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16 May 2006
by Federal Express



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, F.D. 34802

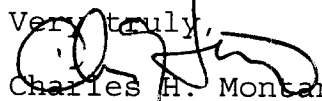
Immediate attention requested

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc. ("PYCO"), enclosed please find an original and ten copies of a Petition for Immediate Injunctive Relief (or alternative relief), in respect to blockade of PYCO's Plant No. 1 by incumbent rail provider South Plains Switching (SAW) in Lubbock, Texas.

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)
John Heffner, Esq. (w/encl.) (for WTL)

ENCLOSURE
OFFICE OF THE SECRETARY
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423-0001

16 MAY 2006
10:10 AM
16 MAY 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
ALTERNATIVE RAIL SERVICE --) F.D. 34802
SOUTH PLAINS SWITCHING LTD.)

Petition for Immediate Injunctive Relief,
or, Alternatively, to Expedite a Protocol Modification
to Address a Retaliatory SAW Blockade

In retaliation against shipper PYCO Industries, Inc., incumbent rail provider South Plains Switching, Ltd. (SAW), spotted some non-revenue cars on top of a rail crossing which PYCO has employed since 1991 to operate its Plant No. 1. SAW first placed the blockade on or about March 21, 2006. The blockade is to punish PYCO for seeking an alternative service order under 49 C.F.R. Part 1146. This Petition seeks emergency relief from the blockade.

Relief Sought

PYCO seeks relief in the alternative: either an injunction or a modification of the currently applicable protocol. Either form of relief should require SAW to remove its blockade of PYCO's long-existing industrial crossing of the "wye" separating PYCO's seed stockpile from its plant, for the pendency of alternative service. Relief in the form of an injunction is authorized under 49 U.S.C. § 721(b)(4), given the irreparable injury arising from loss of PYCO's cottonseed stockpile under SAW's blockade. Alternatively, SAW moves for a modification in the currently applicable protocol to prevent SAW from placing any equipment on the "wye" coming out of the south side of its

yard during the hours allocated to alternative service provider West Texas & Lubbock Railroad (WTL) under the protocol.¹

The injunctive relief would restore the "wye" to its status quo. The protocol change would have the same effect.

Background

PYCO sought the alternative service order applicable in this proceeding when Mr. Larry Wisener carried out his threat to retaliate against PYCO for refusing to accede to his demand to pay SAW \$5.5 million for unspecified SAW assets in November 2005. Mr. Wisener told PYCO that PYCO would have to figure out how to take care of itself. Mr. Wisener then caused SAW to limit service, disrupt car placement, and otherwise throttle PYCO's operations.

This Petition for Immediate Injunctive Relief is in response to further efforts by the Wiseners and their railroad to shut PYCO down. As PYCO's Executive Vice President (Robert Lacy) represents in his attached Supplemental Declaration, PYCO now faces an urgent situation threatening irreparable harm (see especially ¶ 7).

When PYCO expanded its Plant No. 1 in 1991, PYCO constructed a cottonseed storage area on the east side of the rail lead that drops south out of what is now the SAW yard. The lead connects to the yard through a "wye." The west branch of the "wye" is also used to serve PYCO's Plant No. 1, which is on

¹ This Board's order implementing the existing protocol was served February 16, 2006.

the west side of the lead. Cottonseed is transferred by specialized equipment from the seed storage area on the east side of the "wye" to the west side the "wye" for processing. The specialized equipment is not licensed for operation on public highways. Continued economic plant operation is based on access via the existing private crossing between the Plant and its stockpile of seeds.

The crossing has operated without incident since its inception in 1991. SAW has absolutely no rail need to block the crossing. SAW has ample facilities on which to "store" the equipment which it uses to blockade the "wye."²

PYCO first raised the issue of SAW's blockade when PYCO filed its reply in opposition to SAW's second petition to terminate rail service.³ In addition to opposing SAW's second petition to terminate, PYCO moved for a protocol change requiring SAW to remove all cars and equipment from the western branch of the "wye" track serving the south lead off SAW's rail yard.⁴ In light of documented threats to PYCO and WTL personnel attempting to switch cars for PYCO adjacent to the

² In prior pleadings, Delilah Wisener lamely says she needs to use the "wye" because the existing protocol requires SAW to keep its equipment off tracks 9200 and 9298 on the east side of the BNSF mainline. Tracks 9200 and 9298 historically have been used to stage cars for PYCO. That use has never heretofore been an excuse for blockading PYCO elsewhere.

³ SAW filed its second petition to terminate alternative serviced on March 30, 2006. SAW's first petition to terminate service was denied by this Board on February 24, 2006.

⁴ See PYCO Reply served April 6 at p. 3 and pp. 7-10.

"we,"⁵ PYCO reiterated its request for a specific protocol change requiring SAW to keep the "we" clear of its equipment during WTL operating hours in PYCO's Objections filed April 19, at pp. 11-12.

Argument

Issuance of an injunction or modification of the protocol to require SAW to remove obstructions from the "we" at least during WTL's hours of operation as assigned under the protocol is amply supported.

Keeping SAW equipment from operating in the "we" during the WTL protocol hours not only would free PYCO from blockade but also protect the workers of PYCO and alternative rail provider WTL. As previously indicated, PYCO and WTL employees have felt endangered by SAW operations on the "we" during the hours that use of the yard has been assigned to WTL under the existing service protocol.⁶ Two worthy purposes would thus be served by the protocol change requested by PYCO.

PYCO's cottonseed inventory under blockade has a value of \$11 million. Like many plant materials, cottonseed begins to rot in the presence of warm weather and moisture. PYCO's outdoor stockpile will spoil as spring turns into summer. The temperature readings in the stockpile are already growing excessive. The seed must be processed immediately or it will be

⁵ See Howell Declaration, Exhibit D to PYCO Objections filed April 19, 2006.

⁶ See Howell Declaration, Exhibit D to PYCO Opposition filed April 19, 2006.

lost. This would constitute an irreparable harm to PYCO. Lacy Supplemental Dec ¶¶ 7 & 9.

PYCO has examined alternative means to access its stockpile. The cheapest potentially feasible alternative requires a city permit to construct new road access, plus the expenditure of approximately \$250,000 for rental equipment to move an estimated 4000 truckloads of cottonseed on city streets to Plant No. 1. Ironically, all these trucks must still cross the very same trackage that PYCO's private crossing traverses. The only difference is placing 4000 new roundtrips by truck on Lubbock streets and costing PYCO at least another \$250,000. PYCO fears it cannot implement this approach in time to save its entire stockpile, even if the City authorizes the access. City has advised PYCO to get the approval first of Texas Department of Transportation. PYCO's request there is pending. Even if PYCO's request is approved, PYCO must construct the new entrance, and its hours of operation are expected to be limited. Lacy, supra, ¶ 9. Mr. Lacy indicates that as a result of these uncertainties, PYCO remains at risk of substantial irreparable injury even as it tries to obtain the local and state approvals necessary to minimize the damages being inflicted upon it.

No purpose is served by SAW's blockade except to punish PYCO for raising objections to this Board concerning SAW's conduct. SAW has a well-earned reputation for making threats and in finding ways to persist obstreperously in carrying them

out against shippers in Lubbock.⁷ SAW's on-going guerilla warfare in Lubbock to erode and to negate the relief this Board has ordered for PYCO is an assault on this Board's jurisdiction and should not go unchecked.

In prior filings, SAW has asserted a confusing medley of legal reasons which SAW claims entitle it to shut down access to PYCO's cottonseed stockpile. SAW's attorney (who is not licensed in Texas and who therefore is supposedly disabled from expressing a reliable expert opinion on Texas law) first claims, citing a case out of North Carolina, that private crossings are governed by state law, and that they are permitted only if authorized by state statute. SAW Reply in Opposition filed April 13, 2006, at 4. Assuming this true arguendo, Texas law recognizes that private crossings can be established by adverse possession⁸ or estoppel,⁹ or that they can be required by statute.¹⁰ Although no applicable private crossing agreement has been located (this does not mean none exists), PYCO is not

⁷ PYCO documents this with 28 U.S.C. § 1746 statements from other companies in PYCO's pending feeder line application, STB Fin. Dkt. 34844 [Exhibit L, para. 3 ("A SAW shipper lives in fear that SAW management on a whim will cease service"); Exhibit H, ¶¶ 5-6 (describes action that "can only be explained as an action of retaliation and reprisal")].

⁸ Texas & P. RR Co. v. Kaufman County, 17 Tex Civ. App. 251, 42 SW 586 (1897) (public right to use crossing by prescription).

⁹ E.g., Storms v. Tuck, 566 S.W.2d 16 (1978) (person who improves a crossing with the knowledge and implied consent of another acquires an easement by estoppel).

¹⁰ Tex. Civ. Stat. Articles 6321-23.

thereby precluded from a crossing right.

PYCO's Texas counsel has filed a memorandum in this proceeding indicating that he is of the opinion that PYCO has a legal right to cross. As Mr. McLaren indicates (PYCO Reply filed April 6, 2006, at pp. 7-8), PYCO's right arises either by prescription (if adverse) or by estoppel (if by original oral consent).¹¹ PYCO's Texas attorney, Mr. McLaren, is licensed in Texas and can offer an expert view.

SAW's counsel also opines that PYCO can claim no prescriptive right to cross (SAW Reply, supra, at 4-5) because PYCO's use, he says, was not "hostile and adverse" to the railroad. Yet SAW's counsel also claims in the preceding sentences on page 4 of his Reply that the absence of an agreement indicates the railroad never intended to authorize a crossing. But that claim is tantamount to an admission of hostility and adversity. SAW cannot have it both ways.

SAW's counsel then asserts, without citation, that there can be no prescriptive easement "in any event" (SAW Reply, supra, at 5), but gives no authority for this proposition.¹²

¹¹ No one contends that PYCO is seeking to expand any crossing use previously enjoyed; PYCO simply seeks to do what its rail-dependent plant is designed to do. Thus, this is not a case in which a servient estate is protesting expansion of an easement.

¹² Because SAW's counsel has taken the position for other clients [see, e.g., City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005)] that eminent domain (and thus presumably adverse possession) of slivers of federally regulated rights of way is preempted, this may mean he intends to assert federal preemption. But then SAW says there is no federal remedy relating to private crossings that preempts state law. SAW

The gravamen of SAW's argument seems to be that Texas law simply provides no crossing right, so SAW can do as it wishes. SAW is incorrect that there is no Texas law on the subject. As already indicated, Texas law recognizes crossing rights by prescription, estoppel or statute.

The real point, however, is that most all of SAW's argument seems to be grist for another mill. SAW has renounced (see note 12) federal preemption by this Board as a defense. Accordingly, SAW should take its state law arguments to Texas court rather than try them before this agency.

Unfortunately, this does not dispose of the issue of SAW's blockade of the crossing. SAW is accomplishing its blockade with rail equipment. SAW can be expected to assert in Texas court that even if PYCO has a crossing right, SAW is merely operating its rail equipment, and may do so without oversight from a Texas court, even if it operates solely to thwart PYCO's crossing.

In order to allow PYCO use of the crossing, at least one of the following two forms of relief from this Board is necessary and prudent: (a) this Board should issue an order under 49 U.S.C. § 721 enjoining SAW from obstructing the crossing with equipment, or (b) this Board should modify the protocol to require SAW to clear the "wye" during the hours assigned to WTL's operations. Either course (i.e., either an injunction or

Reply in Opposition at 5. This estops SAW from asserting federal preemption of any state law crossing right on the part of PYCO.

a protocol change) additionally will foster the safety of PYCO and WTL employees during switching operations to PYCO's plant no. 1.

Requiring SAW to clear the crossing of its equipment is not an adjudication of PYCO's rights at state law to use the crossing. Should SAW still wish to contest PYCO's rights, the parties could then presumably proceed in State Court to a determination of their respective property rights.

The SAW blockade threatens \$11 million in inventory, and continued economic operation of PYCO's Plant No.1. Loss of the seed stockpile would constitute irreparable damage. As a minimum, PYCO faces an additional \$250,000 in transportation costs to save its seed, and is still seeking permission from the City of Lubbock and Texas Department of Transportation to open access to 34th Street for this purpose. At this stage, PYCO is informed that if it gets access, it will be conditioned on limited hours of operation. PYCO is concerned that so delayed and so conditioned, the company may be unable to move its stockpile in time, and thus will still sustain irreparable damage. Moreover, this approach will place 4000 additional round trips by truck on Lubbock streets.

No harm flows to SAW from either injunctive relief or a protocol change, because the blockade serves no rail purpose of SAW other than to penalize PYCO for seeking remedies for SAW's inadequate rail service. But plaguing PYCO is hardly a legitimate rail purpose; instead, it serves only to act out

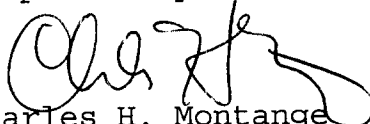
churlish behavior or perhaps by example to cow other shippers. In either event it undermines effective regulation by this Board.

The public would benefit from entry of the injunctive relief or the requested protocol change because it would keep 4000 additional roundtrips by truck off Lubbock streets. The public would also benefit by preserving PYCO and the cotton industry in 25 Texas Counties which it serves from SAW's retaliatory misbehavior and SAW's invidious efforts to inflict irreparable injury. All the criteria for injunctive relief under the traditional tests are met.

Conclusion

For the reasons stated above, either an injunction should be issued, or the protocol should be modified, to require SAW to remove obstructions from the "weye," at least during WTL operating hours under the protocol.

Respectfully submitted,



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(206) 546-1936
fax: -3739
for PYCO Industries, Inc.

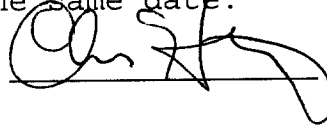
Of counsel:

Gary McLaren, Esq.
Phillips & McLaren
3305 66th St., Suite 1A
Lubbock, TX 79413
(806) 788-0609
for PYCO Industries, Inc.

Exhibit -- Supplemental Declaration by Robert Lacy

Certificate of Service

The undersigned hereby certifies service of the foregoing by placing a copy with Federal Express addressed to Mr. McFarland at 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112, on May 16, 2006. The undersigned also certifies service of the foregoing on John Heffner, counsel for WTL, by fax transmission at 202-296-3939 on the same date.

A handwritten signature in black ink, appearing to be "Ch. H.", is written over a horizontal line.

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	)	

Supplemental Declaration of Robert Lacy

I, Robert Lacy, am the Senior Vice President of PYCO Industries, Inc. (PYCO). This Supplemental Declaration, based on my personal knowledge and on information prepared for me by PYCO staff, is in support of PYCO's petition for emergency relief.

1. PYCO's Plant No. 1 surrounds a lead dropping south out of the rail yard currently owned by South Plains Switching (SAW) in Lubbock, Texas. A map showing the site is attached.

2. In 1991, Burlington Northern and Santa Fe Railroad (now BNSF Railway) provided rail service to PYCO in Lubbock. In that year, PYCO completed construction of additions to its Plant NO. 1 in Lubbock. The additions included facilities to store cottonseed on the east side of the lead referenced in paragraph 1 and a motor vehicular crossing over the lead between the seed storage area and PYCO's processing facility on the west side of the lead. A schematic showing the approximate location of the crossing is attached. Since construction, PYCO has employed the cottonseed storage facility for storage, and has always transferred cottonseed from that facility to its plant on the west side of the lead over the crossing using special equipment not licensed for use on Texas streets or highways.

3. As we have discussed in prior statements, in October 2005, SAW demanded that PYCO sign a deal to pay SAW \$5.5 million for unspecified SAW railroad assets in Lubbock. When PYCO asked for a due diligence clause to study the matter, SAW management angrily refused and indicated an intent to take retaliation against PYCO. SAW did take such retaliatory action. PYCO responded with an alternative rail service petition which this Board granted on January 26, 2006. PYCO has received adequate rail service from its alternative service provider, West Texas and Lubbock Railroad, since that time.

4. SAW nonetheless has twice petitioned to terminate alternative service, and has coupled those legal actions with a variety of "self help" measures to render alternative service for PYCO more difficult and expensive for WTL to provide, and to retaliate against PYCO. For example, as PYCO has detailed in its prior filings, SAW has refused to participate in daily conference calls to work out service issues; SAW has interfered with WTL alternative service by operating outside the times specified in the protocol; and SAW from time to time has blocked rail access with equipment.

5. At about the time SAW filed its second petition to terminate alternative rail service, SAW began blocking access from PYCO's cottonseed stockpile at PYCO's Plant No. 1. In PYCO's opposition to SAW's second petition to terminate alternative rail service, PYCO asked for a service protocol change to prevent SAW from blocking access. As of the time of

filing this Supplemental Declaration, STB has not yet ruled on SAW's second petition to terminate, or on PYCO's request for a protocol change to prevent the blockade of its cottonseed stockpile.

6. SAW continues to maintain the blockade of the crossing, chiefly with non-revenue cars (cars stored for persons who are not shippers on SAW's line). SAW has ample alternative locations to store the cars. Based on data from WTL, and assuming all SAW traffic moves over the lead, SAW averages 4.2 loaded cars and 4.4 empty cars per day for each five day work week. This amounts to one engine up and back per day. The lead is not heavily used.

7. PYCO currently has cottonseed with a value of \$11 million in the stockpile. Because the storage facility for this stockpile is outdoors, PYCO must work it off first before it spoils. Temperature inside portions of the stockpile has now risen to the point where PYCO must now begin to process the cottonseed or it will spoil. If the stockpile spoils, the loss to PYCO is irreparable.

8. PYCO has explored all reasonable options for moving the cottonseed. The least expensive option for PYCO to move the seed to its processing plant will require cutting a new driveway and curb onto 34th Street, and placing 4000 truckloads of additional traffic on that street. PYCO will have to obtain permission from City of Lubbock, which has also direct us to Texas Department of Transportation (TXDOT), to construct the new

access point.

9. PYCO estimates the additional cost of moving the cottonseed by this method would be at least \$250,000 (see attached calculation). In any event, we are concerned that it cannot be implemented in time (given the required permissions and constructions), or in a fashion (given time limitations the City indicates it will impose), to preserve all the stockpile from rot. There would be no enhancement of rail safety in that all the seed must move across the same track; the only change is that the shift south to 34th Street will cost PYCO an additional \$250,000. There would be additional wear and tear to Lubbock's streets. There will be continued risk of substantial irreparable injury to PYCO.

10. SAW's action in blockading the PYCO's access to its cottonseed stockpile serves no rail purpose and is purely retaliatory against PYCO for seeking and obtaining an alternative service order.

11. In order to avoid loss of its stockpile, PYCO must now act within the next few days. Because SAW's action is an obvious retaliation against SAW for invoking this Board's jurisdiction, PYCO respectfully requests that this Board find that there is no rail purpose served by SAW's blockade of PYCO's access, and either enjoin SAW from blockading the crossing during the pendency of the alternative service order, or modify the protocol to require SAW to remove all equipment from the wye during WTL's hours of operation.

Pursuant to 28 U.S.C. § 7146, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: May 16, 2006

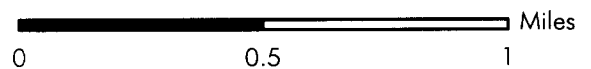
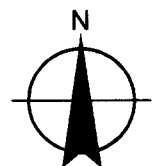
Robert Hoey

Locations of Involved Parties



Legend

-  FYCO Plants
-  Atterbury Grain
-  Farmer's COOP Compress
-  SAW Yard



Source: Image is from the National Agriculture Image Program 2005.

Projection: Universal Transverse Mercator Zone 14 North; North American Datum 1983

STAEDTLER®

No. 937 811E
Engineer's Computation Pad

SENT BY: CHARLES H MONTANGE;

APR-18-2006 (TUE) 14:45 PYCO Industries

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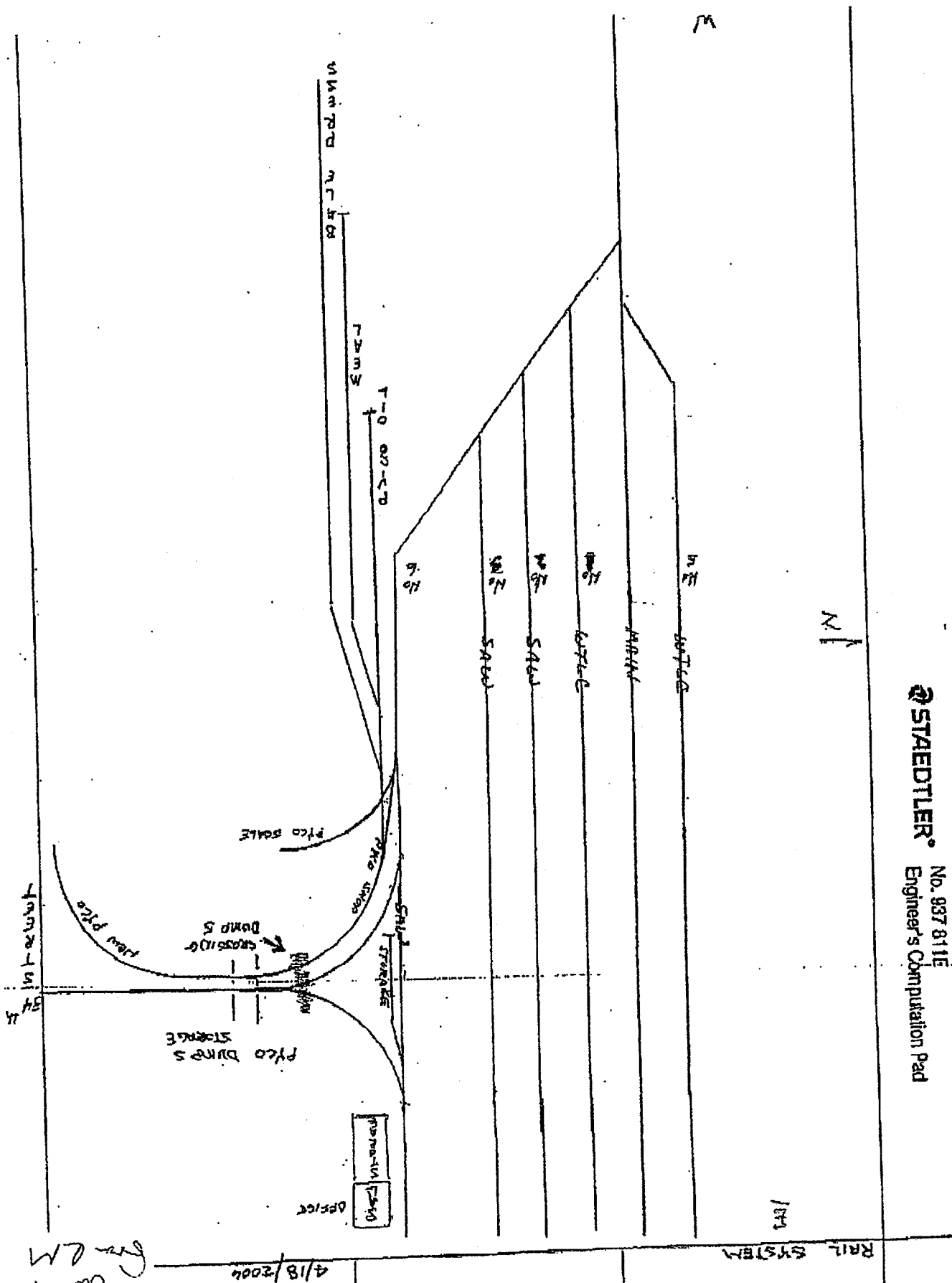
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PAGE 1/1

(FHX) 7443221

Travis and I
Jack Hoffman

W7 mg





PYCO Industries, Inc.
Cottonseed Products

MEMORANDUM

To: Mr. Gail Kring - President
From: Lewis Harvill P.E. - General Superintendent
CC:
Date: 05/16/2006
Subject: Recovery of Piles 5E & 5W

The associated costs are as follows:

1)	Barricades		4,000.00
2)	Over Time Wages		12,500.00
3)	Equipment Wear/ Fuel	\$2.50/ton@35,000tons	87,500.00
4)	Dump Wear/ Electricity	\$2.00/ton@35,000tons	70,000.00
5)	Storage/Cooling		25,920.00
6)	Laterals		5,500.00
7)	Lighting		17,280.00
8)	Fence		7,500.00
9)	Entrance Concrete TDOT Required		15,000.00
10)	Extra Supervision		11,200.00

Total Extra cost for Double Handling 256,400.00

\$256,400.00/35,000tons \$7.33/ton

Cost is only applied to the extra tons double handled, beyond our crushing during the time period.