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LAW OFFICE
THOMAS F. McFARLAND, P.C.

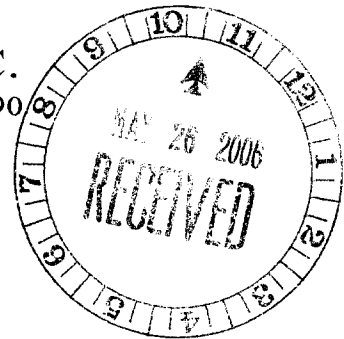
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THOMAS F. McFARLAND

May 25, 2006

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 26 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 Reply In Opposition To Petition For Immediate Injunctive Relief, Or, Alternatively, To Expedite A Protocol Modification To Address A Retaliatory SAW Blockade, 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.

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BEFORE THE
SURFACE TRANSPORTATION BOARD



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

216620

**REPLY IN OPPOSITION TO PETITION FOR IMMEDIATE
INJUNCTIVE RELIEF, OR, ALTERNATIVELY, TO EXPEDITE
A PROTOCOL MODIFICATION TO ADDRESS A
RETALIATORY SAW BLOCKADE**

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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 26, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**REPLY IN OPPOSITION TO PETITION FOR IMMEDIATE
INJUNCTIVE RELIEF, OR, ALTERNATIVELY, TO EXPEDITE
A PROTOCOL MODIFICATION TO ADDRESS A
RETALIATORY SAW BLOCKADE**

Pursuant to 49 C.F.R. § 1104.13(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies in opposition to "Petition for Immediate Injunctive Relief, or, Alternatively, to Expedite a Protocol Modification to Address a Retaliatory SAW Blockade" filed by PYCO Industries, Inc. (PYCO) on May 17, 2006.

Factual matter alleged in this Reply is verified by Mrs. Delilah Wisener, owner and manager of SAW, whose verification is attached to this Reply.

REPLY

PYCO's Petition is required to be denied because the Board has authority to order a rail carrier to take action only as necessary to enforce a legal right of a shipper, and PYCO does not have a legal right to cross SAW's tracks at the location under consideration.

Whether a shipper has a right to a private crossing of a rail carrier's tracks is determined under State law -- under Texas law in this instance. A right to such a private crossing can exist either by contract or by operation of law -- that is, by statute or by application of a principle of real property law.

PYCO has acknowledged that “no applicable private crossing agreement has been located” (Petition at 6). PYCO adds that “this does not mean that none exists” (*ibid*). It does mean that none exists for the purpose of this case. As the proponent of Board action, PYCO has the burden to prove the existence of a private crossing agreement. PYCO’s failure to sustain that burden dictates a finding that PYCO does not have a contractual right to cross the SAW tracks under consideration.^{1/}

PYCO has not identified a Texas statute that provides it with a right to cross SAW’s tracks. PYCO does not have a right to cross SAW’s tracks as a result of operation of any principle of real property law. Attached to this Reply as Appendix 1 is a copy of the legal opinion of James L. Gorsuch, Esq., an experienced Texas attorney, that PYCO does not have a legal right to cross SAW’s tracks under Texas real property law as applied to railroads.

In view of the foregoing, PYCO is not entitled to an injunction under 49 U.S.C. § 721(b)(4) because PYCO cannot demonstrate a likelihood of prevailing on the threshold legal issue of whether the Board has authority to order SAW to move railcars off its tracks where there is no underlying right for PYCO to cross those tracks. PYCO’s failure to show a likelihood of prevailing on the merits is fatal to its request for injunctive relief under § 721(b)(4). *See, BP Amoco Chemical Co. v. Norfolk Southern Ry. Co.*, 2005 STB LEXIS 277 at *7-8 (Docket No. 42093, served June 6, 2005) (“To obtain an injunction, the party seeking it must show that (1) it is likely to succeed on the merits . . . Moreover, a party seeking an injunction ‘carries the burden

^{1/} SAW honors PYCO’s right to cross its tracks at another location at which a private crossing agreement is in place.

of persuasion on all elements required for (such) extraordinary relief . . . (citation omitted).”; and *DeBruce Grain, Inc. v. Union Pacific RR*, 2 S.T.B. 773, 775, n.3 (1997).

Neither is PYCO entitled to the relief it has requested by means of a modification of the existing operating protocol for the provision of alternative rail service. The SAW wye track on which railcars are stored is not used in conjunction with providing alternative rail service to PYCO. The issue raised by PYCO is related to its internal plant operations, not to the provision of alternative rail service. The Board does not have authority to order SAW to move the railcars under consideration as a modification of the operating protocol for alternative rail service because storage of the cars on SAW’s wye track does not have anything to do with the provision of alternative rail service.

The foregoing showing of the absence of Board authority to grant the relief sought, without more, compels denial of PYCO’s Petition. Nevertheless, the following misstatements in PYCO’s Petition should be corrected.

PYCO has incorrectly stated at page 1 of the Petition that the railcars stored on SAW’s wye track are non-revenue cars. The cars are being stored for revenue. The revenue from that storage is badly needed in light of the lost revenues from alternative rail service.

PYCO has falsely alleged that storage of cars on SAW’s wye track is retaliatory against PYCO. In fact, the wye track is the most convenient location on SAW’s rail lines for revenue storage of railcars. SAW is entitled to store railcars at the most convenient location on its own property unless such storage violates a provision of law. As explained above, SAW’s storage of railcars on its wye track does not violate any law because PYCO does not have a legal right to cross SAW’s tracks at that location.

It is highly ironic that SAW initially intended to store these railcars on its Track 9200. However, at PYCO's urging, the Board ordered that Track 9200 be used for staging empty railcars for loading by PYCO under the operating protocol for alternative rail service. The Board amended the operating protocol based on a false representation by PYCO that Track 9200 had historically been used for staging empty cars for loading by PYCO. SAW had pointed out in its reply to PYCO's request for amendment of the operating protocol that the fact is that Track 9200 has historically been used for unloading of trainloads of aggregates, not for staging empty cars for PYCO. However, the Board amended the operating protocol without awaiting receipt of that reply by SAW despite SAW's specific request that the Board not take action until it received and considered SAW's reply. The Board has not taken action to remove Track 9200 from the operating protocol. PYCO's footnote 2 on page 3 of Petition continues the misstatement about the historical use of Track 9200 ("Track () 9200 . . . historically (has) been used to stage cars for PYCO.").

PYCO constantly claims "emergency" in its filings before the Board. However, PYCO consistently creates its own emergency situations. Why doesn't a major corporation like PYCO have indoor storage for its cottonseed to remove the possibility of temperature spoilage? Why didn't PYCO act immediately to get alternative access to its cottonseed as soon as it realized that it did not have a legal right to cross SAW's tracks? This is similar to the absence of sufficient private trackage on PYCO's part before PYCO finally extended its private shop track. PYCO has attempted to lay blame for everything on SAW, but the fact is that PYCO's transportation and storage problems have largely been of PYCO's own making.

The extra costs claimed by PYCO for truck access to its cottonseed are overstated in the extreme (i.e., \$256,400, memorandum of Lewis Harvill attached to the Petition). A more realistic estimate is about \$2,000, i.e., 4,000 truckloads x ½-mile round trip = 2,000 truck-miles x 50 cents cost per truck-mile = \$2,000 total cost.

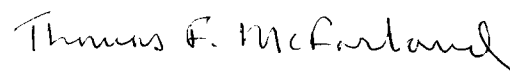
There are other misstatements and distortions of fact in PYCO's Petition, but it is not necessary to rebut all of them in order for the Board to have ample grounds to deny PYCO's Petition. SAW's election not to respond to every PYCO misstatement and distortion should not be taken as agreement by SAW to any of that matter.

WHEREFORE, for the reasons stated, PYCO's Petition should be denied.

Respectfully submitted,

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

Petitioner



THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
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(312) 236-0204

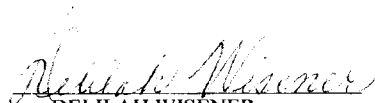
Attorney for Petitioner

DATE FILED: May 26, 2006

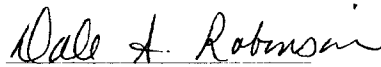
VERIFICATION

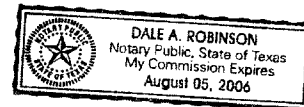
STATE OF TEXAS)
) SS:
COUNTY OF LUBBOCK)

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 25th day
of May, 2006.


Notary Public



My Commission Expires: *August 05, 2006*

APPENDIX 1

JAMES L. GORSUCH, P.C.

Attorney at Law

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

Telephone: (806) 771-6474
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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.

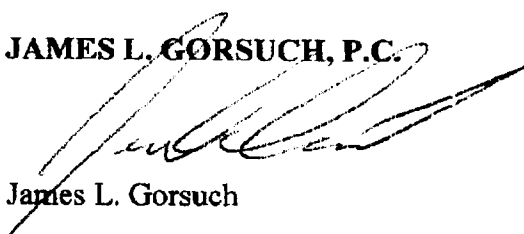
In our opinion, Pyco cannot meet the elements of "continuous" and "adverse", in order to prove a prescriptive easement in this case.

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 25, 2006, I served the foregoing document, Reply In Opposition To
Petition For Immediate Injunctive Relief, Or, Alternatively, To Expedite A Protocol
Modification To Address A Retaliatory SAW Blockade, by UPS overnight mail, on the
following:

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