administrative reconsideration pursuant to 49 CFR 1115.3(f), or a stay pending judicial review under 49 CFR 1115.5.¹ Regardless, given the expedited procedures under which the Board considers stay requests, Keokuk Junction Railway Co. (“KJRY”) hereby responds in opposition to PYCO’s stay request. KJRY will respond at a later date to the reconsideration request

¹ Although unclear as to which remedy PYCO believes is best suited here, figuratively speaking it appears that PYCO’s approach to its stay request is to toss each type of stay against the wall to see if any one might stick.

contained in PYCO's September 10 Petition, consistent with the Board's regulations for replies to petitions for reconsideration.²

As set forth below, PYCO's stay request should be denied. The Board's decision served on August 31, 2007 ("August 31 Decision") is a well-reasoned and faithful application of the feeder line statute at 49 U.S.C. 10907. The Board did not commit material error in granting both of the competing All-SAW feeder line applications and no new evidence has been presented, nor have there been changed circumstances that warrant reconsideration. Thus, PYCO has no chance of prevailing either in a request for reconsideration or if it takes the ill-advised step of seeking judicial review of the Board's decision to grant of KJRY's All-SAW feeder line application. Furthermore, PYCO cannot prove that it will suffer irreparable injury in the absence of stay, that a stay would not harm other parties, or that the issuance of a stay would be in the public interest.

ARGUMENT

Other than mentioning the Board's imposition of a "housekeeping stay" under particular circumstances, PYCO makes no serious effort to explain why one would be warranted here. In fact, PYCO's filing appears implicitly to acknowledge that one should not be imposed. Indeed, this is not the type of situation where housekeeping stays have been used. Housekeeping stays have been used in the past as a means to obtain additional information in the context of class exemption procedures where tight procedural deadlines have prevented the STB from obtaining important information. Such is not the case here. Thus, PYCO's request (and the Board) should properly focus upon the traditional stay factors.

² Although 49 CFR 1115.3 provides for petitions for reconsideration, that regulation does not prescribe a deadline for the filing of replies to such a petition. Because it is not otherwise provided for, the reply provision of 49 CFR 1104.13(a) governs here, and affords KJRY 20 days to respond to PYCO's reconsideration request.

Specifically, to obtain a stay pending administrative or judicial review, PYCO must show that: (1) there is a strong likelihood that the petitioner will prevail on the merits; (2) the petitioner will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports granting the stay. 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) (“Holiday Tours”); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 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). The so-called Holiday Tours four-part standard applies equally to stay requests under 49 CFR 1115.3 and 1115.5.³ As will be shown, PYCO's stay request does not make the appropriate showings under the four-part standard.

PYCO Is Highly Unlikely To Prevail On the Merits

It is highly unlikely that PYCO will prevail on the merits in its petition for reconsideration or in a court appeal. As stated above, the Board's August 31 Decision is a measured and carefully-arrived-at resolution of a knotty rail service problem that exists amid an unfortunate quagmire of litigation and animosity between PYCO and SAW. Finding both PYCO and KJRY financially capable of acquiring and providing adequate service over the All-SAW lines, the Board proceeded carefully to assess the merits of both applications in accordance with the five-part public convenience and necessity (“PC&N”) standard set forth at 49 U.S.C.

³ See, e.g., General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA, STB Finance Docket No. 34867 (STB served July 13, 2007) (four-part standard for granting a stay applies to requests pursuant to Section 1115.3); San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption-Build-Out to the Bayport Loop Near Houston, Harris County, TX, STB Finance Docket No. 34079 (STB served July 9, 2003) (applying the four-part standard to a stay request made pursuant to Section 1115.5).

10907(c)(1). KJRY supplied more than sufficient evidence to prove that it would offer improved service to All-SAW shippers.⁴ PYCO's request for reconsideration, however, demands that the Board apply a new and unprecedented interpretation of Section 10907, which would require the Board to hold the equivalent of a beauty contest among competing applications, so that only the "most qualified" of the competing financially responsible applicants would pass the PC&N test. Such an interpretation of the PC&N statute would be a gross misapplication of Section 10907.⁵

As KJRY will further demonstrate in a later reply to PYCO's reconsideration request, there is more than sufficient evidence in the record for the Board to find that KJRY's service to All-SAW shippers would be an improvement over that provided to shippers by SAW and that KJRY is a financially responsible party. Thus, there is nothing arbitrary and capricious about the Board's decision to grant KJRY's competing application as that application was fully consistent with the statutory criteria and precedent. Additionally, PYCO has not been denied due process in reaching a decision that is supported by the facts. Accordingly, the Board has committed no material error here to warrant reconsideration of its August 31 Decision, nor has PYCO

⁴ KJRY's evidence showed that it would provide adequate service to All-SAW shippers was also sufficient to establish that KJRY would provide improved service compared to that provided by the incumbent carrier, South Plains Switching, Ltd. Co. ("SAW"). KJRY was not required to show that its service would be better than that proposed by PYCO or PYCO's designated operator.

⁵ Indeed, PYCO, by arguing for the application of a "most qualified applicant" standard, is effectively proposing to eliminate long-standing precedent that the incumbent, not the Board, must select among objectively qualified applicants. See Sandusky County, et al.—Feeder Line Appl.—Conrail, 6 I.C.C.2d 568, 570 (1990); Cheney R. Co.—Feeder Line Acq., 5 I.C.C.2d 250, 253-54 (1989), aff'd sub nom. Cheney R.R. Co. v. ICC, 902 F.2d 66 (D.C. Cir. 1990). Quite obviously, PYCO's ceaseless and unseemly efforts to impugn the reputations of Pioneer and KJRY are intended to persuade the Board to make subjective determinations as between competing feeder line applicants. The decisions cited immediately above and the Board's August 31 Decision here demonstrate that the Board does not and should not play favorites. The proper focus is on whether each feeder line applicant can meet the statutory standards, not which one can show that its proposal is "better" than the other proposal.

articulated a case under which the Board's decision is likely to be overturned on judicial review, particularly in light of the deference a reviewing court would extend to the Board's interpretation of the relevant statute and its findings of fact. For these reasons, PYCO has failed to establish that it is likely to prevail on the merits under Board reconsideration or judicial review of the August 31 Decision.⁶

PYCO Will Suffer No Irreparable Injury

Because PYCO has failed to establish any likelihood of prevailing on the merits of an appeal, it is unnecessary for the Board to address the balance of the Holiday Tours four-part standard. Nevertheless, PYCO's stay request fails under the remaining prongs, including the required showing of irreparable harm. PYCO advances a convoluted argument concerning why it believes it would be irreparably harmed in the absence of a stay. In essence, PYCO's case requires the Board to accept, contrary to its findings in the August 31 Decision, that a transfer of All-SAW to KJRY would result in inadequate service to PYCO because KJRY would not have the financial wherewithal to provide such service. Such an argument ignores the fact that KJRY will have access to more than \$1 million in available credit to provide operating funds and any necessary rehabilitation funds. This argument is also nonsensical in that KJRY would not act against its own self-interest by failing to provide adequate service to one of the major customers on the line simply out of spite. KJRY fully intends to work with PYCO to provide better service than that provided by SAW and to do so under reasonable rates. The bottom line is that KJRY

⁶ Regardless of whether PYCO would or could prevail on its petition for reconsideration concerning disputed property transfers from SAW to Choo Choo Properties, Inc. ("Choo Choo"), there is no need for a stay for the Board to address that issue. KJRY understands the Board's August 31 decision to encompass the transfer of all railroad property necessary to provide service to shippers who have historically made use of SAW service and that have been identified in these proceedings. KJRY does not believe the Board would condone efforts by SAW and/or Choo Choo to assert property rights that would thwart the objectives of the Board's feeder line decision.

cannot price PYCO out of the market or destroy service without causing substantial financial harm to KJRY. Thus, the notion that PYCO would be harmed absent a stay has no basis in fact or the record of this proceeding. Moreover, given the overriding purpose of this August 31 Decision to restore adequate service to All-SAW shippers, it is highly unlikely that the Board would sanction any Choo Choo property claim that would have the effect of frustrating the clear objectives of the Board. For these reasons, PYCO has failed to substantiate its claim of prospective irreparable injury, and thus also fails to satisfy the second prong of the Holiday Tours standard.

Interested Parties Will Be Harmed By A Stay

PYCO also fails clearly to demonstrate that KJRY, SAW, or any other interested party would not be harmed by a stay, as it is its burden to do. In the event that SAW were to select KJRY to purchase the All-SAW lines, a stay would result in delaying the arrangements that both KJRY and SAW would need to make in connection with a transfer of ownership and operation and complicates the logistics associated with such a change of operators. A stay would also insert otherwise avoidable inefficiencies into the process. An extended delay will only likely encourage more filings and more litigation between PYCO and SAW and further delay the ultimate benefit to SAW's shippers – which is a permanent resolution to their service issues. Indeed, a stay, while it may be in PYCO's interest, ignores the fact that PYCO represents at most, 50% of the traffic. PYCO shows no concern about the effects of such a stay on the other shippers. These shippers would continue to suffer from continued uncertainty if a stay was granted and the lines would continue to degrade the longer this case continues. Such a result is in no party's interest. Finally, a stay could cause potential harm to KJRY. KJRY's financing arrangements and business plans cannot remain in limbo forever. As with any business, KJRY is

prepared to invest in the All-SAW lines and restore adequate service, but the longer this case drags on, the more unlikely that KJRY can keep its capital “on hold” waiting for further resolution.⁷ KJRY, the shippers, and the banks need certainty – not further delay. For these reasons, a stay would harm interested parties, would result in a waste of Board resources, and therefore must be denied.

A Stay Would Be Contrary To The Public Interest

Finally, a stay most certainly will not promote the public interest. The Board’s August 31 Decision finds that the PC&N warrants a transfer of All-SAW under the feeder line statute, based, in part, on the Board’ conclusion that SAW’s service to shippers on this line is inadequate. 49 U.S.C. 10907(c)(1)(B). In light of that finding and the Board’s prior determination that an All-SAW transfer would be preferable to any alternative where only a portion of SAW’s lines would be acquired, a delay would disserve the public interest here by maintaining the *status quo*. Exercise of the Board’s authority under Section 10907 is designed to remedy existing inadequate service. A stay would merely delay the benefits of that remedy, would not be consistent with the public interest, and thus would not satisfy the final prong of the Holiday Tours four-part test.

CONCLUSION

Regardless of the type of stay PYCO may be seeking, it is entitled to none. Even assuming for the moment that the Board has the authority to impose “housekeeping stays,” PYCO has not established how such a stay would be appropriate here. More importantly, as shown in detail above, PYCO has failed to show that a stay would be appropriate under the four-

⁷ Of course that’s precisely the result PYCO would like to see. PYCO is obviously hoping that its protracted litigation will continue to delay this case so that KJRY would be forced to use its capital and resources to invest elsewhere. The Board should not reward such a tactic by granting a stay and causing further delay.

part Holiday Tours standard. Indeed, a stay would run contrary to the public interest. For these reasons, the stay request contained in PYCO's September 10 Petition should be denied.

As noted above, KJRY will respond separately to PYCO's reconsideration request in a later reply filing.

Respectfully submitted,

A handwritten signature in black ink, reading "William A. Mullins" followed by a stylized flourish that appears to be "by KGO".

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Attorneys for Keokuk Junction Railway Co.

September 14, 2007

CERTIFICATE OF SERVICE

I, William A. Mullins, hereby certify that on September 14, 2007, I caused a copy of the foregoing Reply in Opposition to Petition for Stay of PYCO Industries, Inc., to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in STB Finance Docket Numbers 34890 and 34922.


William A. Mullins