

CHARLES H MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE WASHINGTON 98177
206 546-1936
FAX 206 546-3739



30 August 2007

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

ENTERED
Office of Proceedings

AUG 31 2007

Part of
Public Record

Re: PYCO Industries - Alternative Rail Service -
South Plains Switching, Ltd., F.D. 34802;

PYCO Industries - Alternative Rail Service - 220181
South Plains Switching, Ltd., F.D. 34889;

PYCO Industries - Feeder Line Application - 220182
South Plains Switching, Ltd., F.D. 34890

Comments on SAW Letter dated August 27, 2007

Dear Mr. Secretary:

South Plains Switching, Ltd. (SAW) e-filed a letter dated August 27, 2007 purporting to "clarify" its position in the above dockets, among others. As PYCO Industries, Inc. ("PYCO") indicates below, SAW's clarifications have no legal significance or merit.

1. PYCO's feeder line application. SAW says it "is opposed" to PYCO's feeder line application (FLA). SAW appears to base its opposition on the notion that PYCO failed to demonstrate SAW's service inadequacy. SAW's clarification is revisionist and in any event no longer relevant. When this Board "accepted" PYCO's FLA for all-SAW by decision in F.D. 34890, served August 16, 2006, even SAW seemed to agree that a sale of its entire system was preferable to dividing it up. Slip op. at 4. In any event, SAW did not petition for review of the August 16, 2006 decision, or of any of the many other STB decisions finding that PYCO had demonstrated service inadequacy on the part of SAW. These decisions are now all final and the 60-day judicial review period has lapsed. Moreover, "[t]he doctrine of collateral estoppel ... forecloses the relitigation of a matter that has been litigated and decided."

Norfolk & W. Rwy Co. and N.Y., C. & S. L. RR Co. - Merger, F.D. 21510 (Sub-no. 6), served Dec. 3, 1996, slip op. at 5. SAW fails to show any new evidence, changed circumstance, or material error justifying reopening, and fails even to make a reopening request. SAW asserts in effect that its coercive, abusive, and retaliatory conduct is not evidence of inadequate rail service. Although SAW curtailed service to PYCO as well, SAW's coercive, abusive and retaliatory actions are independently antithetical to any understanding of the basic common carrier obligation to provide adequate rail service on reasonable request. SAW's letter insofar as it involves PYCO's FLA is thus a legal nullity.

2. Alternative service. SAW says it is opposed to the petitions for alternative service in F.D. 34802 and 34889. SAW did oppose in F.D. 34802, but that proceeding is long since completely over; all decisions are final; SAW never sought judicial review; and the period for timely review is past. There is nothing pending on F.D. 34802. In contrast, SAW never opposed the petition in F.D. 34889 on substantive grounds. STB granted the petition in F.D. 34889 by decision served Nov. 21, 2006. SAW did not petition for reconsideration. The decision is final. SAW did not seek judicial review, and the period to do so passed long ago. SAW needs to acknowledge the concept of finality, rudimentary procedural rules, and the concept of deadlines.

SAW in its letter argues that alternative service under F.D. 34889 is unlawful. SAW bases this on the claim that it is entitled to compensation, or security, for its services pursuant to 49 U.S.C. 11102(a). This is specious on a host of grounds. Even a cursory review of this Board's implementing decision for Parts 1146 and 1146 (STB Ex Parte No. 628, served Dec. 21, 1998) shows two things: (1) this Board's rules anticipate that the parties will work out compensation (a point consistent with section 11102(a)), bringing disputes to the Board; and (2) the incumbent is only entitled to compensation for services and facilities, not for lost profit. SAW provides no services to either PYCO or WTL (PYCO's alternative service provider).¹ According to discovery, SAW's investment for its facilities turns out to be only \$10. For these and other reasons, any compensation that SAW can argue is due is, if not zero, then vanishingly small.

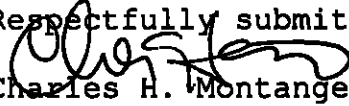
¹ For example, SAW is not maintaining or repairing the track used to provide service to PYCO, even when it is also used to provide service to SAW's own customers. SAW instead denies any responsibility. Rather than provide services, SAW seeks to cause, or to impose, costs on PYCO and WTL.

Even if SAW were entitled to compensation, section 11102(a) provides that compensation may be "adequately secured." Under the BNSF/SAW sales agreement, the switch provider receives a division from the tariff BNSF charges PYCO and its other shippers. PYCO's payment to BNSF is ample security for anything to which SAW could possibly be entitled out of that division during the current period, especially since WTL is doing all the work. In addition, this Board determined PYCO financially able to acquire SAW pursuant to the FLA in F.D. 34890. PYCO's financial capability to buy SAW subsumes security to pay for SAW services (assuming incorrectly there were any) in the interim.

In any event, SAW has never asked the Board to determine compensation; it has only complained, in an improper and belated supplement to a precipitous petition to terminate filed in F.D. 34889, that section 11102(a) bars alternative relief. As PYCO said before and reiterates here again, such a claim is unfounded. SAW does nothing in its letter to advance its cause.

SAW finally claims that the record does not support a finding of service inadequacy. SAW never opposed PYCO's petition in Part 1147 on this or any other substantive ground. The issue of SAW's service inadequacy was resolved in favor of PYCO on November 21, 2006. By that time, this Board had made inadequacy findings against SAW many times in F.D. 34802 and 34890. SAW did not petition for reconsideration, nor seek judicial review, as to any these proceedings. The relevant decisions are now all final. SAW establishes no grounds for reopening. Under collateral estoppel principles, enough is enough. PYCO should not have to relitigate that issue over and over again in F.D. 34889 any more than in F.D. 34890. In any event, the record amply demonstrates SAW's service inadequacy.

3. Conclusion. SAW's letter lacks any legal significance or merit. Given SAW's service inadequacy and SAW's continued practice of retaliation and lack of cooperation in respect to alternative service, PYCO reiterates its request that its feeder line application be granted.

Respectfully submitted,

Charles H. Montange
for PYCO Industries, Inc.

cc. Counsel for parties of record
(service certified by next business day express delivery)
PYCO
Gary McLaren