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October 2, 2006

VIA ELECTRONIC FILING

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

RE: STB Finance Docket Nos. 34890 and 34922
*PYCO Industries, Inc. — Feeder Line Application — Lines Of South Plains
Switching, Ltd. Co.; Keokuk Junction Railway Co. — Feeder Line Application — Lines of South
Plains Switching, Ltd. Co.*

**Reply of Keokuk Junction Railway Co. to Request for Issuance of Sub Poena/Motion to
Compel of Pyco Industries, Inc.**

Dear Secretary Williams:

Pursuant to the Board's decision in this proceeding served on September 29, 2006 (late release), I am enclosing herewith the Reply of Keokuk Junction Railway Co. to the Request for Issuance of Sub Poena/Motion to Compel of Pyco Industries, Inc.

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 DOCKET NO. 34890
STB DOCKET NO. 34922**

**PYCO INDUSTRIES, INC. — FEEDER LINE APPLICATION —
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**KEOKUK JUNCTION RAILWAY CO. — FEEDER LINE APPLICATION —
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**REPLY OF KEOKUK JUNCTION RAILWAY CO.
TO REQUEST FOR ISSUANCE OF SUB POENA/MOTION TO COMPEL
OF PYCO INDUSTRIES, INC.**

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Attorneys for Keokuk Junction Railway Co.

DATED: October 2, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. 34890
STB DOCKET NO. 34922**

**PYCO INDUSTRIES, INC. — FEEDER LINE APPLICATION —
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**KEOKUK JUNCTION RAILWAY CO. — FEEDER LINE APPLICATION —
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**REPLY OF KEOKUK JUNCTION RAILWAY CO.
TO REQUEST FOR ISSUANCE OF SUB POENA/MOTION TO COMPEL
OF PYCO INDUSTRIES, INC.**

On September 26, 2006, PYCO Industries, Inc. ("PYCO") filed what it has entitled a "Request for Issuance of Sub Poena/Motion to Compel on Behalf of Pyco Industries, Inc., Against Pioneer Railcorp ("Pioneer") and its Subsidiary, KJRY" ("Motion"). Although under the Board's rules, Keokuk Junction Railway Co. ("KJRY") had twenty (20) days to reply to the Motion (see 49 CFR 1114.31(a)(1) and 49 CFR 1104.13), in a letter to the Board dated September 28, 2006, and served upon all parties of record, KJRY advised the Board that it would reply to the Motion on October 6, 2006, in half of the time provided for under the Board's regulations. KJRY also advised the Board that it had voluntarily agreed to provide, by no later than October 5, 2006, responses to discovery requests that PYCO had served and directed at Pioneer, not KJRY. Notwithstanding the applicable regulations and KJRY's letter, the Board, in a decision served late in the day on September 29, 2006, has ordered KJRY and its parent

corporation, Pioneer, to reply to the Motion on October 2, 2006. In accordance with the Board's September 29 decision, KJRY hereby replies to the Motion.

ARGUMENT

PYCO's Motion appears to encompass two very different issues. The first is whether as a general matter Pioneer, a nonparty to this proceeding, should be ordered to respond to discovery propounded against it. That question is ripe for Board resolution, and will be discussed in greater detail below. The second question is whether the Board should compel responses from KJRY (and potentially also Pioneer) for any, or all, of the specific individual discovery requests identified in PYCO's Motion. The latter issue, which is only barely touched upon in PYCO's motion, is not yet ripe for Board action, and should only be resolved, *if resolution is necessary at all*, following PYCO's receipt of formal discovery responses from KJRY (and/or Pioneer) and a the failure of the parties to resolve any outstanding disputes.

I. PIONEER IS NOT A PARTY AND SHOULD NOT BE COMPELLED TO RESPOND TO DISCOVERY

The underlying problem with PYCO's discovery, as pointed out in KJRY's letter of September 22, 2006 to PYCO's counsel, was that it was clearly *served upon and directed to* Pioneer. As such, Pioneer (not KJRY or any of its corporate affiliates) is the entity from which a formal response was expected. Pioneer provided that response on the deadline requested by PYCO and objected to the discovery. The basis for Pioneer's objection was that it was not a party to the proceeding and was not required to respond to discovery absent a subpoena by this Board. The Board's regulations and precedent are clear on this point. See 49 CFR 1114.21, 1114.26, and 1114.30; 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, Letter from STB Secretary

sent to Galveston Bay Conservation and Preservation Association dated February 11, 2003 (discovery in not available from an entity that is not a party to a proceeding); cf. Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Railway Company, Boston and Maine Corporation, and Portland Terminal Company, STB Finance Docket No. 33381 (STB served May 6, 1997) (discovery against third parties generally not available absent a subpoena).

Rather than admit that its counsel made a mistake by directing and serving discovery against a non-party, PYCO's counsel continues to blur the distinction between the two.¹ PYCO attempts to argue that because PYCO, in the body of its discovery request, broadly defined "Pioneer" to include KJRY and "all Pioneer subsidiaries and affiliates," KJRY should have provided a response. PYCO cites not precedent or regulation for this position. While it is true that the definition of Pioneer did include KJRY, this ignores the fact that the discovery was directed and addressed to Pioneer. Accordingly, the definition merely set forth the expected scope of Pioneer's responses to discovery, and indicates that PYCO expected Pioneer to include responses from Pioneer-affiliated entities or to object to the broad definition. As such, PYCO misses the point. The discovery was directed to a non-party, Pioneer, and as a non-party, it didn't have to respond at all regardless of what the definitions said. Furthermore, since the discovery was not directed to KJRY, KJRY was not required to respond simply because it was included in a definition of discovery filed against a non-party.

¹ Indeed, PYCO continues even now to do so. In its Motion, PYCO states that, "KJRY is simply Pioneer's nom de guerre here." PYCO Motion to Compel at 4. This is not true. Pioneer is a non-carrier holding company that owns several subsidiaries, including KJRY. KJRY is not a "nom de guerre" of Pioneer. See Exhibit No. 1 from the Iowa Secretary of State showing that Pioneer and KJRY are separate companies and KJRY is not a d/b/a of Pioneer.

PYCO's broad definition of "Pioneer" does not cure PYCO's failure to formally to serve its discovery upon KJRY, which PYCO's certificates of service show it did not do. That definition also does not moot or override KJRY's objection to PYCO's attempt to include a nonparty (or, indeed, if PYCO's definition is taken to its full limit, *many* nonparties) in discovery.²

Despite PYCO's mistake to ensure proper service on the proper party, KJRY, which is clearly a party, has nonetheless agreed to treat the discovery as being filed against it and to respond by October 5. This is apparently not good enough for PYCO as it continues to insist that Pioneer should be required to respond. While KJRY is willing to respond and is actively preparing comprehensive responses to PYCO's discovery requests, requiring Pioneer to respond is an entirely different matter. Pioneer's general objection is valid: it is not a party, and it should not have been served with discovery absent a subpoena issued by this Board.³

KJRY is perplexed as to why, when it has voluntarily agreed to respond to discovery, that PYCO continues to pursue discovery against Pioneer, especially given that the discovery is directed to the so-called "Alternative Two" feeder line application ("FLA"), which is no longer the focus of KJRY's FLA. In fact, the record reflects that South Plains Switching, Ltd. Co. ("SAW"), PYCO, and KJRY all concur that the appropriate subject of this proceeding is not the

² PYCO makes much of the fact that KJRY's counsel is also counsel to Pioneer, suggesting that PYCO "constructively served" KJRY and thus KJRY should have responded. Again, this misses the point. While KJRY was served a copy of the discovery because it was a party to the proceeding and shares the same counsel as Pioneer, the discovery was not directed at KJRY. PYCO's discovery clearly was intended for Pioneer and not KJRY. PYCO has confirmed this in its Motion.

³ At a minimum, if PYCO and the Board consider discovery against a nonparty essential in this case, PYCO should restrict its discovery against Pioneer to information that cannot be obtained from a party to this proceeding. But PYCO has made no such showing of need here. Instead, PYCO has suggested, quite incorrectly, that KJRY and Pioneer are interchangeable entities equally subject to being served with whatever discovery PYCO claims to be relevant.

so-called "Alternative Two" option, which entailed acquisition of a portion of SAW's lines and which is the subject of PYCO's discovery, but rather the "All-SAW" option for all of SAW's lines in Lubbock, TX. Accordingly, on September 27, 2006, KJRY filed new evidence and argument in support of its application for the All-SAW option. That filing provides new evidence of KJRY's financial responsibility to acquire and operate All-SAW which replaces and supersedes the corresponding evidence in KJRY's original Alternative Two application of August 4, 2006. That evidence does not depend upon any subsidy by Pioneer, it does not rely upon any cash flow from Pioneer to acquire and operate the SAW lines, and KJRY does not rely upon Pioneer's consolidated financial statements to operate the lines. Yet, all of the discovery that PYCO seeks against Pioneer is related to Pioneer's finances, not KJRY's.

Given that the focus of KJRY's FLA at this time is the All-SAW alternative and that KJRY has established in its All-SAW FLA that it can acquire and operate All-SAW through a bank loan, its own finances, and through positive cash flow from SAW's operations, Pioneer is of very limited significance to this proceeding. As such, it should not be drawn into this litigation any more than is absolutely necessary, if at all. In fact, under the relevant All-SAW scenario, Pioneer is no more than the conduit through which KJRY would obtain its acquisition funds. Consequently, there is no reason to shift the focus to Pioneer or to any of KJRY's affiliates as PYCO is attempting to do.

In the end, PYCO's efforts to seek discovery against a non-party should be rejected. Pioneer is of limited significance. The real party in interest is KJRY. PYCO could have and clearly should have propounded discovery to KJRY or amended its requests when it understood this point. PYCO has not explained why it did not do so and this Board should not reward PYCO's failures by granting its Motion at this time.

II. IT IS PREMATURE TO RULE UPON ANY SPECIFIC DISCOVERY REQUESTS

If Pioneer and/or KJRY is required to respond, then the Board should not compel responses to specific discovery requests at this time because it is premature to do so at this time. As noted, KJRY soon will respond formally to all discovery served to date, subject to any applicable and appropriate objections. In so doing, KJRY will use its best efforts to supply information in its possession that is responsive to the discovery requests. KJRY will also state with specificity why it objects to certain requests if it finds it necessary to do so. PYCO will then have an opportunity to evaluate those responses, and the parties may pursue informal discussions to resolve any remaining differences in a manner consistent with recent consultations between KJRY's and PYCO's respective counsel. Until this occurs and the parties are unable to resolve any disputes, it is premature for the Board to actually compel responses to any individual document request or interrogatories. Thus, at most and at this time, the Board should only rule upon whether Pioneer and/or KJRY is required to respond. It should refrain from compelling responses to individual objections and responses.

Such an approach by the Board would not only promote voluntary resolution to the pending discovery matter by limiting its action on the motion to compel, but, in so doing, it would also allow for the development of an adequate record should any impasse remain after the next few days. In fact, the Board doesn't even have a record to rule on the individual requests. Of PYCO's eight-page Motion, only one nine-line paragraph is devoted to explaining why fourteen original document requests, eleven original interrogatories, and nine supplemental discovery requests, many of which have multiple parts, are relevant and material. PYCO has provided only the most conclusory assertion that *all* of its discovery is appropriate, without addressing each discovery request in turn.

In the exceedingly short time that it has been given to respond to the Motion, KJRY cannot explain with particularity how it plans to respond to each individual request and why some of PYCO's discovery requests may be irrelevant or should be disallowed, which it would have done had the Board's regulations not been superseded here. It would be unduly burdensome to require KJRY to provide a full and complete discussion of each discovery request under the circumstances. Even if KJRY were able to do so, it would be counterproductive to its simultaneous effort to prepare substantive responses to PYCO's discovery.

The Board should not judge hastily. At this time, it should merely rule upon whether discovery against Pioneer is ripe. If so, Pioneer will respond.⁴ But the Board should refrain from ordering specific responses to specific discovery requests only after Pioneer and/or KJRY have responded and the parties have failed to resolve any impasses. At that time, PYCO can seek to compel responses to individual requests and Pioneer/KJRY can respond. In this way, the Board will have a well-developed record that compelled responses would further the course of the proceeding and would not cloud the proceeding with irrelevant and/or immaterial facts and arguments. The Board's rules, precedent, and due process provide for nothing less.

CONCLUSION

KJRY has long made clear that Pioneer is not a party to this proceeding and has stated on numerous occasions that it is inappropriate for anyone to equate Pioneer with its corporate subsidiary, KJRY. In discovery, as it has done elsewhere, PYCO ignores this important distinction and would have the Board do the same. Despite the fact that it was incorrectly served at the outset, KJRY is formulating formal responses to PYCO's discovery, which will be

⁴ If Pioneer is ordered to respond, it will need additional time to comply with such an order. Pioneer and KJRY share many of the same personnel. These personnel are currently engaged in responding to discovery filed against KJRY. It would be impractical to require Pioneer to respond at the same time as KJRY.

tendered to PYCO within the next few days. If the Board deems it necessary to do so, it would be acceptable to rule now on whether or not PYCO should be permitted to seek discovery against Pioneer. On the other hand, in the absence of a developed record, and for other reasons discussed above, it would be premature and inefficient for the Board to rule upon PYCO's specific discovery requests at this time.

Respectfully submitted,



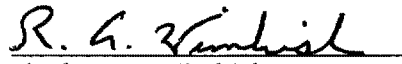
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Attorneys for Keokuk Junction Railway Co.

October 2, 2006

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that on October 2, 2006, I caused a copy of the foregoing "Reply of Keokuk Junction Railway Co. to the Request for Issuance of Sub Poena/Motion to Compel of Pyco Industries, Inc." to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in Finance Docket Nos. 34890 and 34922.


Robert A. Wimbish

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Corporation Summary

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Legal Name	Chapter	Corp No.
PIONEER RAILCORP	CODE 490 DOMESTIC PROFIT	105487
Expiration Date	Type	Modified
PERPETUAL	Legal	No
Effective Date	State of Inc.	
Jan 31, 1986	IA	
Filing Date	Status	
Jan 31, 1986	Active	

Names (viewing 2 of 2)

Type	Status	Modified	Name
Legal	Active	No	PIONEER RAILCORP
Former	Inactive	No	PIONEER RAILROAD COMPANY, INC.

Registered Agent or Reserving Party

Full Name	JERRY A SOPER
Address	5108 C JERSEY RIDGE RD
City, ST, Zip	DAVENPORT, IA, 52807

Home Office

Full Name	
Address	1318 S JOHANSON RD
City, ST, Zip	PEORIA, IL, 61607

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Corp No.	Status	Type	Name
22889	Active	Fictitious name	KEOKUK JUNCTION RAILWAY
22889	Active	Former assumed	KEOKUK JUNCTION RAILWAY
22889	Active	Legal	KEOKUK JUNCTION RAILWAY CO.

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