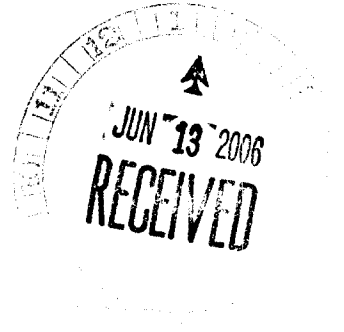


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THOMAS F. MCFARLAND

June 12, 2006

By UPS overnight mail

216750

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

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 Second Supplement To Petition To Terminate Alternative Rail Service, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

ENTERED
Office of Proceedings

JUN 14 2006

Part of
Public Record

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

TMcF:kl:enc:wp8.0\1144\ltrstb10

BEFORE THE
SURFACE TRANSPORTATION BOARD

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



216750

SECOND SUPPLEMENT TO PETITION
TO TERMINATE ALTERNATIVE RAIL SERVICE

ENTERED
Office of Proceedings

JUN 13 2006

Part of
Public Record

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

Incumbent Rail Carrier

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Attorney for Incumbent Rail Carrier

DATE FILED: June 13, 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 ALTERNATIVE RAIL SERVICE**

Pursuant to 49 C.F.R. § 1146.1(d)(1), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby files a Second Supplement to its Petition to Terminate Alternative Rail Service, filed on March 30, 2006. SAW submits the following in support of this Second Supplement.

OVERVIEW

This Second Supplement urges the Board not to continue alternative rail service beyond the scheduled expiration date of June 25, 2006 on the ground that the Board does not have authority to order alternative rail service over the tracks at issue. The Board lacks authority because those tracks are switching tracks as to which the Board does not have abandonment authority by virtue of 49 U.S.C. § 10906. In accordance with the principle of *Battaglia Distributing Co., Inc. v. Burlington Northern*, 2 S.T.B. 323 (1997) ("*Battaglia*"), where the Board lacks authority over termination of rail service over specific tracks, it also lacks authority to order a rail carrier to provide service over those tracks, including the provision of alternative rail service. *Battaglia*, 2 S.T.B. at 328 ("We may not order the resumption of rail service where we lack jurisdiction over its termination").

While this Second Supplement is filed toward the scheduled end of the alternative rail service, it is not legally objectionable on that basis. The real issue is whether alternative rail service will be extended for the balance of the statutory period. The authority or jurisdiction of the Board can be lawfully challenged at any time in a proceeding.

BACKGROUND

In a decision served January 26, 2006, the Board ordered that SAW permit West Texas & Lubbock Railroad Company (WTL) to operate over its tracks for 30 days to provide rail service to PYCO Industries, Inc. (PYCO) at its Plant Nos. 1 and 2. The Board's action was taken pursuant to 49 U.S.C. § 11123(a) and the Board's implementing regulations at 49 C.F.R. Part 1146.

In a decision served February 25, 2006, the Board denied a Petition to Terminate Alternative Rail Service that had been filed by SAW and ordered that alternative rail service continue for 120 additional days until June 25, 2006.

On March 30, 2006, SAW filed a Petition to Terminate Alternative Rail Service, directed to the service ordered in the decision served February 25, 2006. On April 6, 2006, PYCO filed a Reply in opposition to that Petition. On May 24, 2006, SAW filed a Supplement to Petition to Terminate Alternative Rail Service, requesting that the Board not continue alternative rail service beyond the scheduled June 25, 2006 expiration date. On May 26, 2006, PYCO filed a Reply in opposition to that Supplement. The Board has not yet ruled on either that Petition or the Supplement.

This Second Supplement reiterates the request that the Board not continue alternative rail service beyond the June 25, 2006 expiration date. The Second Supplement presents the

additional issue of the lack of Board authority to order alternative rail service over switching tracks as defined in 49 U.S.C. § 10906. That legal argument only recently came to SAW's attention. It is hereby presented to the Board for the first time in this proceeding.

ARGUMENT

THE BOARD LACKS AUTHORITY TO ORDER CONTINUATION OF ALTERNATIVE RAIL SERVICE OVER THE SWITCHING TRACKS USED TO PROVIDE RAIL SERVICE TO PYCO

1. The Tracks Used To Provide Rail Service To PYCO Are Switching Tracks Within The Meaning Of That Term In 49 U.S.C. § 10906

A. The Legal Principle

The SAW tracks that are used to provide rail service to PYCO are clearly categorized as switching tracks as that term is used in 49 U.S.C. § 10906. The applicable legal principle is clearly set forth in *Battaglia, supra*, 2 S.T.B. at 326-327, viz.:

... There is no single test of what constitutes a side track (or a switching track). Instead, our analysis focuses on the disputed track's use, history and physical characteristics, and we rely on a variety of indicia, including, the length of the track; whether it serves more than one shipper; whether it is stub ended; whether it was built to invade the territory of another railroad; whether the shipper is located at the end of the track; whether there is regularly scheduled service; the volume of traffic moving over the track; who owns and maintains the track; whether the track was constructed with light weight rail; the condition of the track; what the track is used for (e.g., loading, unloading, switching); and whether there are stations on the track ...

B. The Tracks Used To Provide Rail Service To PYCO

The track used to provide service to PYCO's Plant No. 1 is a lead track that extends from SAW's yard to point of connection with PYCO's private "shop" track and "scale" track. It is commonly referred to as SAW Track No. 6. It is depicted on a print that was part of Exhibit A to

PYCO's Feeder Line Application (FLA), and which is attached to this Supplement as Appendix A.^{1/}

The primary track used to provide service to PYCO Plant No. 2 is Track No. 310, which is a lead track that extends from the BNSF main track to point of connection with PYCO's private track. It extends through property of Farmers Compress Company. It is depicted on a photograph from the FLA that is attached to this Supplement as Appendix B.

Alternative track used to provide service to PYCO Plant No. 2 consists of Lead Track No. 231 that extends from BNSF's yard to connection with Track No. 9298, thence to connection with PYCO's private track. Track 9298 extends through the property of Attebury Grain Company and Farmers Compress Company. The trackage is shown on the photograph that is attached to this Supplement as Appendix B.

Facts in regard to those tracks are verified by Mrs. Delilah Wisener, whose verification is attached to this Supplement as Appendix C.

The use and physical characteristics of those tracks are further identified below.

**C. Application Of The Legal Principle To The Tracks
Used To Provide Rail Service To PYCO**

(a) Use of the tracks

The most significant criterion in the determination of whether particular track is part of a "line of railroad" subject to Board entry and exit authority, or a "switching track" or other exempt track identified in 49 U.S.C. § 10906, is the use to which the track is put. The Board has found

^{1/} Two switching tracks in SAW's yard (Nos. 1 and 5) and SAW Track Nos. 9298 and 9200 are used to switch, store and stage railcars before and after rail service to PYCO Plant No. 1.

that track that is used exclusively for switching of cars to and from shipper facilities is exempt "switching track" notwithstanding that other characteristics might point to classification of the track as a line of railroad, such as the volume of traffic and the number of shippers served by the track. See *Chevron USA, Inc. -- Lease & Oper. Exemption -- Richmond Belt Railway*, 1995 ICC LEXIS 137 at *5 (Finance Docket No. 32352, served June 12, 1995) ("... In our view, the focus is more properly on the use of the trackage under the terms of the transaction rather than on the character of the trackage itself ... (A)s the lease is for switching purposes only, the transaction does not require our approval ...").

The tracks used to provide rail service to PYCO are quintessentially switching tracks in accordance with the "use" test. Those tracks are located wholly within the Lubbock, Texas switching limits and terminal area. Those tracks are used exclusively to switch cars to and from PYCO Plant Nos. 1 and 2 after those cars have arrived at SAW's yard. SAW is exclusively a switching rail carrier operating within the Lubbock terminal. SAW's rail service over the tracks under consideration is confined to pick up and delivery of cars at PYCO's plants. The tracks at issue are never used in conjunction with line-haul transportation for PYCO. On the foregoing bases, a finding is compelled that the tracks used to provide rail service to PYCO are used exclusively as switching tracks.

(b) Length of track

According to PYCO's testimony in the Feeder Line Application, Track No. 6 used to provide service to PYCO Plant No. 1 is 1,100 feet long; Track No. 310 used to provide service to PYCO Plant No. 2 is 5,600 feet long; and Track Nos. 231 and 9298 alternatively used to provide

service to PYCO Plant No. 2 are a total of 7,240 feet long (Ex. B at 5). Those track lengths are well within the customary length of switching tracks.

(c) **Number of Shippers Served**

PYCO is the only shipper served by Track No. 6 at Plant No. 1. That is indicative of switching track. The tracks used to provide service to PYCO Plant No. 2 can be used to provide service to Farmers Compress and Attebury Grain, but that service, too, is switching service. In any event, several shippers were to be provided switching service in the *Chevron* case without affecting the finding that the track there involved was switching track.

(d) **Stub-ended nature**

Both the track used to serve PYCO Plant No. 1 and the tracks used to provide service to PYCO Plant 2 are stub-ended, i.e., they end at their points of connection to PYCO's private tracks. That is a hallmark of switching tracks.

(e) **Invasion of another railroad's territory**

Neither track that serves PYCO was constructed to invade the territory of another railroad. That, too, is an indication of switching track.

(f) **Location of shipper**

PYCO is located at the end of the tracks used to provide rail service to its Plant Nos. 1 and 2. That is yet another hallmark of switching track.

(g) **Regularly scheduled service**

PYCO Plant Nos. 1 and 2 are served on a regularly-scheduled basis, i.e., five days per week. This is a criterion that can be associated with a line of railroad, as well as a switching track.

(h) Volume of traffic

Substantial volumes of traffic move over the tracks used to provide service to PYCO Track Nos. 1 and 2. That is not necessarily indicative of a line of railroad. In the *Chevron* case, 11,274 cars per year moved over the track there classified as switching track. 1995 ICC LEXIS 137 at *4.

(i) Ownership and maintenance of track

SAW owns and maintains all of Track No. 6 that provides rail service to PYCO Plant No. 1. SAW owns and maintains the tracks that are used to provide rail service to PYCO Plant 2. SAW's ownership and maintenance of most of the track is a minor factor in favor of classification as a line of railroad.

(j) Weight of rail

The tracks used to provide service to PYCO are constructed with 85-pound and 90-pound rail. Those weights of rail are more indicative of switching tracks than line of railroad.

(k) Condition of the track

The tracks used to provide service to PYCO are classified as FRA excepted track. That track classification is more indicative of switching track than line of railroad.

(l) Stations on the track

There are no stations on the tracks that are used to provide rail service to PYCO Plant Nos. 1 and 2. The absence of stations is yet another indication of switching track.

(m) Summary

The use of the tracks at issue solely for switching cars to and from PYCO's Plant Nos. 1 and 2, as well as the overwhelming majority of the physical characteristics of those tracks,

compel a determination that those tracks are switching tracks within the meaning of 49 U.S.C.

§ 10906. What the Board said in *Battaglia, supra*, is equally applicable here, substituting “switching track” for “side track”, which is also exempted under § 10906, viz. (2 STB at 327-328):

Just as there is no single test for what constitutes a side track, there is no single characteristic related to its use, history, or physical characteristics that is dispositive in making a side track determination . . . However, the overwhelming balance of factors relevant to this analysis supports a finding that the disputed track is side track.

2. The Board Does Not Have Authority Under 49 U.S.C. § 11123(a) To Order Alternative Rail Service To Be Provided Over Switching Tracks

Under 49 U.S.C. § 10906, the authority of the Board does not extend to the construction, acquisition, operation, abandonment or discontinuance of service over spur, industrial, team, switching or side tracks located in a single state. That means simply that SAW could have abandoned and removed the switching tracks used to provide service to PYCO without seeking permission from the Board, and the Board would have been without authority to have required SAW to replace those track and to restore rail service. As stated by the Board in *Battaglia, supra*, 2 STB at 326:

. . . Thus, if the track that served Battaglia’s warehouse is side track, discontinuance of operations and abandonment could have occurred without our prior approval, and we would have no jurisdiction to order a restoration of service.

The decision in the *Battaglia* case is also authority for the proposition that the authority of the Board to order alternative rail service under 49 U.S.C. § 11123(a) does not extend to service over switching tracks. The shipper in *Battaglia* filed a complaint alleging that the rail carrier was failing to provide rail service to its facility on reasonable request in violation of 49 U.S.C.

§ 11101(a), and seeking an order from the Board requiring the rail carrier to provide that service. The rail carrier filed a motion to dismiss the complaint on the ground that the track used to provide service to the shipper's facility is a side track, which is exempt from the Board's authority under what is now 49 U.S.C. § 10906. In opposing the motion to dismiss, the shipper argued that the exemption in § 10906 does not extend to failure to provide rail service on reasonable request in violation of 49 U.S.C. § 11101(a). The Board flatly rejected that argument, *viz.* (2 STB at 328):

... We may not order the resumption of rail service where we lack jurisdiction over its termination.

Thus, the Board does not have authority under 49 U.S.C. § 11101(a) to require a rail carrier to provide service over § 10906 switching tracks on the ground that the rail carrier has failed or refused to provide any service at all over those tracks in response to shipper's reasonable request. It necessarily follows that the Board does not have the lesser authority under 49 U.S.C. § 11101(a) to require a rail carrier to provide more adequate rail service than previously provided over § 10906 switching tracks on the ground that the rail carrier has provided inadequate rail service in response to a shipper's reasonable request. (SAW intends to supplement its Motion to Dismiss PYCO's § 11101(a) Complaint on that basis). It also necessarily follows that the Board does not have lesser authority under 49 U.S.C. § 11123(a) to require temporary alternative rail service over a rail carrier's § 10906 switching tracks on the ground that there has been a deterioration of rail service over those tracks. In other words, if the Board does not have authority under 49 U.S.C. § 11101(a) to enforce a rail carrier's common carrier service obligation over § 10906 switching tracks, neither does the Board have authority to

enforce a rail carrier's common carrier service obligation over § 10906 switching tracks by ordering alternative rail service under 49 U.S.C. § 11123(a). See Valley Feed Co. v. Greater Shenandoah Valley Devel. Co., 1995 ICC LEXIS 323 at *13-20 (Docket No. 41068, served Dec. 21, 1995). On the authority of that case and Battaglia, supra, the Board may not order permanent rail service under § 11101(a), nor temporary rail service under § 11123(a), where it lacks authority to terminate that service.

Without question, therefore, the Board did not have authority under 49 U.S.C. § 11123(a) in the first instance to order alternative rail service to be provided over the § 10906 switching tracks that are used to provide rail service to PYCO Plant Nos. 1 and 2. In the absence of such authority initially, it necessarily follows that the Board lacks authority to order that alternative rail service be extended over those tracks beyond the scheduled expiration date of June 25, 2006.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should enter an order providing that alternative rail service will expire on June 25, 2006, as scheduled.

Respectfully submitted,

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

Incumbent Rail Carrier

Thomas F. McFarland

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Attorney for Incumbent Rail Carrier

DATE FILED: June 13, 2006

4/18/2004

RAIL SYSTEM

104

OFFICE

PYCO DUMPS STORAGE

CRASHING DUMP 5

NEW PYCO

PYCO SCALE

34 STREET

SAW STORAGE

PRO SHOP

STAEDTLER

No. 937811E

Engineer's Computation Pad

N

WATER

MAIN

WATER

SAW

SAW

No 6

PRO SHOP

MEAL

BALE PRESS

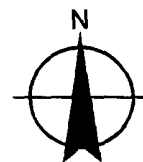
W

Alternative Two



Legend

-  PYCO Tracks
-  BNSF Tracks
-  Atterbury Track
-  SAW Tracks (Some privately owned)
-  Alternative Two Aquisition



0 0.5 1 Miles

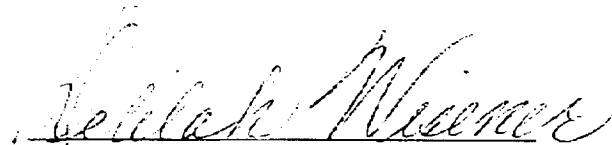
Source: Image is from the National Agriculture Image Program 2005.

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

VERIFICATION

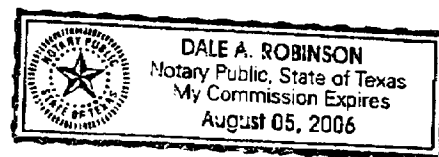
STATE OF TEXAS)
) SS:
COUNTY OF LUBBOCK)

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 12th day
of June, 2006.


Notary Public



My Commission Expires:

August 05, 2006

CERTIFICATE OF SERVICE

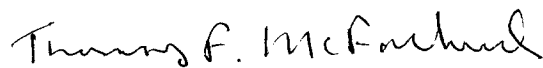
I certify that on June 12, 2006, I served the foregoing document, Second Supplement To
Petition To Terminate Alternative Rail Service, by UPS overnight mail, on the following:

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