

FILED

SEP 17 2007

**SURFACE
TRANSPORTATION BOARD**

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --
FEEDER LINE APPLICATION --
SOUTH PLAINS SWITCHING LTD. CO

)
) F.D. 34890
)

KEOKUK JUNCTION RAILWAY CO. --
FEEDER LINE APPLICATION --
SOUTH PLAINS SWITCHING LTD. CO

)
) F.D. 34922
)

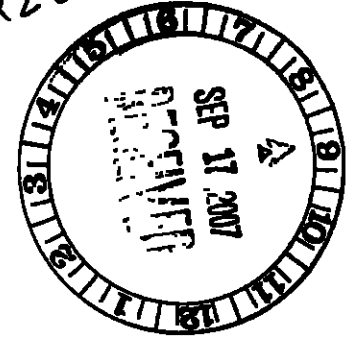
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**SL. FACE
TRANSPORTATION BOARD**

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**Part of
Public Record**

PETITION FOR RECONSIDERATION
OF FLOYD TRUCKING COMPANY
AND JOINER IN
PYCO INDUSTRIES, INC.'S
PETITION FOR RECONSIDERATION
AND STAY

Floyd Trucking Company is one of the shippers which has experienced inadequate rail service from South Plains Switching, Ltd. Co. in Lubbock. Floyd Trucking has previously filed comments supporting the feeder line application filed by PYCO Industries, Inc. (PYCO), and opposing the feeder line application filed by Keokuk Junction Railway Company (KJRY). Floyd Trucking supports this agency's grant of PYCO's feeder line application, but urges the Board to reconsider its grant of the KJRY application.

There are two kinds of feeder line applications under 49 U.S.C. 10907. As to both kinds of applications, the Board must find the applicant to be financially responsible. 49 U.S.C. 10907(b)(1)(B). However, as to the first kind of application --involving lines that are abandonment candidates, in that the line in question is so designated on a system diagram map (id. 10907(b)(1)(A)(11)) --

that is all that the Board need find before it must order the sale.

The second kind of application involves lines that are not designated for abandonment on a system diagram map. As to those lines, the Board must find that "the public convenience and necessity require or permit the sale" of the line in question. 49 U.S.C. 10907(b)(1)(A)(I). "Where that aspiration is imposed, an agency is arguably required to adopt procedures that result in the selection of superior candidates." Cheney R. Co. v ICC, 902 F.2d 66, 69 (D.C. Cir. 1990). In addition, 49 U.S.C. 10907(c)(1) requires the Board to make a series of five findings before it "may find" that public convenience and necessity ("PCN") require or permit a sale. One of these five findings is that "the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line." 49 U.S.C. 10907(c)(1)(E). The burden is on each applicant to show PCN. 49 U.S.C. 10907(c)(2).

Only the second kind of application is involved here. Thus, the Board cannot automatically authorize KJRY to acquire the lines on the ground that it has found KJRY to be financially responsible, which is what Floyd Trucking sees the Board as having done. Instead, the Board must find that KJRY meets the five minimum conditions specified in 49 U.S.C. 10907(c)(1) for a finding of PCN, and, since KJRY has filed a competing application, that its application is superior or at least equal to PYCO's. See Cheney

R.Co., supra, at 69, citing New South Media Corp. v. FCC, 685 F.2d 708, 715 (D.C. Cir. 1982). If the KJRY application is not superior or at least equal to PYCO's, then PCN cannot support giving SAW an opportunity to choose it. 49 U.S.C. 10907 is a remedy for shippers. To allow an incumbent railroad which has provided inadequate service to select an inferior application hardly serves PCN. It instead perpetuates service inadequacies, and subverts the purpose of the statute to afford shippers a remedy.

KJRY has not met the minimum conditions. It relied exclusively on PYCO's showings as to section 10907(c)(1)(A)-(D). It cannot rely on PYCO's showing in respect to section 10907(c)(1)(E), and it made no adequate showing itself. In all feeder line applications to date, condition (E) has been met by a showing of at least some shipper support for the applicant's proposal. In this case, KJRY presented no shipper support for its proposal. It has not shown how it will improve service; to the contrary, it has exhibited surprising hostility to the shipper which would be its chief customer (KJRY introduced itself by accusing PYCO of cherry-picking,¹ and by telling PYCO's counsel that it was entering the proceeding at the request of SAW²)

¹ KJRY "Motion for Extension of Time" dated July 18, 2006, in F.D. 34890.

² Declaration of Gary McLaren at pp. 1 & 3, attached to PYCO's Statement ... Concerning Crossings and Opposition ... to KJRY Reply to Reply, dated 28 July 2006 in F.D. 34890. We explained that KJRY's conduct was peculiar in our letter of 5

The KJRY application is neither equal nor superior to PYCO's. PYCO intends to rely upon West Texas & Lubbock Railroad (WTL) to operate the lines. Whereas KJRY has no operations in Texas, WTL already successfully operates in the Lubbock areas. Whereas KJRY and other subsidiaries of Pioneer have evidently been the subject of many complaints and much litigation,³ WTL has supplied improved service to PYCO under this Board's alternative service orders, and notwithstanding lack of cooperation by the incumbent carrier. KJRY's application is not equal to PYCO's, let alone superior.

As the Board observed in its August 31 Decision, the management of SAW has a pattern of retaliatory conduct against shippers. Floyd Trucking has sought rail service from SAW practically from the inception of SAW to no avail. We do not wish to see continued retaliation from SAW's nominee. 49 U.S.C. 10907 is a remedial

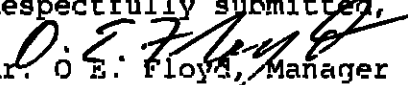
October 2006 to the Board in F.D. 34890 and 34922.

³ According to the record, PYCO sought discovery on these issues from Pioneer and KJRY (on the ground among others of inadequate time to compile from public sources, see PYCO's "Comments on KJRY Feeder Line Application" dated 24 October 2006, at p. 5, in F.D. 34890 and F.D. 34922), but Pioneer and KJRY stonewalled. Id. PYCO furnished extensive evidence of problems with Pioneer subsidiaries, including KJRY, in PYCO's "Reply to KJRY Motion to Strike Portions of PYCO's Rebuttal and Renewed Request for Sanctions Against KJRY" dated 31 October at pp. 14 et seq. in F.D. 34890 and 34922. Floyd Trucking agrees with PYCO's contention in PYCO's petition for reconsideration that it was material error for the Board to order Pioneer and KJRY to respond to PYCO's discovery requests on these matters, and then to fail to order the sanctions requested by PYCO when Pioneer and KJRY stonewalled. KJRY's application should have been rejected due to this conduct. In any event, the evidence shows that KJRY is not likely to improve service in Lubbock.

statute, not something to be used to perpetuate shipper misery.

Floyd Trucking therefore requests that the Board reconsider its Decision of August 31, 2007, insofar as that Decision grants KJRY's application. Floyd Trucking also joins in PYCO's request that the grant, or any closing thereunder, be stayed pending reconsideration and, if necessary, judicial review.

I certify service by US Mail, postage pre-paid, first class on the date below on the attorneys for other parties listed below.

Respectfully submitted,

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Dated: 9/15/07

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