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by Federal Express



Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: PYCO Industries, Inc. -- Feeder Line Application
-- South Plains Switching, F.D. 34844

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc. ("PYCO"), enclosed please find an original and ten copies of an Opposition to SAW Motion to Reject. This document is a reply to a South Plains Switching ("SAW") motion, filed yesterday (16 May) to dismiss Alternative Two of PYCO's pending feeder line application.

We will file our opposition to SAW's motion filed 15 May to stay the feeder line application in the near future.

By my signature below, I certify service by express (next day delivery) on Mr. McFarland, counsel for SAW, at his address of record, on this date.

Thank you for your assistance in this matter.

Very truly,


Charles H. Montange
counsel for PYCO Industries

Encls. (orig. and 10)

cc. Thomas McFarland, Esq. (w/encl.) (for SAW)
Gary McLaren, Esq. (w/encl.) (for PYCO)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34844
SOUTH PLAINS SWITCHING LTD.	)	

Opposition to SAW Motion to Reject
"Alternative Two"
of PYCO's Feeder Line Application

Incumbent rail carrier South Plains Switching Ltd. (SAW), relying on Caddo Antoine and Little Missouri R. Co. v. United States, 95 F.3d 740, 749 (8th Cir. 1996), states that under 49 U.S.C. § 10907(b)(1)(A)(i), shipper PYCO Industries, Inc., must apply to acquire the entirety of SAW's lines in Lubbock and not "cherry-pick." SAW calls for rejection of PYCO's application insofar as it pertains to Alternative Two. SAW's motion is vastly premature and must be denied. It is unsupported by law or evidence.

I.

SAW's call for rejection is tantamount to a motion to dismiss. As such, it presumably should be evaluated under standards applicable in similar proceedings, such as complaint proceedings.

Motions to dismiss early in ICC/STB proceedings are heavily disfavored. "Granting a motion to dismiss requires that all factors be viewed in the light most favorable to the complainant." Grain Land Coop v. Canadian Pacific Limited, STB Dkt. No. 41687, served Dec. 1, 1997 (Grain Land I), p. 4, citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 326 (1991). This

Board has indicated that

"to ensure that participants have a full and fair opportunity to meet their burdens of proof, motions to dismiss prior to the submission of evidence are, as a general rule, denied." Grain Land I, supra, p.4, citing Hill v. Federal Power Comm'n, 335 F.2d 355, 363 (5th Cir. 1964). In considering a motion to dismiss, the Board "construe[s] the factual allegations in a light most favorable to the complainant." Grain Land Coop v. Canadian Pacific Limited, STB Dkt. No. 41687, served Dec. 8, 1999 (Grain Land II), p. 2, citing Sierra Pacific Power Co, et al. v. Union Pacific RR, STB Dkt. No. 42101, served Jan. 26, 1998. "We dismiss complaints only when we find that there is not basis on which we could grant the relief sought." Grain Land II, p. 3.

II.

Under the legal standards set forth above, SAW's motion for partial dismissal can only be denied.

1. Caddo Antoine. Caddo Antoine, on which SAW places its reliance, is easily distinguishable. In that case, the feeder line applicant (a short line railroad allied with five of six shippers on a branch line) filed a feeder line application in the alternative. Believing the entire line to be on the incumbent carrier's system diagram map (SDM) as a candidate for abandonment, the applicant applied for the line under the feeder statute's SDM provision [former 49 U.S.C. 10910(b)(1)(A)(ii), currently codified as 10907(b)(1)(A)(ii)]. In the alternative,

the applicant sought the line under the "public convenience and necessity" (PCN) provision [former 49 U.S.C. 10910(b)(1)(A)(i), currently codified as 10907(b)(1)(A)(i)]. But the incumbent carrier had taken the southernmost portion of the line (serving the dissenting shipper) off its SDM. The incumbent rail carrier and the dissenting shipper opposed transfer of the non-SDM portion of the line.

ICC evidently gave weight to the incumbent carrier's argument that it should not be "force[d] to sell a profitable segment of line which is adjacent to a line being abandoned." 95 F.3d at 744. ICC evaluated the SDM portion of the line under the SDM provision and granted the feeder application as to it. ICC evaluated the non-SDM portion of the PCN standard, found no evidence submitted on it alone, and denied the feeder application as to it. ICC did not evaluate the entire line under the PCN standard as requested by the applicant.

The SDM portion of the line, as bifurcated by ICC and the incumbent carrier, was projected to operate at a loss. The evidence indicated that the line could only be profitable if operated as a unit. 95 F.3d at 742. As a result, the feeder line applicant declined to acquire the SDM segment for which ICC had granted its application. Instead, the feeder applicant challenged ICC's failure to consider the feeder line application for the entire line under the PCN standard as the applicant had requested.

The Eighth Circuit held that ICC erred in failing to

consider the feeder line application for the entire line under the PCN standard as requested by the applicant. The Court of Appeals indicated that the phrase "a particular rail line" as employed by the feeder line statute under the circumstances set forth in the case before it must be construed in light of the overall purpose (as revealed in the legislative history) of the feeder line program, the history of the line as a whole, and the circumstances under which ICC and the incumbent carrier bifurcated the line. 95 F.3d at 745.

The Court of Appeals concurred with prior ICC authority that the overall purpose of the feeder line program was to preserve services over lines that otherwise might be abandoned or degraded. 95 F.3d at 746. This purpose suggests that the "package" of rail assets singled out for transfer under the feeder line program must make economic sense, which of course the SDM segment involved in Caddo Antoine did not.

Ironically, SAW is making what at heart is exactly the argument which the Caddo Antoine court found unpersuasive. SAW is the incumbent carrier. Like the incumbent carrier in Caddo Antoine, SAW is suggesting that it will be left with a non-viable remainder in the event a feeder line application is granted as framed by the applicant. But the Eighth Circuit said that this is not a ground to refuse to engage in PCN analysis. Instead, the Caddo Antoine court said that the agency instead should consider the incumbent railroad's claim of grievous loss "as a factor to take into account" on remand, when the agency

applied the PCN standard to the entire line as requested by the feeder line applicant. 95 F.3d at 748.

Here, the feeder line applicant (PYCO) seeks application of the PCN standard to the entire package of lines owned by SAW in Lubbock, and to the portion thereof suited and prudent for PYCO and neighboring shippers Compress and Attebury. Caddo Antoine requires application of the PCN standard as requested, and rejection of SAW's claim. What SAW wants (dismissal without application of the PCN standard) would be directly contrary to the Eighth Circuit's ruling.

2. PCN. The governing questions under the PCN standard when only a portion of a system is sought are (i) whether the acquired portion makes sense and (ii) whether the incumbent railroad is significantly adversely affected as to the remaining portion. PYCO's evidence, which so far is unrebutted, is that under Alternative Two, the portion of lines remaining to SAW would have a substantial positive Going Concern Value (GCV), even after rehabilitation costs are taken into account.¹ The GCV was calculated by RL Banks & Associates. It takes into account return on investment, repair costs and so forth. A positive GCV indicates a net operating profit. In other words, PYCO's unrebutted evidence shows that the assets remaining in SAW after Alternative Two would still amount to a profitable

¹ Feeder Line Application (FLA) at pp. 38-39. Although PYCO in this memorandum cites only to its FLA cover memo, the valuations in the FLA cover memo in turn are based on expert calculations of GCV and NLV, as referenced in the text of the cover memo and as attached to it.

railroad. This in turn supports the conclusion that Alternative B would not have a significant adverse impact either on SAW or shippers remaining with SAW.

Ironically, the segment reserved for SAW under Alternative Two may be the most attractive segment. The net liquidation value (NLV) for the entire SAW operation is greater than its going concern value (GCV).² Similarly, NLV exceeds GCV for Alternative Two.³ Indeed, Alternative Two GCV is heavily negative due to rehabilitation expenses.⁴ In contrast, the SAW lines remaining after feeder line sale under Alternative Two have a substantial positive GCV even after necessary rehabilitation.⁵ This not only means these assets are clearly viable, but also suggests they are arguably the most viable segment.⁶ Again, this hardly constitutes "cherry-picking" (SAW's rhetoric) by PYCO.

PYCO wishes to emphasize that it would prefer to acquire the entire SAW system, because, based on long experience with SAW, attempts to work with or alongside SAW are difficult. However, PYCO anticipates that SAW plans to oppose its feeder

² FLA 18-19.

³ FLA 19.

⁴ FLA 17.

⁵ FLA 38.

⁶ GCV of the remainder (FLA 38) is greater than GCV for Alternative Two (FLA 17) and also greater than the GCV for the entire system once necessary rehabilitation is taken into account.

application for the entire system, and if due to some technicality or objection SAW dreams up, PYCO cannot acquire the entire system, then PYCO at least wishes to acquire Alternative Two. In doing so, PYCO is merely indicating that it seeks every possible means of relief in order to ensure that it receives adequate rail service. PYCO is a major rail dependent company that desperately needs reliable and adequate rail service in order to stay in business. Seeking to acquire the lines requisite to that purpose hardly constitutes cherry-picking. It is more like trying to stay alive. It is what the feeder line program is supposed to facilitate.

3. History. SAW claims that Caddo Antoine indicates that lines historically operated as a unit must be considered as a unit under the PCN standard. The first problem with SAW's claim is its trackage in Lubbock historically was not a unit. When PYCO began operations in Lubbock, PYCO was served by two railroads: Burlington Northern and Atchison, T. & S.F. The trackage now belonging to SAW was split between them.

A second problem is that PYCO can show that SAW in the past has solicited offers for segments of its operations. This seems an admission by SAW that SAW operations can be split up and yet be viable.

Yet a third problem with SAW's claim is that "history of operation" is not the controlling factor, but only one of the factors, on which the Eighth Circuit relied in Caddo Antoine. Moreover, the court of appeals seemed to qualify "history" as a

germane factor only given the circumstances of that particular case. 95 F.3d at 745. It is far from clear that history has much to do with whether a mass of old yard and switching tracks in Lubbock centered around the BNSF mainline should be split up. The governing standard in the statute is PCN, not historical coincidence.

In the end, all that the Eighth Circuit held in Caddo Antoine is that "a particular line of railroad" for purposes of the PCN standard in the feeder line statute must be comprised of assets that make sense from an operational and financial point of view. PYCO's evidence shows that Alternative B makes sense.

III.

The relevant statute as well as this Board's regulations also demonstrate that SAW's gripe is not legitimate. 49 U.S.C. § 10907(c)(1)(C) requires the feeder line applicant to show that sale of the "line will not have a significantly adverse financial effect on the rail carrier operating the line." Similarly, 49 C.F.R. § 1151.3(a)(11)(i)(C) requires an applicant seeking a line under the PCN standard to provide detailed evidence to allow the Board to find that "sale of the line will not have a significant adverse financial effect on the rail carrier operating the line."

The statute and regulations obviously contemplate that a shipper group may specify less than an entire system so long as the remainder of the system can be operated without significant adverse effect. PYCO's un rebutted evidence meets these

requirements in respect to Alternative Two.⁷ In particular, PYCO's unrebutted evidence shows that the GCV of the lines remaining to SAW under Alternative Two is substantial.⁸ This necessarily means that the lines remaining to SAW would be profitable to operate. PYCO's Alternative Two is clearly in compliance with the statute.

Caddo Antoine does not overrule the statute. The statute and its regulations clearly anticipate that feeder line applicants may seek less than the entirety of a particular incumbent rail carrier's system. The issue is whether any portion "left behind" is operational and viable. PYCO's unrebutted evidence shows that Alternative B meets that requirement.

IV.

In 2005, SAW sought offers to purchase all or portions of SAW assets. In the fall of 2005, SAW specifically demanded that PYCO buy certain unspecified SAW assets, which PYCO understood to be those assets necessary to serve PYCO. PYCO requested at least a due diligence clause, which SAW angrily rejected, terminating talks and proceeding to retaliate against PYCO by degrading service.

PYCO's Alternative Two is what PYCO thinks SAW was demanding PYCO buy last fall. Seen in this light, SAW's motion to reject is positively mystifying: it takes PYCO to task for

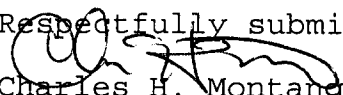
⁷ FLA 38-39.

⁸ FLA 38.

seeking to acquire that which SAW demanded PYCO acquire on pain of retaliation by SAW. SAW can hardly complain when, in response to SAW's effort to put PYCO out of business by degrading PYCO's service, PYCO files a feeder line application for the assets that SAW previously demanded PYCO buy. In other words, the recent "history" of the rail assets in this case does not support SAW's arguments. If the Caddo Antoine court had those facts before it, we do not have to ponder very long to know the result.

V.

PYCO has submitted unrebutted evidence in support of Alternative Two; the Alternative comports with the statute; it is not contrary to anything in Caddo Antoine; and it tracks what PYCO thought SAW was demanding that PYCO buy last fall. SAW's motion to reject is misguided, misconceived, unsupported, premature and inappropriate. It is what should be rejected.

Respectfully submitted,

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