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28 August 2006
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Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34889 217387

49 C.F.R. Part 1147: temporary relief for service inadequacies

also

Rail General Exemption Authority -- Misc. Ag Products -- PYCO Industries, Petition for Partial Revocation, Ex Parte 346 (Sub-no. 14C) 217388

Final Action before October 23 Requested

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc., enclosed please find the original and ten copies of PYCO's "rebuttal" (due no later than 30 August) per 49 C.F.R. § 1147.1(b)(3).

Incumbent rail provider did not offer opposition to the relief requested in Rail General Exemption Authority -- Misc. Agricultural Products, Ex Parte 346 (Sub no. 14C).

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange
counsel for PYCO Industries

Encls.

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

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BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- ALTERNATIVE RAIL SERVICE -- SOUTH PLAINS SWITCHING LTD.	)	F.D. 34899
RAIL GENERAL EXEMPTION AUTHORITY -- MISC. AGRICULTURAL PRODUCTS -- PYCO INDUSTRIES, INC., Petition for Partial Revocation	)	Ex Parte 346 (Sub-no. 14C)

REBUTTAL
on behalf of
PYCO INDUSTRIES, INC.

PYCO Industries, Inc. (PYCO), a cottonseed oil cooperative in Lubbock, Texas, heavily dependent upon rail service, filed a petition for alternative rail service pursuant to 49 C.F.R. Part 1147 on July 2, 2006. Incumbent railroad South Plains Switching, Ltd. (SAW) filed a letter reply on August 14, 2006. Pursuant to 49 C.F.R. 1147(b)(3), PYCO provides the following rebuttal, and reiterates its request that the Board authorize alternative rail service under Part 1147, effective no later than October 23, 2006.

I. PYCO Has Fulfilled the Substantive Requirements

PYCO's entitlement to relief in the situation at bar should rise or fall on PYCO's showings under 49 C.F.R. § 1147.1(a). PYCO has shown a substantial, measurable deterioration or other demonstrated inadequacy in the service provided by incumbent rail carrier SAW. This Board has repeatedly made this finding in the Part 1146 proceeding (F.D. 34802) and has acted consistently in two feeder line proceedings (F.D. 34844 and

34890).[1] Part 1146 which has an identical substantive requirement for relief (see 49 C.F.R. § 1146.1) to that set forth in 49 C.F.R. § 1147.1. It follows that PYCO has established all that is required for relief under Part 1147.

Moreover, SAW does not contest PYCO's substantive showings for relief. The Board accordingly should issue Part 1147 relief.

II. SAW's Arguments Are Unavailing

SAW's only argument is in the nature of the possibility of future mootness. STB decisions as late as that served August 16 in F.D. 34890 suggested that the Board would attempt to reach a result which could be implemented by October 23, 2006 in the feeder line proceeding under 49 U.S.C. § 10907. SAW argued that such a result would either (a) moot this Part 1147 proceeding before relief under Part 1147 is needed, or (b) overrule PYCO's showings.

PYCO currently is obtaining alternative rail service from West Texas & Lubbock Railroad (WTL) pursuant to authorizations from this Board in F.D. 34802, a proceeding under 49 C.F.R. Part 1146. PYCO agrees that this Part 1147 proceeding will be moot if PYCO is authorized to acquire the SAW lines and is able to do

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[1] See PYCO's Part 1147 Petition (in this proceeding) at pp 15-18 & p. 25 (summarizing and quoting Board and Director findings through June 2006. See also Decision, F.D. 34890, served July 3, 2006, at p. 5 (demonstration of inadequate service); Decision, F.D. 34890, et al., served August 3, 2006 (voiding retaliatory "sale" of rail assets by SAW); Decision, F.D. 34890, served August 16, 2006 (majority of shippers view SAW service as inadequate).

so prior to October 23, 2006, for in that event, WTL will continue seamlessly to provide service after October 23.

However, SAW on or about August 17 sought an indefinite extension of time to file its valuation case in F.D. 34890. Over PYCO's objection, this Board granted the extension by Decision served August 18.[2] As a result, there is no longer a possibility that this Board can issue a decision in the feeder line case such that PYCO, much less someone else, can acquire the lines by October 23. Indeed, at this time, there is no definite schedule to resolve the feeder line proceeding.

Furthermore, the Board in its Decision served August 16 in F.D. 34890 has apparently pre-authorized acceptance of a yet to be filed competing feeder line application by Pioneer for all of SAW should the Director accept as complete Pioneer's "me-too" application for Alternative Two, which the Director evidently did (over PYCO's objection) the following day. The other recent feeder line proceeding involving a Pioneer subsidiary took two full years to litigate between initial acceptance of an application and a final determination of terms and conditions (there was additional litigation beyond that time frame as well). Moreover, in the August 16 decision, the Board invited anyone else to file another round of competing feeder line applications by September 6. Although the August 16 decision imposed time deadlines for the competing applications, the

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[2] In a filing on August 23, 2006, PYCO sought reconsideration of the open-ended nature of this extension of time.

August 18 decision extends all deadlines based on when SAW files its valuation case, which, as noted, is not definite.[3] As a result, it would appear that the parties will not even know who is in the proceeding earlier than the first week of October, and if someone files a competing application that week, the parties will presumably not know who is in or out until late October. In all events, it is now essentially impossible to claim that PYCO's request for Part 1147 relief will be mooted by timely relief in the feeder line proceeding by October 23.

When this Board postponed indefinitely the due date for SAW's valuation proceeding in the feeder line proceeding by its August 18 order, this Board adopted SAW's suggestion that the Board "toll" the 270 day statutory limit on relief under 49 U.S.C. § 11123 and 49 C.F.R. Part 1146 so that PYCO would not be prejudiced. Perhaps SAW or Board staff believe this might still moot the need for Part 1147 relief. It does not for at least two reasons.

First, it is not clear to PYCO that the Board has power to toll the 270 day statutory limit. A statutory time limit on the Board's power to regulate arguably means that the Board simply has no power to regulate if the time limit is breached. Ignoring the statutory limit is arguably acting beyond the Board's authority. Moreover, if the Board has power to breach the limit, it is not clear why 49 C.F.R. Part 1147 would ever be

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[3] PYCO in its filing of August 23 sought reconsideration of certain of these actions.

necessary, for the showings required under the Part 1147 regulations are otherwise the same as those under the Part 1146 regulations. Neither SAW nor the Board cite any authority allowing the Board to waive (or to exempt itself from) a statutory limitation on its power. The Board made no findings allowing such a waiver under 49 U.S.C. § 10502, and candidly the language in section 10502 authorizing the Board to exempt particular transactions from regulation does not clearly fit the situation at issue: the Board is not exempting SAW from regulation by "tolling" the limitation in 49 U.S.C. § 11123. To the contrary, the Board is imposing additional regulation on SAW beyond that authorized by Congress.

If the Board's action is ultra vires, then PYCO will clearly be prejudiced commencing October 23, 2006. The only solution is to grant PYCO's Part 1147 petition before that date.

Second, even if "tolling" works, the time that will be available to the Board to determine terms and conditions of transfer and for the parties then to close a transaction is minimal. If the Board takes thirty days to reach a valuation decision, then essentially all the time available before the extension date beyond October 23 will exhausted. Even if there are no further competing applications, the August 16 Decision in F.D. 34890 works out to provide for final pleadings to be filed on roughly September 21. The Board will barely have time to issue a decision in 30 days, let alone issue a decision and afford the parties time to close a transaction such that

seamless service is provided to PYCO.

Pioneer Railcorp requested 60 days from the Board's order to consummate a transaction with SAW. Certainly the Pioneer would not have time under this schedule. In short, tolling is inadequate.

Moreover, Pioneer takes the position that if competing applications are accepted (as the Board has apparently done, plus invited more besides), SAW gets to choose with whom it will deal, not the Board. Since SAW wishes to retaliate against PYCO, PYCO expects SAW if given a choice will choose the party it expects will render the worst service to PYCO. Certainly SAW's last concern will be whether the prospective service provider can or will provide adequate service. If Pioneer's view prevails at the Board, then PYCO (much less other shippers) may never obtain any meaningful relief under the feeder line statute.[4] In that event, the Part 1147 petition in this proceeding, or the petition to revoke SAW's acquisition exemption so the property goes back to BNSF, are the only viable means to secure adequate rail service. In short, the result in the feeder line proceeding may never moot this Part 1147 process.

This leads to another argument made by SAW. Besides its

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[4] Based on experience, PYCO knows WTL will provide adequate rail service. Based on Pioneer's statements to date, the fact that Pioneer personnel told PYCO and BNSF that SAW invited Pioneer into Lubbock, and the local market power enjoyed by any switch provider in Lubbock, PYCO is legitimately concerned that Pioneer will behave as SAW has in the past, but more expensively.

mootness argument, SAW claims that if the public convenience and necessity (PCN) do not permit the lines to be sold to PYCO in the feeder line proceeding, then PCN must necessarily preclude the rail lines from being used by PYCO pursuant to terminal trackage rights [49 U.S.C. § 11102(a)] or reciprocal switching [id. § 11102(c)]. (SAW's reference to reciprocal switching is irrelevant. PYCO filed its Part 1147 proceeding pursuant to this Board's power to order terminal trackage rights (§ 11102(a)) and through routes (49 U.S.C. § 10705(a)), not reciprocal switching. See PYCO's Part 1147 Petition at pp. 13-14.[5])

SAW's PCN argument does not follow. PYCO is entitled to relief under Part 1147 if it demonstrates inadequate rail service to itself. It has done so.

In order to qualify for any relief under 49 U.S.C. § 10907, PYCO must show inadequate rail service for a majority of shippers (which may or may not include itself) and meet certain other criteria. While PYCO has now met the criteria to qualify for feeder line relief, whether PYCO obtains relief under the feeder line statute depends on two things: (a) whether the Board sets terms and conditions that allow a viable railroad and (b) whether a railroad ready, willing and able acquires the lines and then proceeds to provide adequate rail service at a

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[5] This Board has recognized that PYCO's F.D. 34889 proceeding is predicated on 49 U.S.C. § 10705(a) as well as 11102. See Decision served August 3, 2006, in F.D. 34890, et al., at p. 2.

price shippers can afford. There is no way to know whether condition (a) will be satisfied; no one at this time knows when SAW will even file its valuation case. As to condition (b), Pioneer essentially claims this Board has no more of a role in determining who gets the railroad once the Board accepts Pioneer's application than the Board has under 49 C.F.R. Part 1150.31, et seq. (notice of exemption for acquisition). In Pioneer's (and we believe SAW's) view, Larry Wisener and SAW regulate who gets the railroad, not this agency. This agency only determines the amount of money that must be paid by whomever gets the assets.

The Director's decision in F.D. 34890 and 34922 served August 17, 2006, seems to suggest that STB staff agree that its role is limited at this time simply to valuing SAW's property for sale eventually to whomever SAW chooses. Certainly under the Pioneer/SAW construction of the feeder line statute, whether PYCO or any other shipper in Lubbock actually ends up with better service in Lubbock than what PYCO or other shippers received from SAW will depend on the whim of SAW. .

This is no "baseless fear" on the part of PYCO. SAW management has repeatedly indicated that it seeks to retaliate against PYCO, and has attempted to do so already during the course of the Part 1146 proceeding and the feeder line proceeding before this agency.[6] In short, what the Board does

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[6] PYCO successfully sought emergency relief from this Board to prevent some aspects of the retaliation, including a sale by SAW of a portion of its yard to Choo Choo Properties for

under § 10907 unfortunately no longer means that PYCO's service problems will be meaningfully addressed under that statute.[7] In contrast, if PYCO is accorded relief under Part 1147, that relief will continue until the incumbent carrier, whomever that is, demonstrates that it "is providing, or is prepared to provide, adequate service to affected shippers." 49 C.F.R. § 1147(c)(1). That does protect PYCO.

Since the legal tests and relief under 49 U.S.C. § 10907 in the end are quite different from the legal tests and relief under either 49 C.F.R. Part 1146 or Part 1147, relief in one does not foreclose relief under the other. Given the decisions in the feeder line proceeding served August 16-18, PYCO may now end up with inadequate rail service if the only remedy available to it is 49 U.S.C. § 10907. Fortunately, section 10907 is not the only remedy available to PYCO, and the outcome under section 10907 does not dictate the outcome under Parts 1146 or 1147.

III. Conclusion

PYCO has shown it is entitled to relief under Part 1147. SAW does not contest that showing. PYCO's claim for relief is

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the purpose of disrupting PYCO's rail dependent operations. See Decision served August 3, 2006 in F.D. 34890, 34802, 34870, 34889, and 33753 (Sub-no.1).

[7] Indeed, shipper fears that STB might not afford meaningful relief was a contributory factor for why shippers in Lubbock were reluctant to state publicly that SAW service was inadequate until the comment deadline of August 2. Many shippers feared that if the Board did not afford meaningful relief for inadequate service, then all that admission of service inadequacy would accomplish in Lubbock is that the shippers would risk retaliation from SAW or higher rates and inadequate service from a successor company installed by SAW.

neither moot nor superfluous, nor are the remedies under the ICC Termination Act mutually exclusive so as to require PYCO to make an election.

PYCO filed a number of proceedings under different statutes against SAW for inadequate service in part because no one proceeding would assuredly afford a remedy necessary and sufficient for the inadequate service PYCO was receiving. This in turn was due to the reason for that service inadequacy: the abusive nature of SAW management[8] and its arbitrary exercise of local market power to retaliate against, threaten and actually harm local shippers in Lubbock.[9] PYCO wishes to continue to pursue all available remedies, because PYCO is rail dependent, needs a meaningful remedy, and there is still no reliable indication when and how it will receive one.

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[8] In this Board's decision served August 3, 2006 in F.D. 34890, 34802, 34870, 34889, and 33753 (Sub-no.1), this Board voided a sale by SAW to company controlled by the husband of the putative owner/manager of SAW because the Board found that the sale was to evade this Board's authority. Decision at p. 6.

[9] This Board has already found that SAW has abused local market power in Lubbock. Decision in PYCO Industries--Alternative Rail Service -- South Plains Switching, F.D. 34802 and Rail General Exemption Authority -- Miscellaneous Agricultural Commodities -- PYCO Industries, Inc., Petition for Partial Revocation, Ex Parte 346 (Sub-no. 14C), served June 21, 2006, at p. 4. As to actions by SAW to harm PYCO, see the activities of SAW discussed by the Board in its decision referenced in note 4, supra.

Respectfully submitted,

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Certificate of Service

I hereby certify service of the foregoing by depositing same for express (next business day) delivery this 28th day of August 2006 upon

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