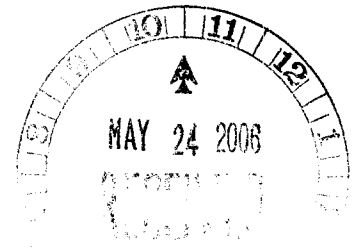


LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com



THOMAS F. MCFARLAND

May 23, 2006

216601

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

MAY 24 2006

Part of
Public Record

Re: STB Finance Docket No. 34802, *PYCO Industries, Inc. -- Alternative Rail Service*
-- *South Plains Switching, Ltd. Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Supplement To Petition To Terminate Alternative Rail Service, for filing with the Board in the above referenced matter.

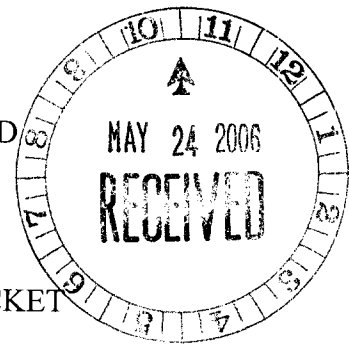
Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for South Plains
Switching, Ltd. Co.

TMcf:kl:enc:wp8.0\1144\ltrstb7

BEFORE THE
SURFACE TRANSPORTATION BOARD



PYCO INDUSTRIES, INC. --)
ALTERNATIVE RAIL SERVICE --) FINANCE DOCKET
SOUTH PLAINS SWITCHING, LTD. CO.) NO. 34802

SUPPLEMENT TO
PETITION TO TERMINATE
ALTERNATIVE RAIL SERVICE

ENTERED
Office of Proceedings

MAY 24 2006

Part of
Public Record

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Petitioner

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Petitioner

DATE FILED: May 24, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	FINANCE DOCKET
SOUTH PLAINS SWITCHING, LTD. CO.	)	NO. 34802

**SUPPLEMENT
PETITION TO TERMINATE
ALTERNATIVE RAIL SERVICE**

Pursuant to 49 C.F.R. § 1146.1(d)(1), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby supplements its Petition for Termination of Alternative Rail Service, filed on March 30, 2006. The Board has not ruled on that Petition. This Supplement is supported by the verified statement of Mrs. Delilah Wisener, owner of SAW, and the legal opinion (Texas law) of James L. Gorsuch, Esq., which are attached to this Supplement as Appendices 1 and 2, respectively.

This Supplement provides reasons why the Board should not extend alternative rail service beyond the scheduled termination date of June 25, 2006 that is provided for in the decision served February 24, 2006. In the latter decision, the Board said (at 4):

... (T)he need for alternative rail service to continue beyond the time we are authorizing in this decision can be reassessed at the end of the 120-day extension period.

As demonstrated in this Supplement, alternative rail service should not be extended beyond June 25, 2006 because:

- (1) the Board does not have authority to extend alternative rail service because of the unregulated status of the overwhelming majority of traffic transported to and from PYCO's facilities; and
- (2) SAW is prepared to provide rail service required by PYCO; and
- (3) PYCO has failed to provide justification for extension of alternative rail service.

I. THE BOARD DOES NOT HAVE AUTHORITY UNDER 49 U.S.C. § 11123 TO EXTEND ALTERNATIVE RAIL SERVICE BEYOND JUNE 25, 2006

The Board does not have authority under 49 U.S.C. § 11123 to extend alternative rail service beyond June 25, 2006 because the overwhelming majority of traffic that is transported to and from PYCO's facilities has been exempted from all provisions of Subtitle IV, Title 49, which includes § 11123. Neither did the Board have authority initially to order alternative rail service, for the same reason. SAW did not raise the absence of Board authority previously because it did not come to SAW's attention until recently when PYCO filed a complaint against SAW alleging violation of a number of statutes that are part of Subtitle IV of Title 49. That complaint was filed in regard to transportation of traffic that has been exempted from all provisions in that Subtitle. SAW has filed a Motion to Dismiss that complaint based on the absence of Board authority over that transportation. A decision on that Motion is pending.

According to PYCO's Complaint in Finance Docket No. 34838 filed on April 10, 2006 (Section 3[c]), PYCO ships whole cottonseed, cottonseed hulls, and cotton linters by rail to or from its Plant 1 and/or Plant 2 at Lubbock, TX. SAW's records show that between November 1, 2005 and January 29, 2006, the period leading up to the alternative rail service order, rail shipments of exempt commodities constituted 74 percent of PYCO's total rail shipments to or

from those points. (V.S. Mrs. Wisener, Attachment A). That percentage is typical of lengthier time periods; 74 percent of PYCO's rail shipments in calendar year 2005 were exempt commodities. (*Ibid*). The remainder of PYCO's rail shipments consisted of cottonseed oil, cottonseed meal or cottonseed cake. (*Id.*).

Rail transportation of cottonseeds, cottonseed hulls and cotton linters has been exempted from the Board's regulatory authority under Subtitle IV of Title 49. *See Rail General Exemption Authority*, 367 I.C.C. 298, 310-312 (1983), and 49 C.F.R. § 1039.10 (STCC Nos. 01-14110; 20-914-25, and 20-915). Subtitle IV of Title 49 encompasses 49 U.S.C. § 11123, which is the statute that authorizes the Board to order alternative rail service. Rail transportation of cottonseed oil, meal and cake remain subject to the Board's regulatory authority.

Where, as here, rail transportation of a commodity has been exempted from the Board's regulatory authority, the Board cannot entertain a complaint alleging that rail transportation of that commodity violates any statutory provision of Subtitle IV of Title 49. *Pejepscot Industrial Park, Inc. -- Pet. for Declar. Order*, 2003 STB LEXIS 253 at *12-13 (Finance Docket No. 33989, served May 15, 2003); *Consolidated Rail Corp. -- Aband. Exempt. -- in Erie County, NY*, 1998 STB LEXIS 777, slip. opin. at 9 (Docket No. 42028, served Oct. 7, 1998); *Consolidated Rail Corp. - Declar. Order - Exempt*, 1 I.C.C.2d 895, 900 (1986), *aff'd sub nom. G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3rd Cir. 1987).

The same principle necessarily applies to 49 U.S.C. § 11123 because § 11123 is a part of Subtitle IV of Title 49, and because the exemption from regulation applies to all statutes in Subtitle IV. Accordingly, where, as here, rail transportation of a commodity has been exempted from the Board's regulatory authority, the Board cannot entertain a Petition under 49 U.S.C.

§ 11123 alleging that a rail carrier's failure to provide adequate rail transportation of that commodity warrants an order for the provision of alternative rail service. Inasmuch as the Board cannot entertain such a Petition in the first instance, it necessarily follows that the Board cannot lawfully extend such alternative rail service that it did not have authority to order in the first place.

The foregoing principles lead inevitably to the conclusion that the Board does not have authority under 49 U.S.C. § 11123 to extend alternative rail service because the transportation under consideration has been exempted from Subtitle IV of Title 49. The Board lacks such authority where, as here, the overwhelming majority of rail shipments under consideration have been exempted, notwithstanding that a minority of shipments from the same facility would otherwise be subject to regulation. That is so because the Board cannot lawfully ignore its inability to regulate the great majority of shipments, and because it would not be practical nor safe to provide for alternative rail service for a distinct minority of shipments from the same facility.

The upshot of the foregoing is that as a matter of law, the Board lacks authority to extend alternative rail service in this matter. Consequently, the Board should decline to extend alternative rail service on that basis.

II. SAW IS PREPARED TO PROVIDE RAIL SERVICE REQUIRED BY PYCO

SAW is prepared to provide all of the rail service required by PYCO, just as SAW was prepared to provide that service prior to the order for alternative rail service. The difference now is that PYCO has prepared itself to receive that rail service. PYCO was not prepared with

sufficient private trackage to receive and load the number of cars per day that it wanted to ship prior to the order for alternative rail service, but SAW was punished for PYCO's shortcoming.

The endless false accusations against SAW in PYCO's pleadings have obscured the principal reason that PYCO did not ship the desired number of cars from its Plant No. 1 last November, December and January: PYCO lacked sufficient private trackage to do so. PYCO stated that it desired to ship 24 cars per day from Plant 1 at that time. However, PYCO's private track could accommodate only 12 cars at a time. SAW was able to deliver only as many cars as PYCO was able to receive. As for PYCO's desire to ship more cars per day, it was akin to trying to put 10 pounds of potatoes in a 5-pound potato bag. It simply was not possible.

Prior to November, 2005, PYCO had been able to get away with having inadequate private trackage in Plant 1 because SAW permitted PYCO to operate PYCO's trackmobile in SAW's rail yard at all hours of the day. PYCO used SAW's yard tracks as PYCO's private tracks. In November, 2005, SAW discontinued the practice of permitting PYCO to operate its trackmobile on SAW's yard tracks. That action was taken by SAW for legitimate safety reasons. PYCO has contended that instead SAW discontinued that practice in retaliation for PYCO's refusal to purchase those yard tracks at SAW's asking price. SAW denies that contention, but even if it were true it would not make SAW's action unlawful in any respect. Without SAW's permission, PYCO has never had a legal right to operate its trackmobile on SAW's rail tracks. It is elementary that a shipper does not have a legal right to operate equipment on a rail carrier's tracks without permission. It follows that SAW could grant or withhold permission for PYCO to operate a trackmobile on SAW's tracks in SAW's sole discretion.

An alternative that may well have enabled PYCO to ship its desired number of cars per day was an additional daily switch and/or weekend service. PYCO never requested SAW to provide additional daily switching or weekend service. On the contrary, PYCO ignored SAW's specific invitation for a meeting to discuss service alternatives in light of PYCO's inability to continue to operate its trackmobile on SAW's yard tracks. Had PYCO requested extra switching, SAW would have provided it, as evidenced by SAW's subsequent written offer to provide extra switching service without charge.

The upshot of the foregoing is that PYCO was unable to ship the desired number of cars last winter because PYCO self-destructed, by virtue of having insufficient private track to receive and load that number of cars, and by virtue of failing to request that SAW provide additional switching service.

After alternative rail service was ordered at the end of January, PYCO constructed additional private track by extending its "shop track" to accommodate 35 to 50 additional cars. That additional private track enables PYCO presently to receive and load more than the number of cars per day that it was unable to receive and load last winter.

In light of that additional private track, SAW is presently prepared to provide all of the rail service required by PYCO. Thus, SAW is willing and fully capable of transporting cuts of 24 cars or more to and from the extended shop track at PYCO Plant No. 1. SAW has safely provided such multiple-car and trainload service on many occasions since the inception of its rail service seven years ago.

Thus, SAW is presently prepared to provide the rail service that PYCO has geared itself up to receive. In accordance with 49 C.F.R. § 1146.1(d)(a), therefore, the Board should refuse to extend alternative rail service beyond its scheduled June 25, 2006 expiration date.

III. PYCO HAS FAILED TO PROVIDE JUSTIFICATION FOR EXTENSION OF ALTERNATIVE RAIL SERVICE

SAW has withdrawn several privileges that it previously provided to PYCO. As explained below, those actions were taken in SAW's legitimate self-interest. They did not deprive PYCO of any right provided by law. PYCO has argued that alternative rail service should be continued because those actions reflect an uncooperative attitude that would result in poor service if alternative rail service were to be terminated. On the contrary, the fact that SAW has withdrawn privileges that it has no duty to provide in no way means that SAW will not fulfill its common carrier duty to provide adequate rail service to PYCO.

One such action was SAW's refusal to permit PYCO to operate its trackmobile on SAW's yard tracks. PYCO contends that such action was taken in retaliation for PYCO's refusal to purchase SAW property at SAW's asking price. In fact, that action was taken for legitimate safety reasons. PYCO was not thereby deprived of any legal right. It is axiomatic that a shipper does not have a legal right to operate equipment on a rail carrier's tracks. Consequently, SAW could grant or withhold the privilege for PYCO to operate a trackmobile on SAW's tracks in SAW's sole discretion.

Another such action was non-renewal of the one-year lease to PYCO of Track 9298. PYCO claims that such action was retaliatory, but the fact is that the impetus for that lease -- BNSF having placed a lock on the switch to Track 231 -- no longer existed at the end of that

one-year term. Non-renewal of that lease did not deprive PYCO of any legal right. It is also axiomatic that a shipper does not have a legal right to lease a rail carrier's trackage. SAW had a legal right to put Track 9298 to whatever use SAW desired.

The latest PYCO claim of retaliation relates to SAW's placement of railcars for revenue storage on a SAW wye track near PYCO Plant 1. PYCO claims that SAW's action is designed to block PYCO from crossing SAW's tracks at that location. That is not so. The wye track is the most convenient location for SAW to store the railcars. It is highly ironic that those cars were going to be stored on Track 9298 until at PYCO's insistence, Track 9298 was designated as a staging point for empty cars for PYCO under the alternative rail service order. SAW's storage of railcars at that location does not deprive PYCO of any legal right. There is no agreement for a private crossing for PYCO at that location. According to the legal opinion of James L. Gorsuch, Esq., attached hereto as Appendix 2, PYCO does not have a prescriptive easement under Texas law to cross SAW's tracks at the location under consideration.

PYCO's arguments seek to mislead the Board. The issue now before the Board is not whether SAW would be likely to cooperate with PYCO by providing privileges that are not required by law. Instead, the issue is whether SAW is prepared to provide adequate rail service to PYCO. SAW has shown that now that PYCO has constructed adequate private trackage, SAW is willing and fully capable of transporting 24 or more cars to and from the extended PYCO shop track, thereby satisfying PYCO's maximum rail service needs. PYCO has provided no evidence or argument to the contrary. It follows that PYCO has failed to provide justification for extension of the alternative rail service in this matter.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, alternative rail service should not be extended beyond the scheduled expiration date of June 25, 2006.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Petitioner

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Petitioner

DATE FILED: May 24, 2006

APPENDIX 1

South Plains Switching, Ltd. Co.
P. O. BOX 64299 LUBBOCK, TEXAS 79464
PHO: (806)828-4841 FAX: (806)828-4863

Verified Statement of Delilah Wisener

RE: Finance Document No. 34802

My name is Delilah Wisener. I am owner and now Operating Manager of South Plains Switching, Ltd. Co. (SAW). SAW is a Class III rail carrier subject to the jurisdiction of the Surface Transportation Board (STB). SAW acquired this rail line at Lubbock, Texas from BNSF in 1999.

This verified statement is made as a Supplement to SAW's Petition to Terminate Alternative Rail Service. This Supplement requests that the STB allow alternative rail service to terminate on June 25, 2006, as scheduled.

There are two ways to address my request. The first is to make brief statements and attach files already in the possession of the STB. This method only adds to the destruction of more trees to file 10 copies of 300 plus pages. The alternative is to simply state, in brief form the positions of SAW without reattaching a mass of already filed documents. The second alternative shall be used.

This supplement is in two parts: Part (1) the STB did not have authority to order alternative rail service in the first place because the overwhelming majority of shipments by PYCO are of commodities whose regulation by the STB has been exempted. This part will also outline the car order process and lease/ownership of equipment in question. Part (2) will show that SAW is prepared to provide more than adequate rail service to PYCO.

Part (1): Attachment A to this statement identified the number of PYCO rail shipments that are not regulated by the STB. These non-regulated commodities are cottonseed, cotton linters, and cottonseed hulls. The regulated commodities consist of cottonseed oil, cottonseed meal or cottonseed cake.

For ease of verification, and to not aggregate data, information is shown for three periods: (1) calendar year 2005; (2) Nov. 1, 2005 – Jan. 29, 2006; and (3) Mar. 1, 2005 – Jan. 29, 2006.

Please be aware that there may be different sets of data flowing between PYCO, SAW and BNSF. This is due to PYCO's shipment records and interchanges of loads between PYCO/SAW/BNSF on different days. It is hoped that all parties will look to the relative size of non-regulated vs. regulated shipments instead of having an exercise pointing out differences of a few cars between data sources.

Clearly PYCO shipments are mostly in the non-regulated category. A summary shows:

Calendar Year 2005:	unregulated	74%
Nov. 1, 2005 – Jan. 29, 2006:	unregulated	73%
Mar. 1, 2005 – Jan. 29, 2006:	unregulated	74%

I simply cannot respond to general "you did it" accusations. Any rebuttal on regulated commodities should be fully documented by PYCO with type of alleged service failure, date, car number and name of SAW administration member with whom the said failure was discussed. It is the position of SAW that no service failures occurred on regulated commodities associated with PYCO.

As to the issue of SAW's requirement to supply PYCO with rail equipment, I have attached blank car request forms (Attachments B and C) used by PYCO to order cars. These forms are generally used to order boxcars and hopper cars. The form would be filled out by PYCO and sent, usually by fax, to the SAW. The SAW would then place the order with the BNSF based on the customer's request, i.e. number of cars needed, dates needed and the type of car. SAW would generally place car orders to the BNSF electronically using Equipment Request through the BNSF website.

PYCO never ordered car equipment other than boxcars or hopper cars from SAW as PYCO either owns or leases tank cars for their shipments of cottonseed oil. As to PYCO's shipments of the non-regulated cottonseed, SAW has learned from BNSF and Penny Newman Grain representatives that these specialty cars (i.e. WS4 type) were leased from the BNSF to Penny Newman. Therefore, PYCO has never placed a car equipment request with the SAW for the WS4 type of car. The supply of these cars is between the leaseholder and BNSF only. Although SAW had an agreement with the BNSF to store Penny Newman leased WS4 cars at no cost to the BNSF, the responsibility to have these cars returned to the SAW for PYCO would fall on the leaseholder and the BNSF. I have attached (Attachment D) a copy of an e-mail from BNSF representative referencing the WS4 storage agreement between BNSF and SAW.

Service failures may occur in two areas; on the SAW or on another rail line. The other rail line generally involves BNSF Lubbock terminal or BNSF line haul service.

My railroad service provides switching loads and empty equipment between BNSF and PYCO Plants 1 and 2. SAW has outlined congestion caused by constructive placement of PYCO equipment in SAW yard, and difficulty caused by BNSF inability to interchange cars with SAW. PYCO contends they are at the mercy of SAW. SAW

contends that it is at the mercy of both BNSF and PYCO for total service levels. SAW has no proven service failures.

BNSF abruptly cancelled car hire arrangements with SAW late in 2005. This cancellation impacted PYCO in a negative way.

Part (2): There are essentially four reasons for STB affirmative consideration of termination of the present order and return of normal rail service to my company.

First: PYCO has completed the lengthening of their private shop track at Plant 1. This work was completed during the period of alternative rail service and will now accommodate the expected daily shipments made by PYCO. This will allow SAW to make the expected 24 car a day movement with PYCO in a single switching movement.

Second: I hereby restate my long-standing offer to provide a second switching movement to PYCO Plant 1, without extra charge.

Third: SAW's regular service is consistent with service requirements stated by PYCO in their request for alternative service as well as feeder line application. This is the same level of service provided by SAW for PYCO for many years.

Fourth: The only PYCO claim of inadequate service for PYCO Plant 2 is an alleged service interruption during Thanksgiving week in 2005, and failure to furnish an adequate supply of boxcars in January of 2006. PYCO did not rebut; or even attempt to rebut; SAW's evidence that service at Plant 2 was not provided on only one day, November 28, 2005 due to locomotive failure. SAW also furnished evidence that SAW supplied every boxcar ordered by PYCO Plant 2 in January 2006 on a timely basis.

SAW is ready and willing to resume rail service to PYCO.

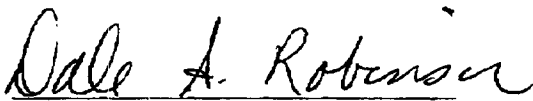
VERIFICATION

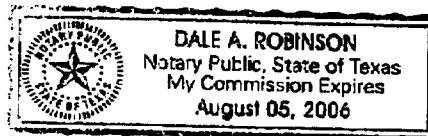
STATE OF TEXAS)
) SS:
COUNTY OF LUBBOCK)

DELILAH WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.


DELILAH WISENER

SUBSCRIBED AND SWORN to
Before me this 23rd day
of May, 2006.


Notary Public



My Commission Expires:

Aug. 05, 2006

ATTACHMENT A

Calendar Year, 2005	non-regulated	74%
Non-regulated Commodities:	4,151 cars	
Regulated Commodities:	1,421 cars	
November 1, 2005 – January 29, 2006	non-regulated	73%
Non-regulated Commodities:	889 cars	
Regulated Commodities:	331 cars	
March 1, 2005 – January 29, 2006	non-regulated	74%
Non-regulated Commodities:	3,786 cars	
Regulated Commodities:	1,335 cars	

EQUIPMENT REQUEST FORM**EQUIPMENT REQUEST FORM**

SOUTH PLAINS SWITCHING, LTD. CO.

PHO: 806 828-4841

FAX: 806 828-4863

CUSTOMER INFORMATION

Customer Name: _____ Request Date: _____

Customer Contact: _____

Customer Phone: _____ FAX: _____

EMPTY INFORMATION

Loading Location: _____ Commodity ID: _____

Road to Furnish Equipment: _____ BNSF Zone Track Spot #: _____

Empty Route: RD: _____ JCT: _____ RD: _____ JCT: _____

Equipment Group: _____ Alt. Equipment Group: _____

LOADED INFORMATION

Dest. City/ST of Load: _____

Loaded Route: RD: _____ JCT: _____ RD: _____ JCT: _____

NUMBER OF CARS AND DATE(S) REQUIRED

Want Date of Equipment (WEEK OF:)	MON No. of Cars	TUE No. of Cars	WED No. of Cars	THU No. of Cars	FRI No. of Cars	SAT No. of Cars	SUN No. of Cars	TOTAL No. of Cars

PLEASE NOTE: In order to facilitate timely filling of orders, equipment requests should be made at least **seven (7) days** in advance of the date needed.

FOR BNSF USE ONLY:

OFFLINE EQUIPMENT REQUEST #: _____ BNSF EQUIPMENT REQUEST #: _____

ATTACHMENT "C"



**Ag Commodities Single Car(s) Tariff
Request For Equipment
Fax to (817) 234-7082**

Today's Date: _____

Requests must be made at least 7 days but not more than 30 days in advance of the preferred want date

Customer Information

Loading Elevator Name: _____
 Loading Location (City, State): _____
 Phone: () _____
 Fax: () _____
 Person Placing Order _____ Elevator #: _____
 Company Placing Order: _____ Track # / Z,T,S: _____

Empty Equipment Information

Quantity of Cars: _____ Preferred Want Date: _____
 Commodity Group: _____ Equipment Group (Car Type): _____
 Spotting Instructions: _____ Foreign Road SCO # _____
 BNSF Providing Car/s Yes ☐ No ☐ _____
 If Not BNSF: _____ If Not BNSF: _____
 RR Providing Car/s _____ RR Spotting Car/s _____
 (Switch Order) _____ (Foreign Order) _____

Loaded Equipment Information:

Destination (City, State): _____
 Loaded Route: Rd: _____ Jct: _____ Rd: _____ Jct: _____

Number of Cars and Date(s) Preferred for Spotting

Want Date of Equipment (Week of)	Mon No. of Cars	Tue No. of Cars	Wed No. of Cars	Thur No. of Cars	Fri No. of Cars	Sat No. of Cars	Sun No. of Cars	Total No. of Cars

FOR BNSF USE ONLY:

Accepted: _____ Equipment Request # _____
 Declined: _____ Foreign Road SCO # _____
 Reason: _____ Tracer Cars: _____
 _____ Want Date: _____

Revised 1-14-99

ATTACHMENT "D"

Shalia D.

From: Hudson, Donna L [Donna.Hudson@bnsf.com]
Sent: Thursday, January 13, 2005 1:46 PM
To: 'shaliad@nts-online.net'
Subject: FW: RE:Car Hire Relief on the SAW RR

SHALIA- THIS IS WHAT I SENT OUR ACCOUNTING DEPT.

-----Original Message-----

From: Hudson, Donna L
Sent: Wednesday, January 12, 2005 10:21 AM
To: Pinick, Marie K
Cc: 'www.shaliad@nts-online.net'
Subject: RE:Car Hire Relief on the SAW RR

Marie

DUE TO LIMITED STORAGE ON THE BNSF... I AGREED TO WAIVE CAR HIRE CHARGES ON THE SAW RR IN LUBBOCK, TEXAS FOR CAR KIND WS4 EFFECTIVE AUG. 1, 2004.

ANY QUESTIONS, PLEASE LET ME KNOW.

THANK YOU,
DONNA HUDSON
EQUIPMENT MGMT
867.6381

APPENDIX 2

JAMES L. GORSUCH, P.C.

Attorney at Law

4412 - 74th Street, Suite B-102
Lubbock, Texas 79424

Telephone: (806) 771-6474
Facsimile: (806) 771-6476
jgorsuch@nts-online.net

May 22, 2006

Mrs. Delilah Wisener
South Plains Switching, Ltd. Co.
P.O. Box 64299
Lubbock, Texas 79464-4299

Re: Legal Opinion – Prescriptive Easement Claim Over West End of “Wye” Track

Dear Mrs. Wisener:

You have asked this firm to give you our legal opinion in connection with the claim of Pyco Industries, Inc. (“Pyco”), that a prescriptive easement exists on a crossing from east to west over the West End of the “Wye” track.

Underlying Facts

The West End of the “Wye” track was part of trackage and real estate purchased by South Plains Switching, Ltd. Co. (“South Plains”), from The Burlington Northern and Santa Fe Railway Company (“BNSF”) pursuant to an Asset Sale Agreement in 1999. Pyco has a cotton storage facility on each side of the “Wye”. The newer facility is located on the east side of the “Wye”. For several years, a road has existed crossing the west end of the “Wye” track owned by SAW. There was no lease allowing Pyco to cross the property owned by South Plains. There is no written easement covering this crossing.

We understand the crossing has been used by Pyco intermittently over the years. In times when there was no cottonseed stored on the east end, the crossing was not used by Pyco. In times where cottonseed was stored in the east storage plant, the crossing was used by Pyco.

There have been no informal discussions regarding the use of the easement. As stated above, the use of the easement has been sporadic.

Pyco has taken no steps to either fence the crossing in question, request special railroad warning signs and/or traffic control devices in the area nor have they made any filings, to our knowledge, with the Property Records of Lubbock County asserting a claim of an easement, implied or express, or claiming any type of ownership rights to the crossing in question.

Authorities

In Texas, it is well settled that in order to establish an easement by prescription, the person claiming the easement must show that the use of the easement was open and notorious, adverse, hostile, exclusive, uninterrupted and continuous for a period of ten years or more. *Wiegand v. Riojas*, 547 S.W. 287 (Tex.App.—Austin 1977, no writ).

Although statutes of limitations are inapplicable to easements, Texas courts have adopted the statutory period of ten years as the period required to establish a prescriptive right. *Baker v. Brown*, 55 Tex. 377, 381 (1981).

The burden rests on the party claiming an easement by prescription (here Pyco) to prove all of the requisite elements, and the failure to make proof of any one element will defeat the claim. *Davis v. Carriker*, 536 S.W.2d 246 (Tex.Civ.App.—Amarillo 1976, writ ref'd. n.r.e.); *Dailey v. Alarid*, 486 S.W.2d 620 (Tex.Civ.App.—Tyler 1972, writ ref'd. n.r.e.).

As may be inferred by the stringent requirements of this burden of proof, the creation of an easement by prescription *is not favored by the law*. *Hollingsworth v. Williamson*, 300 S.W.2d 194, 197 (Tex.Civ.App.—Waco 1957, writ ref'd. n.r.e.); *Maricle v. Heinz*, 247 S.W.2d 611, 612 (Tex.Civ.App.—Fort Worth 1952, no writ).

A failure by Pyco to prove any of the essential elements of a prescriptive easement is fatal. *Dailey v. Alarid*, 486 S.W.2d at 623.

Use by the claimant of the prescriptive easement not only must be adverse, but must be with the knowledge and acquiescence of the owner of the servient tenement. *Wiegand v. Riojas*, 547 S.W.2d at 290. Notice to the owner that the servient tenement need not be actual but may be constructive. *Cockrell v. City of Dallas*, 111 S.W. 977 (Tex.Civ.App.—Dallas 1908, no writ). Notice serves to inform the servient owner that the claimant's use is under a hostile claim of right. *Wiegand*, 547 S.W.2d at 290. The prescriptive period for establishing the easement does not begin to run until the servient owner against whom the prescription right is claimed has notice. *Gooding v. Sulphur Springs Country Club*, 422 S.W.2d 522 (Tex.Civ.App.—Tyler 1967, writ dism'd.).

A discussion of the elements will follow below.

Open and Notorious

It appears that Pyco's use of the roadway was open and notorious. The fact that Pyco trucks could be seen using the roadway between the two Pyco plants was not concealed and would be visible to any passerby, and in fact, they have been visible from the switching yard of South Plains. Therefore, Pyco may be able to meet the "open and notorious" requirement.

Continuous

From the information provided to us, it does not appear that the use of the roadway over the "we" track was continuous by Pyco. There were years in which no seed was stored in the east Pyco plant and therefore we understand there was no use of the road in question. The use of the road in question depended upon the size of the cotton harvest and the amount of seed, if any, stored in the east plant. If there was no seed in the east plant, then there was no use of the roadway. Therefore, it does not appear that the use of the roadway by Pyco was continuous as to meet this required element under the law of prescriptive easement.

Adverse or Hostile

The hostile or adverse character of the use necessary to establish the easement is the same which is necessary to establish title by adverse possession. *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (1950).

One general test to determine whether a claim is hostile is whether the adverse possessor's use, occupancy and possession of the land is of such a nature and character as to notify the true owner that the claimant is asserting a hostile claim to the land. *Stallman v. Newman*, 9 S.W.3d 243 (Tex.App.—Houston [14th Dist.] 1999, pet. denied).

When claiming title to land, hostility can be shown by the adverse possessor's decision to "designedly enclose" the disputed property by erecting a fence. *Terril v. Tuckness*, 985 S.W.2d 97, 108 (Tex.App.—San Antonio 1998, no pet.).

While a road or easement is not normally "enclosed" the evidence of hostility must be of equivalent import. There must be a distinctive positive assertion of a right which is brought to the servient owner's attention and which is hostile to the owner's rights. *Stallman*, 9 S.W.3d at 248. There were two lines of Texas authority at this point..

One line of authority indicates that mere use of an easement alone of a roadway will never create an easement. Moreover, the use of the roadway is permissive and not adverse as a matter of law, if the way is also used by the owner of the land along with the adverse user. *Rust v. Engledow*, 368 S.W.2d at 638. *Dailey v. Alarid*, 486 S.W.2d at 623; *Othen v. Rosier*, 226 S.W.2d at 626.

One court has held that a claimant for a prescriptive easement must exclude, or attempt to exclude, all other persons, including the property owner from using the roadway. *Vrazel v. Skrabanek*, 735 S.W.2d 709, 711 (Tex. 1987).

The second line of authority indicates that an open, unmolested and continuous use of a roadway for more than ten years raises a rebuttable presumption that the use was non-permissive, under claim of right, and thus adverse. *Johnson v. Dale*, 835 S.W.2d 216, 219 (Tex.App.—Waco

1992, no writ). South Plains can produce rebuttable evidence that there was a permissive or concurrent use of this property in question over the applicable ten-year period.

In our opinion, the facts of this case do not fit the element of "adverse or hostile" required to prove a prescriptive easement. It appears that the use of the property was by permission of South Plains. No objection was ever launched by South Plains to the use of the property and no affirmative steps were ever taken by Pyco to make an adverse and hostile claim to the property.

For example, the roadway was never fenced, even though the fencing would go across the tracks of South Plains. No document was ever filed with the County Clerk's office indicating an ownership right of Pyco in the roadway in question. No effort by Pyco was ever made to request protective crossing devices for the railroad. The lack of Pyco in taking these steps, in our opinion, shows that the easement was permissive rather than adverse or hostile. Further, we rely on the Texas cases which indicate that the mere use of a roadway will not create an easement, no matter how long that use continued.

The Supreme Court in Mississippi has recently decided a similar case and its analysis may be applicable to this case. Out-of-state authority is not binding on Texas courts but can be persuasive particularly if a particular fact scenario has never been in front of the Texas appellate courts.

In *Mississippi Export Railroad Co. v. Rouse*, _____ So.2d _____ (2006 WL 948052) (Miss. 2006), the property landowners claimed a prescriptive easement of a private crossing over active railroad tracks. The private crossing had been in use for over fifty years. The landowners sought to enjoin the railroad from removing or restricting the crossing. After the landowners purchased the property, there was a discussion that the railroad may remove the crossing unless the landowners agreed to indemnify the railroad for liability claims in connection with the crossing. No agreement was reached at that meeting. Thereafter, the landowners planted shrubs for sale on their land and used the private crossing across the railroad to care for the plants and prepare them for sale. The purchase of the property was in 2000. In 2003, the railroad provided notice that the crossing would be removed within thirty days. Later in the year, the railroad removed the crossing and the landowners brought suit claiming an easement by prescription.

The Mississippi court ruled that there was no easement by prescription. The court held that prescriptive easements may not be obtained by private citizens across active railroad lines. The court held that the rights of the public to the use of streets and public roads cannot be lost by adverse possession. The court pointed out that in Mississippi, railroad tracks are considered public highways under the Constitution.

Therefore, the court held it was constitutionally required to recognize "railroads" as "public highways". The court indicated that state precedence clearly prohibited a private individual from gaining an interest across a public highway by adverse possession or by prescriptive easement.

The reasoning of the Mississippi Supreme Court may well apply in this case.

Like the Mississippi Constitution, the Texas Constitution provides that railroads constructed in the state are declared to be public highways, and railroad companies are common carriers. Texas Const. Art. X, Sec. 2.

Likewise, Texas authority has held that a private citizen cannot obtain a prescriptive easement over dedicated roads and streets. *County of Calhoun v. Wilson*, 425 S.W.2d 846 (Tex.Civ.App.—Corpus Christi 1968, writ ref'd.); *Woolaver v. Texaco, Inc.*, 638 S.W.2d 153 (Tex.App.—Fort Worth 1982, writ ref'd. n.r.e.).

It appears that a Texas court, facing a similar situation, such as here, would adopt the reasoning of the Mississippi Supreme Court indicating that since the active railroad tracks of South Plains are public highways, the tracks cannot be lost through a prescriptive easement.

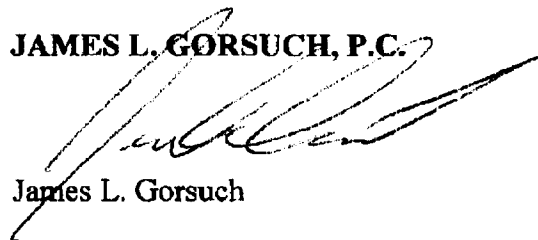
In our opinion, Pyco cannot meet the elements of "continuous" and "adverse", in order to prove a prescriptive easement in this case.

If you have any questions or need any further information, please do not hesitate to let us know.

We remain,

Very truly yours,

JAMES L. GORSUCH, P.C.



James L. Gorsuch

JLG:jeb

CERTIFICATE OF SERVICE

I certify that on May 23, 2006, I served the foregoing document, Supplement To Petition
To Terminate Alternative Rail Service, by UPS overnight mail, on the following:

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