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**SURFACE  
TRANSPORTATION BOARD**

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1 July 2006  
by Federal Express



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

**FILED**

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**SURFACE  
TRANSPORTATION BOARD**

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

216926

ENTERED  
Office of Proceedings

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

JUL 03 2006

also

Part of  
Public Record

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

216927

Final Action before October 23 Requested

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc., enclosed please find an original and ten copies of a petition for alternative rail service under 49 C.F.R. Part 1147 (and other related provisions). The docket assigned to this proceeding is F.D. 34889. The petition arises from lack of adequate service by the incumbent carrier, South Plains Switching, Ltd., in Lubbock, TX. I also enclose a check in the amount of the applicable filing fee (\$200).

I also enclose eleven additional copies for filing in connection with PYCO's Petition for Partial Revocation in Rail General Exemption Authority -- Misc. Agricultural Products, Ex Parte 346 (Sub no. 14C). In order to ensure that this is promptly filed, I also enclose a check in the amount of \$200 to cover any filing fee if applicable. If none is applicable, please destroy the check or return it to me.

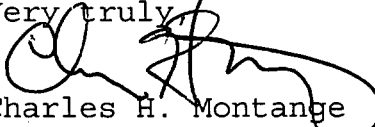
By my signature below, and as required by 49 C.F.R. 1147.1(b)(1)(iv), I certify service on or before this date by

deposit of copies of the petition (and attachments) with Federal Express, next business day delivery, upon the following:

- a) South Plains Switching, Ltd. (as incumbent carrier)  
10917 -- E. FM 250 & E. Co. Road 78  
Slaton, TX 79364
- b) Thomas McFarland, PC  
208 South LaSalle St., Suite 1890  
Chicago, IL 60604-1112  
(counsel for SAW)
- c) John Heffner, Esq.  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(counsel for West Texas and Lubbock, the  
proposed alternative carrier)
- d) Federal Railroad Administration  
1120 Vermont Avenue, NW  
Washington, DC 20590

Thank you for your assistance in this matter.

Very truly,

  
Charles H. Montange  
counsel for PYCO Industries

Encls.

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

BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34899  
SOUTH PLAINS SWITCHING LTD. )

RAIL GENERAL EXEMPTION AUTHORITY )  
-- MISC. AGRICULTURAL PRODUCTS -- ) Ex Parte 346 (Sub-no. 14C)  
PYCO INDUSTRIES, INC., Petition for )  
Partial Revocation )

VERIFIED PETITION FOR ALTERNATIVE RAIL SERVICE

TEMPORARY RELIEF  
FOR SERVICE INADEQUACIES  
(49 C.F.R. Part 1147)

AMENDMENT TO  
MOTION/PETITION FOR IMMEDIATE REVOCATION  
OF CLAIMED COMMODITY EXEMPTIONS (IF APPLICABLE)

EXPEDITIOUS TREATMENT REQUESTED  
(Final Action before Oct. 23, 2006)

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

VERIFIED PETITION FOR ALTERNATIVE RAIL SERVICE

TEMPORARY RELIEF  
FOR SERVICE INADEQUACIES  
(49 C.F.R. Part 1147)

AMENDMENT TO  
MOTION/PETITION FOR IMMEDIATE REVOCATION  
OF CLAIMED COMMODITY EXEMPTIONS (IF APPLICABLE)

EXPEDITIOUS TREATMENT REQUESTED

Pursuant to 49 U.S.C. § 11102, 49 U.S.C. § 10705(a), 49 C.F.R. Part 1147 and other applicable authorities, PYCO Industries, Inc. ("PYCO") hereby petitions the Surface Transportation Board ("Board") for an order authorizing alternative rail service to PYCO by West Texas and Lubbock Railroad ("WTL") over certain lines of incumbent railroad South Plains Switching Ltd. ("SAW") in Lubbock, Texas, commencing October 23, 2006. PYCO also requests, a specific condition allowing it to enter the premises through a qualified private inspector to inspect the SAW trackage, and to repair same, as part of the Part 1147 authorization. See discussion in Part III.D. infra.

This Petition is verified, and is further supported by the

attached Verified Statement(s), Declaration(s), and other documents and exhibits.

The related Amendment to PYCO's petition for partial revocation of SAW's claimed commodity exemptions [Ex Parte 346 (Sub-no. 14C) is quite simple: PYCO amends its petition also to seek a partial revocation of any commodity exemption claimed by SAW to the extent the commodity exemption is raised by SAW as a defense against this Part 1147 Petition.<sup>1</sup>

Relief needed by October 23, 2006. PYCO is a major rail shipper in Lubbock, using in excess of 6000 carloadings per year. Since 1999, PYCO's two cottonseed oil mills in Lubbock have been served by SAW, with BNSF as PYCO's line haul railroad. PYCO's high season for demand for rail transport is October through March. As explained in more detail below, PYCO is currently receiving alternative rail service from WTL pursuant to 49 C.F.R. Part 1146 and orders issued in Finance Docket 34802. By the terms of the applicable statute (49 U.S.C. § 11123), Part 1146 relief must expire on October 23, 2006.

Unfortunately, the 2006 cotton rush will commence about that time, and PYCO's dependence on rail will be as great as last November when SAW service inadequacies precipitated PYCO's Part 1146 petition.<sup>2</sup> Although PYCO currently has pending

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<sup>1</sup> Specifically, PYCO seeks a partial revocation insofar as the commodity exemption, if applicable, might be construed to prevent relief to PYCO under 49 U.S.C. § 10705(a) or 49 U.S.C. § 11102(a).

<sup>2</sup> See Supplementary Declaration of Robert Lacy, Attachment A hereto, at ¶ 5.

several requests for permanent relief (e.g., feeder line applications and a petition for revocation of SAW's acquisition exemption), PYCO is concerned that there will be a gap between the date its Part 1146 service will end and the date permanent relief could begin. In order to avoid being subject to inadequate SAW rail service and retaliation by SAW and in light of SAW's evident intent to continue its retaliatory conduct against PYCO,<sup>3</sup> PYCO is compelled to file this petition under 49 C.F.R. Part 1147 and further to request that relief be granted no later than October 23, 2006.

I. Other Proceedings between SAW and PYCO  
and This Proceeding's Relationship to Them

Faced with a service emergency created by a dramatic curtailment of rail service by incumbent rail provider SAW commencing last November 18, 2005, PYCO on December 19, 2005 filed a petition for alternative rail service under 49 C.F.R. Part 1146 ("expedited relief for service emergencies"). On January 26, 2006, this Board issued an order authorizing alternative service to PYCO for 30 days by WTL. PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, served Jan. 26, 2006.

SAW moved to terminate the order; PYCO moved to extend it. By decision served February 24, 2006, this Board denied SAW's petition to terminate, and granted PYCO's request for continuation, providing for an additional 120 days of

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<sup>3</sup> See id. ¶¶ 2-3. See also Attachment B (Gary McLaren Dec.) ¶ 5 (SAW indicates no meaningful negotiations).

alternative rail service. Id., served Feb. 24, 2006.

SAW promptly filed yet another petition to terminate alternative rail service.<sup>4</sup> The petition basically argued that the Board had erred, that service problems were the fault of BNSF and not SAW, or that service problems were the fault of PYCO, not SAW, and that SAW's conduct was otherwise lawful and appropriate. PYCO responded that WTL had handled more than twice as many cars in an equivalent period than SAW, that WTL was able to work with BNSF, and that WTL was able to work with PYCO.

Before the Board could act on SAW's second petition to terminate, SAW began taking a series of additional retaliatory measures against PYCO. For example, SAW continued to refuse to participate in daily conference calls with BNSF and WTL to address service issues. In addition, SAW blockaded PYCO's long-established industrial crossing to prevent PYCO from moving its \$11 million cottonseed stockpile to its Plant No. 1 for processing into oil and other products, or for rail transport to customers in California. Moreover, SAW engaged in periodic episodes of harassment of PYCO employees by, among other things, operating in or adjacent to its yard and PYCO's sidings during the hours assigned to WTL to serve PYCO under the protocol.

Furthermore, SAW failed to inspect or repair its trackage, raising the risk of derailment due to track and switch defects

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<sup>4</sup> SAW's second petition was dated March 30.

(this resulted in a major derailment on June 14, 2006).<sup>5</sup> Derailments of this nature are expensive: the June 14 derailment is believed to cost approximately \$25,000.<sup>6</sup> SAW's failure to maintain its track so as to provoke derailments itself is a means of eroding the effectiveness of this Board's alternative service orders and also a means by SAW to evade its own common carrier obligations, but also to prevent others from discharging them. It amounts to constructive abandonment.

Besides these events on the ground, SAW filed two "supplements"<sup>7</sup> to its petition to terminate, urging additional grounds to terminate alternative rail service. SAW's first "supplement" argued that because some of the products shipped by PYCO are covered by a commodity exemption in 49 C.F.R. Part 1139, 49 U.S.C. § 11123 is not applicable. SAW raised this same argument in its motion to dismiss PYCO's Complaint in PYCO v. SAW, F.D. 34838.<sup>8</sup> On June 7, PYCO responded with, among other things, a motion/petition for immediate revocation of SAW's claimed commodity exemption. See Rail General Exemption Authority -- Misc. Agricultural Products -- PYCO Industries,

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<sup>5</sup> SAW refuses to allow PYCO or WTL to inspect the track for defects. SAW through counsel emphasized this refusal again on Thursday, June 22, 2006.

<sup>6</sup> See Lacy Supplemental Declaration (Attachment A) ¶3.

<sup>7</sup> SAW's first "supplement" was filed May 24, 2006; SAW's "second supplement" was filed June 13, 2006.

<sup>8</sup> PYCO's Complaint proceeding before this Board was in part precipitated by SAW's lawsuit to collect discriminatory surcharges and fees from PYCO through a suit SAW filed against PYCO in Texas state court.

Inc. Petition for Partial Revocation, Ex Parte 346 (Sub-no. 14C), filed May 26, 2006. PYCO also petitioned for extension of alternative rail service for 120 more days, to and including October 23, 2006, which is the statutory maximum under 49 U.S.C. § 11123.

SAW's second supplement, filed June 13, argued that the tracks used to provide service to PYCO were "switching tracks" outside this Board's jurisdiction under 49 U.S.C. § 10906. PYCO responded to this "supplement" with a Reply filed June 17. PYCO pointed out that the Board had jurisdiction over all the trackage, the trackage included the former (and unabandoned) Fort Worth and Denver Railroad mainline in Lubbock, the trackage in question was still in service, and none of the relevant trackage had been abandoned.

On June 21, 2006, this Board issued a decision rejecting SAW's petition to terminate alternative rail service, and granting PYCO's petition to extend it through and including October 23, 2006 (the statutory maximum under 49 U.S.C. § 11123). Although this Board agreed with PYCO that the commodity exemption claimed by SAW did not preclude alternative rail service, this Board found that PYCO had shown an abuse of market power by SAW and accordingly also revoked the commodity exemption to the extent necessary to allow alternative rail service to continue for all PYCO shipments. The Board likewise rejected SAW's claim that the Board lacked jurisdiction on the ground that the trackage was just switching track. The Board

Les Howell, Attachment C, ¶ 3 and exhibit thereto.

SAW's Lubbock counsel on Tuesday, June 26, informed PYCO that SAW had sold portions of its track and ties (including the "wye" where PYCO's industrial crossing is located) to an entity called "Choo Choo Properties."<sup>11</sup> So far as PYCO can tell from review of this Board's e-library, SAW has neither sought nor obtained any STB authorization for this purported transfer of its rail assets. The sale is thus on its face void. In addition, the sale appears contrary to section 7 of the BNSF/SAW contract (Attachment D), in which SAW must promptly provide BNSF with a copy of the sales contract to "Choo Choo" within seven days of execution, and then afford BNSF a sixty day right of first refusal.

In addition to the alternative use, complaint, and commodity exemption revocation proceedings before STB, and the TRO proceeding, as referenced above, there are three additional proceedings that bear on the subject matter of this case. First, PYCO is very aware that SAW's management threatens economic retaliation and actively implements measures to economically coerce its shippers.<sup>12</sup> Indeed, SAW management also has a reputation for engaging in physical intimidation to

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<sup>11</sup> See Declaration of Gary McClaren, Attachment B, ¶ 6 and Exhibit C thereto.

<sup>12</sup> See, e.g., discussion infra circa pages 17-18, and Attachments F (Lacy V. S.), H (Floyd Dec.) and L (Kidwell Dec.).

also modified the protocol governing WTL and SAW use of the rail lines during the period of alternative rail service to prevent SAW from blocking the industrial crossing between PYCO's cottonseed stockpile and PYCO's Plant No. 1. Finally, in response to concerns expressed by PYCO about SAW's failure to inspect or to repair the track, this Board indicated PYCO and WTL should take the matter up with FRA. PYCO and WTL have done so. See Letter to Regional Administrator, Federal Railroad Administration, dated June 29, 2006, Attachment E.

Because SAW contrived to maintain its blockade of the industrial crossing subsequent to the Board's June 21 order,<sup>9</sup> PYCO sought and obtained a temporary restraining order (TRO) in United States District Court (N.D. Texas, Lubbock Division) on Monday, June 25 against SAW.<sup>10</sup> Mr. Larry Wisener, SAW's agent for service of process, refused to accept service of process. PYCO's counsel was subsequently informed that SAW had resolved on opposing PYCO essentially wherever possible. PYCO understands this to mean that SAW will not entertain serious negotiations to resolve differences with PYCO. See Declaration of Gary McLaren, Attachment B, ¶ 5. When PYCO attempted to arrange preparation of the crossing for use later on Monday, SAW employees again obstructed the crossing. PYCO called for police protection so the crossing could be opened. See Declaration of

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<sup>9</sup> See Declaration of Gary McLaren, Attachment B hereto.

<sup>10</sup> A copy of the TRO is attached as Exhibit B to Mr. McLaren's Declaration (which is Attachment B to this Petition).



silence dissent.<sup>13</sup> PYCO accordingly realized that once it brought its problems to this Board, SAW management would seek to retaliate by making life as difficult as possible for PYCO, as SAW's former president Mr. Wisener indicated SAW would do in his conversation with Mr. Lacy of PYCO on November 18, 2005.<sup>14</sup> SAW is nothing if not persistent.<sup>15</sup>

PYCO accordingly has sought permanent relief from dependence on SAW. In particular, on May 5, 2006, PYCO filed a feeder line application (FLA) pursuant to 49 U.S.C. § 10907. In that FLA, PYCO sought to acquire the entirety of SAW or, as Alternative Two, the portion of SAW on the east side of the BNSF mainline (serving Attebury Grain, Farmers Cooperative Compress and PYCO) and sufficient facilities for service to PYCO's Plant No. 1 on the west side of the BNSF main. The FLA was supported by statements by two shippers other than PYCO attesting to threats of economic retaliation and indeed physical intimidation. PYCO requested entry of a protective order, at which point it indicated it would provide additional confidential data bearing on financial responsibility.

In a decision served June 2, 2006, the Director declined to

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<sup>13</sup> See, e.g., Attachment F (Lacy ¶ 12), Attachment L (Kidwell ¶2), Attachment H (Floyd ¶5, 11, & 13). Indeed, SAW employees including the owner's son attempted physical intimidation against PYCO personnel earlier this week. See Les Howell Declaration (attachment D), ¶ 3 and exhibit thereto.

<sup>14</sup> See Lacy V.S., Attachment F, at ¶ 14 and log for Nov. 18, 2005.

<sup>15</sup> E.g., Supplemental Declaration of Robert Lacy, Attachment B, ¶ 3.

issue a protective order, and dismissed the FLA as incomplete, without prejudice to refile an FLA with additional information. The Director apparently believed that in order to qualify to acquire a line, PYCO had to submit letters from a majority of shippers stating that SAW service as to them was inadequate. The Director also stated that PYCO had not shown financial responsibility. PYCO Industries, Inc. -- Feeder Line Acquisition -- South Plains Switching, Ltd., F.D. 34844, served June 2, 2006.

On June 12, PYCO appealed the Director's decision to the Board. PYCO argued that the statute does not require that PYCO submit a poll of shippers to show inadequacy of service to a majority, and that in a climate of economic and physical coercion, polls do not work and that such a poll requirement in a coercive environment is contrary to the intent of the statute. PYCO argued that the Board should infer that service is inadequate for a majority when SAW's largest shipper as well as small and potential shippers all attest that SAW engages in coercion and threatens and takes retaliation in the face of complaints. Because of the urgency of PYCO's need for relief, PYCO, without waiver of its appeal concerning the impropriety of dismissing the appeal without issuing a protective order so PYCO could submit additional confidential information, submitted its confidential financial responsibility information without benefit of the standard STB protective order, which the Director had declined to issue. As of the time of service of this

Petition, the Board has not issued a ruling on the appeal.

Two days later, on June 14, 2006, PYCO filed a Revised FLA (docket F.D. 34890), incorporating the prior FLA (docket F.D. 34844). This filing included letters from Attebury and Compress indicating that they believed service from SAW was no longer adequate as to them. In addition, one of the aggregate shippers (Hanson) had completed its round of shipments over SAW, was no longer fearful of retaliation, and provided PYCO with an email indicating it too viewed SAW service as inadequate.<sup>16</sup> As of the time of service of this Petition, STB has not acted on the Revised FLA.

Finally, SAW's coercive behavior and evident willingness to abuse its market power, combined with (A) SAW's claim (in its first "supplement" in F.D. 34802) to possess the power arbitrarily to deny service, and (B) SAW's claim (in its second "supplement" in F.D. 34802) to be able to abandon its tracks without any authorization from this Board, underscores the unsuitability of SAW as a common carrier railroad. PYCO accordingly on June 17 filed a petition to revoke SAW's acquisition authorization in South Plains Switching, Ltd.-- Acquisition Exemption -- BNSF Railway Company, F.D. 33753 (Sub-no. 1). BNSF authorized PYCO to state that BNSF does not oppose the revocation. Floyd Trucking and Hi Plains Bag and Bagging, both of which have experienced coercion from SAW and stand out only in their bravery in risking further retaliation by

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<sup>16</sup> See Attachment K.

discussing the abuse, supported revocation of the acquisition exemption in their Declarations. If the acquisition exemption is revoked, then the SAW lines must be returned to BNSF. In that event, PYCO's FLA and Revised FLA proceedings may become moot. This Part 1147 petition will also be moot if the acquisition exemption is revoked such that the property is returned to BNSF prior to October 23. Revocation is justified, and PYCO is hopeful that a prompt revocation may occur so that PYCO is assured of adequate rail service after October 23. In this sense, this Part 1147 petition is an alternative form of relief in the event that the acquisition exemption is not revoked prior to October 23.

## II. Law Applicable to Part 1147 Petitions

To the best of PYCO's knowledge, there is no STB precedent employing or interpreting Part 1147. However, the Board's regulations under Part 1147 indicate that the basic legal test is identical to that provided for relief under Part 1146. In particular, 49 C.F.R. 1147.1, in a fashion essentially identical to id. 1146.1, states that

"[a]lternative rail service will be prescribed under 49 U.S.C. 11102(a), 11102(c) or 10705(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."

The operative statutes for Part 1147 relief (i.e., 49

U.S.C. §§ 11102 and 11705) differ from the operative statute for Part 1146 (i.e., 49 U.S.C. § 11123) in that the Board is not limited to relief that is effective for only 270 days. Both section 10705 and section 11102 are germane here, and are discussed below.

Section 10705(a). PYCO Industries ships over a through route and tariff set by BNSF Railway, Inc., with the incumbent rail provider in Lubbock (i.e., SAW) receiving a division of that tariff established pursuant to the incumbent carrier's contract with BNSF. Compare Supplemental Declaration of Robert Lacy, Attachment B, ¶ 2 with BNSF/SAW Agreement §§ 16-17 (through routes and divisions).

49 U.S.C. § 10705(a) authorizes the Board to prescribe, and "when it considers it desirable in the public interest" requires the Board to prescribe, "through routes ... and the conditions under which those routes must be operated." Because service by SAW to PYCO is via a "through route," and because that service as provided by incumbent carrier SAW is inadequate, the Board has authority under section 10705(a) to require, as a condition of the existing through route, that an alternative service carrier provide local switching service to PYCO.

Section 11102(a). Incumbent carrier SAW's roughly 14 miles of trackage in Lubbock is comprised of a combination of former Fort Worth and Denver Railroad (FWD) mainline, plus branch lines, and the old FWD yard in Lubbock. 49 U.S.C. § 11102(a) provides that

"[t]he Board may require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, ... to be used by another rail carrier if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities ... to handle its own business."

The Board has authority under this provision to order alternative service on a permanent basis to PYCO.

### III. PYCO Is Entitled To Relief under Part 1147

49 C.F.R. § 1147.1(b)(1)(i) requires PYCO to provide a full explanation, together with all supporting evidence to demonstrate that there has been a substantial, measurable deterioration in service over an identified period of time. As explained in this Part III, this Board has already repeatedly found that PYCO has met the identical standard under 49 C.F.R. § 1146.1(b)(1)(i) in the proceedings discussed in Part I, infra. As also discussed in Part I, this Board has also found that PYCO has demonstrated inadequate service in a feeder line proceeding. After quoting relevant some of the relevant excerpts from these prior decisions, PYCO will then summarize the evidence on inadequacy by quoting the summary provided in the feeder line proceeding. PYCO incorporates all its evidence from these proceedings pursuant to 49 C.F.R. § 1114.4, inasmuch as all that evidence is publicly available at the STB's website, through its e-library under "filings." PYCO supplements this evidence with several additional Declarations

and exhibits (Attachments A-D and exhibits thereto), including information relating to SAW's latest efforts to retaliate against PYCO (Attachments B and C dealing with the industrial crossing). Finally, PYCO will discuss any requirements specific to 49 U.S.C. § 10705(a)(1) and § 11102(a), and remaining requirements set forth in Part 1147.

A. Substantial Measurable Deterioration

This Board should readily find that PYCO, over an identified period of time, has sustained a "substantial, measurable deterioration or other demonstrated inadequacy in rail service" provided by incumbent carrier SAW. On four separate occasions between January and the end of June of this year, this Board has made such a finding. We will first discuss the alternative use (Part 1146 proceeding) and then PYCO's first feeder line application.

1. Finance Docket 34802 (alternative rail service under Part 1146). In its decision initially authorizing alternative rail service (F.D. 34802, served Jan. 26, 2006), this Board found that

"PYCO has demonstrated through ample, credible evidence, that as a result of [enumerated] service inadequacies, it will soon run out of storage capacity for its cottonseed oil and related products, and will be forced to curtail or close operations. Consequently, we find that PYCO has shown ... 'a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent

carrier."

Decision in F.D. 34802, served Jan. 26, 2006, slip op. at 5.

In its decision served February 24, 2006, denying SAW's petition to terminate and granting PYCO's request to extend alternative service, the Board found that the transportation emergency was continuing:

"If we were to end the alternative service now, and if SAW were not to provide adequate service to PYCO, the situation would be similar to the situation that led to our authorizing interim alternative service in the first place. SAW's recent non-participation in the parties' daily conference calls indicates an unwillingness to cooperate in ensuring adequate service to PYCO. [In footnote 12, STB also indicated concern about "a report of a number of unsafe actions by Mrs. Wisener's son affecting WTL employees, which SAW did not rebut."] The evidence in this case indicates that ... the transportation emergency would continue to exist if WTL were removed as an alternative service provider...."

Although the agency did not grant PYCO's request to extend the alternative service order for a full 240 days, the Board did grant a 120 day extension. Decision in F.D. 34802 served Feb. 24, 2006, slip op. at 4.

By decision in F.D. 34802 served June 21, 2006, the Board denied SAW's second petition to terminate alternative rail service, and granted PYCO's petition for an extension for 120 more days. After discussing PYCO's evidence of continuing need



for reliable rail service and finding that PYCO has shown a need to ship a high volume of rail cars, the Board turned to SAW's claim now to be able and willing to provide adequate rail service. The Board stated as follows:

... We are concerned that SAW still has not taken any responsibility for the service failures that led to the January Decision in which we initially authorized alternative rail service. As stated previously, SAW contends that BNSF's actions have been a major cause of the service difficulties experienced by PYCO. However, ... these allegations have been convincingly rebutted by PYCO. Until it acknowledges its past service lapses, SAW is unlikely to be able to avoid the difficulties it experienced in the past in providing service to PYCO.

Moreover, SAW's continued actions belie its claimed willingness to now provide adequate service to PYCO. It is unrefuted that, until March 2006, SAW permitted PYCO to move PYCO equipment over a long-existing industrial crossing of the wye track separating PYCO's outdoor cottonseed stockpile from its Plant No. 1, at which cottonseed is processed. PYCO states that the stored cottonseed has a value of \$11 million. During the period of alternative service, however, SAW has stored empty rail cars on the wye track in a location that prevents PYCO's equipment from using the industrial crossing to get to the seed stockpile.

SAW would have us excuse its recent blockage of the industrial crossing because there is no document granting PYCO the right to cross SAW's tracks at that crossing. SAW also claims that it needs the revenue it earns from storing the rail cars at issue and states that it would have placed these cars on Track 9298 but of the protocol provision requiring that track to be kept clear for the staging of cars for PYCO. But as PYCO explains, SAW has other locations available to place these stored cars. The fact that SAW may have the right to store rail cars in a position that blocks the industrial crossing does not justify its doing so when the blockage harms PYCO and SAW has other locations in which to store the cars.

In addition SAW evidently still does not participate in the daily telephone conference calls by which PYCO and BNSF address any service issues that arise, including congestion on SAW's rail lines or yard. A rail carrier that is committed to providing good rail service likely would participate. Taken together, the blockage of the industrial crossing and nonparticipation in the daily telephone calls

give us good reason to question the credibility of SAW's assertion that it would provide adequate service to PYCO if alternative service were terminated now.

In light of these facts, we find that PYCO's transportation emergency will continue after June 25, 2006

....

Decision in F.D. 34802, served June 21, 2006, slip op. at 5-6.

2. Finance Docket 34844 (feeder line) and a summary of PYCO's evidence on service inadequacy through May 5. PYCO essentially incorporated its showing of service inadequacy from the alternative service proceeding into PYCO's showing of inadequate rail service for purposes of PYCO's feeder line application in F.D. 34844. PYCO's FLA (at pp. 25-31, hereby incorporated herein) states as follows:

"SAW has a reputation for threatening to take, and actually taking, retaliatory action against its shippers and potential shippers, including reduction of service, and ripping out of track and switches. See O.E. Floyd Dec, Exhibit H, ¶13.<sup>[17]</sup> As a result, a number of smaller shippers and prospective shippers have informed counsel for PYCO that they fear retaliation from SAW if their own service problems with SAW are discussed in public. In confirmation of the fears and risks of retaliation with respect to SAW, one of the smaller shippers -- Hi Plains Bag and Bagging (HPBB) -- has provided a statement. That shipper notes that Mr. Wisener has already threatened (through "screaming") to

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<sup>17</sup> A copy of this Declaration is attached as Attachment H to this Petition.

"cut us off and do whatever he wanted because it was his railroad." Declaration of Calvin Kidwell, Exhibit L, ¶2.

[18] Mr. Kidwell observes that "I construed this as it was intended: a threat to retaliate and to deprive us of service if we did not do exactly what he told us to do." Id.

"Of course, SAW does not limit its bullying to its smaller customers. PYCO is the largest shipper on SAW's system, and SAW has already taken about as many retaliatory shots at PYCO as it can take. Thus, in the hopes of preserving remaining shippers from additional exposure to SAW retaliation, PYCO believes it appropriate and sufficient to focus on SAW's service inadequacies to PYCO. That in tandem with the various letters and declarations of support, including representations of threats against HPBB and losses to Penny Newman [a major PYCO customer], paint a clear picture of service inadequacy under SAW as incumbent carrier.

"PYCO sets forth below excerpts from our Verified Petition for Alternative Rail Service, filed by PYCO on December 19, 2005, in STB F.D. 34802. [All references to exhibits in the material quoted below are to exhibits filed with the Petition. These exhibits have been filed with the Board, served on SAW, are publicly available over the internet (this Board's e-Library, under filings, for December 19, 2005), and are hereby incorporated into this proceeding.

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<sup>18</sup> A copy of this Declaration is attached as Attachment L to this Petition.

Moreover, this Application is Verified by Mr. Gail Kring.]

"In order to facilitate switching between sidings on PYCO property serving Plant No. 1, PYCO operates two track mobiles. Until this year, SAW permitted PYCO to operate its equipment on a portion of SAW trackage sufficient to allow PYCO to move cars between tracks at PYCO's Plant No. 1. This allowed PYCO to ship 26 or more carloads per day from Plant No. 1. SAW has now placed a derail on its track that now prevents PYCO from moving more than one car at a time. This and related service inadequacies by PYCO limits PYCO to 12 carloads per day at Plant No. 1, a 16 carload/day shortfall. This adds to, and further complicates, the service inadequacies and disruptions discussed below.

First episode of service inadequacy. By 2005, SAW and BNSF were embroiled in a complicated dispute over the terms of the 1999 contract by which SAW acquired the BNSF trackage in Lubbock. Apparently incensed because PYCO declined to take sides in its favor in that contract dispute, SAW by early March stopped spotting and picking up cars on reasonable request at PYCO's two rail-dependent plants in Lubbock. Indeed, shortly before March 11, 2005, Mr. Larry Wisener ... informed PYCO that SAW was terminating service to PYCO's Plant No. 2, evidently due to a dispute between SAW and BNSF over the removal of certain switches. Despite efforts by PYCO to compose the differences between BNSF and SAW, service continued to deteriorate, with Mr. Wisener again threatening to shut down service to Plant No. 2 on April 4, 2005. On April 4, a derailment occurred on the track serving Plant No. 1. Mr. Wisener (SAW) stated that SAW "didn't have time to clean up a mess right now" resulting in suspension of service to Plant No. 1.

On April 5, 2005, PYCO complained in writing to Mr. Melvin Clemens, Director of STB's Office of Compliance and Enforcement ("OCE") about service to both its Lubbock plants. This was followed by a May 3 letter from PYCO to Mr. Herzig in STB's OCE noting service problems and the threat by SAW to impose a surcharge on PYCO. By letter dated May 23 to STB, PYCO reported it had sustained \$450,000 in losses in April due to "slow switching of railcars" and that the situation had not improved. By letter dated June 8 to STB, PYCO indicated it was "experiencing worse service by the day." On June 17, 2005, Mr. Wisener sent a letter to PYCO (i) directing PYCO to make Mr. Wisener the sole source of contact for all SAW rail services to PYCO, (ii) withdrawing permission for PYCO to operate its equipment on SAW trackage, (iii) imposing surcharges, and (iv) requiring a "formal agreement" for future inbound and outbound service. On June 13, SAW threatened to "embargo any future PYCO shipments from handling." By approximately June 21, PYCO had drafted a

petition for alternative rail service under 49 C.F.R. Part 1146. Although this draft was not filed, it summarizes key events in the service disruption which PYCO experienced March through June of 2005, and also collects as exhibits the correspondence discussed above. A copy of this draft petition is attached as Appendix A, along with its exhibits.

Intervention by STB's OCE. Although counsel for PYCO does not understand himself to have all the communications, PYCO understands that Director Clemens of STB's Office of Compliance and Enforcement informed SAW in writing of SAW's obligations to provide service on reasonable request. PYCO is in possession of letters from SAW's counsel to Mr. Clemens offering excuses for SAW's failure to provide service (SAW chiefly claimed to be limited by policies of BNSF), and Mr. Clemens response of 10 June 2005 indicating that SAW needed to meet its service obligations. See Exhibit B. Due to Director Clemens' intervention, SAW improved service to PYCO at the end of June. PYCO, hoping that this marked a peaceful resolution of its service problems with SAW, did not file the emergency petition with STB for alternate rail service at that time.

Interregnum. In a request for proposals bearing date of May 10, 2005, SAW offered its Lubbock trackage for sale, including the trackage serving PYCO.

In September of 2005, Mr. Wisener informed PYCO's Senior Vice President for Marketing (Robert Lacy) that he (Wisener) wished to sell SAW and get out of the railroad business, and wished to know if PYCO was interested. After consulting internally, PYCO informed SAW that PYCO had an interest. See Exhibit C (Ver. Statement of Robert Lacy). SAW then made a specific demand to PYCO to sign an agreement by which PYCO would be bound to pay SAW \$5,500,000 (5.5 million dollars) for the trackage serving PYCO. That proposed agreement is set forth in a letter dated October 11, 2005, from SAW's Lubbock counsel to PYCO's Lubbock counsel, and is an attachment to the Lacy Verified Statement (Exhibit C). The proposed agreement as tendered by SAW does not specify what property or rights SAW proposed to transfer, nor provide for normal due diligence activities to be conducted and customary concerns to be satisfied as a condition to closing. PYCO accordingly responded on October 13 that it was "still in the early stages of looking at the purchase" of SAW's assets, and requested a paragraph making the purchase contingent upon the completion of due diligence activities and upon PYCO's obtaining financing satisfactory to PYCO. See Letter attached to Exhibit C.

SAW angrily rejected PYCO's position. SAW's president, Mr. Wisener, orally informed PYCO that SAW intended to make

business miserable for PYCO. By letter dated November 3, 2005 (also in Exhibit C), SAW through its [then] president, Larry Wisener, effectively broke off negotiations on acquisition (before they had begun), claiming agreement "cannot be reached." SAW also demanded that PYCO "cease all plant operations on SAW property immediately." [footnote 6: Letter attached as part of Exhibit B. It is unclear what Mr. Wisener meant by plant operations. PYCO surmises that he felt PYCO was loading seed cars on SAW trackage, a claim that Mr. Wisener made in a telephone call on November 17, 2005. However, PYCO was loading seed cars on its own trackage. SAW's Mr. Wisener also perhaps meant that he no longer would store cars for PYCO.]

Second episode of service inadequacy. On or about November 17, SAW placed a derail on the track making it difficult for PYCO to prepare cars for the daily switches. By letter dated November 17, 2005, SAW cancelled PYCO's lease of track #9298.

On November 18, 2005, PYCO contacted Mr. Wisener to request that he move the derail to allow switching. Mr. Wisener initially said he was busy and would look into it later. Then he said he was imposing additional charges on PYCO, and desired PYCO to "come over." PYCO's representative, weary of the confrontational nature of Mr. Wisener in meetings, indicated that if Mr. Wisener had made up his mind, there was no need to come over. Mr. Wisener indicated that PYCO "would have to figure out how to take care of [itself]." Mr. Wisener told PYCO that it would "cost a lot more for [PYCO] to continue doing business with [SAW]." See Exhibit C and attachments thereto.

On November 22, 2005, PYCO determined that if SAW would switch cars on the scale track instead of the shop track, or if it would switch on both, PYCO could load more cars. PYCO asked SAW to switch on the scale track or on both tracks. SAW refused. SAW's representative indicated that Mr. Wisener would allow only one pull per day, and only on the shop track. From that day forward, SAW has refused to switch cars on the scale track and has otherwise engaged in conduct minimizing the number of cars which PYCO can switch each day. By November 29, SAW's policies or inabilities had resulted in PYCO's being unable to load an additional 80 cars at Plant No. 1. This deteriorated situation has continued until the date of filing of this petition.

PYCO Verified Petition for Alternative Rail Service, F.D. 34802 at pp. 4-9.

"The various subsequent filings in the alternative rail

service proceeding further document the inadequate service provided PYCO by SAW. Pursuant to 49 C.F.R. § 1114.5, PYCO hereby incorporates all its evidentiary filings (documents, verified statements, Declarations, and verified pleadings) in PYCO Industries -- Alternative Rail Service, F.D. 34802.<sup>19</sup>

"On January 26, 2006, this Board issued an alternative service order on January 26, 2006, finding that PYCO Industries had demonstrated that it was not receiving adequate rail service.

"The validity of the Board's determination has been demonstrated by subsequent events. PYCO has received excellent switching service from its alternative service provider ("WTL") from January 26 to date. Despite numerous problems with SAW, WTL managed quickly to work off PYCO's backlog, reduce or eliminate car storage needs except for ordinary staging, and otherwise speed up shipments. PYCO shipped more than twice as many cars in the first 17 days of service with WTL under the alternative service order than during the prior 17 days of SAW service.<sup>20</sup> BNSF remarked that turnaround times for cars had markedly improved.<sup>21</sup>

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<sup>19</sup> Should this Board desire PYCO to furnish additional copies of all these documents (publicly available in this Board's e-library under filings for the relevant docket, and all previously served upon SAW), PYCO will do so.

<sup>20</sup> PYCO Reply in F.D. 34802 at p.1 and Lacy V.S. as cited, filed Feb. 16, 2006.

<sup>21</sup> PYCO Reply in F.D. 34802 (filed Feb. 15, 2006) at p. 1 and Kring V.S. at ¶ 10 (available at STB e-library, filings), and incorporated herein. See also PYCO Reply in F.D. 34802

"SAW from time to time has contended,<sup>22</sup> and still contends,<sup>23</sup> that service problems in Lubbock are due to BNSF, not SAW. SAW from time to time suggests that PYCO has been used as a pawn by BNSF. But the fact that WTL has provided excellent service belies SAW's claims that the problem lies at BNSF's feet. Instead, it indicates that the problem lies with SAW.

"SAW sometimes complains that PYCO has inadequate storage facilities for rail cars. PYCO's storage needs are exacerbated by inadequate switching by SAW, and are compounded by SAW's desire or modus operandi to shake-down its shippers by congesting its lines both by failing to provide adequate switches and by storing non-revenue cars on its tracks for parties who are not shippers on SAW's lines. BNSF has remarked to PYCO how service under WTL has enhanced car turnaround times, to the benefit of BNSF, PYCO, and presumably other shippers as well.<sup>24</sup>"

Although the Director in his initial decision dismissed the FLA

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(filed April 19, 2006), Exhibit C (BNSF communication to PYCO that BNSF is "very satisfied" with WTL service and "[e]quipment velocity remains, high"). That has to be good news for all BNSF customers.

<sup>22</sup> See Letter, Mr. McFarland (for SAW) to Mr. Clemens (STB OCE), dated June 8, 2005, Exhibit B to PYCO Petition for Alternative Rail Service in STB F.D. 34802, filed December 19, 2005.

<sup>23</sup> E.g., SAW Petition to Terminate, Delilah Wisener V.S. p. 1, in Finance Docket 34802, filed March 30, 2006; SAW Reply, Larry Wisener Declaration, in F.D. 34802 (filed April 11, 2006).

<sup>24</sup> See note 21 supra.



as incomplete, the Director found the showing above in fact demonstrated that SAW's service to PYCO was inadequate. As the Director stated, "[t]his evidence is adequate to show that SAW provided inadequate rail service to PYCO." Decision in F.D. 34844, served June 2, 2006, at p. 5. The Director also found that PYCO had demonstrated that service to Floyd Trucking and to Hi Plains Bag and Bagging was "inadequate." Id. slip at 5 & 6.

3. Recent developments. Mindful of the Board's admonition in the June 21 decision extending the alternative service order to October 23 that the parties should "work together before [October 23] to reach a satisfactory solution to PYCO's continuing need for adequate rail service" (slip op. at p. 6), PYCO immediately sought to follow-up with SAW on two issues of concern to PYCO: SAW's blockade of the industrial crossing between PYCO Plant No. 1 and the outdoor seed stockpile, and the need for inspection and repair of SAW's deteriorated trackage.

In both cases, SAW shut PYCO down. As to the industrial crossing, SAW moved the empty rail cars out of the "wye" but placed personnel and signs athwart the crossing instead. SAW's counsel in Lubbock did not return telephone messages left for him on the issue. PYCO was compelled to seek and to obtain a TRO on Monday, June 26, from the United States District Court for the Northern District of Texas to enforce this Board's order that SAW clear the crossing. See Declaration of Gary McLaren, Attachment B, exhibits A & B (motion papers and TRO). Although

Mr. Larry Wisener is registered agent for SAW, he refused service of the TRO. SAW's Lubbock counsel accepted service. He indicated to PYCO's Lubbock counsel that SAW had decided to contest all PYCO actions, by which PYCO and its counsel understand him to mean that SAW will not meaningfully negotiate with PYCO concerning the industrial crossing or any other issue. See Declaration of Gary McLaren, Attachment B, ¶ 5.

Later on Monday, after service of the TRO, Mr. and Mrs. Wisener's son, Shad Wisener, along with another SAW employee, physically obstructed, used threatening gestures and profanity, and orally abused PYCO employees attempting to ready the crossing for use by PYCO to transfer its seed stockpile.<sup>25</sup> PYCO withdrew its employees until police arrived to ensure that PYCO's employees were not molested by SAW in performing their work at the crossing. See Declaration of Les Howell, Attachment C. On Tuesday, June 26, SAW's counsel filed papers in the TRO proceeding contesting the TRO on behalf of an entity called "Choo Choo Properties." See Attachment B, Exhibit C. SAW's counsel represents that SAW sold its track and ties, at least in the area of the "wye," to "Choo Choo" earlier in June. The sale, if there was a sale, appears contrary to 49 U.S.C. § 10901(a) and a direct challenge to this Board's jurisdiction.

WTL experienced a derailment on June 14 due to worn-out

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<sup>25</sup> See Declaration of Les Howell, Attachment C, ¶ 3 and exhibit. Shad Wisener has earlier exhibited hostile conduct. See STB Decision in F.D. 34802, served February 24, 2006, at footnote 12 (expressing concern about unrebutted reports of physically hostile actions by owner's son).

switches on SAW trackage. See Declaration of Eldon Martin, Attachment G. To PYCO's knowledge, SAW has not engaged in a significant repair program for the trackage serving PYCO since SAW acquired the lines from BNSF in 1999. WTL for some time has complained that SAW neither inspects nor repairs the trackage WTL employs to serve PYCO. WTL and PYCO are concerned that SAW is engaged in a constructive abandonment by "track rot." Although PYCO has requested an FRA inspection (Attachment E), PYCO is concerned that SAW may simply declare the track "excepted" or otherwise fail to make repairs such that the trackage soon will become inoperable. In addition, there is a concern that the FRA inspection may precipitate an embargo or closure. If SAW refuses to repair, as seems likely to WTL and PYCO, the entire rail line may be shut down either by order of FRA, by embargo, or otherwise. While this would be equivalent to an unlawful abandonment by SAW, the cost to rail-dependent PYCO would be potentially catastrophic. Counsel for WTL and PYCO accordingly telephoned SAW's counsel (Mr. McFarland) on June 23. WTL counsel requested that SAW allow WTL or PYCO to permit a qualified private inspector to view the portion of SAW trackage used by WTL to serve PYCO. WTL and PYCO hoped in this fashion to identify critical areas for repair so that service would not be interrupted by derailments. SAW refused cooperation.

SAW continues to decline to participate in daily conference calls to resolve service issues in Lubbock.

Given that SAW counsel has indicated that SAW does not intend meaningful negotiations, given that PYCO has had to resort to a TRO from a federal judge to obtain compliance with a key portion of this Board's June 21 decision, given that SAW is letting its track fall apart, and given the continued antagonistic and belligerent attitude not only of certain SAW employees but also of the family which owns and controls SAW, a neutral observer must conclude that PYCO faces the continued and essentially assured prospect of inadequate rail service on October 23, 2006, when the current alternative service order expires. See also Supplemental Declaration of Robert Lacy, Attachment B, ¶ 3. This in turn supports a finding of substantial, measurable deterioration of service required for a Part 1147 order justifying continued permanent alternative service for PYCO.

#### B. Other Statutory Issues

1. Section 10705(a). Under the BNSF/SAW contract governing SAW's operations in Lubbock, BNSF retains authority to establish through routes and to through rates for both itself and SAW. See Attachment D, section 16 (p. 23 of Agreement). PYCO is a BNSF customer, paying a tariff to BNSF, and all PYCO's rail shipments are on through routes established by BNSF. SAW receives a division of revenue from BNSF (under the alternative service order, this division is provided to WTL which is performing the service for PYCO in Lubbock).

49 U.S.C. § 10705(a) allows the Board to "prescribe

through routes and ... the conditions under which those routes must be operated" and requires the Board to do so "when it considers it desirable in the public interest." Since BNSF already establishes through routes for all PYCO traffic involving SAW in Lubbock, 49 U.S.C. § 10705 on its face permits this Board to condition the operation of those through routes by requiring that service to PYCO be provided by alternative service provider WTL.

As already discussed, this Board has repeatedly found that there has been a substantial, measurable deterioration of service experienced by PYCO in connection with incumbent rail carrier SAW and has repeatedly remarked on SAW's continued refusal to cooperate in addressing PYCO's service issues. Indeed, this Board has already found SAW's service to PYCO to have been "so inadequate as to amount to an abuse of market power." PYCO Industries, Inc. -- Alternative Rail Service-- South Plains Switching, Ltd., F.D. 34802, and Rail General Exemption Authority -- Miscellaneous Agricultural Commodities-- PYCO Industries, Inc., Petition for Partial Revocation, STB Ex Parte No. 346 (Sub-no. 14C), served June 21, 2006, slip op. at 4. Given these findings, this Board should also determine that it is "desirable in the public interest" (49 U.S.C. § 10705(a)(1)) to condition the operation of the BNSF through routes for PYCO in Lubbock to require service over SAW lines by alternative rail service provider WTL. This would be consistent with national rail transportation policy "to prohibit

predatory pricing and practices and to avoid undue concentrations of market power" (49 U.S.C. § 10101(12)), "to encourage honest and efficient management" (id. § 10101(9)), and to "foster sound economic conditions in transportation" (id. § 10101(5)).

2. Section 11102(a). Under 49 U.S.C. § 11102(a), this Board "may require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal" to be used "by another rail carrier" if the Board "finds that use to be practicable and in the public interest without substantially impairing the ability of [the incumbent carrier] to handle its own business."

WTL has provided alternative rail service to PYCO in Lubbock since the issuance of this Board's initial authorization by Decision in F.D. 34802 served January 26, 2006. The service to PYCO has been highly successful, addressing PYCO needs and speeding the velocity of rail cars on the BNSF system to the benefit of shippers elsewhere. This experience establishes that alternative service to PYCO is "practicable."

Such service is also in the public interest for the reasons stated in the discussion concerning public interest for purposes of section 10705(a)(1).

Finally, provision of alternative service under Part 1147 will not substantially impair incumbent carrier SAW's ability to serve its other customers. Despite SAW's lack of cooperation, WTL and BNSF have managed to minimize any problems for SAW's

customers. To the extent SAW claims problems exist, those problems arise (a) from SAW's refusal to participate in the daily conference calls between WTL and BNSF to address service issues, (b) from the poor condition of SAW's trackage, or (c) from SAW's inherent shortcomings as a rail provider.

To the extent that PYCO is required to show that SAW has employed market power to extract unreasonable terms, or that it has used its market power to display a disregard for PYCO's needs,<sup>26</sup> PYCO has made the required showing. This Board has already determined that SAW's service to PYCO has been "so inadequate as to amount to an abuse of market power." PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, and Rail General Exemption Authority -- Miscellaneous Agricultural Commodities -- PYCO Industries, Inc., Petition for Partial Revocation, STB Ex Parte No. 346 (Sub-no. 14C), served June 21, 2006, slip op. at 4. PYCO appends as Attachments F, H, and L the Verified Statements and Declarations by Robert Lacy,<sup>27</sup> O.E. Floyd,<sup>28</sup> and Calvin

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<sup>26</sup> Midtec Paper Corp. v. U.S., 857 F.2d 1487, 1501-03 (D.C. Cir. 1988).

<sup>27</sup> Mr. Lacy notes that Mr. Wisener in meetings becomes progressively more profane and discusses "throwing out" people who have opposing opinions, making meetings "unpleasant episodes." Attachment F, ¶ 12. Mr. Wisener told PYCO that it would have to "fend for itself" on November 18, 2005 (¶14) (see also log for that date recording that Mr. Wisener told PYCO that PYCO would have to take care of itself). After that date, SAW degraded service to the point that PYCO was forced to petition for alternative service under 49 C.F.R. Part 1146.

Kidwell<sup>29</sup> respectively attesting to service inadequacies, refusals and threats of arbitrary refusal of service, and a reputation for economic and physical intimidation on the part of

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<sup>28</sup> Floyd Trucking purchased property in southern Lubbock which included a side track, approximately 2500 feet long, served off an industrial lead then under BNSF ownership. Just before the sale to SAW in 1999, Floyd Trucking thought it had made arrangements to restart service, and arranged for Martin Construction to rehabilitate the lead. However, SAW advised Floyd Trucking that it would never serve Floyd Trucking, and Floyd Trucking therefore suspended rehabilitation work. SAW concocted a make-weight excuse that the switch was defective, and declined delivery of a car ordered by Floyd to the siding, but Floyd proved to the contrary by two independent experts. Floyd complained to STB, at which point SAW's Mr. Wisener removed the switch. Mr. Floyd in his statement notes that Mr. Wisener at first threatened removal, and that he knew other shippers who were fearful of coming forward due to fear of reprisal. ¶6.

When STB's Office of Compliance and Enforcement reminded SAW's Mr. Wisener of his responsibility to provide service, Wisener demanded that Floyd pay the bulk of the \$25,000 Wisener claimed it would cost to restore the switch. STB's OCE ultimately got Wisener to restore the switch. However, SAW's Wisener then demanded that Floyd Trucking enter into an industrial trackage agreement which, unlike any similar agreement, provided that Wisener could tear out the entire side track after two years, on payment of salvage value of the trackage to Floyd. Naturally Floyd Trucking was not prepared to agree to service for only two years and then removal of its track. Since SAW had indicated it would never serve Floyd, and apparently would use any ruse or subterfuge to achieve that goal, Floyd Trucking "gave up" on SAW in 2004.

<sup>29</sup> Mr. Kidwell notes that when his company had a service issue with SAW, Mr. Wisener (SAW) "went ballistic" and started "screaming." "He said he could cut us off and do whatever he wanted because it was his railroad." Mr. Kidwell stated this was a clear threat to retaliate, and that Mr. Wisener went on to discuss the "incompetence" of the shipper, the "power" of SAW and his "willingness to use it." Mr. Kidwell explained that Mr. Wisener "intended to and did scare the heck out of us." ¶2. Mr. Kidwell explains that "[a] SAW shipper lives in fear that SAW management on a whim will cease service" and that SAW management is "not compatible with a common carrier railroad." ¶3. Mr. Kidwell specifically supports revocation of the exemption. Id.



SAW and its management toward shippers on the SAW system. When a railroad's management makes physical as well as economic threats against some of its shippers in order to silence them, then no shipper can count on reliable or adequate rail service. Accord, Appendix I (Attebury and Compress Letters). SAW behaves as if it has market power, and its use of market power is abusive.

#### C. Other Part 1147 Requirements

49 C.F.R. 1147.1(b)(1)(ii) (summary of discussions). Early in the alternative use proceeding, PYCO indicated that it was willing to meet with SAW management if SAW management had any concrete measures to propose to PYCO to address PYCO's concerns. SAW never responded, except to accuse PYCO of refusing to meet with SAW in filings before this agency. Based on PYCO's experience with SAW, SAW management simply tells a shipper whatever SAW chooses and then threatens to throw the shipper out if the shipper wishes to discuss the matter. Lacy V.S. (Attachment F), Lacy Supplemental Declaration (Attachment G). See also Kidwell Declaration (Attachment L). PYCO management no longer wishes to endure that kind of behavior or suffer the sometimes profane speech and attempted physical intimidation that go along with it. SAW management hung up on a conference call in which the undersigned was listening in during an attempt to discuss the service protocol governing alternative rail service for PYCO over SAW lines last February. This precipitated the need for this Board to intervene with a

protocol order (Decision in F.D. 34802, served Feb. 16, 2006). In sum, it is not possible to discuss matters with SAW, because in telephone calls SAW either dictates and hangs up, or at meetings dictates and walks/throws out.

Since filing the alternative use proceeding, PYCO either directly or through WTL has attempted to raise with SAW various issues germane to any rail service to PYCO over the SAW trackage. PYCO's efforts have centered on (a) attempts to persuade SAW to stop blockading the industrial crossing used by PYCO to access its \$11 million cottonseed stockpile and (b) attempts to persuade SAW to inspect and to repair trackage used by WTL to provide service to PYCO.

SAW in essence hung up on telephone calls about the crossing, and has thus far refused any discussion.

As to track repair, most recently (June 23), WTL and PYCO rail counsel (Mr. Heffner and Mr. Montange respectively) telephoned SAW rail counsel (Mr. McFarland) to determine if SAW would permit an independent inspection of the relevant SAW trackage. SAW through its counsel flatly refused.

PYCO's Lubbock counsel was advised by SAW's Lubbock counsel on June 26 that SAW had decided simply to oppose PYCO essentially across the entire spectrum of SAW's relationship to PYCO. This essentially is what SAW's Mr. Wisener informed PYCO's Mr. Lacy that SAW was going to do to PYCO last November. See Lacy Verified Statement ¶ 14 and daily log for November 18, 2005 (Attachment F). As stated by Mr. Lacy in his Supplemental

Declaration (Attachment D) ¶ 3,

"SAW by its actions and inactions has persisted in this retaliatory course to date. PYCO sees no evidence that SAW is ready or willing to change its retaliatory behavior."

PYCO notes that US Rail Partners has expressed public interest in acquiring the SAW assets. PYCO has agreed to confidential discussions with US Rail Partners. Because the discussions are confidential, it is inappropriate to describe their nature or scope. However, it is fair to say that nothing so far has materialized in those discussions that alleviates the need for Part 1147 relief.

On June 27, 2006, SAW's Lubbock counsel (Mr. Gorsuch) disclosed to PYCO in a pleading that SAW has purported to sell at least a portion of its track and underlying real estate to an entity called "Choo Choo Properties" on or about June 16, 2006. That portion of property sold to Choo Choo is said to include the "we" at which PYCO's industrial crossing is located. PYCO believes that Choo Choo Properties is owned by the Wisener family and that the sale was part of an effort to defeat this Board's jurisdiction, undermine its orders, or further complicate any effort to compose differences between the parties. See Declaration of Gary McLaren, Attachment B, ¶ 8.

In the circumstances, PYCO has exhausted all reasonably available means to communicate with SAW and to compose differences. SAW has a reputation in Lubbock for retaliation against shippers who voice complaints. PYCO is bearing the

brunt of that retaliation, and expects that it will continue to be subject to SAW retaliation so long as SAW is incumbent rail provider in Lubbock.

In the circumstances, it is unlikely that SAW will restore adequate rail service to PYCO within a reasonable period of time, or that service if restored will be or remain adequate. In the circumstances, PYCO will face a crisis and an emergency subsequent to October 23 unless this Part 1147 petition is granted. The 2006 cotton rush commences in mid-October. Due to improved seedstock, another large harvest is likely weather permitting, and PYCO will remain heavily rail dependent for cottonseed oil and related shipments in all events.

49 C.F.R. § 1147.1(b)(1)(iii) requires a commitment by another railroad to supply alternative service. PYCO attaches commitment letters of our current alternative service provider (WTL) as Attachment J. The letters contain the representations required by the relevant subsection. WTL's successful provision of alternative service under 49 C.F.R. § 1146.1(b)(1)(iii) confirms that it will meet the requirements of the comparable Part 1147 regulation.

D. Request for Special Condition (track inspection/repair)

While the existing service protocol, as modified by this Board in its Decisions in F.D. 34802 served February 16, 2006, and June 21, 2006, should work for the provision of service, this will only be the case if SAW inspects and timely repairs its track. SAW has not been doing so and WTL in consequence

sustained an expensive derailment on June 14.<sup>30</sup> While PYCO has requested an FRA inspection, SAW may avoid repairs by declaring the track "excepted," and otherwise may seek to avoid its responsibilities to repair by declaring an embargo, notwithstanding (and perhaps because of) the damage that will cause PYCO. PYCO does not wish to suffer a service breakdown due to SAW's failure to inspect or to repair its trackage.

PYCO accordingly requests that this Board issue a condition applicable to the relief authorized under Part 1147 that allows PYCO to enter all portions of the SAW premises employed to provide service to PYCO through a qualified private inspector during the hours of operation by PYCO's alternative service provider. For each deficiency under, or violation of, FRA track requirements noted by the inspector, PYCO further requests that this Board provide that PYCO is authorized to make the required repair through an independent contractor at reasonable market rates after two days notice and opportunity to cure to SAW. In the case of an emergency repair (e.g., a derailment), PYCO requests authority to contract to make the repair immediately.

The FRA program calls for self-certification of track inspectors. That is, railroads self-certify their own track inspectors. PYCO cannot count on cooperation from SAW in certifying any otherwise qualified third person to inspect SAW tracks. PYCO accordingly requests that this Board specifically indicate that "qualified private track inspector" for purposes

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<sup>30</sup> See Déclaration of Eldon Martin, Attachment G.

of PYCO's requested condition means any person certified to inspect track by PYCO's alternative service provider. This will ensure that a knowledgeable track inspector is involved. PYCO further requests that any sums spent by PYCO on independent inspection and repair may be deducted from any amounts due and owing for use of the trackage for alternative service. Because the owner of the trackage is responsible for inspection and repair, it is only fair that PYCO be given a credit for performing those tasks itself given SAW's lack of attention to the matter.

The requested condition is necessary to prevent what would amount to constructive abandonment of the lines by SAW. See also Supplemental Declaration of Robert Lacy, Attachment B, ¶ 2 (track repair problem) and ¶ 6 (need for independent power to inspect and repair). As noted, the track disrepair has already resulted in a costly derailment. WTL has made it quite clear that something must be done to ensure that someone is able to maintain the track in the absence of any activity by SAW on that score.

#### IV. Amendment to Petition for Partial Revocation of Commodity Exemption

In PYCO's Part 1146 proceeding (Finance Docket 34802), SAW asserted as a defense that this Board lacked jurisdiction to issue an alternative service order by reason of the exemption in 49 C.F.R. § 1039.10 for cotton linters, cottonseed hulls, and cottonseed. While PYCO does rely on rail to ship these products, PYCO is also a major cottonseed oil producer, leasing

a fleet of 120 tankcars for that purpose. In addition, PYCO produces cottonseed meal, which PYCO ships by rail. This Board specifically excepted from the exemptions in section 1039.10 cottonseed oil and cottonseed meal [see 49 C.F.R. § 1039.11(a) (STCC No. 20, except 20 911, cottonseed oil; STCC No. 20 914, cottonseed cake or meal or byproducts)]. Thus, the Board unquestionably has jurisdiction over PYCO's major product line (oil) as well as cottonseed meal and cake. Shipments of these products cannot be distinguished from shipments of exempt commodities. SAW's service deficiencies are across the board, and relief for non-exempt commodities requires similar relief for exempt commodities. In the Part 1146 proceeding, SAW in fact argued that "it would not be practical [] or safe to provide for alternative rail service" for only the non-exempt commodities shipped by PYCO. See STB Decision in F.D. 34802, served June 21, 2006, at p. 3; quoting SAW Supplement at p. 5.

While PYCO does not believe that the commodity exemption is applicable (accord STB Decision in F.D. 34802, served June 21, 2006, at p. 4), to the extent it were applicable, it should be revoked for purposes of relief under Part 1147 for PYCO against SAW for the same reasons cited by this Board in revoking the exemption for those purposes under Part 1146. Decision in F.D. 34802, served June 21, 2006, at p. 4. Because PYCO's Petition for Partial Revocation did not specifically state that PYCO sought partial revocation for purposes of relief under Part 1147 (or its operative statutes), PYCO hereby amends its

Petition to so state.

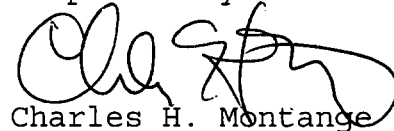
V. Conclusion

For the reasons stated above, PYCO petitions this Board to issue an alternate service order under Part 1147 effective no later than October 23, 2006.

Certification of service of this petition as provided in 49 C.F.R. § 1146.1(b)(1)(iv) is provided in the transmittal letter to Mr. Williams as STB Secretary.

BNSF has authorized PYCO to state that it is not opposed to the relief sought herein.

Respectfully submitted,



Charles H. Montange  
426 NW 162d St.  
Seattle, WA 98177  
(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.



Attachments:

- A -- Supplemental Declaration of Robert Lacy
- B -- Declaration of Gary McLaren
- C -- Declaration of Les Howell
- D -- BNSF/SAW Agreement
- E -- Letter to Regional Administrator, FRA
- F -- Lacy Verified Statement (from Part 1146 proceeding)
- G -- Declaration of Eldon Martin
- H -- Declaration of OE Floyd
- I -- Attebury and Compress letters
- J -- WTL commitment letters
- K -- Hanson email
- L -- Declaration of Calvin Kidwell

Verification

I, Gail Kring, depose and state that I am Manager and Chief Executive Officer for PYCO Industries, Inc., that I am authorized to make this Verification, and that I have read the foregoing Petition, and know that the facts asserted therein are true and accurate as stated to the best of my knowledge, information and belief.

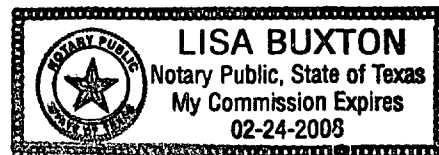
Gail Kring

Subscribed and sworn to before me on  
this 29<sup>th</sup> day of June 2006, by

GAIL KRING, personally known  
to me or proved to me on the basis of  
satisfactory evidence to be the person  
who appeared before me.

Lisa Buxton  
Notary public

My commission expires: 2-24-08



BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34899  
SOUTH PLAINS SWITCHING LTD. )

RAIL GENERAL EXEMPTION AUTHORITY )  
-- MISC. AGRICULTURAL PRODUCTS -- ) Ex Parte 346 (Sub-no. 14C)  
PYCO INDUSTRIES, INC., Petition for )  
Partial Revocation )



VERIFIED PETITION FOR ALTERNATIVE RAIL SERVICE

TEMPORARY RELIEF  
FOR SERVICE INADEQUACIES  
(49 C.F.R. Part 1147)

**FEE RECEIVED**

JUN 30 2006

AMENDMENT TO  
MOTION/PETITION FOR IMMEDIATE REVOCATION  
OF CLAIMED COMMODITY EXEMPTIONS (IF APPLICABLE) SURFACE  
TRANSPORTATION BOARD

PYCO INDUSTRIES'  
VOLUME OF ATTACHMENTS

- A -- Supplemental Declaration of Robert Lacy
- B -- Declaration of Gary McLaren
- C -- Declaration of Les Howell
- D -- BNSF/SAW Agreement
- E -- Letter to Regional Administrator, FRA
- F -- Lacy Verified Statement (from Part 1146 proceeding)
- G -- Declaration of Eldon Martin
- H -- Declaration of OE Floyd
- I -- Attebury and Compress letters
- J -- WTL commitment letters
- K -- Hanson email
- L -- Declaration of Calvin Kidwell

ENTERED  
Office of Proceedings

JUL 03 2006

Part of  
Public Record

Charles H. Montange  
426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
fax: -3739  
for PYCO Industries, Inc.

Attachment A

BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34889  
SOUTH PLAINS SWITCHING LTD. )

Supplemental Declaration of  
Robert Lacy

I, Robert Lacy, make this Supplemental Declaration in support of PYCO Industries, Inc.'s, Petition under Part 1147 for alternative rail service from October 23, 2006, onward.

1. I am the Senior Vice President-Marketing for PYCO Industries, Inc., and am responsible for overseeing shipment of product to customers. As such, I am familiar with PYCO's rail-dependent operations.

2. PYCO has been, is, and will remain for the foreseeable future heavily rail dependent. PYCO is a customer of BNSF Railway, paying BNSF a through tariff for through routes, although incumbent railroad South Plains Switching, Ltd. (SAW), provides local switching in Lubbock pursuant to its contract with BNSF. SAW through its then president Larry Wisener indicated to me on November 18, 2006, that SAW in effect intended to retaliate against PYCO (evidently because PYCO did not immediately accede to SAW's demand that we pay the Wisener family \$5.5 million for unspecified SAW assets) in every way possible.

3. SAW by its actions and inactions has persisted in this retaliatory course to date. PYCO sees no evidence that SAW is

ready or willing to change its retaliatory behavior. Instead, it seeks new ways to evade the intent of STB orders that it cooperate in alternative rail service and in otherwise allowing adequate service to PYCO. SAW consistently has taken actions to frustrate a business relationship, including (a) failure to inspect or to maintain its track, (b) refusal to permit independent inspection, and (c) refusal to permit PYCO to enter the premises for any purpose. The upshot of these actions (or inactions, or frustrations of action) is that alternative provider West Texas and Lubbock Railroad has sustained an expensive derailment and risks further derailments. For example, on June 14, WTL suffered a derailment due to faulty switches and the cost incurred is expected to be approximately \$25,000. WTL has noted additional trackage in need of immediate repair (see attachment). SAW is effectively attempting to shut down service to PYCO completely by failing to maintain its track. In addition, SAW has taken other frustrating and retaliatory actions, including (d) blockade of PYCO's industrial crossing between Plant No. 1 and PYCO's seed stockpile; (e) resistance even to a TRO secured by PYCO to ensure that PYCO can access the stockpile as provided in this Board's June 21 decision in F.D. 34802; (f) harassment of PYCO employees including use of profane language and attempts to bait physical confrontations; (g) refusal to coordinate rail service; and (h) "take it or leave it" demands, followed by abrupt termination of

telephone calls or "throwing people out" in face to face conferences.

4. PYCO needs reliable and adequate rail service.

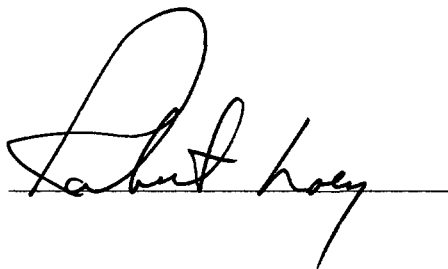
5. Cotton harvest starts in mid-October in a normal year. The Texas cotton belt has had record crops the past two years due to new varieties which have boosted yields coupled with adequate moisture. We do not know yet what the size of the crop for 2006 will be; however, we do know for certain that we will be heavily rail dependent for shipment of cottonseed oil and other products by the latter half of October. PYCO needs reliable and adequate rail service from October 23, 2006, onward.

6. The existing service protocol as modified June 21, 2006, should work to allow reliable and adequate rail service by WTL for PYCO. However, this will be true only if SAW properly inspects and repairs its track. WTL has advised PYCO that SAW is allowing its track to deteriorate to the point of inoperability (WTL email attached). Given SAW's attitude and track record, PYCO surmises that SAW is indirectly seeking to shut PYCO down by failure to inspect and to repair its track, which was badly in need of rehabilitation in the first place. This Board should authorize PYCO to engage a qualified track inspector to inspect (during WTL protocol hours) all trackage employed by WTL to serve PYCO and, after two days prior notice to SAW, to contract with a qualified rail construction firm to make necessary repairs. We believe only

two days prior notice should be afforded because WTL advises that some of the repair needs are urgent. In fairness, PYCO should be permitted to deduct the cost of the inspection and repairs from any amounts due and owing to SAW for use of its track.

Pursuant to 28 U.S.C. § 1746, 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 June 29, 2006

A handwritten signature in black ink, appearing to read "Robert Hoey", is written over a horizontal line.



**c.montange**

---

**From:** "Steve Gregory" <gregorys@iowapacific.com>  
**To:** "c.montange" <c.montange@verizon.net>  
**Sent:** Wednesday, June 28, 2006 11:33 AM  
**Subject:** SAW track condition

I have been advised by our Superintendent Hans Grosstueck that our Roadmaster, Paul Arriaga, has noticed a serious problem on the SAW trackage. Mr. Arriaga was looking at track on PYCO property and then drove by SAW trackage and on his own initiative investigated a track defect and identified significant wide-gauge and crosslevel deviations from the accepted standards, on the route from track 9200 to Plant 2, just inside the Compress plant gate on the north side, I believe. I am not trained in track evaluation but my understanding is this makes the track virtually impassable.

Mr. Arriaga was not authorized to do a complete track inspection and there could be other defects that need to be repaired.

This location is in the vicinity of the recent derailment, and I understand an invoice has been issued for over \$23,000 in the cleanup of that derailment.

If the track condition continues to deteriorate we will have to evaluate embargoing the operation due to track conditions.

**Steve Gregory**  
**Vice President - Marketing**  
**West Texas & Lubbock Railway**  
**Cell: 806-438-0891**  
**Fax: 972-692-8016**

6/28/2006

Attachment B

BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34889  
SOUTH PLAINS SWITCHING LTD. )

Declaration of  
Gary McLaren

I, Gary McLaren, make this Declaration in support of PYCO Industries, Inc.'s, Petition under Part 1147 for alternative rail service from October 23, 2006, onward.

1. I am an attorney licensed to practice law in the State of Texas and have long served as legal counsel in Lubbock for PYCO Industries, Inc. (PYCO).

2. Shortly after this Board extended the original 30 days of alternative rail service to PYCO authorized in Finance docket 34802, incumbent railroad South Plains Switching, Ltd., prevented PYCO from completion of PYCO's private siding expansion and repaving of the private industrial crossing linking Plant No. 1 to PYCO's large cottonseed stockpile. SAW did this by spotting empty rail cars on the "we" athwart the crossing. This also blocked PYCO's use of the crossing. Because this put PYCO's \$11 million cottonseed stockpile at risk and because SAW refused to discuss the matter, PYCO brought the issue to this Board's attention as (a) obvious retaliation against PYCO for seeking relief from STB, (b) an indication of SAW's hostile intent, and (c) a practice that should be discontinued.

3. On June 21, the Surface Transportation Board served a decision in Finance Docket 34802. That decision among other things addressed PYCO's concern that incumbent railroad South Plains Switching, Ltd. (SAW) had blocked PYCO's use of its long-established industrial crossing between PYCO's large outdoor cottonseed stockpile and Plant No. 1. In the decision (slip op. p. 7), the Board indicated that it would modify the protocol to require SAW to keep the "wye" (where the crossing is located) clear during WTL operating protocol hours.

4. The following day SAW moved the empty rail cars, but posted signs athwart the crossing and SAW personnel nearby to continue to prevent PYCO from using the crossing. PYCO management directed me to obtain enforcement of the STB June 21 order in United States District Court, Northern District of Texas, so that PYCO could use the crossing. I telephoned SAW's Lubbock counsel (Mr. Gorsuch) on Friday, June 23, to advise that PYCO intended to file suit and to seek a temporary restraining order (TRO) on the following Monday. Mr. Gorsuch did not return my call. On Monday, June 26, 2006, I sought and obtained on behalf of PYCO a TRO from the United States District Court. A copy of the motion papers is attached as Exhibit A. A copy of the TRO is attached as Exhibit B.

5. Although I confirmed that Mr. Larry Wisener is registered agent for SAW, he refused to accept service of the TRO. A copy was accordingly served on Mr. Gorsuch. I subsequently spoke with Mr.

Gorsuch. He indicated that SAW had decided to oppose PYCO essentially wherever possible. I construed this to mean that SAW will not authorize meaningful negotiations to address any differences between SAW and PYCO.

6. On the following day, Tuesday (June 27), I received from Mr. Gorsuch as attorney for an entity called "Choo Choo Properties" a motion to intervene in the United States District Court proceeding. In the motion to intervene and the associated complaint, "Choo Choo" acknowledges that PYCO has used the crossing for years. "Choo Choo" claims to have purchased all the land, track and ties in the "wye" (area of the crossing) on June 12, 2006, and on that basis seeks to intervene and to enjoin PYCO from using the crossing.

7. Based on a search of the STB e-library, "Choo Choo" has neither sought nor received STB authorization to purchase any portion of SAW. Based on inquiry to BNSF Railway, SAW has not complied with the requirements of section 7 of the BNSF/SAW Agreement that SAW give BNSF prior notice of a sale of a portion of its lines and an opportunity for BNSF to exercise its right of first refusal.

8. "Choo Choo Estates" is the name Larry and Delilah Wisener have given to their home in Lubbock. It is my belief that "Choo Choo Properties" is simply an alter ego of the Wiseners formed for the purpose of holding property for the purpose of attempting to

evade STB jurisdiction or the enforcement of STB orders.

Pursuant to 28 U.S.C. § 1746, 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

6/29/06

A handwritten signature in cursive script, appearing to read "Henry Paulson", written over a horizontal line.

McLaren, Exhibit A

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED  
JUN 26 2006  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_  
Deputy

Defendant

**SERIALS**

5-06 CV 0131-C

NO. \_\_\_\_\_

I.



1.4 This Court has jurisdiction of the subject matter and the parties based upon 49 U.S.C. § 11704 (a) which states: "A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board [Surface Transportation Board] under this part does not obey an order of the Board, except an order for the payment of money, may bring a civil action in a United States District Court to enforce that order under this subsection."

1.5 On June 21, 2006, the Surface Transportation Board issued an order involving the parties to this lawsuit, said order having been disobeyed by Defendant beginning on June 22, 2006 and continuing thereafter until the filing of this Complaint.

1.6 The place where the disobedience of the said order occurred and continues to occur is Lubbock, Lubbock County, Texas.

1.7 This Court has proper jurisdiction and venue pursuant to the above-referenced federal statute and venue facts.

## II.

### GENERAL ALLEGATIONS

2.1 PYCO Industries, Inc. ("PYCO") is involved in the business of processing cottonseed into cottonseed oil, cottonseed meal and other cottonseed byproducts.

2.2 South Plains Switching, Ltd., Co. ("SAW") is a rail carrier engaged in the switching of rail cars from and to the BNSF main line for industries located in Lubbock.

2.3 PYCO is a rail dependent business entity and depends on SAW for the timely placement of its rail cars for shipping purposes. PYCO is SAW's largest switching shipper.

2.4 During the year 2005, a dispute arose between the parties hereto relating to SAW not providing adequate rail service to PYCO at PYCO's Lubbock facilities. The rail dispute centered

around inadequate switching activities by SAW in failing to supply adequate rail cars to PYCO, and further involved threats of physical violence by SAW's owner, Mr. Larry Wisener, against PYCO's management. SAW asked PYCO to purchase SAW for several million dollars, and PYCO declined unless it was able to conduct the standard due diligence procedures relating to such a purchase.

2.5 The dispute was filed with the appropriate federal agency, the Surface Transportation Board ("STB") in December 2005, and on January 26, 2006, the STB issued an opinion, pursuant to 49 U.S.C. 11123 (a) and 49 C.F.R. 1146, in PYCO's favor finding that SAW had provided inadequate rail service. The STB ordered another rail carrier, West Texas & Lubbock Railway Company, Inc. ("WTL") to provide rail service to PYCO. STB Finance Docket No. 34802.

2.6 This alternative service has recently been extended by order of the STB for a period of 270 days from January 26, 2006 to October 23, 2006.

2.7 On March 21, 2006, SAW retaliated against PYCO, and the STB's alternative service order, by blocking a rail grade crossing at PYCO's Plant No. 1 located at 34<sup>th</sup> Street and Avenue A in Lubbock, Texas. The subject grade crossing is known as the "wye track grade crossing." This entire set of facts is discussed in some detail within PYCO's filing before the STB concerning the matter, entitled PYCO Industries' Opposition To Incumbent Rail Carrier's Petition To Terminate Alternative Rail Service And Request For Modification Of Service Protocol, and incorporated herein by reference as Exhibit "1", said Exhibit attached without voluminous attachment exhibits to the original.

2.8 Summarized, the facts of that controversy are that a rail track bisects PYCO's property at Plant No. 1. On the east side of the bisection is property upon which PYCO is presently storing some \$11 million worth of cottonseed. The wye track grade crossing allows PYCO to

traverse the railroad and transport the subject cottonseed from the east side of their facilities, where the seed is stored, to the west side to accomplish processing of the seed.

2.9 The subject grade crossing has been used continuously by PYCO to access the stored seed since 1991, without benefit of any written agreement between PYCO and the original or subsequent owners of the railroad.

2.10 During 1991, the railroad was owned and operated by the former Atchison Topeka and Santa Fe Railway Company ("ATSF"). During 1999, the corporate successor to ATSF sold the railroad to SAW for ten dollars.

2.11 PYCO's use of the subject grade crossing had never been at issue with the ATSF or SAW until the STB took away SAW's right to service PYCO.

2.12 SAW's retaliation occurred originally in the form of SAW positioning a cut of several empty railcars to block completion of PYCO's resurfacing of the subject grade crossing in March 2006.

2.13 From March 21, 2006, through June 21, 2006, SAW refused to move the cut of railcars less than 50 feet down the railroad track to allow PYCO to complete the resurfacing of the crossing, and thereby begin moving the subject seed across the crossing to the west side of PYCO's Plant No. 1 for processing.

2.14 SAW's response was that SAW owned the track and they did not intend to move the cut of cars even if space to accomplish such movement existed on their trackage.

2.15 PYCO, aware that STB had jurisdiction over the crossing blockage of the crossing, petitioned for injunctive relief in March 2006 to allow PYCO to continue surface repairs to the

crossing and resume transportation of the seed from east to west before summer's weather began the rapid deterioration of the seed.

2.16 SAW argued before the STB that PYCO had no easement for use of the grade crossing and that SAW was free to block the crossing.

2.17 The STB considered the pleadings and verified statements of the parties and disagreed with SAW. On June 21, 2006, STB ordered SAW to immediately remove its blockage of the crossing during the WTL operating protocol hours of 10 a.m. to 2 p.m. to allow PYCO to reach its seed. This order is attached hereto as Exhibit "2" and incorporated herein by reference.

2.18 As the Order contemplated, PYCO's request for injunctive relief from the STB was "...rendered unnecessary because the modification would achieve the same results." That is PYCO would have access to the seed via the grade crossing for the period of alternative rail service, or through October 23, 2006.

2.19 The day following the issuance of the STB's order, June 22, 2006, SAW retaliated against the STB and PYCO by moving the cut of cars and in their place erecting "Private Property" signs in the middle of the subject crossing, as depicted in the photographs of the subject grade crossing taken the afternoon of June 22, 2006, and attached hereto as Exhibit "3" and incorporated herein by reference.

2.20 SAW continues to block the subject grade crossing, in defiance of the STB's order, with its posted signs and the presence of SAW employees located a few yards away and monitoring the crossing. PYCO's management is concerned that any attempts to displace the sign may result in violence from SAW's employees towards PYCO.

2.21 After waiting for months to gain the ruling of STB to order the crossing cleared, now PYCO is retaliated against by SAW yet again through their most recent actions.

2.22 Meanwhile, some \$11 million dollars worth of cottonseed, at cost, remains stranded on the opposite side of the SAW blockade of the crossing. As summer's temperatures begin to rise, the seed itself becomes jeopardized, as does PYCO's ability to meet its contractual obligations for cottonseed byproducts. Further, PYCO will suffer immeasurable harm in the damage to its business reputation through the actions of SAW's blockade and the resultant failure to achieve satisfaction of PYCO's contractual obligations.

### III.

#### COUNT 1 - ENFORCEMENT OF THE SURFACE TRANSPORTATION BOARD'S ORDER

3.1 Plaintiff realleges and incorporates paragraphs 1.1 through 2.20 as though fully set forth herein.

3.2 PYCO seeks enforcement of STB's order issued June 21, 2006 in STB Finance Docket 34802 as to SAW's clearance of the rail grade crossing made the subject of said order, and the enforcement of PYCO's right of use of the subject grade crossing during the WTL protocol hours of 2:00 p.m. to 10:00 a.m. daily, pursuant to 49 U.S.C. § 11704 (a).

### IV.

#### COUNT 2 - REQUEST FOR PRELIMINARY INJUNCTION

4.1 Plaintiff realleges and incorporates paragraphs 1.1 through 4.1 as though fully set forth herein.

4.2 Plaintiff will suffer irreparable injury if SAW is not enjoined during the pendency of this lawsuit from preventing PYCO's resurfacing of the subject grade crossing and subsequent use of the grade crossing during the hours from 2:00 p.m. to 10:00 a.m. daily for the purpose of transporting cottonseed from the storage area to the processing plant.

4.3 Plaintiff will suffer irreparable harm unless injunctive relief is granted.

4.4 PYCO will not be able to alternatively transport the subject \$11 million worth of cottonseed in a timely enough manner to prevent significant spoilage of the subject cottonseed and further to be able to satisfy contractual obligations of PYCO to its buyers of cottonseed byproducts, if forced to transport the seed via public street as previously suggested by SAW to the STB.

4.5 Unless PYCO can begin transporting the cottonseed within the coming ten days, the internal temperature of the cottonseed storage pile located on the opposite side of the SAW blockade will significantly and unavoidably increase resulting in large scale spoilage of the seed. This increase in internal temperature of the seed pile is already imminent, in that the temperature already exceeds that of the normal standards utilized by PYCO in determining when to begin movement and processing of the stored seed.

4.6 Once PYCO begins to lose the quality of this amount of stored cottonseed, the injury to PYCO would be irreparable in that a monetary estimate of the harm becomes incapable of being accurately measured. PYCO has established its market integrity over decades of operation in the cottonseed byproducts industry and has buyers of its products located across the nation.

4.7 If the cottonseed is lost in whole or large part due to the SAW blockade, PYCO will not only be unable to fulfill existing contractual obligations with the subject seed, but will also be damaged through loss of its contractual integrity and business goodwill by failing to deliver product

as promised. This type of harm will be incapable of being undone by monetary damages as PYCO will not only be unable to fulfill its contractual obligations, but will lose future sales through buyers' unwillingness to contract, or even negotiate, with PYCO due to the failures stemming from PYCO's inability to perform resulting from SAW's blockade.

4.8 PYCO cannot receive an adequate remedy at law if SAW continues to blockade the crossing. PYCO will be unable to accurately and adequately calculate damages from the failure of PYCO's ability to meet its contractual obligations, resulting from SAW's blockade of the crossing and the resulting damage to PYCO in the cottonseed byproduct marketplace to PYCO's goodwill and reputation for being able to fulfill a buyer's request. Damages flowing from the damage to business reputation are incapable of accurate measurement and thereby adequate remedy.

4.9 There is a substantial likelihood that PYCO will prevail on the merits because SAW has clearly failed to cease and desist from blockading a rail grade crossing made the subject of an STB order. SAW has not only retaliated against PYCO, but now retaliates against the STB's order. SAW has directly violated a federal agency's order, and PYCO is within its statutory rights to seek injunctive relief and will prevail in such pursuit given SAW's disobedience and PYCO's compliance with the STB's orders issued in this matter.

4.10 The threatened harm to PYCO outweighs the harm a preliminary injunction would inflict on SAW. SAW would have the ability to operate trains over the crossing, as contemplated by the STB's operating protocol, for twenty hours per day, except for the period of time from 2:00 p.m. to 10:00 a.m. daily. SAW has no use of the crossing other than the operation of trains over the crossing. PYCO, as detailed hereinabove, has imminent need to use the subject crossing to prevent the spoilage of seed and the resulting harm therefrom.

4.11 Issuance of a preliminary injunction is not against the public interest because such an injunction would have no ill effects on any other member of the public as the subject crossing is located between the private property of PYCO solely and the rail located upon the crossing would continue to operate as prescribed by the governing federal agency of same, the STB.

4.12 PYCO is willing to post a bond in the amount the court deems appropriate.

4.13 PYCO asks the court to set its application for preliminary injunction for hearing at the earliest possible time and, after hearing the request, issue a preliminary injunction against Defendant SAW.

#### V.

#### DAMAGES

5.1 Plaintiff realleges and incorporates paragraph 1.1 through 4.13 as though fully set forth herein.

5.2 For the reasons set forth hereinabove, Plaintiff PYCO seeks the following:

- a. A preliminary injunction against SAW preventing them from in any way or manner fouling or blocking the rail grade crossing made the subject of STB Finance Docket 34802 issued June 21, 2006, and thereby allowing PYCO to complete resurfacing of the crossing and use of the subject crossing between the hours of 2:00 p.m. to 10:00 a.m. daily through October 23, 2006.
- b. Enter judgment for Plaintiff.
- c. Award costs of court.
- d. Award attorneys' fees.
- e. Grant such other and further relief to which Plaintiff may know itself entitled.



THE STATE OF TEXAS  
COUNTY OF LUBBOCK

§  
§  
§

**VERIFICATION**

BEFORE ME, the undersigned Notary Public, on this the 26<sup>TH</sup> day of June, 2006,  
personally appeared **Gail Kring**, who, upon his oath, duly stated as follows:

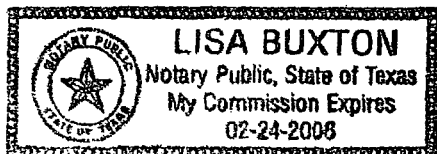
"My name is Gail Kring. I am over the age of 18 years and competent and able to make this Affidavit. I am employed by PYCO Industries, Inc. in Lubbock, Texas, and have personal knowledge of the facts and circumstances surrounding the subject of this lawsuit.

"I have read the above and foregoing Plaintiff's Original Complaint And Application For Injunctive Relief, and the facts contained therein are just and true and correct to my personal knowledge."

Further Affiant sayeth not.

Gail Kring  
Gail Kring

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, by the said Gail Kring, on this the 26<sup>TH</sup> day of June, 2006, to which witness my hand and seal of office.



Lisa Buxton  
Notary Public, State of Texas

# **EXHIBIT 1**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. =  
ALTERNATIVE RAIL SERVICE --  
SOUTH PLAINS SWITCHING LTD. )

F.D. 34802



**PYCO INDUSTRIES' OPPOSITION**  
**TO INCUMBENT RAIL CARRIER'S**  
**PETITION TO TERMINATE ALTERNATIVE RAIL SERVICE**  
**AND**  
**REQUEST FOR MODIFICATION OF SERVICE PROTOCOL**

Respectfully submitted,

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ATTORNEYS FOR PYCO INDUSTRIES, INC.

Date due: April 6, 2006

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

**PYCO INDUSTRIES' OPPOSITION**  
**TO INCUMBENT RAIL CARRIER'S**  
**PETITION TO TERMINATE ALTERNATIVE RAIL SERVICE**  
**AND**  
**REQUEST FOR MODIFICATION OF SERVICE PROTOCOL**

Pursuant to 49 CFR 1146.1(d)(2), Respondent PYCO Industries, Inc. ("PYCO") replies to the latest "Petition to Terminate Alternative Rail Service" South Plains Switching, LTD. CO. ("SAW") filed with the Board March 30, 2006. PYCO urges the Board to reject SAW's Petitions for the many of the same reasons that led it to deny the relief SAW sought in its previous Petition filed February 9, 2006. Contrary to the Board's requirements, its Petition provides not a shred of evidence demonstrating that SAW is prepared to provide adequate service at this time. Moreover, PYCO requests that the Board order continuation of alternative service until at least June 25, 2006, the present expiration date. Finally, PYCO requests relief by the Board from certain retaliatory actions taken by SAW in response to the present alternative service order.

**Background**

On January 26, 2006, the Board granted PYCO's initial Petition for Alternative Rail Service under 49 U.S.C. 11123(a) and 49 CFR 1146.1, authorizing the West Texas & Lubbock Railway Company, Inc. ("WTL") to provide service to PYCO over SAW's tracks and facilities. In time, the Board extended that alternative rail service order until June 25, 2006, due to SAW's

continuing refusal to cooperate. In granting PYCO's request for relief, the Board noted that "there is a rebuttable presumption that the alternative service would need to continue for more than 30 days" and that this additional 120 day period [until June 25] will give SAW "an opportunity to make a clear showing that it is prepared to restore service to PYCO at levels needed and requested by PYCO."<sup>1</sup> The Board's regulations caution incumbent carriers against filing such petitions to terminate "prematurely." 49 CFR 1146.1(d)(1).

In denying its first petition, the Board reasoned that despite SAW's "new management" and promises of cooperation, its actions belie any change in behavior. For instance, the Board noted SAW's refusal to take part in the early morning conference calls intended to insure a safe coordination of operations between and among carriers at Lubbock. It stated that PYCO is now entering its most "rail-dependent season" with a large bumper crop expected and that WTL has thus far been successful in cutting PYCO's shipping backlog and meeting current demand. For these reasons, the Board concluded that SAW has not "met its burden of showing that the emergency is over or that it could and would provide the same level of service that WTL is providing."<sup>2</sup>

### **The Current Position**

PYCO continues to receive adequate rail service from its alternative service provider, WTL. Now, shortly after this Board received SAW's first petition to terminate, SAW again petitioned to terminate alternative rail service. SAW's latest petition is based upon the "personal observation" of SAW's owner, Mrs. Wisener, and her bases for termination are as follows:

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<sup>1</sup>Surface Transportation Board Decision, STB Finance Docket No. 34802, decided February 24, 2006, p.1.

1. PYCO is not “working” seven days a week;
2. SAW is prepared to provide PYCO with “whatever rail services are needed”;
3. SAW is losing revenue as a result of the alternative rail service order; and
4. SAW is not to be blamed for rail service problems, but rather BNSF.<sup>3</sup>

With the exception of item 2 above, PYCO does not believe that any of the other bases, even if true, are contemplated by 49 C.F.R. § 1146.1(d)(1) relating to termination of alternative rail service. All will be addressed below, including SAW’s hollow representation that it is ready, willing and able to reform its past actions and provide satisfactory service to PYCO.

Indeed, not only does SAW not provide evidence for alternative service termination through its petition, SAW should be further enjoined by the Board for SAW’s recent retaliatory actions taken against PYCO, to PYCO’s further and continuing detriment.

On March 21, 2006, SAW escalated its retaliation against PYCO by blocking PYCO’s access to complete rehabilitation of a crossing from PYCO’s outdoor cottonseed storage pads to PYCO’s Plant No. 1. SAW’s action threatens imminent curtailment of PYCO’s rail dependent operations. PYCO therefore is forced to request a modification of the service protocol entered by STB in this docket in its decision dated February 16, 2006. The modification should require SAW to cease parking equipment on the grade crossing thereby allowing PYCO to complete crossing work or use of the crossing during the period of the alternative service order. This will maintain status quo and allow continuation of PYCO’s rail-dependent operations at Plant No. 1.

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<sup>2</sup>Id. at p.4.

<sup>3</sup>SAW Pet. at 3-4.

## Argument

The starting point for the Board's analysis of this most current Petition To Terminate is the simple fact that PYCO continues to receive adequate rail service from its alternative service provider, WTL.

### I. Round Up The Usual Suspects

Although addressed in the later part of SAW's subject petition, SAW claims that in addition to PYCO and WTL's faults, the core of PYCO's rail service problems are attributable to BNSF not to SAW. SAW and its counsel go to considerable lengths to detail SAW's legal battles with BNSF and its effect on PYCO. PYCO can only respond that if the problem is actually the BNSF, and not SAW, why has WTL been able to provide good rail service to PYCO, when WTL also has to also work with BNSF.

SAW seems incapable of accepting responsibility for its actions and shortcomings and intent upon blaming the same group of entities, no matter the circumstances of SAW's own making.

When STB issued a service protocol for the parties by decision served February 16, 2006, the Board provided (over SAW's objection) in essence that SAW could not obstruct tracks 9200 and 9298, because those tracks were needed to serve PYCO's Plant No. 2.

By similar token, a grade crossing between parcels of PYCO property, discussed fully below, which PYCO is seeking to rehabilitate and use is essential for continued rail dependent operation of PYCO's Plant No. 1, and SAW has absolutely no railroad reason to block the crossing. SAW is doing so only to obstruct PYCO's ability to operate and to retaliate against PYCO for seeking this Board's assistance. PYCO requests this Board to modify the protocol to require SAW to keep the crossing clear. If SAW wishes to contest PYCO's use of the crossing,

SAW should bring an action in state court to establish its legal right.

## **II. Erroneous Observation, False Conclusion**

First, Mrs. Wisener makes her "personal observation" that PYCO is not "working seven days a week."<sup>4</sup> Wisener and SAW seem to claim that rail service has returned to normal levels, implying that SAW now is able to provide service with its foreshortened capacity.

In fact, PYCO continues to operate its plants seven days a week, twenty four hours a day, and has throughout the pendency of the alternative service order.<sup>5</sup> PYCO's rail dependent operations continue to demand a quality of rail service well beyond the inadequate service provided by SAW prior to this Board's alternative service order. PYCO continues to face significant rail shipping requirements equaling, if not exceeding, those that gave rise to these proceedings before the Board.<sup>6</sup>

Although Mrs. Wisener has no knowledge of PYCO's operating schedule, and makes erroneous personal observations about same, it is nonetheless not the number of days a week that PYCO "works" that form a basis for termination of alternative service. If PYCO only operated one day a week, and inadequate rail service was present, SAW would still be subject to an alternative service order. A shipper's operations schedule should be of no consequence to the Board under circumstances where the shipper has maintained its operation schedule for years, where the incumbent rail provider, for no better reasons than SAW's, begins to provide inadequate rail service.

As evidenced by the affidavit of PYCO's chief executive officer, Gail Kring, nothing has changed from the previous circumstances warranting the Board's subject order relating to heavy

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<sup>4</sup>Verified Statement of Mrs. Wisener at 1.

<sup>5</sup>Verified Statement of Gail Kring, Exhibit A, para. 4-5.



demand for rail service over the coming months by PYCO.<sup>7</sup> PYCO is still operating at full capacity and has a large cottonseed crop to work off through rail shipments of its cottonseed byproducts. PYCO's need for adequate service is the same or greater than when we filed our original petition.<sup>8</sup>

If SAW's point to this Board is to falsely represent that PYCO has reduced its operations and things are returning to a 'normal' rail shipping level that SAW could accommodate, nothing could be further from the truth. SAW either refused, or could not provide, adequate rail service at the time the Board issued its order. Nothing about PYCO's operational facts has changed that would allow SAW to claim that such a fact alone should be used as a basis for termination of alternative rail service.

### **III. Same Leopard, Same Spots**

Next, SAW represents to the Board that alternative service should be terminated because SAW is "prepared and willing" to provide PYCO with adequate rail service. Mrs. Wisener makes this statement in her supporting verified statement without further elaboration or evidence. PYCO is essentially requested to 'just trust her' as the sole owner of SAW.

There are several reasons why PCYO doesn't just accept Mrs. Wisener's statement. These reasons all are centered on Mrs. Wisener and SAW's actions, not words. Indeed, PYCO's previous response to SAW's previous request to terminate alternative rail service, filed February 16, 2006, suggested that just as a leopard can't change its spots, neither would SAW change its actions.<sup>9</sup> The analogy was prophetic.

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<sup>6</sup>Id. at para. 15-17.

<sup>7</sup>Id. at para. 5, 15-16.

<sup>8</sup>Id.

<sup>9</sup>See PYCO's Opposition to Pet. to Terminate, p. 4-9.

In SAW's Opposition To Petition For Alternative Rail Service filed on December 28, 2005, Mr. Larry Wisener claimed in his verified statement that PYCO was partially to blame for its rail service problems because of "insufficient track infrastructure."<sup>10</sup>

The "insufficient track infrastructure" is alleged lack of storage track. But PYCO's need for storage track is largely a function of SAW's prior inadequate service, which caused a backlog of cars. PYCO, to reduce its dependency on SAW for car storage (arising due to SAW's inadequate service in the first place), undertook extensive track construction. As the construction proceeded, SAW watched PYCO's progress on track constructions from its property.<sup>11</sup> Just prior to completion of the rail construction project, on March 21, 2006, SAW parked a cut of empty cars on its "wye" track adjacent and parallel to one of the newly refurbished tracks of PYCO.<sup>12</sup>

This cut of cars was positioned in such a manner on SAW's track as to prevent the completion of asphalt surfacing of the private grade crossing over PYCO and SAW's tracks.<sup>13</sup> This grade crossing is fully discussed in the affidavit of PYCO's senior vice president, Mr. Robert Lacy.<sup>14</sup>

The subject grade crossing has served PYCO continuously since the early 1990's, and is used to transport cottonseed from two large outdoor storage piles to processing equipment located to the west across the subject tracks.<sup>15</sup> Under Texas easement laws, PYCO possesses, at a minimum, an implied prescriptive easement, or easement by estoppel in part, due to its

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<sup>10</sup>See Verified Stmt. of Larry Wisener, p. 5-6 attached as exhibit to SAW's Opposition To Petition For Alternative Rail Service.

<sup>11</sup>Verified Statement of Robert Lacy Exhibit B, para. 4.

<sup>12</sup>Id.

<sup>13</sup>Id. at para. 4-15.

<sup>14</sup>Id.

continuous use of the grade crossing for a period exceeding ten years without objection by the dominant estate. Presently, there is cottonseed valued at a cost of \$11 million stored across the tracks from PYCO's equipment, and stranded by SAW's actions in blocking the crossing.

PYCO notified WTL that the cut of cars needed to be moved in order to complete track construction.<sup>16</sup> WTL in turn notified SAW by telephone, and advised PYCO that SAW's response to the request was a "NO" and a hangup by SAW to the phone call without further discussions.<sup>17</sup>

PYCO has learned that SAW is storing the subject cars for another entity and that there is abundant storage space for the subject cut of cars on other SAW track.<sup>18</sup>

SAW's action in parking the cut of empty cars is simply retaliation to the Board's alternative service order. Next, PYCO attempted resolution of moving the cut of cars via communication between the parties' respective lawyers.<sup>19</sup> SAW refused such cooperation.

PYCO then notified the STB by letter dated March 27, 2006, of the situation.<sup>20</sup>

SAW's response: a letter to the Board from Mrs. Wisener dated March 28, 2006, never offering to resolve the matter "honestly and diligently" - as Mrs. Wisener indicated in her February 8, 2006 verified statement - but instead claiming that PYCO was trying to use the STB, gain an easement PYCO didn't have, gain complete control of SAW's yard, claim violation of state clearance laws, criticize PYCO and WTL, and claim that PYCO is "harassing SAW."<sup>21</sup>

But SAW, the would-be cooperative leopard, was not yet finished. On the same day,

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<sup>15</sup>Id. at para. 18.

<sup>16</sup>Id. at para. 22.

<sup>17</sup>Id.

<sup>18</sup>See Verified Statement of Stephen Gregory, Exhibit C.

<sup>19</sup>Id. at para. 23.

<sup>20</sup>Id. at para. 24.

March 29, 2006, that Mrs. Wisener gave her verified statement accompanying SAW's present Petition To Terminate Alternative Service, SAW's Lubbock lawyer drafted a letter to PYCO's counsel threatening that any use of the subject grade crossing would be considered trespassing and SAW would utilize all legal remedies available to it.<sup>22</sup>

Moreover, two days earlier, on March 27, 2006, SAW filed suit against PYCO in state district court in Lubbock, Texas, to collect some \$49,000 in "constructive placement" surcharges levied against PYCO since January 2006.<sup>23</sup> These are the actions of SAW's "new management" that contradict their own verified statements. Just as the leopard does not change its spots, nothing has changed at SAW except that now SAW seeks to retaliate directly against PYCO in the face of STB's order.

More than adequate track space exists to uncouple the lead car blocking the crossing and shove the cut forward (south) on SAW's track to accommodate surfacing and access to the cottonseed by PYCO.<sup>24</sup>

More than adequate track space also exists to shove the entire cut of cars back on SAW's track (north) to accommodate PYCO's request.<sup>25</sup>

The subject crossing has been used continuously to reach the outdoor cottonseed storage area since at least 1991, many years prior to SAW purchasing the subject track from BNSF

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<sup>21</sup>Id.

<sup>22</sup>Id. at para. 25.

<sup>23</sup>See PYCO Rebuttal to SAW Reply filed January 3, 2006, p. 1-4 under Section III Argument, Verified Statement Lacy at para. 29.

<sup>24</sup>Verified Statement of Lacy at para. 12.

<sup>25</sup>Id. at para. 14.

in 1999.<sup>26</sup>

Although no written agreement between BNSF, SAW and PYCO has been located, SAW and its counsel are well aware that for the entire period of time SAW has owned the track, and before that BNSF, PYCO has continuously utilized the grade crossing with no objection from SAW or BNSF.<sup>27</sup>

Now, time is of the essence in gaining access to the cottonseed on the opposite side of SAW's tracks. As Mr. Lacy's affidavit details, as temperatures begin to rise in Texas during April, PYCO has historically processed these particular storage piles of seed because their large tonnage makes them particularly prone to rapid deterioration.<sup>28</sup> Deterioration through heat build up in the cottonseed will result in damages to PYCO the longer the cottonseed is stranded by SAW's actions.<sup>29</sup>

Moving the subject seed via truck traffic on busy 34<sup>th</sup> Street, as suggested by SAW, is not possible with PYCO's off-road equipment. Moreover, moving the seed on city streets would pose significantly increased hazards to the public traveling on 34<sup>th</sup> Street, as a result of a high volumes of truck traffic.<sup>30</sup>

SAW doesn't wish to work with PYCO. SAW doesn't wish to acknowledge PYCO's rights or accept responsibility for SAW's shortcomings, factual or legal. SAW furnishes no

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<sup>26</sup>Id. at para. 18-19.

<sup>27</sup>Id.

<sup>28</sup>Id. at para. 20.

<sup>29</sup>Id.

<sup>30</sup>Id.

evidence that it is prepared to resume service to PYCO, but PYCO furnishes ample evidence of SAW's retaliatory efforts against PYCO and effectively against the STB.

PYCO correctly predicted the leopard would not change its spots. Instead, SAW acted in such a way as to further reveal the existing spots.

#### **IV. A Point Of Understanding Between PYCO And SAW**

As mentioned, SAW complains in its petition that it is losing revenue as a result of the alternative rail service order. PYCO also has incurred significant expenses as a result of SAW's improper service. Now thanks to SAW's retaliatory efforts, PYCO continues to expend further resources to answer SAW's inappropriate actions. PYCO wishes SAW would cease its unnecessary retaliation in order that both companies might conserve their economic resources. However, the fact that SAW's strategy is costing SAW money is not relevant.

The only grounds to terminate such service is that SAW will provide adequate service. SAW's own strategy and tactics demonstrate that providing adequate service to PYCO is the last thing on SAW's mind, and SAW's intent remains what it was in November 2005: to cause as much disruption to PYCO as SAW possibly can achieve.

This is hardly compatible with discharge of a common carrier obligation. SAW's hostile attitude is further demonstrated by SAW's failure, in violation of the service protocol issued by this Board, to designate a representative available twenty four hours a day, seven days a week to address service issues, and to participate in the daily teleconference with WTL and BNSF to deal with service issues. SAW has also engaged in other disruptive conduct toward PYCO's alternative service provider, WTL.<sup>31</sup>

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<sup>31</sup>See Verified Statement of Stephen Gregory, Exhibit C.

### Conclusion

In November 2005, SAW's management told PYCO that PCYO "would have to figure out how to take care of [itself]" and that SAW intended to create conditions "to cost a lot more for [PYCO] to continue doing business." See PYCO's original petition at p. 9 and sources cited. This continues to be SAW's tactic and strategy. It challenges credibility for SAW in the circumstances once again to file a petition to revoke alternative rail service, so soon after this Board ordered a 120-day continuation and denied the previous alternative service request.

For the reasons stated in this Opposition and the attached statements, this Board should maintain the existing alternative service order and modify the existing protocol to require SAW to keep long standing crossing used by PYCO clear of obstructions during the course of this alternative service order.

Respectfully submitted,

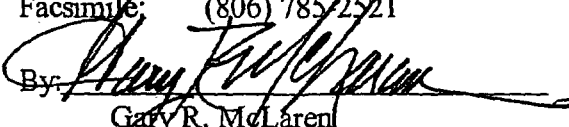
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Of Counsel, Although Out of the USA

ATTORNEYS FOR PYCO INDUSTRIES, INC.

Exhibit A – V.S. Gail Kring  
Exhibit B – V.S. Robert Lacy  
Exhibit C – V.S. Stephen Gregory



## **EXHIBIT 2**

37081  
EB

SERVICE DATE – JUNE 21, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34802

PYCO INDUSTRIES, INC.—ALTERNATIVE RAIL SERVICE—  
SOUTH PLAINS SWITCHING, LTD. CO.

STB Ex Parte No. 346 (Sub-No. 14C)

RAIL GENERAL EXEMPTION AUTHORITY—MISCELLANEOUS  
AGRICULTURAL COMMODITIES—PYCO INDUSTRIES, INC.  
PETITION FOR PARTIAL REVOCATION

Decided: June 20, 2006

In a decision served on January 26, 2006 (January Decision), we granted the petition of PYCO Industries, Inc. (PYCO), for an order pursuant to 49 U.S.C. 11123(a) and 49 CFR part 1146 authorizing West Texas & Lubbock Railway Company, Inc. (WTL), to provide interim alternative rail service to PYCO, over the lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX, for the initial statutory period of 30 days. We ordered amendments to the parties' operating protocols governing the use of SAW's lines for the duration of alternative rail service in a decision served on February 16, 2006 (February 16 Decision). We extended alternative service for an additional 120 days (until 1:59 p.m. on June 25, 2006) in a decision served on February 24, 2006 (February 24 Decision). SAW continues to serve the other shippers located on its lines.

SAW asked us to terminate alternative service in a petition filed on March 30, 2006 (Petition). In a pleading filed on April 6, 2006, PYCO opposed the termination request and asked us to continue alternative service at least through June 25, 2006 (the current expiration date), and to modify the existing operating protocols by requiring SAW to keep certain track clear.

SAW opposed PYCO's requested modification, asked for a different modification of the operating protocols, and responded to PYCO's opposition to termination of the alternative rail service, in a pleading filed April 13, 2006 (SAW Rebuttal). PYCO objected to SAW's Rebuttal as untimely and opposed SAW's requested modification, in a pleading filed April 19, 2006.

PYCO filed a Petition for Immediate Injunctive Relief or to Expedite a Protocol Modification to Address a Retaliatory SAW Blockade on May 17, 2006. SAW filed a reply on May 26, 2006.

On May 22, 2006, WTL filed a letter-request dated May 17, 2006, to modify the operating protocols. Having received that letter-request by facsimile copy, SAW filed a reply to it on May 19, 2006.

On May 24, 2006, SAW filed a Supplement to its Petition (Supplement), arguing that alternative rail service should not extend beyond the current expiration date because the majority of rail shipments to and from PYCO involve commodities that have been exempted from regulation, and SAW is prepared to provide all necessary rail service. On May 26, 2006, PYCO filed a partial reply to SAW's Supplement.

Also on May 26, 2006, US Rail Partners, Ltd. (USRP) sought leave to file the verified statement of its president.

On June 7, 2006, PYCO filed a Motion for Extension of Alternative Rail Service.

On June 13, 2006, SAW filed a Second Supplement to its Petition (Second Supplement).

On June 19, 2006, PYCO asked us to strike SAW's Second Supplement and also replied to it.<sup>1</sup>

We will deny SAW's requests to terminate alternative service and to modify the operating protocols. As explained below, we find that we have regulatory authority to order alternative service as to PYCO and will extend the alternative rail service authorization for an additional 120 days beyond the current expiration date, for a total of 270 days. Also, to remove any doubt, we will revoke the exemption from regulation for commodities shipped to, or received by, PYCO, to the extent necessary to allow the alternative service.

To promote safe operations on SAW's rail lines during the period of WTL's alternative service, we will grant the requests of PYCO and WTL for a modification of the operating protocols to require SAW to keep a specific section of its tracks clear. In light of this modification, we will deny PYCO's request for injunctive relief as unnecessary.

#### PRELIMINARY ISSUES

Citing 49 CFR 1146.1(d)(3), PYCO argues that SAW's Rebuttal was filed 2 days late. We will treat PYCO's request as a motion to strike the rebuttal. Because the rebuttal was SAW's first opportunity to reply to PYCO's request for modification of the operating protocols, we will deny the motion to strike.

Because no party will be harmed and it will lead to a more complete record, USRP's request for leave to file the verified statement of its president will be granted and the statement will be made part of the record.

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<sup>1</sup> In that June 19, 2006 filing, PYCO also sought revocation of the exemption in STB Finance Docket No. 33753 (Sub-No. 1), through which SAW acquired the trackage that is at issue in this proceeding. The revocation request will be addressed separately.

In light of PYCO's having taken the opportunity to reply to SAW's Second Supplement, we will deny the motion to strike it.

## BACKGROUND

In 1999, SAW acquired approximately 14.1 miles of rail lines in Lubbock, TX, formerly owned by The Burlington and Northern and Santa Fe Railway Company (BNSF).<sup>2</sup> From that time until recently, PYCO, a rail-dependent processor of cottonseed oil and related products, was served only by SAW, whose rail lines connect only with those of BNSF.

In the January Decision, we found that PYCO had experienced a substantial, measurable deterioration in rail service and that SAW was unlikely to restore adequate rail service to PYCO within a reasonable time. We authorized WTL to provide alternative rail service to PYCO for a 30-day period, and we noted that there was a rebuttable presumption that alternative rail service would need to continue beyond that period.

In the February 24 Decision, we found that the transportation emergency would continue to exist if alternative service were terminated, and we therefore ordered an additional 120 days of alternative rail service by WTL. SAW petitioned to terminate alternative rail service about a month after we ordered the 120-day extension.

## DISCUSSION AND CONCLUSIONS

We will first address the Board's regulatory authority to order alternative service to PYCO. Then we will discuss our reasons for not terminating, but instead continuing, the alternative service and granting some of the requested modifications of the operating protocols.

### I. Regulatory Authority to Order Alternative Service for PYCO.

SAW states that approximately 74% of the rail traffic to and from PYCO's plants consists of commodities (cottonseed, cottonseed hulls, and cotton linters) that have been exempted from regulation, in Rail General Exemption Authority, 367 I.C.C. 298, 310-12 (1983) (General Exemption) and 49 CFR 1039.10. SAW argues that because the exemptions at issue are essentially from the entirety of the Interstate Commerce Act, as amended (the Act), and because the statutory provision for alternative service is part of the Act, the Board lacks authority to extend (or initially to have ordered) alternative service to transport these commodities for PYCO. Concerning the remaining 26% of PYCO's traffic that does not involve exempt commodities, SAW contends that "it would not be practical [ ] or safe to provide for alternative rail service for a distinct minority of shipments from the same facility." Supplement at 5.

PYCO responds that the commodity exemptions do not preclude alternative rail service because the rail transportation for PYCO of regulated commodities is not segregated from the transportation of exempted commodities. Alternatively, PYCO seeks partial revocation of

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<sup>2</sup> BNSF has since changed its name to BNSF Railway Company. We will refer to both entities as BNSF.

General Exemption so as to permit alternative rail service for all of the commodities PYCO ships and receives by rail at Lubbock.

We find no merit to SAW's contention that, where the majority of shipments comprise exempt commodities, we may not authorize alternative service even as to commodities that are not exempt. SAW's argument would not give effect to our authority to prescribe alternative rail service under 49 U.S.C. 11123(a) whenever we determine that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy of rail service provided by the incumbent carrier. 49 CFR 1146.1(a). Therefore, we conclude that where there is a mix of regulated and exempted commodities being received and shipped and it would not be practical to provide separate service for the two types of traffic, the Board can order alternative rail service as to all of the shipments, so long as the criteria for alternative rail service are met, as they plainly have been in this case. Thus, we conclude that we lawfully authorized, and lawfully may extend, alternative rail service as to all of the rail service to PYCO without having to first revoke the exemption for the otherwise unregulated transportation.

In any event, we may revoke an exemption, in whole or in part, at any time under 49 U.S.C. 10502(d), if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. See Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 976 (1998) (Expedited Relief).

Even if partial revocation of General Exemption were considered necessary, we conclude that the standard for revocation has been met here. The exemptions at issue were predicated on railroads not abusing their market power in transporting the exempted commodities. We view SAW's rail service as having been so inadequate as to amount to an abuse of market power. Therefore, to remove any doubt, we can and will revoke the exemptions, to the extent required to provide for alternative rail service. This action will ensure the continuation of a sound rail system to meet the needs of the shipping public. See 49 U.S.C. 10101(4).

In its Second Supplement, SAW claims that the tracks that are used to serve PYCO are excepted switching tracks and argues that, as a result, we lack authority to order alternative service over those tracks. We disagree that the tracks at issue are switching tracks that fall within 49 U.S.C. 10906. SAW sought and received authority under 49 U.S.C. 10901 to acquire these tracks. Moreover, the tracks are used by more than one shipper. Even if these tracks constitute switching tracks, however, such tracks are given an exception only from the entry and exit provisions at 49 U.S.C. 10901-10905 governing the construction, acquisition, operation, abandonment, or discontinuance of rail lines. 49 U.S.C. 10906. SAW relies upon Battaglia Distributing Co., Inc. v. Burlington Northern, 2 S.T.B. 323 (1997) for the proposition that, when track is within the exception at 49 U.S.C. 10906, the Board lacks authority to order alternative rail service over the track. Battaglia is distinguishable, however, because in that case the rail carrier asserted that it had previously abandoned the track and the case presented a request to restore service that already had ended lawfully. 2 S.T.B. at 326. Likewise, service previously had ended in another case on which SAW relies, Valley Feed Company v. Greater Shenandoah Valley Development Company d/b/a/ Shenandoah Valley Railroad Company, Docket No. 41068 (ICC served Dec. 21, 1995). Here, of course, the tracks have not been abandoned and service has been continual, even if inadequate for a period.

II. Merits of Termination or Continuation of Alternative Rail Service for PYCO.

SAW contends that the emergency that led to the need for alternative service has ended because PYCO's demand for rail service has returned to normal levels. SAW states that it is prepared to provide PYCO with whatever rail services are needed, that BNSF (rather than SAW) is at fault for the rail service problems PYCO has experienced, and that SAW has been punished enough by losing revenue from not providing PYCO's rail service.

PYCO counters that it has been operating its plants at full capacity because it still has a large cottonseed crop to process and that its corresponding demand for service is either the same or greater than when it filed its original petition for alternative service in December 2005. In light of recent actions taken by SAW,<sup>3</sup> PYCO questions the sincerity of SAW's claimed willingness to provide adequate rail service. PYCO also argues that BNSF is not responsible for the service inadequacies PYCO experienced from SAW, noting that WTL has coordinated with BNSF to provide adequate service. Finally, PYCO contends that SAW's loss of revenue is not an adequate basis to terminate alternative rail service. Accordingly, PYCO seeks the continuation of WTL's alternative rail service to the statutory limit of a total of 270 days. We discuss these arguments below.

PYCO has demonstrated that, throughout the alternative service period, it has been operating its plant nonstop. The statement of PYCO's general manager shows that PYCO's demand for service continues to be as high as when it originally sought alternative service. Therefore, we find that PYCO has a continuing need to ship a high number of rail cars of cottonseed products.

We now turn our attention to SAW's contention that it sincerely desires to provide adequate service to PYCO. We are concerned that SAW still has not taken any responsibility for the service failures that led to the January Decision in which we initially authorized alternative rail service. As stated previously, SAW contends that BNSF's actions have been a major cause of the service difficulties experienced by PYCO. However, as discussed above, these allegations have been convincingly rebutted by PYCO. Until it acknowledges its past service lapses, SAW is unlikely to be able to avoid the difficulties it experienced in the past in providing service to PYCO.

Moreover, SAW's continued actions belie its claimed willingness to now provide adequate service to PYCO. It is unrefuted that, until March 2006, SAW permitted PYCO to move PYCO equipment over a long-existing industrial crossing of the wye track separating PYCO's outdoor cottonseed stockpile from its Plant No. 1, at which cottonseed is processed. PYCO states that the stored cottonseed has a value of \$11 million. During the period of alternative service, however, SAW has stored empty rail cars on the wye track in a location that prevents PYCO's equipment from using the industrial crossing to get to the seed stockpile.

SAW would have us excuse its recent blockage of the industrial crossing because there is no document granting PYCO the right to cross SAW's tracks at that crossing. SAW also claims

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<sup>3</sup> See discussion of SAW's actions in the January Decision and February 24 Decision.

that it needs the revenue it earns from storing the rail cars at issue and states that it would have placed these cars on Track 9298 but for the protocol provision requiring that track to be kept clear for the staging of cars for PYCO. But as PYCO explains, SAW has other locations available to place these stored cars. The fact that SAW may have the right to store rail cars in a position that blocks the industrial crossing does not justify its doing so when the blockage harms PYCO and SAW has other locations in which to store the cars.

In addition, SAW evidently still does not participate in the daily telephone conference calls by which PYCO and BNSF address any service issues that arise, including congestion on SAW's rail lines or yard. A rail carrier that is committed to providing good rail service likely would participate. Taken together, the blockage of the industrial crossing and nonparticipation in the daily telephone calls give us good reason to question the credibility of SAW's assertion that it would provide adequate service to PYCO if alternative service were terminated now.

As for SAW's claim that it has been punished enough by the earlier alternative service orders, we note that an alternative rail service order is not to be viewed as a punitive measure against the incumbent rail carrier. Expedited Relief, 3 S.T.B. at 974. Rather, alternative service is intended to temporarily replace a rail carrier that is not providing adequate service until that carrier shows that it is once again able to provide such service.<sup>4</sup>

In light of these facts, we find that PYCO's transportation emergency will continue after June 25, 2006, and we will extend the alternative service to the maximum (270-day) period allowed by the statute, through October 23, 2006. Under the regulations at 49 CFR part 1146, alternative rail service to PYCO will not be available after October 23, 2006. We encourage the parties to work together before that time to reach a satisfactory solution to PYCO's continuing need for adequate rail service.

### III. Modifications of the Operating Protocols.

A. Unblocking the Industrial Crossing. PYCO asks us to order injunctive relief: that SAW immediately remove its blockage of the industrial crossing of the "we" track separating PYCO's seed stockpile from its plant for the duration of alternative service. Alternatively, PYCO and WTL request modification of the existing operating protocols to prevent SAW from placing any equipment on the we coming out of the south side of SAW's yard during the operating hours allocated to alternative service provider WTL. According to PYCO, either of these remedies would restore the we to its status quo.

PYCO contends that keeping the we clear of SAW equipment is needed not only to free the blockage but also to protect PYCO's and WTL's workers. PYCO documents occasions on which its workers felt endangered by SAW operations on the we during the hours assigned to WTL for using the adjoining SAW yard. According to PYCO, the requested modification of the

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<sup>4</sup> SAW contends that alternative service should be terminated because it is a small railroad and cannot long sustain the loss of revenue from not transporting PYCO's traffic. We note, however, that this is not a reason to terminate alternative rail service. See 49 CFR 1146.1(d)(1).

protocols would enhance the safety of operations while there are two rail operators using SAW's lines.

PYCO explains that the nearby public road is not a feasible alternative to reach the stockpile because it would apparently require the approval of the Texas Department of Transportation (Texas DOT) as well as the City of Lubbock's authorization to construct a new road access. PYCO's request to Texas DOT is pending. But even if the necessary approval is obtained, the City or State could limit the hours in which PYCO could use any newly constructed road access. In any event, the public road access would not likely be available in time to prevent the loss of PYCO's stored cottonseed.

Accordingly, in light of the lack of a feasible alternative to reach the stockpile and the safety benefits from keeping the wye track clear, we will modify the current operating protocols to provide that, during the WTL operating hours, SAW may not place or have any equipment on the wye coming out of the south side of its yard. PYCO's request for immediate injunctive relief is rendered unnecessary because the modification would achieve the same result.

B. Preventing WTL From Storing Cars for PYCO on SAW's Main Track. SAW contends that WTL is "permanently" storing rail cars for PYCO on SAW's main track, Yard Tracks 1 and 5, and Tracks 9298 and 9200. SAW states that the operating protocols do not give WTL around-the-clock use of those tracks. SAW therefore asks us to modify the operating protocols to require that all of the tracks covered by the protocols shall be kept clear by WTL when not in use by WTL in providing rail service to PYCO and during SAW's operating window.

PYCO counters that the tracks assigned to it under the existing protocols historically have been used to stage cars for PYCO. In addition, it states that SAW does not need these tracks to serve any other shippers, that SAW has not shown harm to SAW or any of its shippers from WTL's use of these tracks, and that SAW has not complained to PYCO about WTL's use of these tracks.

We agree that SAW has not demonstrated any harm from WTL's use of the tracks to stage cars for PYCO. Accordingly, we will deny this requested modification of the operating protocols.

C. Requiring SAW to Observe the Protocols' Time Allotments and to Repair Tracks. PYCO and WTL express concern for the safety of WTL and PYCO personnel when SAW performs switches in its yard at the same time that WTL is supposed to be switching there, according to the operating protocols. SAW denies that its operations on Tracks Nos. 2, 3, 6, and a short portion of the main track at its east end create a safety hazard or interfere with WTL's service to PYCO, which is performed in the west end of the yard. However, we are concerned about the potential danger to all of the personnel involved when the protocols' time allotments are not followed. We expect SAW to observe the operating protocols by not performing any operations in its yard during the hours that the protocols provide for WTL to operate in SAW's yard.



WTL and PYCO claim that, during the period of alternative service, SAW has not inspected or repaired the sections of its trackage used by WTL to provide service to PYCO. PYCO claims that the SAW lead into PYCO's Plant No. 1 requires repair in order to avoid derailment. Both WTL and PYCO ask us to order SAW to inspect and repair all of its trackage used by WTL for the duration of alternative service. SAW replies that it has performed inspections and maintenance of trackage used by SAW and WTL as required.

In authorizing the extension of alternative service, we act to ensure the provision of adequate service to PYCO for the duration of the alternative service period. As the owner of the track that WTL is using to serve PYCO, SAW has the responsibility to inspect and adequately maintain the trackage used by WTL. We expect that SAW will adequately maintain the involved trackage. If WTL or PYCO continues to be concerned that track conditions are unsafe, the Federal Railroad Administration should be contacted to request an evaluation of the track.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. USRP is granted leave to file the verified statement of its president.
2. SAW's petition to terminate alternative rail service and request for a modification of the operating protocols are denied.
3. PYCO's requests to strike the SAW Rebuttal and SAW's Second Supplement and for immediate injunctive relief are denied.
4. The exemptions for any and all of the commodities that PYCO ships or receives by rail are revoked to the extent necessary to allow the provision of alternative rail service for all of PYCO's rail traffic.
5. The operating protocols attached to WTL's February 8, 2006 request, as modified by the decision served on February 16, 2006, are further modified by adding the following term, which shall apply for the same duration as the existing operating protocols:

During the hours allocated to WTL under these protocols, SAW may not place or have any equipment on the wye coming out of the south side of its yard.

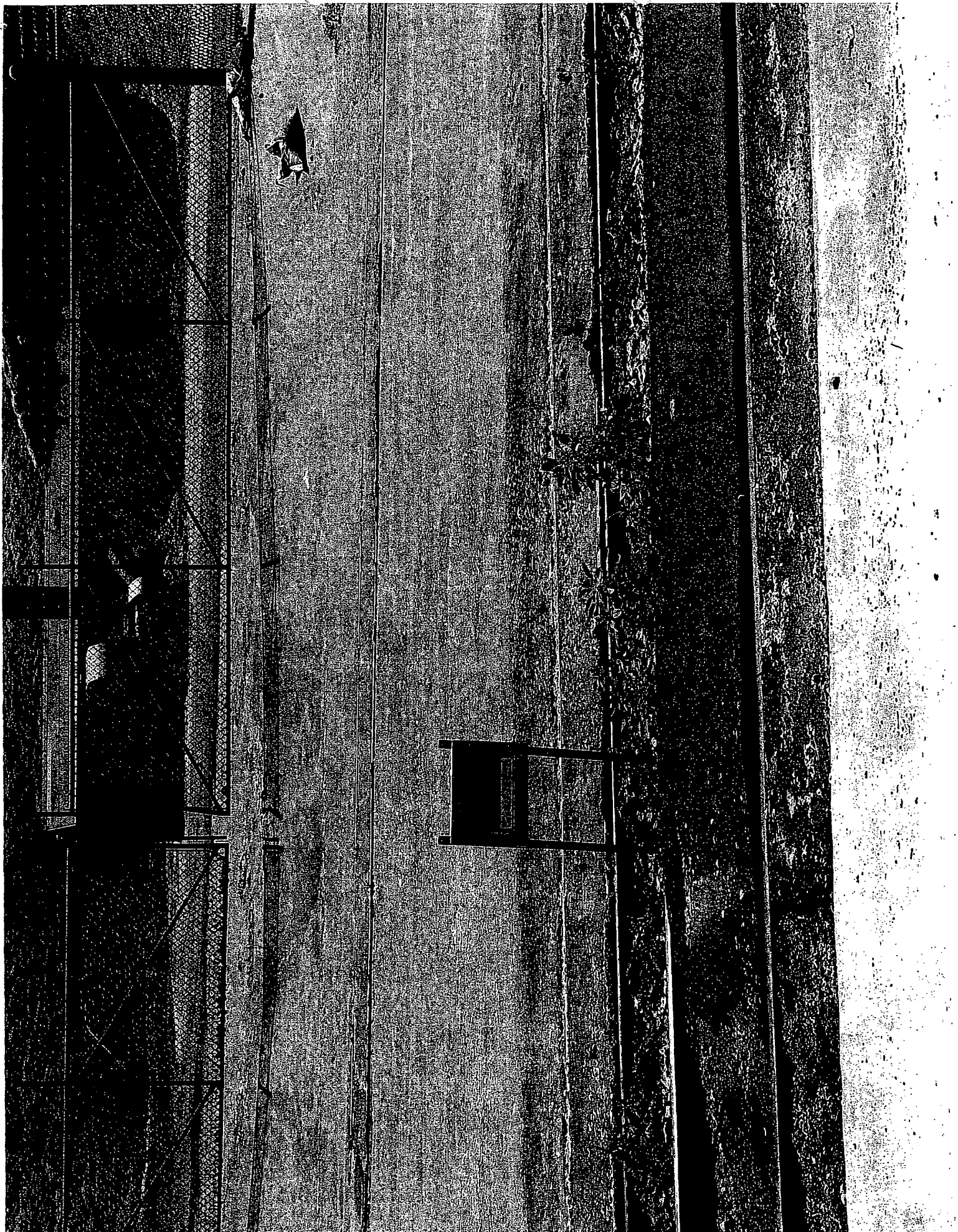
6. WTL is authorized to provide alternative service to PYCO on SAW's lines for an additional period of 120 days, until 11:59 p.m. on October 23, 2006, under the provisions of 49 CFR 1146.1, and SAW is directed to allow such operations on its lines. The agreed-upon operating protocols, as amended in this decision and the decision served on February 16, 2006, shall continue to apply.

7. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

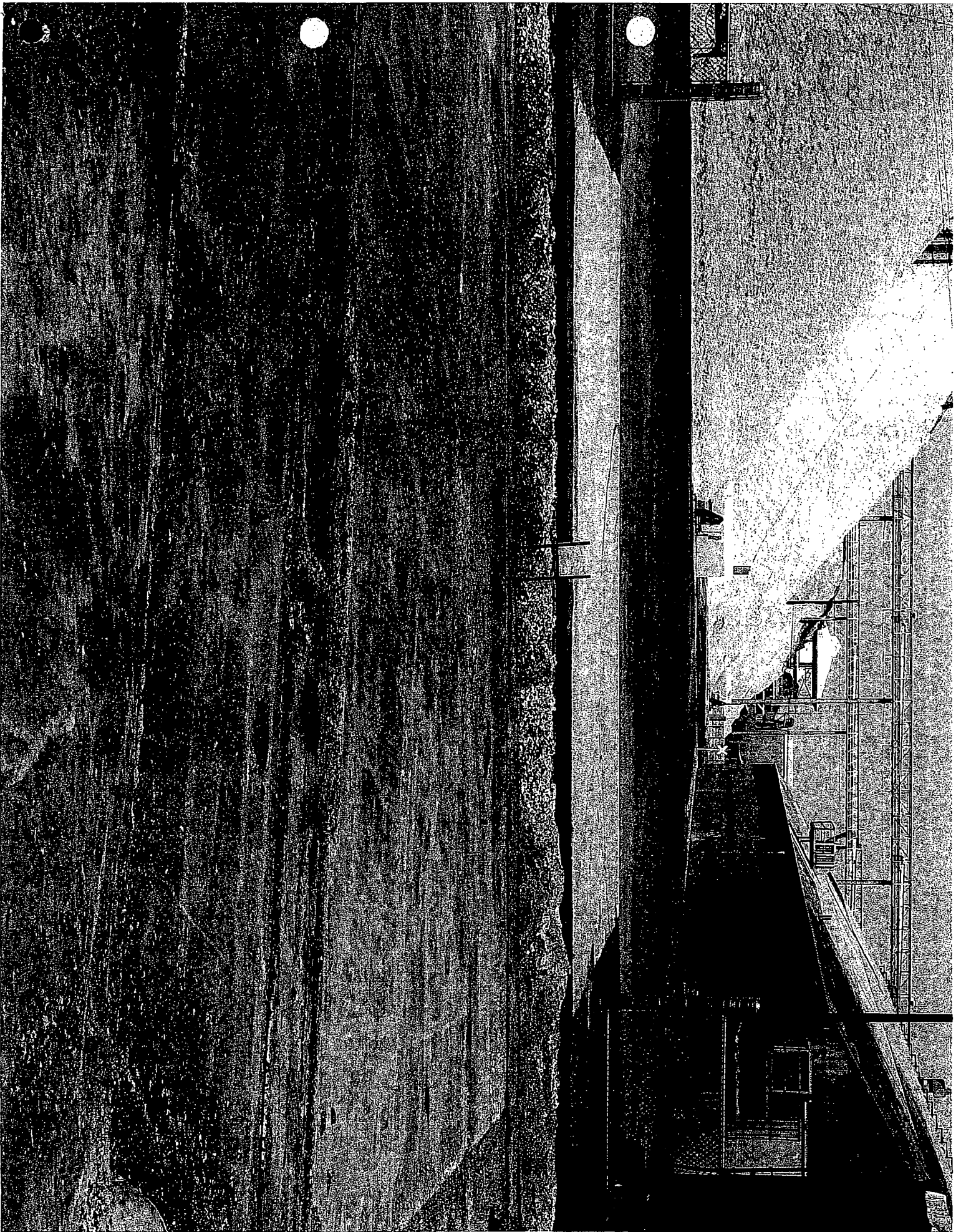
Vernon A. Williams  
Secretary

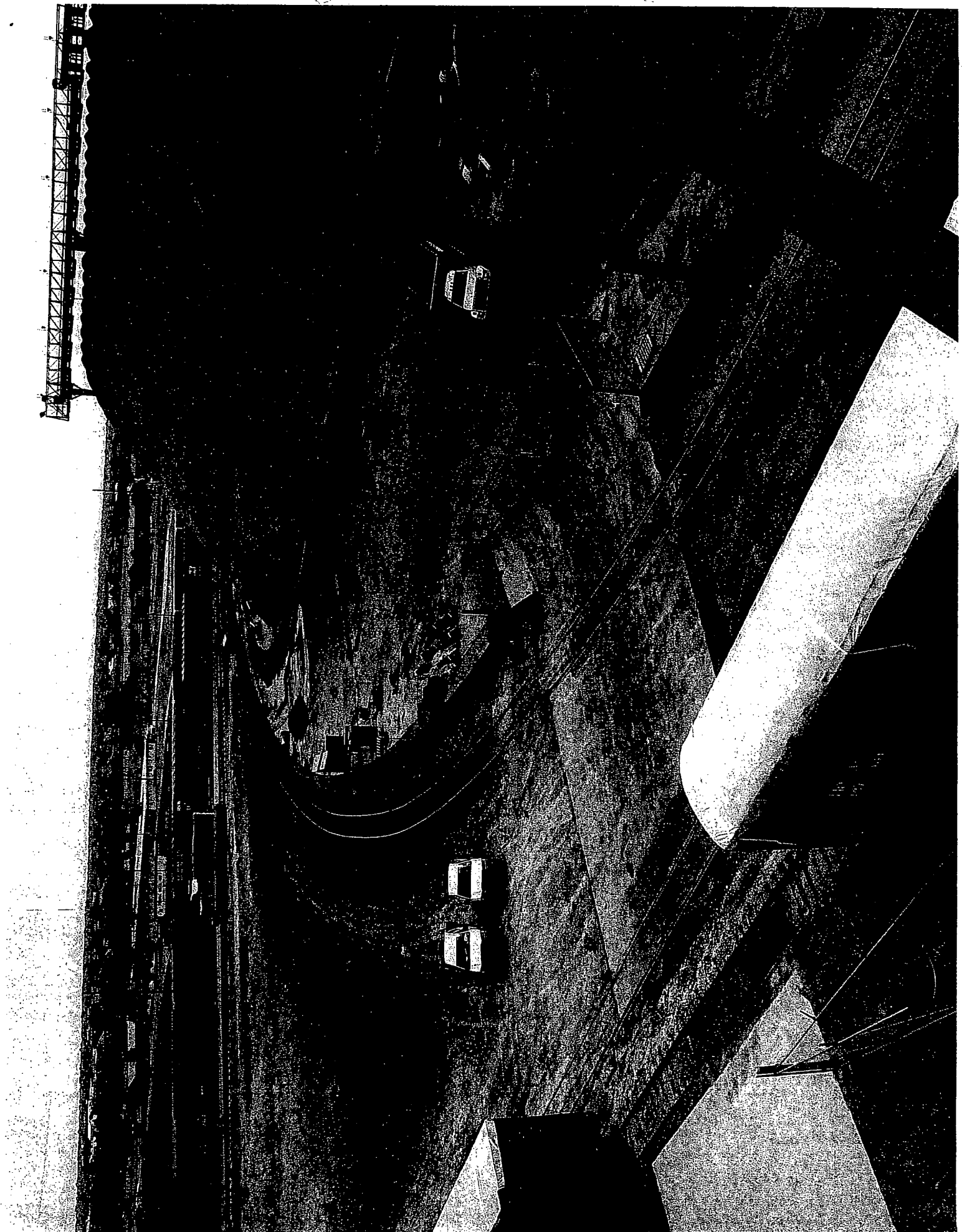
# **EXHIBIT 3**



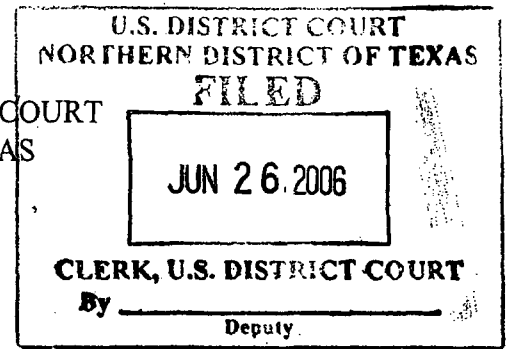








IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION



PYCO INDUSTRIES, INC.,  
a Texas corporation

Plaintiff

v.

SOUTH PLAINS SWITCHING, LTD., CO.,  
a Texas corporation

Defendant

5-06CV0131-C  
NO. \_\_\_\_\_

**EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER**

COMES NOW, PYCO Industries, Inc. ("PYCO") and files its Ex Parte Motion For Temporary Restraining Order in the above styled and numbered cause and would show the Court as follows:

I.

**INTRODUCTION**

1.1 Plaintiff PYCO seeks a temporary restraining order against Defendant South Plains Switching, Ltd., Co. ("SAW").

1.2 PYCO sued SAW in this matter over SAW's disobedience of an order issued June 21, 2006 by the United States Surface Transportation Board ("STB") which ordered SAW to cease blockading a railroad grade crossing known as the "wye track grade crossing" located within the property perimeter of PYCO's Plant No. 1, said grade crossing being located in Lubbock, Lubbock County, Texas.



1.3 SAW removed a cut of rail cars that had blocked PYCO's use of the crossing from March 2006 until June 21, 2006. However, SAW has now fouled the grade crossing by posting signs on the crossing that prevent the use of same and continues the blockade of the crossing in clear disobedience and defiance of the STB's order.

## II.

### ARGUMENT

2.1 PYCO will suffer immediate and irreparable injury if SAW is not immediately restrained from in any way or manner blocking PYCO's access and use of the wye track crossing made the subject of STB's order of June 21, 2006 in STB Finance Docket F.D. 34802, for the hours of 2:00 p.m. to 10:00 a.m. daily until further order of this Court.

2.2 PYCO will not be able to timely, efficiently and economically transport the subject \$11 million worth of cottonseed through alternative methods to prevent significant spoilage of the subject cottonseed and further to be able to satisfy contractual obligations of PYCO to its buyers of cottonseed byproducts, if forced to transport the seed via public street as previously suggested by SAW to the STB.

2.3 Unless PYCO can begin transporting the cottonseed within the coming ten days, the internal temperature of the cottonseed storage pile located on the opposite side of the SAW blockade will significantly and unavoidably increase resulting in large scale spoilage of the seed. This increase in internal temperature of the seed pile is already imminent, in that the temperature already exceeds that of the normal standards utilized by PYCO in determining when to begin movement and processing of the stored seed.

2.4 Once PYCO begins to lose the quality of this amount of stored cottonseed, the injury to PYCO would be irreparable in that a monetary estimate of the harm becomes incapable of being accurately measured. PYCO has established its market integrity over decades of operation in the cottonseed byproducts industry and has buyers of its products located across the nation.

2.5 If the cottonseed is lost in whole or large part due to the SAW blockade, PYCO will not only be unable to fulfill existing contractual obligations with the subject seed, but will also be damaged through loss of its contractual integrity and business goodwill by failing to deliver product as promised. This type of harm will be incapable of being undone by monetary damages as PYCO will not only be unable to fulfill its contractual obligations, but will lose future sales through buyers' unwillingness to contract, or even negotiate, with PYCO due to the failures stemming from PYCO's inability to perform resulting from SAW's blockade.

2.6 PYCO cannot receive an adequate remedy at law if SAW continues to blockade the crossing. PYCO will be unable to accurately and adequately calculate damages from the failure of PYCO's ability to meet its contractual obligations, resulting from SAW's blockade of the crossing and the resulting damage to PYCO in the cottonseed byproduct marketplace to PYCO's goodwill and reputation for being able to fulfill a buyer's request. Damages flowing from the damage to business reputation are incapable of accurate measurement and thereby adequate remedy.

2.7 There is a substantial likelihood that PYCO will prevail on the merits because SAW has clearly failed to cease and desist from blockading a rail grade crossing made the subject of an STB order. SAW has not only retaliated against PYCO, but now retaliates against the STB's order. SAW has directly violated a federal agency's order, and PYCO is within its statutory rights to seek

injunctive relief and will prevail in such pursuit given SAW's disobedience and PYCO's compliance with the STB's orders issued in this matter.

2.8 The threatened harm to PYCO outweighs the harm a temporary restraining order would inflict on SAW. SAW would have the ability to operate trains over the crossing, as contemplated by the STB's operating protocol, for twenty hours per day, except for the period of time from 2:00 p.m. to 10:00 a.m. daily. SAW has no use of the crossing other than the operation of trains over the crossing. PYCO, as detailed hereinabove, has imminent need to use the subject crossing to prevent the spoilation of seed and the resulting harm therefrom.

2.9 Issuance of a temporary restraining order is not against the public interest because such an injunction would have no ill effects on any other member of the public as the subject crossing is located between the private property of PYCO solely and the rail located upon the crossing would continue to operate as prescribed by the governing federal agency of same, the STB.

2.10 PYCO is willing to post a bond in the amount the court deems appropriate.

2.11 The court should enter this temporary restraining order without notice to Defendant because of the immediate and irreparable harm that results to PYCO as detailed hereinabove. Clearly, SAW's actions in continuing to block the subject grade crossing indicate their continuing efforts to not cooperate with the STB or the requests of their largest shipper, PYCO, to not foul the crossing. PYCO's counsel placed a call to SAW's Lubbock counsel of record in other legal proceedings, Mr. James L. Gorsuch, on Friday, June 23, 2006, intending to ask if his client, SAW, would voluntarily comply with PYCO's request to clear the subject grade crossing. Mr. Gorsuch has not yet returned the call.

2.12 PYCO asks the court to set the request for preliminary injunction for hearing at the court's earliest possible time.

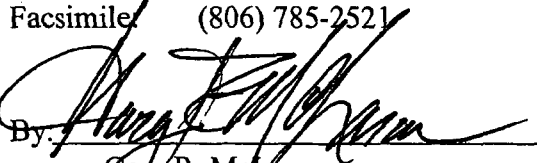
III.

PRAYER

3.1 Plaintiff PYCO, for the reasons articulated hereinabove, asks the Court to issue a temporary restraining order preventing Defendant SAW from in any way or manner blocking the railroad grade crossing known as the "wye track crossing" located within the perimeters of PYCO's Plant No 1 in Lubbock County, Texas and made the subject of STB F.D. 34802 order dated June 21, 2006 during the hours of 2:00 p.m. to 10:00 a.m., seven days a week, until further order of this Court, and for such other and further relief as Plaintiff may show itself entitled.

Respectfully submitted,

PHILLIPS & McLAREN, L.L.P.  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, Texas 79413  
Telephone: (806) 788-0609  
Facsimile: (806) 785-2521

By:   
Gary R. McLaren  
State Bar Number 00791232

ATTORNEY FOR PYCO INDUSTRIES, INC.

THE STATE OF TEXAS  
COUNTY OF LUBBOCK

§  
§  
§

VERIFICATION

BEFORE ME, the undersigned Notary Public, on this the 26<sup>TH</sup> day of June, 2006,  
personally appeared **Gail Kring**, who, upon his oath, duly stated as follows:

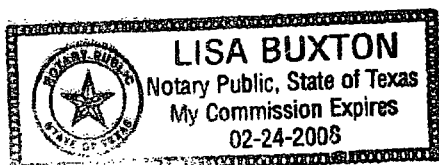
"My name is Gail Kring. I am over the age of 18 years and competent and able to make this Affidavit. I am employed by PYCO Industries, Inc. in Lubbock, Texas, and have personal knowledge of the facts and circumstances surrounding the subject of this lawsuit.

"I have read the above and foregoing Ex Parte Motion For Temporary Restraining Order, and the facts contained therein are just and true and correct to my personal knowledge."

Further Affiant sayeth not.

Gail Kring  
Gail Kring

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, by the said Gail Kring, on this the 26<sup>TH</sup> day of June, 2006, to which witness my hand and seal of office.



Lisa Buxton  
Notary Public, State of Texas

McLaren, Exhibit B

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED  
JUN 26 2006  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

5-06CV0131-C  
NO. \_\_\_\_\_

## 1

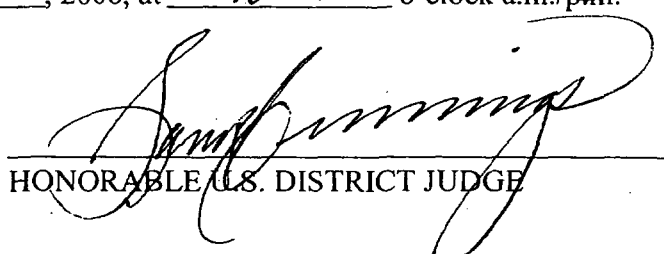
3. Defendant South Plains Switching Ltd., Co. its owners, officers, employees, agents and all persons acting in concert with them are hereby restrained from blocking or interfering in any manner with Plaintiff's use of the wye track railroad grade crossing located within the perimeters of the PYCO Plaintiff No. 1 property boundaries and made the subject of STB Finance Docket No. 34802 order issued June 21, 2006, during the hours of 2:00 p.m. to 10:00 a.m., seven days a week, effective upon Plaintiff's proper posting of bond as set herein by the Court until further order of this Court.

4. The clerk is to issue notice to Defendant, that the hearing on Plaintiff's request for preliminary injunction is set for July 3, 2006, at 1:15 o'clock ~~a.m.~~/p.m.

5. Plaintiff to post bond in the amount of \$ 5000.00.

This Order will expire on July 3, 2006.

SIGNED on June 26, 2006, at 10:00 o'clock a.m./~~p.m.~~

  
HONORABLE U.S. DISTRICT JUDGE



McLaren, Exhibit C

IN THE UNITED STATE DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

PYCO INDUSTRIES, INC.,  
a Texas corporation,  
*Plaintiff*

v.

SOUTH PLAINS SWITCHING, LTD. CO.  
a Texas corporation,  
*Defendant*

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NO. 5-06CV0131-C

**MOTION TO INTERVENE**  
**OF CHOO-CHOO PROPERTIES, INC.**  
**AND SUPPORTING BRIEF**

CHOO-CHOO PROPERTIES, INC. ("CHOO-CHOO"), Intervenor herein, files this, its Petition in Intervention, pursuant to *Fed.R.Civ.P. 24(a)*, and would show to the court that it seeks to intervene in this action as a matter of right, or, in the alternative, by permission, and would show to the court as follows:

**I.**

Plaintiff, **PYCO INDUSTRIES, INC. ("PYCO")**, filed its Original Complaint and Application for Injunctive Relief naming **SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS")**, as the Defendant.

**II.**

**PYCO** alleges that **SOUTH PLAINS** has failed to comply with an order of the Surface Transportation Board, to which both **PYCO** and **SOUTH PLAINS** were parties, and **PYCO** seeks enforcement of that order in this court.

**III.**

The dispute arises regarding a crossing of a railroad track formerly owned by **SOUTH PLAINS** and now owned by **CHOO-CHOO**, known as the “wye” track. The “wye” track is a railroad track generally in the shape of a “y”, with the tail end of the “y” heading south across 34<sup>th</sup> Street and the northbound track splitting shortly after the crossing in question with one leg veering to the northwest and one leg veering to the northeast.

**IV.**

The “wye” track runs between two **PYCO** facilities. On the east is **PYCO’S** plant and on the west is a storage facility also owned by **PYCO**. A crossing had been in place for many years which was used on occasion by **PYCO’S** vehicles and trucks.

The property and the rail line involved in the dispute were transferred from **SOUTH PLAINS** to **CHOO-CHOO** by Deed dated June 13, 2006. Therefore, **CHOO-CHOO** owns the track and the real property involved in this dispute.

**V.**

**PYCO** has obtained a Temporary Restraining Order and seeks further injunctive relief prohibiting **SOUTH PLAINS** from interfering with **PYCO’S** use of the crossing.

**VI.**

**CHOO-CHOO**, as the owner of the property of the owner in question, has an interest in the subject matter and the disposition of this suit may impair or impede its interest. The interests of **CHOO-CHOO** are significantly protectable for the reason that **CHOO-CHOO** owns the property and the track in question.

**VII.**

**CHOO-CHOO** has a legal interest in that the property rights of **CHOO-CHOO** are being threatened by the relief sought and **CHOO-CHOO** has its own affirmative relief, both legal and equitable, it seeks in this case. By filing this suit and obtaining preliminary injunctive relief, **PYCO** has lodged a tangible threat to **CHOO-CHOO'S** legally cognizable interests.

**VIII.**

An intervenor must show that it has an interest in the subject matter of the pending suit and disposition of the suit may impair its interest. *Davis v. Butts*, 290 F.3d 1297, 1300 (11<sup>th</sup> Cir. 2002); *In Re: Troutman Enters.*, 286 F.3d 359, 363 (6<sup>th</sup> Cir. 2002).

The interest must be a legal interest, as distinguished from a general or indefinite interest. *Mountain Top Condo Association v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3<sup>rd</sup> Cir. 1995).

**IX.**

**CHOO-CHOO'S** interest, as being the owner of the real property, is a legal interest. **CHOO-CHOO** meets all of the tests for intervention by permission. The intervention will not unduly delay or prejudice adjudication of the rights of the original parties. *U.S. v. City of L.A.*, 288 F.3d 391, 403 (9<sup>th</sup> Cir. 2002). **CHOO-CHOO'S** claims and defenses in the main action share common questions of law and fact, that is, the rights of all parties to the use of the railroad track and the railroad crossing in question.

**X.**

**CHOO-CHOO**, upon receiving permission to intervene, plans to file an Original Complaint and Request for Injunctive Relief, requesting a hearing for July 3, 2006. A copy of the Original

Complaint and Request for Injunctive Relief is attached as Exhibit "A".

**WHEREFORE, Premises Considered, CHOO-CHOO** prays that the court grant its Motion to Intervene and that the court enter an order allowing intervention in this action either as a matter of right or as a matter of permission.

Respectfully submitted,

**JAMES L. GORSUCH, P.C.**

4412 74<sup>th</sup> Street, Suite B-102

Lubbock, Texas 79424

Telephone: (806)771-6474

Telecopier: (806)771-6476

s/ James L. Gorsuch

By: James L. Gorsuch

State Bar No. 08221250

**CERTIFICATE OF CONFERENCE**

This is to certify that pursuant to Northern District of Texas Local Rule 7.1(b), counsel for Choo-Choo Properties, Inc., has conferred with counsel for Pyco Industries, Inc., and counsel for Pyco Industries Inc., opposes this motion.

s/ James L. Gorsuch

James L. Gorsuch

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Motion to Intervene has been sent to Plaintiff's attorney of record via certified mail, return receipt requested, on the 27<sup>th</sup> day of June, 2006:

**CM/RRR 7005 0390 0000 8941 3009**

Mr. Gary R. McLaren

**PHILLIPS & McLAREN, L.L.P.**

3305 66<sup>th</sup> Street, Suite 1A

Lubbock, Texas 79413

s/ James L. Gorsuch

James L. Gorsuch

IN THE UNITED STATE DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

PYCO INDUSTRIES, INC.,  
a Texas corporation,  
*Plaintiff*

v.

SOUTH PLAINS SWITCHING, LTD. CO.  
a Texas corporation,  
*Defendant*

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§  
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§  
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NO. 5-06CV0131-C

**EXHIBIT "A"**  
**INTERVENOR'S ORIGINAL COMPLAINT AND**  
**APPLICATION FOR INJUNCTIVE RELIEF**

CHOO-CHOO PROPERTIES, INC. ("CHOO-CHOO"), files this, its Intervenor's Complaint, and Application for Injunctive Relief against Plaintiff, PYCO INDUSTRIES, INC. ("PYCO"), and would show to the court as follows:

I.

**JURISDICTION**

CHOO-CHOO denies that this court has jurisdiction in this case. Plaintiff sought jurisdiction on the basis of an action to enforce an Order of the Surface Transportation Board ("STB"). The Order dealt only with the placement of moving of particular railroad cars on certain tracks owned by Intervenor. The Order did not cover the property rights usage and obligations of the parties in connection with a railroad crossing.

That dispute is between a Texas corporation, PYCO, and another Texas corporation, CHOO-CHOO. Even if Defendant, SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS")

somehow has a property interest in the area, **SOUTH PLAINS** is also a Texas corporation. No diversity of jurisdiction is involved and no federal question is involved as between these parties and this dispute.

## II.

### SERVICE OF PROCESS

Service of process may be had on **PYCO** by serving its Registered Agent, Mr. Gail Kring, Pyco Industries, Inc., 2901 Avenue A, Lubbock, Lubbock County, Texas 79404.

**SOUTH PLAINS** can be served through its Registered Agent at its principal place of business at 10917 East FM 2150, East County Road 78, Slaton, Lubbock, Lubbock County, Texas 79364.

## III.

### FACTUAL BACKGROUND

**SOUTH PLAINS** purchased approximately fourteen miles of track from The Burlington, Northern and Santa Fe Railway Company ("BNSF"), in 1991. Part of the track included a "we" track located in east Lubbock. The "we" track runs north and south with the tail end of the "we" heading south across 34<sup>th</sup> Street. The track splits north of 34<sup>th</sup> Street into one track that goes generally to the northeast and one track that generally goes to the northwest. The switching yard of **SOUTH PLAINS** is located near the north end of the "we".

## IV.

The "we" track is located between a **PYCO** plant that is located just west of the "we" and **PYCO** storage facility which is located just east of the "we". The track purchased by **SOUTH PLAINS** in 1991 included track and real property extending several feet on either side of the track.

V.

For years, there was a railroad crossing that crossed the “wye” track connecting the west **PYCO** facility with the east **PYCO** facility. Intermittently, **PYCO** would use the crossing. There never was a written easement covering the crossing or a written lease covering the crossing. Further, there was no easement implied by law as the easement was a permissive easement since at least 1991, until the last several months.

VI.

**CHOO-CHOO** purchased the track and the property from **SOUTH PLAINS** in June of 2006. **CHOO-CHOO** then became the owner of the property in question.

In February or March of 2006, without permission and without notice, **PYCO** began building its own track in the “wye” area. This track generally was laid outside of the fence owned by **PYCO** and at a very close distance from the track in question. The track was built closer than clearance would allow for existing track on the “wye” traffic. As a part of building the track, **PYCO** bulldozed and dug a hole over the east side of the “wye” track. This hole covered property owned at the time by **SOUTH PLAINS** and caused problems with the “wye” track in that it took support away from the track. No notice was given by **PYCO** prior to this construction and no permission was obtained by **PYCO**.

VII.

Beginning in late 2005, **PYCO** instituted proceedings with the Surface Transportation Board (“STB”) in Washington, D.C., in connection with disputes that arose with regard to the service provided by **SOUTH PLAINS** to **PYCO**. A number of Orders were issued by the STB. These Orders dealt with the operation of the railroad and the certain times by which certain parties could



use tracks. The STB at one point ordered and then twice changed protocols that were in place between **SOUTH PLAINS** and West Texas Railroad (West Texas) for service to the **PYCO** plant.

**VIII.**

In the last STB proceeding, **PYCO** complained that rail cars were stored on the track over the railroad crossing. The STB ordered the cars removed. After the STB Order was issued, the cars were removed.

**IX.**

The crossing in question is a "private crossing" under Texas law. There was no requirement that a carrier grant a private crossing to a business in the absence of a statute compelling such action.

**X.**

As soon as the railroad cars were removed on June 26, 2006, **PYCO** started procedures to fill in and re-concrete the crossing. These moves constituted trespass and were made despite the fact that **PYCO** has no easement across the property and does not own the property in question.

**XI.**

On Monday, June 26, 2006, the day this suit was filed, **PYCO** removed two "No Trespassing" signs from the property and began to work on constructing a crossing across the property owned by **CHOO-CHOO**. When asked by employees of **SOUTH PLAINS** what they were doing, **PYCO'S** response was that the signs were to be torn down and that the material used to build the crossing would, if necessary, be poured over the signs.

**XII.**

The STB Order, dated June 21, 2006, does not deal with the parties' rights regarding the ownership or use of the property in question. It does not speak to or address whether or not an

easement exists or whether a right exists for **PYCO** to unilaterally build a crossing across property it does not own. Such issues were never presented to the STB. The STB merely ordered that cars blocking the crossing in question be removed.

**XIII.**

**PYCO** has begun operations to fill in and concrete a crossing across the railroad tracks on property it does not own and has no right to cross as of Monday, June 26, 2006. Gary McLaren, counsel of record for **PYCO**, has indicated in a phone call to counsel of record for **CHOO-CHOO**, that **PYCO** will begin work immediately on the crossing.

**XIV.**

When problems arose in connection with the crossing, **PYCO** approached the city of Lubbock and obtained permission from the City of Lubbock to use one lane of 34<sup>th</sup> Street (a busy thoroughfare in Lubbock) for its vehicles to move from one side of the track to the other. **CHOO-CHOO** understands that **PYCO** vehicles have been used on this special 34<sup>th</sup> Street crossing that was granted by the city. Therefore, there is an alternative method of crossing from the west **PYCO** plant to the east **PYCO** storage facility.

**INJUNCTIVE RELIEF**

**XV.**

**CHOO-CHOO** will suffer irreparable harm and injury if **PYCO** is not enjoined during the pendency of this lawsuit from trespassing on the property of **CHOO-CHOO**, and from concreting or cementing a new crossing across the railroad track on property owned by **CHOO-CHOO**. **PYCO** will be able to alternatively transport cotton seed, much of which has been transported, by its permission from and use of 34<sup>th</sup> Street to run their vehicles across from one **PYCO** facility to the

other **PYCO** facility.

**XVI.**

There is a substantial likelihood that **CHOO-CHOO** will prevail on the merits for the reason that **CHOO-CHOO** owns the property in question, there is no lease allowing access to the property by **PYCO**, there is no easement allowing access to the property by **PYCO**, and the actions of **PYCO** in attempting to build a crossing amounts to trespass under Texas law.

**XVII.**

Issuance of a preliminary injunction is not against the public interest. As set out above, this area is a "private crossing" under Texas law. It is not a public crossing and the court's Order would have an ill effect on the public rights or transportation.

**XVIII.**

**CHOO-CHOO** is willing to post a bond or a cash deposit in the amount that the court deems appropriate. Further, **CHOO-CHOO** asks the court for a declaratory judgment, that **PYCO** has no rights in connection with the crossing in question, either by lease, written easement, or prescriptive easement, and that any presence on the property of **CHOO-CHOO** by **PYCO** constitutes trespassing.

**XIV.**

**CHOO-CHOO** requests a hearing on its request for a preliminary injunction for July 3, 2006, at 1:15 p.m., in this court.

**WHEREFORE, Premises Considered, CHOO-CHOO** seeks the following:

- 1: A preliminary injunction against **PYCO** preventing **PYCO** from constructing or building a railroad crossing across property owned by **CHOO-CHOO** or trespassing until the trial of the case on the merits or until further order of the court.

2. The court award judgment for damages in favor of **CHOO-CHOO**, any costs of court and for attorney's fees as the court deems appropriate and for any and other further relief to which **CHOO-CHOO** may show itself to be entitled.

Respectfully submitted,

**JAMES L. GORSUCH, P.C.**  
4412 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424  
Telephone: (806)771-6474  
Telecopier: (806)771-6476

s/ James L. Gorsuch

By: James L. Gorsuch  
State Bar No. 08221250

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Original Complaint and Motion for Injunctive Relief has been sent to Plaintiff's attorney of record via certified mail, return receipt requested, on the \_\_\_\_\_ day of \_\_\_\_\_, 2006:

**CM/RRR**

Mr. Gary R. McLaren  
**PHILLIPS & McLAREN, L.L.P.**  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, Texas 79413

s/James L. Gorsuch  
James L. Gorsuch

Attachment C

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34889  
SOUTH PLAINS SWITCHING LTD. )

I, Les Howell, Purchasing and Seed Management Director for PYCO Industries, Inc., make this Declaration in connection with PYCO's Petition under 49 C.F.R. Part 1147 for continued alternative rail service past October 23, 2006 for PYCO's two plants in Lubbock, Texas.

1

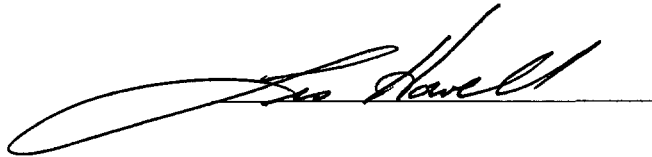
2. On Tuesday, June 21, 2006, the Surface Transportation Board issued a decision which, among other things, modified the service protocol for SAW and alternative rail service provider West Texas & Lubbock Railroad (WTL) applicable in Finance Docket 34802. The modification provided that SAW was to stop blocking PYCO's industrial crossing between our seed stockpile and our adjacent processing plant. Although SAW subsequently moved the empty cars it had placed across the crossing to prevent completion of rehabilitation of the crossing and to stop our use of the crossing, SAW posted signs and from time to time personnel to prevent our use.

3. On Monday, June 26, 2006, the United States District Court for the Northern District of Texas issued a Temporary Restraining Order barring SAW from obstructing our crossing. PYCO immediately arranged for paving of the crossing to be completed. However, as indicated in the attached memorandum which I prepared immediately after the events discussed, two SAW employees (one the son of the owners of SAW and the other SAW's superintendant) obstructed our work and attempted to bait us into a physical confrontation. We called for police assistance instead and only with that assistance were able to complete the work so the crossing could again be used. The attached memorandum is as I prepared it, but the "colorful" speech used by the SAW employees is partly blacked out.

4. The value of the seed stockpile is approximately \$11 million. Use of the crossing to move the seed for processing in our oil mill or for shipment out (by rail) is vital to our operations, and disruption of the crossing threatens the seed stockpile with rot.

Pursuant to 28 U.S.C. § 1746, 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 June 29<sup>th</sup>, 2006

A handwritten signature in black ink, appearing to read "Leo Howell", is written over a horizontal line.





**PYCO Industries, Inc.**  
Cottonseed Products

## MEMORANDUM

---

To: Mr. Gail Kring  
From: Les Howell-Purchasing & Seed Management Director  
CC:  
Date: 06/26/2006  
Subject: Railroad – Paving Confrontation

---

### Events:

At approximately 3:00PM June 26, 2006 Quick Stripe Paving began paving of the railroad crossing on the Y-track between seed piles #5 and dump #5. I had removed the private property sign and laid it on SAW property to the north side. We cleaned the loose gravel and leveled the ground while waiting for hot mix. SAW employees Shad and Rodney drove up and placed the sign that I had removed back into the middle of the crossing. Shad and Rodney drove away and parked on the 34<sup>th</sup> street to watch us. I removed the sign once again placing it on the north side of SAW property so we could continue working. When Shad and Rodney saw me remove the sign, they drove down where we were working and placed the sign back into the middle of the crossing. At this point Lewis Harvill commented to Shad, that we would need to remove the sign to pave and that we had a court order giving us the right to pave the crossing and use it. Shad continued to install the sign. Upon finishing the placement of the sign, Shad and Rodney started trying to bait us into a physical confrontation. Offering threatening gestures and statements such as "Remove the [REDACTED] sign, I dare you!" and "We got all [REDACTED] day to stop yall". They repeated these statements over and over. At that point I turned to Lewis and asked him to call the police. Shad and Rodney sat in their truck waiting for us to begin again. After 15 minutes or more they left. Shad returned about 5 to 10 minutes later and sat waiting for us to remove the sign. I instructed the crew to wait until the police arrived and I would remove the sign so they could continue paving the crossing. When the police arrived, I removed the sign and placed it again on the north side of SAW property. Shad was instructed by the officers we had a right to continue work. I was instructed by Lewis to avoid confrontation. No further confrontation ensued.

Attachment D

5/3/99

AGREEMENT FOR  
SALE OF CERTAIN ASSETS, RIGHTS  
AND OBLIGATIONS  
OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO  
SOUTH PLAINS SWITCHING, LTD. COMPANY



AGREEMENT FOR SALE OF CERTAIN ASSETS, RIGHTS AND OBLIGATIONS  
OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO SOUTH PLAINS SWITCHING, LTD. COMPANY

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AGREEMENT FOR  
SALE OF CERTAIN ASSETS, RIGHTS  
AND OBLIGATIONS  
OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO  
SOUTH PLAINS SWITCHING, LTD. COMPANY

This Agreement is entered into as of the third day of May, 1999, between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation (hereinafter referenced as "Seller"), and SOUTH PLAINS SWITCHING, LTD. COMPANY, a Texas limited liability company (hereinafter referenced as "Buyer").

WHEREAS, Seller desires to sell and convey to Buyer on the terms and conditions set forth in this Agreement Seller's interest in a rail line of Seller's in the vicinity of Lubbock, Texas, in Seller's Old BN Yard and former BN and ATSF tracks generally south of the Old BN Yard at Lubbock, Texas, the rail freight transportation business which Seller conducts on this rail line, and certain other rights, obligations and assets as specified in this Agreement; and

WHEREAS, Buyer desires to purchase, pursuant to the terms and conditions set forth in this Agreement, Seller's interest in a rail line of Seller's in the vicinity of Lubbock, Texas, in Seller's Old BN Yard and former BN and ATSF tracks generally south of the Old BN Yard at Lubbock, Texas, the rail freight transportation business which Seller conducts on this rail line, and certain other assets, rights and obligations as specified in this Agreement.

NOW THEREFORE, Buyer and Seller agree as follows:

1. Description of Business Sold.

(a) Seller shall convey to Buyer on the date of Closing, subject to the terms and conditions set forth in this Agreement and the terms, conditions, reservations and exceptions set

forth in the Quitclaim Deed conveying this property, all of Seller's interest in the rail line segments of Seller in the vicinity of Lubbock, Texas, shown on the map print and list attached hereto as Exhibit A, except that Seller's tracks 9200 and 9205 shall be included in the conveyance, as well as the metal depot and contiguous real estate near the Old BN Yard. The above rail line segments, together with related rail corridor property interests, less Seller's retained real property interests and access rights, are described specifically in the Quitclaim Deed set forth in Exhibit B, attached hereto, and are referenced collectively hereinafter as "Rail Line."

Seller shall furnish Buyer a complete legal description of Rail Line, and Seller shall use its best efforts to furnish such description on or prior to the date of Closing. This conveyance is expressly subject to Seller's retained interests, as specified in detail in the Quitclaim Deed, for: (1) an exclusive, permanent easement for construction, maintenance and operation of one or more pipelines or fiber optics communication lines facilities and appurtenances, in, under, across, along and through all or any portion of the Rail Line; (2) mineral rights and related permanent access easements; (3) water rights and related permanent access, construction, maintenance and water pipeline rights; and (4) Seller's continued access by rail to tracks 0340 and 9298, at no cost to Seller, and tracks 9200 and 9205, at no cost to Seller for the first five years following the date of Closing and at the rate of \$1,000 per year commencing the sixth year following the date of Closing (and thereafter until such time as Seller notifies Buyer in writing that Seller no longer desires to use said tracks), such rights to be subject to dispatching control and direction of Buyer.

(b) Seller shall convey to Buyer, on the date of Closing, the rail freight transportation business which Seller conducts on the Rail Line, subject to the terms and conditions set forth in this Agreement, in the Quitclaim Deed, or in any agreement assigned by Seller to Buyer in accordance with the terms of this Agreement.

(c) Seller shall convey to Buyer on the date of Closing, by a Bill of Sale identical in form to the Bill of Sale set forth as Exhibit C attached hereto, all of Seller's interest in all rail, ties, spikes, tie plates, rail anchors, bridges, culverts, signalling equipment, and other supporting structures, ballast, track materials and supplies, and the metal depot at or near the Old BN Yard (excluding any vehicles, maintenance equipment on wheels, radios, and computer equipment) that, on the date of the Closing, are not improvements that constitute the Rail Line, but which then are present on the real property comprising the Rail Line. This conveyance shall be subject to the terms and conditions set forth in this Agreement, including those set forth in Exhibit D, and the terms and conditions set forth in any agreement assigned by Seller to Buyer in accordance with the terms of this Agreement.

(d) Incident to the conveyance of the Rail Line, effective as of the date of the Closing, Buyer shall have the right to operate over Seller's tracks in Seller's Lower Yard at Lubbock, Texas, and over Seller's mainline between track 9298 and Seller's Lower Yard at Lubbock, Texas, all as designated by Seller's operating personnel (which rail line segments shall be referenced collectively herein as "Interchange Access Line"), at no charge to Buyer, for the sole purpose of interchanging rail traffic and equipment between Buyer and Seller at Seller's Lower Lubbock Yard. Buyer shall operate its trains over the Interchange Access Line subject to Seller's dispatching directions. Buyer agrees to keep the Interchange Access Line clear at all times, except when actually switching cars between Buyer and Seller. In dispatching the Interchange Access Line, Seller shall accord trains of Buyer equal priority with trains of Seller. Nothing herein shall preclude Seller from abandoning any portion of the Interchange Access Line if conditions otherwise warrant.

(e) Seller shall assign to Buyer on the date of Closing, subject to all terms and conditions set forth in this Agreement, or in any agreement assigned by Seller to Buyer in accordance with

the terms of this Agreement, all assignable rights and obligations of Seller to the extent that they are related to the Rail Line and are set forth in any agreement identified in Exhibit D, which is attached hereto. Buyer on the date of Closing shall accept the assignment of all such rights and obligations, as of the date of Closing, in accordance with their terms and the terms of this Agreement. Seller shall reserve all rights set forth in any agreement identified in Exhibit D to the extent those rights are related to one or more other rail lines or property of Seller. If any contract is related to the Rail Line and inadvertently is not identified in Exhibit D, it is the intent of Seller and Buyer that such contract be deemed to have been assigned by Seller to Buyer, in whole or in part as appropriate, effective the date of Closing. Seller promptly shall provide to Buyer a copy of any such contract immediately upon locating it. Buyer shall make no claim against Seller arising out of any failure to obtain a consent to assignment from any party to an agreement assigned by Seller to Buyer, in whole or in part. It is the intent of both Seller and Buyer that all assignments of rights and obligations related to the Rail Line shall be effective on the date of Closing, whether or not any consents to such assignments then have been obtained.

2. Consideration for the Sale.

(a) In consideration for Seller's sale of its interest in the Rail Line, and conveyance of the other rights, interests and obligations described in Paragraph 1 of this Agreement, Buyer agrees to all of the following:

- (1) - To accept all transferred real and personal property "AS IS, WHERE IS" and "with all faults", except for the specific representations and warranties set forth in this Agreement.



- (2) To pay on the date of Closing a purchase price of TEN DOLLARS (\$10.00), for Seller's assets, rights and obligations to be conveyed to Buyer as set forth herein.
- (3) To maintain the Rail Line at a level adequate for the required rail service.
- (4) To pay in addition to the purchase price all costs of Closing (except Seller's cost of preparation of documents to be delivered at Closing). This includes, but is not limited to, any escrow and service fees, real estate transfer taxes, recording fees and sales taxes associated with this Agreement or any of the conveyances governed by this Agreement.

(b) Buyer shall obtain the written consent of Seller, which consent shall not be unreasonably withheld or delayed, prior to entering into any agreement with any other party, or issuing any license or permit to any other party, which would allow such other party any right to cross or access any portion of the Rail Line to serve any customer located along the Rail Line.

(c) Without Seller's prior written consent, which consent shall not be unreasonably withheld, (1) Buyer shall not seek authority from the Surface Transportation Board or any other governmental agency having jurisdiction, to abandon or discontinue rail service over the Rail Line; and (2) Buyer shall not remove any track from the Rail Line except in connection with the repair or replacement of the track, unless (i) in the case of house track there has been no movement of revenue freight over the track for a period of three years, or (ii) in the case of lead track there has been no movement of revenue freight over the track for a period of five years.

### 3. Governmental Approval.

(a) Promptly following execution of this Agreement, Buyer, at its sole expense, shall prepare and file such documents as may be required to secure approval, or exemption from

approval, of this transaction by the Surface Transportation Board of the United States Department of Transportation ("STB"), as appropriate. Buyer shall make all reasonable efforts to obtain this approval or exemption in time for this transaction to close on or before May 31, 1999. Buyer shall permit Seller to review prior to filing all documents proposed by Buyer to be filed with the STB, or any court, to secure legal approval or exemption of this transaction.

4. Representations and Warranties.

(a) Seller hereby represents and warrants to Buyer, and Buyer's successors and assignees, the following facts, as of the date of this Agreement and as of the date of Closing:

- (1) Seller is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware;
- (2) Seller has the corporate power and authority to enter into this Agreement and carry out its obligations under this Agreement;
- (3) The execution, delivery and performance of this Agreement have been duly authorized and approved by all necessary corporate actions of Seller, and no further corporate proceedings of Seller are required to complete the transactions covered by this Agreement;
- (4) All of Seller's obligations set forth in this Agreement constitute legal, valid and binding obligations of Seller which are enforceable against Seller in accordance with their terms, except to the extent enforcement may be limited by bankruptcy, insolvency or reorganization law;

- (5) There is no provision in the Certificate of Incorporation or By-Laws of Seller which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement;
- (6) The negotiations related to this Agreement have been handled by Seller on its own behalf, without intervention of any agent or other person, so that no party has a valid claim on this basis for any finder's fee, brokerage commission, or other similar payment in connection with any of the transactions included in this Agreement;
- (7) Seller has duly filed with the appropriate agencies of the United States, the State of Texas, and appropriate local governments or political subdivisions in Texas, all tax returns and reports required to be filed; Seller either has paid in full, or is agreeable to paying in full as finally determined, all taxes, interest, penalties, assessments or deficiencies which are due for the period up to the date of Closing; and Seller has made all withholdings of tax which are required to be made under all applicable regulations of the United States, the State of Texas, and local governments in Texas;
- (8) To Seller's knowledge, there is no pending or threatened litigation or arbitration proceeding, or administrative proceeding or investigation, against or affecting the properties or assets comprising the Rail Line, or Seller's rights to conduct rail freight transportation operations over the Rail Line as Seller conducts those operations on the date of this Agreement, the result of which foreseeably would

materially adversely affect Buyer's ability to conduct rail freight transportation operations over the Rail Line on the day following the date of Closing;

- (9) Seller has received no written notice of any pending civil, criminal, or administrative actions with respect to any hazardous or toxic substance on or adjacent to the Rail Line (As used herein, "written notice" shall mean written notice delivered to either Seller's Assistant Vice President-Environmental and Hazardous Materials, or Seller's Director Environmental Remediation and Special Projects, who are the people designated by Seller to receive notice of such matters);
- (10) The physical condition of the Rail Line will be sufficient to enable Buyer to conduct rail freight transportation operations over the Rail Line on the day following the date of Closing; and
- (11) No representation or warranty by Seller in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to prevent that representation or warranty from being materially misleading.

(b) Buyer hereby represents and warrants to Seller, and Seller's successors and assignees, the following facts as of the date of this Agreement and as of the date of Closing, except where specifically noted to be as of the date of Closing only:

- (1) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas, and by the date of Closing will be qualified to do business in the State of Texas;

- (2) Buyer has all requisite authority to purchase Buyer's properties and Seller's rights and properties which are conveyed to Buyer by this Agreement; to enter into this Agreement; to conduct rail freight transportation business on the Rail Line; and to perform all of Buyer's obligations under this Agreement;
- (3) The execution of this Agreement and consummation of the transactions which are a part of this Agreement have been duly authorized and approved by all necessary company actions by Buyer, and immediately upon execution of this Agreement by Buyer's authorized representative, all of Buyer's obligations set forth in or referenced in this Agreement shall constitute legal, valid and binding obligations of Buyer; or Buyer's successors or assigns, which obligations are enforceable in accordance with their terms against Buyer or Buyer's successors or assignees;
- (4) There is no provision in the Certificate of Incorporation or By-Laws of Buyer which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement;
- (5) As of the date of Closing, Buyer shall have obtained all legal authority which is necessary to enable Buyer lawfully to conduct rail freight transportation operations over the Rail Line as a common carrier and under one or more rail freight transportation contracts, commencing at 12:01 a.m. on the day following the date of Closing;
- (6) The negotiations related to this Agreement have been handled by Buyer on its own behalf, without intervention of any agent or party, and in such manner as not to give rise to any valid claim by any party for any finder's fee, brokerage

commission, or other similar payment in connection with any of the transactions included in this Agreement;

- (7) Neither Buyer nor any of Buyer's equity owners or financing sources, nor any of their partners, is a Class I railroad or affiliated with a Class I railroad; and
- (8) No representation or warranty by Buyer in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to prevent that representation or warranty from being materially misleading.

5. Inspection and Condition of Rail Line.

(a) By signing this Agreement, Buyer acknowledges that Buyer has inspected the Rail Line, including all improvements and structures on the Rail Line. Buyer further acknowledges that (i) except as set forth in Paragraphs 4(a)(8), 4(a)(9), and 4(a)(10) of this Agreement, no representation has been made by Seller to Buyer concerning the state or condition of the Rail Line, or the age of any improvements on the Rail Line; (ii) Buyer has not relied upon any statement or declaration of Seller with respect to the physical condition of the Rail Line, Seller's title to the Rail Line, Seller's freight traffic volumes to or from the Rail Line, or any other matter, either oral or in writing, as an inducement to entering into this Agreement, other than as stated in this Agreement; and (iii) the sole consideration for execution of this Agreement by Buyer is set forth in this Agreement.

(b) EXCEPT AS SET FORTH IN PARAGRAPH 4(a) OF THIS AGREEMENT, SELLER HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF THE RAIL LINE, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY

OF THE MATERIAL OR WORKMANSHIP OF THE RAIL LINE, OR THE CONFORMITY OF THE RAIL LINE TO ITS INTENDED USES. SELLER SHALL NOT BE LIABLE TO BUYER FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT) WITH RESPECT TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF THE RAIL LINE OR THE CONFORMITY OF THE RAIL LINE TO ITS INTENDED USES. SELLER OFFERS, AND BUYER ACCEPTS, THE RAIL LINE IN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON SELLER'S RIGHTS, INTEREST, AND TITLE TO THE PROPERTY COMPRISING THE RAIL LINE.

6. Liability and Indemnity.

(a) Cooperation in Defense. Buyer and Seller agree that, following the date of Closing, they will cooperate as necessary in defense of any claim, demand, investigation or litigation arising out of Seller's or Buyer's ownership or operation of the Rail Line.

(b) Definition of Losses. In this Agreement the term, "Losses" shall include all costs, expenses, fees or liabilities of, or in any way related to the following: (i) any violation of law or regulation; (ii) any damage to property, the environment or to natural resources; (iii) any bodily injury or death of any person; or (iv) the breach of any contract. "Losses" shall include, but not be limited to, all costs of claims, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, court costs, and attorney, consultant and expert witness fees.

(c) General Liability and Indemnity.

- (1) Seller's General Liability and Indemnity. Except as provided in Paragraph 6(d) of this Agreement (environmental liability), Seller shall be responsible for, and shall indemnify, defend and hold harmless Buyer fully against, all Losses, which:
- (i) except as limited by clause (iii) just below, arise out of Seller's ownership or operation of the Rail Line on or prior to the date of Closing; (ii) result from any breach by Seller of any of its representations or warranties set forth in Paragraphs 4(a) and 10 of this Agreement, or, except as covered by clause (iv) just below, any failure by Seller to perform any of its obligations under this Agreement; (iii) result from claims of third parties caused by Seller's performance or nonperformance, or Buyer's nonperformance only where Buyer had no knowledge of the existence of the duty to perform, under any material contract, lease, permit, license, easement or commitment related to the Rail Line that is not identified in this Agreement or on Exhibit D; or (iv) occur during Seller's operations on the Interchange Access Line, regardless of Seller's or Buyer's negligence or alleged negligence, solely to the extent that such Losses involve Seller's property or employees or lading on Seller's trains, or where third parties or their property (other than lading on Buyer's or Seller's trains) are involved, the negligent party shall respond in accordance with the law of the applicable jurisdiction.
- (2) Buyer's General Liability and Indemnity. Except as provided in Paragraph 6(d) of this Agreement (environmental liability), and further except for Losses resulting from one or more of Seller's representations or warranties set forth in this



Agreement containing any untrue or materially misleading statement of a material fact, or omitting any material fact that is necessary to prevent the representation or warranty from being materially misleading, Buyer shall be responsible for, and shall indemnify, defend and hold harmless Seller fully against, regardless of any negligence or alleged negligence of Seller prior to closing, all Losses which:

(i) except as limited by clause (iii) just below, arise out of Buyer's ownership or operation of the Rail Line after 12:01 a.m. on the day following the date of Closing; (ii) result from any breach by Buyer of any of its representations or warranties set forth in Paragraph 4(b) of this Agreement, or any failure by Buyer to perform any of its obligations under this Agreement; (iii) result from claims of third parties caused by Buyer's nonperformance or required performance under any material contract, lease, permit, license, easement or commitment relating to the Rail Line, where that contract, lease, permit, easement or commitment either is identified in this Agreement or on Exhibit D, or Buyer has specific knowledge of it, but then only from the time when Buyer acquired such specific knowledge; or (iv) arise out of, or are attributable to Buyer's activities or operations on the Interchange Access Line, regardless of Seller's negligence or alleged negligence, except to the extent Losses involve Seller's property or employees or lading on Seller's trains, or where third parties or their property (other than lading on Buyer's or Seller's trains) are involved, in which case the negligent party shall respond in accordance with the law of the applicable jurisdiction.

(d) Environmental Liability and Indemnity.

(1) Buyer Accepts the Rail Line "As Is, Where Is". Buyer acknowledges that Seller has provided Buyer with full access to inspect the Rail Line. Buyer further acknowledges that Seller makes only those representations and warranties to Buyer concerning the existence of any hazardous or toxic substances on or near the Rail Line, or compliance of the Rail Line with any statutes, ordinances, rules, regulations, orders or decisions with regard to hazardous or toxic substances on or near the Rail Line, which are expressly set forth in Paragraph 4(a)(9) of this Agreement.

(2) Seller's Environmental Liability and Indemnity. Notwithstanding any other liability or indemnification provision in this Agreement, Seller shall be responsible for, and shall indemnify, defend and hold harmless Buyer fully against, Losses incurred due to any claim, demand or litigation concerning violation of any applicable statute, ordinance, rule, regulation, order or decision in any way concerning any of the following: (i) any chemical, material or substance that is now, or at the time in question, is regulated or governed by any law, the release of which creates any liability under any applicable law; or (ii) any other material which, when released, would cause significant ecological damage (items described by (i) or (ii) above are referenced hereinafter as "Hazardous Materials") located on or near the Rail Line where such Losses:

(a) were caused by one or more acts of Seller that occurred on or prior to the date of Closing; and

(b) result from any written claim ("Claims") that is delivered to Seller within four years following the date of Closing; and

(c) exceed \$10,000.00 in the aggregate in any year.

(3) Buyer's Environmental Liability and Indemnity. As part of the consideration for this Agreement, and notwithstanding any other liability or indemnification provision in this Agreement, Buyer shall be responsible for, and shall indemnify, defend, and hold harmless Seller fully against, regardless of any negligence or alleged negligence of Seller occurring prior to Closing, Losses incurred due to any claim, demand or litigation concerning violation of any applicable statute, ordinance, rule, regulation, order or decision in any way concerning any Hazardous Materials located on or near the Rail Line where such Losses either:

(a) were not caused by one or more acts of Seller, or Seller's corporate predecessors, regardless of when the act or omission giving rise to the claim occurred; or

(b) regardless of cause, do not result from a Claim delivered to Seller within four years following the date of Closing; or

(c) were caused by Seller and result from a Claim delivered to Seller within four years of the date following Closing, but only up to \$10,000.00 in the aggregate in any year.

Buyer also shall be responsible for, and shall indemnify, defend and hold harmless Seller fully against, regardless of any negligence or alleged negligence of Seller, Losses incurred due to any claim, demand or

litigation concerning violation of any applicable statute, ordinance, rule, regulation, order or decision in any way concerning any Hazardous Materials on or near the Interchange Access Line, to the extent such Losses arise out of, or are attributable to, Buyer's activities or operations on the Interchange Access Line, except to the extent Losses result from Seller's affirmative negligent acts.

(4) Arbitration of Allocation of Liability Between Buyer and Seller. Any dispute between Seller and Buyer as to allocation between them of Losses for which both Seller and Buyer are responsible under the terms of this Paragraph 6 shall be settled by binding arbitration in accordance with the rules of the American Arbitration Association.

(5) Buyer To Comply With Hazardous Materials Laws. Buyer agrees to comply with all federal, state and local laws, regulations and rules concerning handling and disposal of Hazardous Materials.

(6) Liability Remedies and Obligations Are Exclusive. Buyer and Seller agree that the remedies and obligations set forth in this Paragraph 6 shall be exclusive remedies and obligations of each one to the other with respect to any Losses relating to the release or existence of Hazardous Materials on or near the Rail Line.

(e) Seller to Delivery Property Records to Buyer. Seller shall deliver to Buyer, on or soon following the date of Closing, originals or copies of whatever records, prints, archival information, or other evidence Seller locates in a reasonable search of Seller's records, which

bears upon the use of, maintenance, or title to the real estate comprising the Rail Line during the time the Rail Line was operated by Seller as a common carrier line of railroad. If, at any time after Closing, Seller locates any other documents which bear upon the use of, maintenance, or title to the real estate comprising the Rail Line, Seller promptly shall provide originals or copies of those documents to Buyer.

7. Assignment; Seller's Right of First Refusal.

(a) Buyer may not assign this Agreement, or any rights or obligations under this Agreement, to another railroad, or any party or individual who at the time of the assignment is affiliated with or working for another railroad, without the prior written consent of Seller, which consent shall not be unreasonably withheld. Any assignee, including any successor in interest, of Buyer's or Seller's rights under or property acquired by this Agreement, shall assume in writing all of Buyer's or Seller's continuing and existing or thereafter arising obligations under this Agreement, and under any then effective contract assigned by Seller to Buyer, in whole or in part, in accordance with the terms of this Agreement, which obligations are related to the property or rights involved in the assignment.

(b) Any subsequent agreement by Buyer to sell all or any portion of the Rail Line (except to an affiliate of Buyer) must contain the effective right for Seller to purchase the Rail Line, or portion thereof, from Buyer, on the same, or substantially similar, basis as that set forth in the subsequent sale agreement. Buyer shall deliver to Seller a copy of the executed subsequent sale agreement within seven days following its execution. After receiving such copy, Seller and Buyer then shall negotiate in good faith for sixty days Seller's purchase of the Rail Line, or portion thereof, from Buyer. If Seller, at any time during these sixty days, offers in writing to

purchase from Seller the Rail Line, or portion thereof, on the same, or substantially similar, basis as that set forth in the subsequent sale agreement, and at a purchase price equal to the average of the highest three bids received by Buyer, then Buyer, within seven days, shall accept such offer, and within thirty days thereafter, shall convey such property to Seller. The foregoing shall not apply where Buyer wishes to sell small segments of track or property comprising the Rail Line where such sale would not hinder the overall operations of Buyer on the Rail Line.

8. Obligations are Continuing.

The representations, warranties and obligations of Buyer and Seller in this Agreement are continuing and survive the Closing. Terms of continuing obligations in this Agreement are subject to amendment only by a written contract signed by both Buyer and Seller, or their respective successors or assignees.

9. Liens and Encumbrances.

Seller represents, warrants and covenants that Seller has not caused or suffered, and will not cause or suffer prior to the date of Closing, any liens or encumbrances to be filed against the Rail Line or the Interchange Access Line which would materially adversely affect Buyer's ability to conduct rail freight transportation operations on the Rail Line or the Interchange Access Line on the day following the date of Closing. Buyer agrees to take title to the Rail Line subject to all liens and encumbrances on the Rail Line, except for the liens that would violate one or more of Seller's representations and warranties in Paragraph 4(a) or this Paragraph. The only encumbrances on the Rail Line of which Seller is aware are related to the agreements identified in Part I of Exhibit D, attached hereto, and may encumber the Rail Line on the terms and conditions set forth in those agreements.

10. Pending Public Works Projects.

Seller shall notify Buyer prior to closing of all pending public works projects on the Rail Line of which Seller is aware, Seller shall pay the railroad's share of the cost of whatever work is performed on pending public works projects before the date of Closing, and Buyer shall pay the railroad's share of the cost of whatever work is performed on these projects after the date of Closing. Any payments received by Buyer or Seller from any government body for a pending public works project shall be apportioned on the basis that Seller shall receive that share of the payments applicable to work performed on these projects prior to date of Closing, and Buyer shall receive that share of the payments applicable to work performed on these projects after the date of Closing.

11. Closing.

(a) The closing of this transaction shall occur on May 31, 1999, or an earlier date mutually agreeable to the parties (referenced herein as "Closing").

(b) At Closing, Seller shall deliver to Buyer the following documents:

- (1) A sufficient number of original counterparts of executed Quitclaim Deeds to the Rail Line, in exact form as the Quitclaim Deed attached hereto as Exhibit B, to enable Buyer to file an original Quitclaim Deed in each county in which the real property comprising the Rail Line is located;
- (2) An executed Bill of Sale in exact form as the Bill of Sale attached hereto as Exhibit C;
- (3) A copy of Seller's Articles of Incorporation and By-Laws; and

(4) An opinion of counsel for Seller to Buyer with respect to those items represented by Seller to Buyer in Paragraphs 4(a)(1), 4(a)(2), 4(a)(3), 4(a)(4), 4(a)(5) and 4(a)(8) of this Agreement.

(c) At Closing, Buyer shall deliver to Seller:

(1) A copy of Buyer's Articles of Incorporation and By-Laws;

(2) A Certificate of Insurance establishing that Buyer has effective liability insurance meeting the requirements of Paragraph 16 of this Agreement; and

(3) An opinion of counsel for Buyer to Seller with respect to those items represented by Buyer to Seller in Paragraphs 4(b)(1), 4(b)(2), 4(b)(3), 4(b)(4), 4(b)(5) and 4(b)(7) of this Agreement.

(d) At Closing, Buyer shall deliver to Seller the purchase price, as set forth in Paragraph 2 of this Agreement.

12. Proration.

(a) Prepaid rentals, utilities, and other income or fees attributable to the contracts related to the Rail Line that are being assigned under Paragraph 1 of this Agreement, shall be prorated between Seller and Buyer in such manner as to allocate to Seller all income received, and all expenses incurred, on or prior to the date of Closing, and to allocate to Buyer all income received, and expenses incurred, after the date of Closing.

(b) Seller shall be responsible for all real estate taxes applicable to the Rail Line for the calendar year 1999. Buyer shall be responsible for all real estate taxes applicable to the Rail Line commencing on and following calendar year 2000.



13. Interchange.

(a) Buyer and Seller shall interchange rail freight cars and equipment to and from each other at Seller's Lower Lubbock Yard. Seller shall have the right to change the location at which such interchange occurs, within the Lubbock, Texas area, if Seller reasonably determines that such change is necessary for operational purposes. Such interchange may include tracks designated by Buyer on Buyer's property as mutually agreed between both parties. Interchange between Buyer and any party other than Seller will not be permitted at any location along the Rail Line other than at Seller's Lower Lubbock Yard. The trackage upon which such interchange takes place shall be referenced hereinafter as "Interchange Track". Buyer will block traffic for interchange with Seller in accordance with written instructions to be furnished by Seller.

(b) Cars and their contents delivered by one party to the other on an Interchange Track shall be deemed to be in the possession of the receiving party as of the time they are placed on the Interchange Track and uncoupled from the delivering party's train or engine, except that if any such car is rejected by the receiving party under the Interchange Rules of the Association of American Railroads ("AAR") or any successor rules, the refused car shall be deemed to remain in the possession of the delivering party until that car is accepted by the receiving party.

14. Car Hire Costs.

In connection with all loaded and empty rail equipment moving in rail freight transportation service to or from the Rail Line and interchanged between Buyer and Seller on an Interchange Track, the party in possession of any car shall be responsible for all car hire costs, per diem expenses and mileage allowances payable with respect to such car, for any per diem charges for trailers or containers carried by such car, and for any equipment use charges

applicable to any RoadRailer equipment or similar carless intermodal technology. Although Buyer is a line haul carrier, the parties acknowledge that for purpose of car hire only, Buyer will be eligible for treatment as a terminal switch carrier entitled to transfer of car hire liability for up to 96 hours within the provisions of Car Hire Rule 5 - Switching Car Hire Expense Recovery, as set forth in the Code of Car Hire Rules administered by the Association of American Railroads. Seller shall make reasonable efforts to make freight cars available at Buyer's request on an Interchange Track as needed by Buyer for rail service to or from facilities on or along the Rail Line, on a non-discriminatory basis between Seller's car needs on similar rail lines and Buyer's car needs; however, Seller makes no guarantee of equipment supply to Buyer. It is the responsibility of Buyer to provide all locomotives, freight equipment for local traffic, and maintenance of way equipment.

15. Liability Insurance.

(a) For so long as Seller conducts any activities on any portion of the Interchange Access Line, Buyer shall maintain a comprehensive general form of insurance covering liability in connection with any of Buyer's activities or operations on or near the Interchange Access Line, including but not limited to Public Liability, Personal Injury and Property Damage, Federal Employers Liability Act Liability, Bill of Lading and Foreign Rolling Stock Liability, and Contractual Liability, with such limits, deductibles and exclusions as Seller may agree are satisfactory, provided however, that: (i) such limits shall not be less than \$2 million per occurrence, and \$4 million in the aggregate; and (ii) policy terms shall not exclude or limit, in connection with any of Buyer's or Seller's activities or operations on or near the Interchange Access Line, coverage where activities or operations are near railroad tracks. Seller shall be

named as an ADDITIONAL INSURED on such liability insurance policy. Such liability insurance must be purchased from an insurance company licensed to do business in Texas, and possessing a current Best's Insurance Guide Rating of B and Class X or better.

(b) Buyer shall provide to Seller evidence of Buyer's liability insurance coverage at Closing, with copies of its insurance policies and any amendments, as soon as they are available, and with evidence of continued insurance coverage on January 1 and July 1 of each year. Buyer's failure to provide such evidence shall entitle Seller to purchase such liability insurance, and withhold from the divisions payment forwarded to Buyer the cost of this insurance.

16. Seller's Authority to Establish Through Routes and Offer Through Routes.

Buyer and Seller agree that, with respect to all current and future traffic originating or terminating on or along the Rail Line and interchanged between Buyer and Seller at Lubbock, Texas, for ninety-nine years following the date of Closing, Seller shall have authority to establish through routes and offer through freight rates via through routes involving both Buyer and Seller with interchange between Buyer and Seller at Lubbock, Texas. Buyer shall not impose a surcharge upon this traffic without the prior written consent of Seller, which consent shall not be unreasonably withheld. For these ninety-nine years, Seller shall specify junctions and routes for all traffic, effective the day following the date of Closing. For this same ninety-nine years, following the date of Closing, Buyer automatically concurs in all such through rates established by Seller, whether for present or future freight traffic, so long as Buyer shall receive for transporting the traffic the division of revenues that is set forth in Paragraph 17(a) of this Agreement.

17. Division of Revenue.

(a) Buyer and Seller agree that for so long as Seller establishes through freight rates for interline freight transportation service involving both Buyer and Seller, the through revenue accruing on all existing and future carload traffic movements interchanged between Buyer and Seller at Lubbock, Texas, to or from existing and future rail destinations or origins on or along the Rail Line, shall be divided between Buyer and Seller on the following basis:

- (1) For each carload of freight that originates or terminates on the Rail Line and is interchanged between Buyer and Seller at Lubbock, Texas, billed in a block of 27 or more cars for an individual shipper or receiver, Buyer shall receive \$40.00 per car from Seller.
- (2) Except as provided in subparagraph (3), below, for each carload of freight that originates or terminates on the Rail Line and is interchanged between Buyer and Seller at Lubbock, Texas, not billed in a block of 27 or more cars for an individual shipper or receiver, Buyer shall receive \$125.00 per car from Seller.
- (3) Commencing as of January 1, 2000, should the number of carloads of freight originating and terminating on the Rail Line, interchanged between Buyer and Seller at Lubbock, Texas, and not billed in blocks of 27 or more cars for an individual shipper or receiver exceed 3,300 carloads in any calendar year, Buyer shall receive \$115.00 per car from Seller for each carload commencing with car 3,301 for the duration of that calendar year.

For purposes of computing the division of revenue set forth above, two loaded trailers or containers in intermodal service shall count as one carload.

(b) For all current and future traffic originating or terminating on or along the Rail Line, and interchanged between Buyer and Seller at Lubbock, Texas, for twenty-five years following the date of Closing, the divisions set forth in Paragraph 17(a) shall be adjusted annually, commencing as of January 1, 2001, based on 50% of the increase or decrease between the fourth quarter of 2000 compared to the fourth quarter of 1999, in the Rail Cost Adjustment Factor, unadjusted for productivity, as published by the Association of American Railroads (or, if it ceases to be used, some similar rail cost index), and thereafter as of each January 1 based on 50% of the increase or decrease in the Rail Cost Adjustment Factor in the fourth quarter of the immediately preceding year compared to the fourth quarter of the year before that. However, in no event will Buyer's divisions be reduced to a level less than the amounts specified in subparagraph (a) of this Paragraph 17.

(c) Nothing in this Agreement shall preclude Seller and Buyer from negotiating and mutually agreeing to different divisions than those specified in this Paragraph. Divisions of revenue shall be paid by Seller only where Seller is entitled to receive linehaul revenues for a shipment. Buyer shall not impose any surcharge or any additional or increased charges to shippers without Seller's written consent, which consent shall not be unreasonably withheld.

18. Buyer to Offer to Hire Seller's Qualified Employees.

Buyer shall consider for employment those of Seller's employees who want to work for Buyer on the terms and conditions of employment that are offered by Buyer, at Buyer's sole discretion. Buyer shall give priority hiring consideration to employees of Seller who work on the Rail Lines and are represented by the Brotherhood of Maintenance of Way Employees. Any such individual who Buyer in its sole discretion determines to be qualified for a job that Buyer

has available, shall be offered such job by Buyer on the terms and conditions that Buyer establishes, in Buyer's sole discretion. Buyer promptly shall notify Seller of the name of each of Seller's current employees who Buyer offers to hire, and also the name of each of these employees who Buyer actually hires. Buyer shall assume a neutral stance in any Brotherhood of Maintenance of Way Employees union organizing effort.

19. Transfer of Operations.

All rail operations on the Rail Line shall be transferred from Seller to Buyer at 12:01 a.m. on the day following the date of Closing. Upon reasonable advance notice provided by Buyer to Seller, prior to the Closing Seller will switch up to two of Buyer's locomotives from Buyer's affiliates in Slaton, Texas, and in Oklahoma, to the Rail Line, at no charge to Buyer. Following the date of Closing, Seller will perform (at no cost or charge to Buyer) up to two switch movements per year of Buyer's locomotives between the Rail Line and Slaton, Texas, for locomotive maintenance purposes.

20. Collection of Revenues.

(a) Seller shall submit freight bills or interline settlements for, and shall collect, all revenues due for movements over the Rail Line of all shipments moved over the Rail Line, on or before the date of Closing. Seller shall assess and collect all charges due for all switching services performed on the Rail Line on or before the date of Closing. Seller shall assess and collect all demurrage and miscellaneous charges relating to car supply and other services performed on the Rail Line on or before the date of Closing.

(b) Except as otherwise provided by freight transportation contracts, all shipments which move to, from or via the Rail Line that are interchanged between Buyer and Seller, after 12:01

a.m. on the day following the date of Closing, and which are made under rates and routes established by Seller as set forth in Paragraph 16 of this Agreement, shall be settled between Buyer and Seller on the basis of a modified junction settlement plan, with Seller paying division of revenue payments to Buyer on a weekly basis within five working days following the date on which Seller issues the revenue waybill for the movement. Seller shall submit freight bills for, and shall collect all revenues due for, shipments originating or terminating on the Rail Line that are interchanged between Buyer and Seller, including all prepaid shipments that originate on the Rail Line, and all collect shipments that terminate on the Rail Line, except for shipments where Seller does not receive line haul revenues. Seller has the right to grant, or refuse to grant, credit to any customer on the Rail Line concerning any shipments routed to, from or via the Rail Line that are interchanged between Buyer and Seller. Buyer shall assess and collect all charges due for all switching services performed on the Rail Line at and after 12:01 a.m. on the day following the date of Closing. Buyer shall assess and collect all demurrage and miscellaneous charges relating to car supply and other services performed on the Rail Line at and after 12:01 a.m. on the day following the date of Closing.

21. Transfer of Liabilities; Payment of Charges.

For the period before and including the day of Closing, Seller shall be responsible for: (a) all common carrier rail operations, including car supply, on the Rail Line; (b) any freight loss and damage claims attributable to rail operations over the Rail Line; and (c) all car hire and car mileage allowance payments relating to rail operations over the Rail Line. At and after 12:01 a.m. on the day following the date of Closing, Buyer shall be responsible for: (d) all common carrier rail operations, including car supply, on the Rail Line; (e) any freight loss and damage claims

attributable to rail operations over the Rail Line; and (f) all car hire and car mileage allowance payments relating to rail operations over the Rail Line.

22. Electronic Data Interchange.

Within 30 days following the date of Closing, Buyer must have the ability to send and receive electronically waybills, advanced consists, and bills of lading; as well as Train II reports and passing/placement reportings for performance purposes. Transaction reporting should be at industry standard levels or one level behind.

23. Assignment of Freight Transportation Contracts.

The parties agree that, notwithstanding any other provision of this Agreement, the only freight transportation contracts to be assigned by this agreement are: (a) freight transportation contracts that apply to traffic moving to or from facilities on or along the Rail Line; or (b) freight transportation contracts with or involving shippers or receivers that have facilities on or along the Rail Line, and which would apply to one or more shipments to or from a facility on or along the Rail Line. Seller agrees to send on the date of Closing to each shipper (or consignee), and each railroad, who is a party to any freight transportation contract involving any existing or potential freight traffic movement to or from any rail origin or destination on the Rail Line, a Notice of Assignment, advising those parties of the following: (a) the occurrence of this sale; (b) the fact that all rates and service (and in the case of other railroads, revenue divisions) terms in each contract will remain the same; and (c) the fact that Buyer will replace Seller as the party responsible for all rail service to be performed under the contracts for all movements over all or any part of the Rail Line. Buyer agrees that as between Buyer and Seller, Seller's actions in



accordance with the terms of this Paragraph will discharge in full Seller's responsibility to assign freight transportation contracts to Buyer.

24. Applicable Law.

This agreement shall be governed by and construed in accordance with the laws of the State of Texas.

25. Effect of Waiver.

Any waiver by either Buyer or Seller, or failure of either Buyer or Seller to insist upon full and complete performance by Seller or Buyer of its obligations set forth in this Agreement, shall not constitute a waiver or release of such party's right to insist upon full and complete performance of any other obligations in this Agreement, or a waiver or release of such party's right to insist upon full and complete performance of the obligations that were waived or not enforced for periods prior to, or following, the waiver or failure to insist upon full and complete performance. This Agreement shall be amended or modified only by written agreement signed by the parties hereto.

26. Notices.

All notices and other communications under this Agreement shall be in writing and deemed properly served if delivered by hand to the party addressed or, if mailed, when received by the United States Postal Service in registered or certified mail, postage prepaid, or, if sent by a national overnight service, when received by the carrier service in a prepaid mailer, return receipt requested, addressed as follows:

Seller: Mr. Jerome M. Johnson  
Assistant Vice President  
Shortline/Interline Development  
The Burlington Northern and Santa Fe Railway Company

2650 Lou Menk Drive  
Fort Worth, Texas 76161

Buyer: Mr. Larry D. Wisener  
President/Manager  
South Plains Switching, Ltd. Company  
P.O. Box 676  
Slaton, Texas 79364

Either party hereto may change its address or addressee to which notices are to be given by providing written notice of the change to the other party.

27. Confidentiality.

Except to the extent that the terms of this Agreement are required to be disclosed by the STB, by order of any court of competent jurisdiction or any governmental agency, or by parties involved in financing this purchase, each party to this Agreement shall not disclose the contents of this Agreement to any other party, without the prior written consent of the other party to this Agreement. Any party who learns of any of the terms of this Agreement shall be required by the party to this Agreement who is disclosing the information not to disclose those terms to any other party without the prior written consent of both parties to this Agreement.

28. Entire Agreement; Integration of Agreement.

This document, together with all Exhibits attached hereto, constitutes the entire agreement between Buyer and Seller relating to this transaction. Any other prior or contemporaneous agreements, understandings, representations or statements, whether oral or written, relating to this transaction are merged herein. The headings and titles to provisions in this Agreement are for convenience only, and shall not be deemed to modify or affect the rights or duties of Buyer or Seller. All rights and obligations of Buyer and Seller set forth in this Agreement, or in any Exhibit attached hereto, are integral parts of this Agreement. The consideration inducing Buyer and Seller to enter into this Agreement includes all of the commitments by Buyer to Seller, and

by Seller to Buyer, as set forth in this Agreement, including terms set forth in the Exhibits attached hereto.

IN WITNESS WHEREOF, authorized representatives of the parties have executed this agreement as of the third day of May, 1999.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

SOUTH PLAINS SWITCHING, LTD., CO.

By: Douglas J. Babb  
Title: Senior Vice President  
Merchandise Business Unit

By: Larry Luker  
Title: President/Manager

EXHIBIT A

LIST OF TRACKS AND MAP/PRINT OF RAIL LINE

| LUBBOCK TRACKS                                    | ATSF Side(Track #) | Track Feet | BN Side(Track #) | Track Feet |
|---------------------------------------------------|--------------------|------------|------------------|------------|
| (Includes both BNSF-<br>Owned and Shipper Tracks) |                    |            |                  |            |
|                                                   | 0310               | 1804       | 9201             | 1608       |
|                                                   | 0311               | 255        | 9202             | 1531       |
|                                                   | 0312               | 129        | 9203             | 1450       |
|                                                   | 0313               | 49         | 9204             | 623        |
|                                                   | 0320               | 1686       | 9208             | 1100       |
|                                                   | 0330               | 356        | 9220             | 1026       |
|                                                   | 0331               | 995        | 9298             | 5067       |
|                                                   | 0332               | 578        | 9310             | 800        |
|                                                   | 0340               | 3146       | 9320             | 1026       |
|                                                   | 0341               | 432        | 9322             | 1685       |
|                                                   | 0370               | 4535       | 9330             | 1000       |
|                                                   | 0372               | 777        | Orchard Lead     | 17298      |
|                                                   | 0373               | 110        | 9304             | Unknown    |
|                                                   | 0380               | 12278      | 9311             | Unknown    |
|                                                   | 0381               | 653        | 9312             | Unknown    |
|                                                   | 0382               | 6515       | 9321             | Unknown    |
|                                                   | 0385               | 109        | 9323-9326        | Unknown    |
|                                                   | 0387               | 180        | 9331             | Unknown    |
|                                                   | 0388               | 172        | 9333             | Unknown    |
|                                                   |                    |            | 9401-9406        | Unknown    |
|                                                   | Total              | 33560      | 9408-9412        | Unknown    |
|                                                   |                    |            | 9415             | Unknown    |
|                                                   |                    |            | 9420-9424        | Unknown    |
|                                                   |                    |            | Total            | 34224      |

↑ TO MIN  
ATSF YARD

← 2

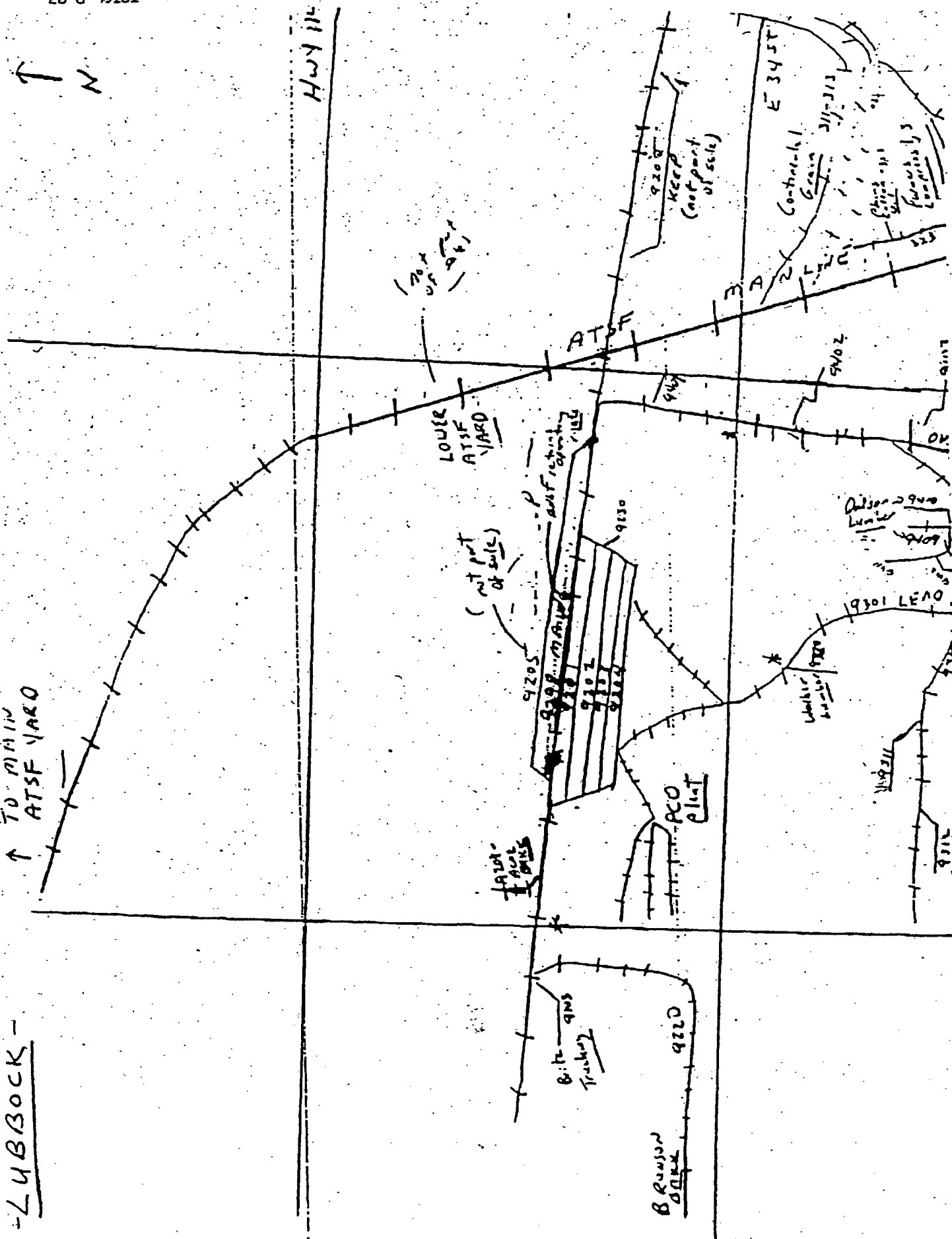




**EXHIBIT B**

**QUITCLAIM DEED**

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, Grantor, for Ten and no/100 Dollars (\$10.00) and other good and valuable consideration, to it duly paid, the receipt whereof is hereby acknowledged, does by these presents REMISE, RELEASE and QUITCLAIM, without any covenants of warranty whatsoever and without recourse to the Grantor, its successors and assignees, unto SOUTH PLAINS SWITCHING, LTD. COMPANY, Grantee, its successors and assignees, forever, all of its all the right, title and interest, if any, in and to a certain strip or parcel of land located in the County of Lubbock, Texas, as described in detail in Attachment 1, attached hereto.

SUBJECT, however, to all existing interests, including but not limited to all reservations, rights-of-way, easements and other encumbrances, of record or otherwise.

EXCEPTING AND RESERVING unto Grantor, its successors and assigns, all of the coal, oil, gas, casing-head gas and all ores and minerals of every kind and nature, including sand and gravel underlying the surface of the premises herein conveyed, together with the full right, privilege and license at any and all times to explore, or drill for and to protect, conserve, mine, take, remove and market any and all such products in any manner which will not damage



structures on the surface of the premises herein conveyed, or unreasonably interfere with the use of such premises, together with the right of access at all times to exercise these rights.

ALSO RESERVING unto Grantor, its successors and assigns, any and all water rights, and the exclusive right to develop and take water by any means, and to all appropriations, priorities, permits and certificates which are appurtenant to, associated with, used upon, flowing over, under, or lying on, in or under the premises herein conveyed, and an exclusive, permanent easement to construct, install, operate, replace, rework, reconstruct, rehabilitate and maintain any and all water diversion, production and transportation structures, equipment, improvements and piping, and to construct, install, operate and maintain water pumps and hydroelectric generation equipment necessary, convenient or related to the production, transportation or delivery of water from, on, under or across the premises herein conveyed, together with the right of access at all times to exercise these rights.

ALSO RESERVING onto Grantor, its successors and assigns, an exclusive, permanent easement for construction, reconstruction, maintenance, use and/or operation of one or more pipelines or fiber optic communication lines, facilities and appurtenances in, under, across, along and through all or any portion of the premises herein conveyed, including the right for Grantor, its successors and assigns, or any of its licensees, to enter, disturb the surface, and occupy the premises herein to be conveyed for purposes of constructing, reconstructing, maintaining, using and/or operating one or more pipelines or fiber optics communication lines, facilities and appurtenances in, under, across, along and through all or any portion of the premises herein to be conveyed; provided however, that all activities in the exercise of these rights shall be performed in a manner which will not damage structures on the surface of the premises herein

conveyed, and that Grantor shall notify Grantee in advance of any such entry, and shall enter and occupy such premises in a manner which does not unreasonably interfere with Grantee's use of such premises.

TO HAVE AND TO HOLD the same unto Grantee, its successors and assignees, forever.

IN WITNESS WHEREOF, Grantor has caused this instrument to be signed by its authorized representative, attested by its Assistant Secretary, and its corporate seal to be affixed hereto, on the \_\_\_\_ day of \_\_\_\_\_, 1999.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Assistant Secretary

STATE OF TEXAS                    )  
                                          ) ss.  
COUNTY OF TARRANT            )

On this \_\_\_\_ day of \_\_\_\_\_, 1999, before me, the undersigned, a Notary Public in and for the State of Texas, duly commissioned and sworn, personally appeared Douglas J. Babb, Senior Vice President Merchandise Business Unit and an Assistant Secretary, respectively, of The Burlington Northern and Santa Fe Railway Company, the corporation that executed the foregoing instrument, and acknowledged the execution thereof to be the free and voluntary act and deed of such officer and the voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the foregoing instrument and that the seal affixed in the corporate seal of said corporation.

Witness my hand and official seal affixed the day and year first above written.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

Attachment 1

[property description]  
to be supplied

MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY OF THE PROPERTY, OR THE CONFORMITY OF ANY OF THE PROPERTY TO ITS INTENDED USES. SELLER SHALL NOT BE LIABLE TO BUYER FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT) WHICH IS RELATED IN ANY WAY TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF ANY OF THE PROPERTY CONVEYED BY DELIVERY OF THIS BILL OF SALE; OR THE CONFORMITY OF SUCH PROPERTY TO ITS INTENDED USES. SELLER CONVEYS TO BUYER, AND BUYER, BY ACCEPTANCE OF SELLER'S DELIVERY OF THIS BILL OF SALE, HEREBY ACCEPTS, ALL PROPERTY CONVEYED BY DELIVERY OF THIS BILL OF SALE IN "AS IS, WHERE IS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON SELLER'S RIGHTS, INTEREST, AND TITLE TO SUCH PROPERTY.

IN WITNESS WHEREOF, Seller has caused this Bill of Sale to be executed by its duly authorized representative on this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

BILL OF SALE

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("Seller"), for and in consideration of promises made by SOUTH PLAINS SWITCHING, LTD., COMPANY ("Buyer"), to purchase all of Seller's interest in the rail line segments identified in the Agreement for Sale of Certain Assets, Rights and Obligations of The Burlington Northern and Santa Fe Railway Company To South Plains Switching, Ltd. Company, dated as of May 3, 1999 (which property is hereinafter referenced as "Rail Line"), hereby sells, grants and conveys to Buyer, and Buyer's successors and assignees, all of Seller's rights, interest and title, to the following property constituting the Rail Line, subject to all limitations on Seller's rights, interest and title to the following property:

All rail, ties, spikes, tie plates, rail anchors, turnouts, bridges, culverts, signalling equipment, and other supporting structures, ballast, other track materials and supplies, and the metal depot at or near the Old BN Yard (excluding: (1) any and all vehicles, maintenance equipment on wheels, radios, and computer equipment; and (2) if a notice of interim trail use is filed and accepted as to the Rail Line or if trail use is implemented during the abandonment or discontinuance process, also excluding all bridges, culverts and bridge support structures) that on the date of this Bill of Sale are present on the real property comprising the Rail Line, whether on that date they are installed or uninstalled.

SELLER HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY OF THE PROPERTY CONVEYED BY DELIVERY OF THIS BILL OF SALE, ITS

**EXHIBIT D**

**AGREEMENTS TO BE ASSIGNED IN PART  
TO BUYER**

[To be furnished]

Attachment E



CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET  
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

29 June 2006

by express service, next day delivery

Hon. Bonnie Murphy  
Regional Administrator  
Federal Railroad Administration  
4100 International Plaza, Suite 450  
Fort Worth, TX 76109

Re: request for inspection of trackage  
currently owned by South Plains Switching  
in Lubbock, TX

Dear Ms. Murphy:

This letter is on behalf of PYCO Industries, Inc., a cottonseed mill cooperative with two plants in Lubbock, Texas. PYCO has shipped roughly 6000 to 7000 carloads per year for the past two years. PYCO is rail dependent, and must have rail service in order to ship its product. PYCO is a BNSF Railway customer, but local switching service is provided by South Plains Switching, Ltd. (SAW) in Lubbock. SAW is owned by Larry and/or Delilah Wisener. SAW is a common carrier railroad operating in interstate and foreign commerce, which acquired approximately 14 miles of track from BN pursuant to South Plains Switching, Ltd. -- Acquisition Exemption -- BNSF Railway, STB Finance Docket No. 33753 (Sub-no. 1), served July 15, 1999. SAW is subject to FRA jurisdiction under 49 CFR 213.1.

Due to service inadequacies experienced by PYCO in connection with SAW service in 2005, PYCO in December of that year petitioned the Surface Transportation Board (STB) to authorize alternative rail service by West Texas & Lubbock Railroad (WTL) for PYCO on the SAW lines pursuant to 49 C.F.R. Part 1146. By decision served in STB Finance Docket 34802 on January 26, 2006, STB authorized such service and WTL immediately began to provide same. A copy of this decision is attached.

Although as a result of STB's orders SAW must permit WTL to provide PYCO with alternative rail service, SAW otherwise has refused permission for PYCO to enter the premises. To the best of PYCO's knowledge, SAW has not inspected or repaired the trackage employed by WTL to serve PYCO since the inception of alternative service. Indeed, to the best of PYCO's knowledge, SAW has performed little or no track maintenance on this trackage since acquiring it from BNSF in 1999. WTL has

increasingly complained to PYCO about problems with the trackage impinging on operations. On June 14, WTL sustained a serious derailment as a result of defective switches. WTL in addition has provided the attached email identifying a specific track condition with respect to which they are alarmed. (Note that the email confirms the derailment as well.) PYCO has become increasingly concerned that SAW is allowing the track to deteriorate to the point that it is inoperable, as a means to retaliate against PYCO for seeking alternative service and as a means to defeat the intent of STB in issuing the alternative service order. This would also amount to a constructive abandonment.

In STB's decision (over the objection of SAW) extending alternative rail service, STB indicated that PYCO and WTL should address their concerns over track deterioration to FRA. "If WTL or PYCO continues to be concerned that track conditions are unsafe, the Federal Railroad Administration should be contacted to request an evaluation of the track." STB June 21 Decision, slip op. at 8. A copy of this decision is attached. Legal counsel for WTL (joined by myself for PYCO) telephoned SAW's attorney (Mr. McFarland) on June 23 to ask if SAW would permit a qualified private inspector to go over the lines. SAW's counsel declined. Thus, in order to ensure that the lines are inspected and deficiencies or violations in need of repair are identified (and hopefully repaired), WTL and PYCO feel they have no alternative but to request an FRA inspection. WTL has emphasized to PYCO that the track needs attention.

I attach hereto a map showing what we believe to be the SAW trackage (in yellow) in Lubbock. The locations of PYCO's plants 1 and 2 are marked in green. The location of Farmer's Coop Compress, which is referenced in the WTL email, is marked in blue. Hopefully this information will facilitate the inspection.

WTL's attorney is John Heffner. His telephone number in Washington, D.C., is 202-263-4180. Please also feel free to contact me if you need any further information. Otherwise, PYCO requests an inspection of the SAW trackage with the intent of identifying deficiencies and violations for remedy so that alternative service may continue uninterrupted.

Thank you for your assistance in this matter.

Very truly,

  
Charles H. Montange  
for PYCO Industries, Inc.

Attachments:

STB decisions in F.D. 34802 (Jan. 26 and June 21, 2006)  
WTL email  
map

cc. John Heffner, Esq. (for WTL)  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036

Thomas McFarland, Esq.  
208 South LaSalle St., Suite 1890  
Chicago, IL 60604-1112

Gail Kring & Robert Lacy  
PYCO Industries, Inc.  
% Gary McLaren, Esq.  
3305--66th St., Suite 1A  
Lubbock, TX 79413

Mr. Mel Clemens, Director  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street, N.W., Suite 780  
Washington, D.C. 20423-0001

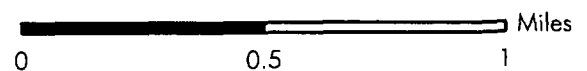
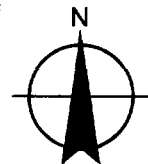
all cc's with att(s) and by express

# Locations of Involved Parties



## Legend

-  PYCO 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

**c.montange**

---

**From:** "Steve Gregory" <gregorys@iowapacific.com>  
**To:** "c.montange" <c.montange@verizon.net>  
**Sent:** Wednesday, June 28, 2006 11:33 AM  
**Subject:** SAW track condition

I have been advised by our Superintendent Hans Grosstueck that our Roadmaster, Paul Arriaga, has noticed a serious problem on the SAW trackage. Mr. Arriaga was looking at track on PYCO property and then drove by SAW trackage and on his own initiative investigated a track defect and identified significant wide-gauge and crosslevel deviations from the accepted standards, on the route from track 9200 to Plant 2, just inside the Compress plant gate on the north side, I believe. I am not trained in track evaluation but my understanding is this makes the track virtually impassable.

Mr. Arriaga was not authorized to do a complete track inspection and there could be other defects that need to be repaired.

This location is in the vicinity of the recent derailment, and I understand an invoice has been issued for over \$23,000 in the cleanup of that derailment.

If the track condition continues to deteriorate we will have to evaluate embargoing the operation due to track conditions.

**Steve Gregory**  
**Vice President - Marketing**  
**West Texas & Lubbock Railway**  
**Cell: 806-438-0891**  
**Fax: 972-692-8016**

6/29/2006

36603  
EB

SERVICE DATE – JANUARY 26, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34802

PYCO INDUSTRIES, INC.–ALTERNATIVE RAIL SERVICE–  
SOUTH PLAINS SWITCHING, LTD. CO.

Decided: January 25, 2006

On December 20, 2005, PYCO Industries, Inc. (PYCO) filed a petition under 49 U.S.C. 11123 and 49 CFR part 1146,<sup>1</sup> seeking an order authorizing interim alternative rail service, for an initial period of 30 days and a total period of not more than 270 days, over the lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX, by West Texas & Lubbock Railway Company, Inc. (WTL) to all shippers on the line including PYCO, and by PYCO to itself. Alternatively, PYCO seeks an order authorizing WTL to provide interim service exclusively to PYCO. WTL has certified that it is willing to provide interim rail service to PYCO and all other shippers on SAW's lines.

SAW filed a reply in opposition to the petition on December 28, 2005. PYCO filed a rebuttal on January 3, 2006, and SAW filed a letter in "clarification" of a matter contained in PYCO's rebuttal on January 6, 2006. On January 9, 2006, PYCO replied to the clarification letter, asking the Board to strike it from the record. On January 10, 2006, WTL joined in the request to strike. Also, SAW and PYCO filed letters on January 19, 2006, and January 20, 2006, respectively.

We will grant the alternative request for WTL to provide service to PYCO.

PRELIMINARY MATTER

SAW submitted its clarification letter under 49 CFR 1117.1, which authorizes a party to seek relief not otherwise provided in another rule. PYCO asks us to strike the clarification from the record on grounds that it does not request any relief and constitutes an impermissible reply to the final pleading allowed under the applicable rule, a petitioner's rebuttal under 49 CFR 1146.1(b)(3). PYCO correctly notes that the purported clarification constitutes an additional reply that is not contemplated in the rule. However, the additional information in the clarification will be instructive in our analysis, and for that reason we will not strike it from the record. Rather, in the interest of fairness and a complete record, we will also accept into the record PYCO's January 9, 2006 reply to the clarification and the letters filed on January 19 and 20, 2006.

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<sup>1</sup> These rules were adopted in Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998) (Service Inadequacies).

## BACKGROUND

In 1999, SAW received authority to acquire and operate approximately 14.1 miles of rail line from The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF),<sup>2</sup> in Lubbock, TX, and approximately 3 miles of incidental trackage rights over BNSF's main line to a BNSF yard, where SAW interchanges with BNSF.<sup>3</sup> Since that time, SAW has switched rail cars for shippers located on this line and transported the cars to and from BNSF's yard for interchange with that linehaul carrier. PYCO, a large processor of cottonseed oil, is heavily rail dependent and is served only by SAW.<sup>4</sup>

At Lubbock, PYCO has two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Previously, SAW permitted PYCO to operate a rail car mover<sup>5</sup> on a portion of SAW's track, which allowed PYCO to move rail cars between tracks located on PYCO's property. Through this means of operation, PYCO could load 26 cars per day at its Plant No. 1. It could also load 12 cars per day from Plant No. 2. Because of a record cottonseed harvest, PYCO advised SAW that, beginning on April 1, 2005, PYCO would have an increased need for switching of rail cars.

Mr. Robert Lacy, PYCO's senior vice president of marketing, recites problems with SAW's service beginning in March 2005 that led PYCO to seek solutions from both SAW and BNSF. When these discussions did not resolve the service deficiencies, PYCO complained to the Board's Office of Compliance and Enforcement (OCE) about SAW's slow switching of rail cars. According to PYCO, after OCE's intervention, it received satisfactory service from SAW from July through October 2005, a period in which PYCO continued to need large numbers of rail cars to handle the record harvest.

PYCO states that, in September 2005, SAW inquired whether PYCO was interested in purchasing SAW's Lubbock rail lines. According to PYCO, when it expressed interest, SAW tendered a draft "Letter of Intent" that would have bound PYCO

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<sup>2</sup> Effective January 20, 2005, The Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company.

<sup>3</sup> South Plains Switching, Ltd. Co.-Acquisition Exemption-The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33753 (Sub-No. 1) (STB served July 15, 1999).

<sup>4</sup> PYCO asserts that it is the largest shipper served by SAW.

<sup>5</sup> A rail car mover is a vehicle equipped with sets of both steel rail wheels and rubber tire road wheels, which allows the vehicle to move rail cars along rail lines as well as travel on surface roads. Its operating functions are controlled from within an operator's cab much like a locomotive.

to purchase these rail lines for \$5.5 million. Considering its negotiations to be in the early stages, PYCO states that it requested an addition to the draft letter of intent to make the purchase contingent upon PYCO's completing a due diligence examination and obtaining satisfactory financing. PYCO asserts that SAW then cut off sale negotiations.

PYCO states that, shortly thereafter, SAW's president, Mr. Larry Wisener, demanded that PYCO immediately cease operating its rail car mover on SAW's property. On November 17, 2005, SAW placed a derail device on the track to prevent PYCO's equipment from entering onto SAW's rail line. PYCO's representative, Mr. Lacy, asked Mr. Wisener to remove the device but declined Mr. Wisener's request to meet in person, due to what he asserts was his past experience with Mr. Wisener's confrontational demeanor and profane language.

PYCO also contends that SAW has engaged in other conduct that severely hampers its ability to obtain adequate transportation. PYCO reports that on November 17, 2005, SAW cancelled PYCO's lease of a track on which PYCO stored rail cars, stating only that SAW was not obligated to provide storage.<sup>6</sup> According to PYCO, since that date, SAW has switched cars for PYCO at Plant No. 1 only on a shop track outside PYCO's fence, which greatly reduces the number of cars that PYCO can load. PYCO indicates that it asked SAW to instead switch cars on a scale track inside PYCO's fence or on both the shop and the scale tracks, to allow PYCO to load more cars. PYCO relates that SAW responded that it would switch cars only on the shop track and that SAW now claimed that it would be unsafe to continue to use the scale track because PYCO personnel had to cross the track and it was close to buildings—which is true in many industrial plants. PYCO emphasizes that, in any event, the shop track cannot accommodate the number of rail cars that PYCO needs to ship.

SAW did not switch any cars at all at PYCO's Plant No. 2 between November 22 and November 28, 2005, because of "a locomotive breakdown."<sup>7</sup> SAW also admits that it has not recently provided as many boxcars as PYCO requests at that plant because SAW lacks sufficient cars to meet PYCO's needs. See Reply, Appendix LDW-8. According to PYCO, since November 2005, SAW has billed PYCO for surcharges, switch charges, and storage fees that SAW has not billed its other Lubbock shippers for comparable services.

PYCO asserts that it is now able to load only about 12 cars per day at Plant No. 1, instead of the 26 cars it formerly was able to load. In addition, PYCO claims that SAW's lack of delivery of sufficient boxcars continues to limit loading of a product at Plant No. 2. PYCO complains that the resulting shortfall of switched cars has caused lost sales, delayed shipments, and an inventory accumulation such that PYCO soon will be forced to curtail operations for lack of storage for its products.

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<sup>6</sup> Petition, Exhibit C, Verified Statement (V.S.) Lacy at 3 and Exhibit 4 (entry of Nov. 17, 2005).

<sup>7</sup> Reply, V.S. Wisener at 7.



## DISCUSSION AND CONCLUSIONS

### 1. Interim Alternative Service to Shippers Other Than PYCO.

The claim of inadequate service to shippers other than PYCO is not well supported. One potential shipper, Floyd Trucking, Inc., submitted a letter supporting PYCO's petition and indicating that SAW's response to its service requests has been inadequate. But the record here suggests that, ultimately, Floyd Trucking has other transportation alternatives and has chosen not to use rail service because of the cost.

The record shows that there are numerous other shippers served by SAW on these lines, and the "service and support comments" attached to SAW's reply rated SAW's service favorably.<sup>8</sup> Although PYCO's witness, Mr. Gail Kring, states that some of the other shippers told him informally that they supported PYCO's petition, none of the other shippers has provided a statement criticizing SAW's service. Nor is there anything else in the record to establish a measurable deterioration in the service SAW has provided to them. Accordingly, we find that PYCO has not demonstrated a substantial deterioration in service to the other shippers on SAW's line. For this reason, there is no basis to grant PYCO's request to authorize WTL to serve the other customers currently served by SAW in Lubbock.

### 2. PYCO's Rail Car Mover.

We turn next to PYCO's request that we authorize PYCO to operate its rail car mover on SAW's line. SAW has the right to bar PYCO from operating on its line, especially in light of derailments that occurred in the last year (nine in the 12-month period ending in November 2005). PYCO does not dispute that it caused these derailments, that the derailments damaged SAW's track and equipment, or that a crane was needed to repair three of the derailments. Indeed, PYCO paid for the crane.<sup>9</sup> Therefore, we deny PYCO's request for an order directing SAW to allow PYCO to operate its own switching equipment on SAW's line. However, should WTL and SAW agree that PYCO may safely move railcars to and from its facilities, they may permit such activities.

### 3. Interim Alternative Rail Service By WTL for PYCO.

We have established procedures under which shippers receiving poor service may obtain interim relief. Under 49 CFR 1146.1, a petition seeking such relief must: (1) show substantial, measurable service deterioration or service inadequacy;

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<sup>8</sup> One shipper, Goetz, gave SAW the lowest numerical rating but also commended SAW's crew, which indicates it may have meant to give a high rating.

<sup>9</sup> Rebuttal, V.S. Kring at paragraph 9d.

(2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time; and (3) contain a commitment from an alternative carrier to meet current transportation needs and show that this service can be performed safely without hurting service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's service.<sup>10</sup> We discuss these criteria below.

Substantial and Measurable Deterioration in Service. The procedures at 49 CFR 1146.1 are for localized immediate service relief. Service Inadequacies, 3 S.T.B. at 972 n.11. PYCO is a rail-dependent shipper with two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Moreover, PYCO is served only by SAW. Here, the daily shortfall of 14 carloads for switching at Plant No. 1 (more than half of the 26 carloads that PYCO previously could load there), the continued lack of delivery of sufficient boxcars to serve Plant No. 2, and the period in November 2005 during which SAW performed no switching at all at Plant No. 2 indicate a serious deterioration in SAW's service to PYCO. PYCO has demonstrated through ample, credible evidence that, as a consequence of these service inadequacies, it will soon run out of storage capacity for its cottonseed oil and related products, and will be forced to curtail or close operations.<sup>11</sup> Consequently, we find that PYCO has shown, as to itself, "a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."<sup>12</sup> 49 CFR 1146.1(a).

Discussions with the Incumbent and Reasons Why Restoration of Adequate Service Is Unlikely. The purpose of requiring pre-filing discussions is to ensure that the shipper and the carrier have done all that they can do to resolve the service issues before coming to the Board for relief. American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad, STB Finance Docket No. 33795, slip op. at 2-3 (STB served Dec. 7, 1999) (American Plant Food) (denying alternative service request where the shipper had not contacted the incumbent carrier in the 9 months prior to filing the petition). This is not a case where the parties sought relief from us prematurely, before attempting to resolve the service issues themselves. Rather, there were many discussions between PYCO and SAW representatives in 2005 concerning the decline in SAW's service.<sup>13</sup>

<sup>10</sup> The petition must be served, by hand or overnight delivery, on the incumbent and proposed alternative carriers and the Federal Railroad Administration. PYCO has certified that it served its petition on the required parties by overnight delivery.

<sup>11</sup> See Rebuttal, V.S. Kring and appended charts; PYCO's January 9, 2006 reply, Supplemental V.S. Kring.

<sup>12</sup> See Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc., STB Finance Docket No. 34479 (STB served Mar. 11, 2004) (authorizing alternative, interim rail service after two weeks of service problems on a rail line that generated about 6,000 carloads of traffic per year).

<sup>13</sup> See Petition, Exhibit A and attached Exhibits 7, 8; Exhibit C, V.S. Lacy and Exhibit 4.

It is true that, after SAW barred PYCO from operating its rail car mover, Mr. Wisener invited a PYCO representative to discuss in person alternative ways of loading PYCO's rail cars. But PYCO's explanation as to why its personnel declined to meet with Mr. Wisener in person—because the relationship had become acrimonious—was not unreasonable. According to Mr. Lacy, in previous meetings in his office, Mr. Wisener had become progressively more profane and threatened to “throw out” people with opposing opinions, and his “bullying attitude” had worsened after SAW cut off negotiations for PYCO to purchase the line, at which point SAW cancelled the lease of the track on which PYCO had stored rail cars.<sup>14</sup> In any event, it does not appear that another meeting would have been productive. Mr. Wisener now states that, had PYCO managers agreed to meet with him in person, he would have offered the option of ordering a second daily switch for a \$500 surcharge.<sup>15</sup> However, SAW ultimately provided that option to PYCO in its December 2005 reply, as revised in its January 2006 clarification. Thus, another in-person meeting was not necessary.

The record here shows that, unlike the situation in American Plant Food, there were many contacts between PYCO personnel and SAW personnel in the months prior to filing the petition.<sup>16</sup> Given the evidence showing a history of communications between the parties during the course of the events that led to the filing of this petition, we find that PYCO has made adequate attempts to work with SAW to try to resolve the service deficiencies.

The second part of this criterion requires a showing that the incumbent is unlikely to restore adequate rail service within a reasonable time. We find that the requisite showing has been met in this case. At the outset, we note that PYCO experienced a series of problems with SAW's service in March through June 2005: slow service because of SAW's failure to spot and pick up cars on reasonable request; two threats to terminate service at Plant No. 2; suspension of service to Plant No. 1; and threats of imposing surcharges on service SAW had been providing in the past without surcharges.<sup>17</sup> Mr. Wisener has not refuted the fact that SAW's service deteriorated during that period. SAW's principal response was to offer to sell the line to PYCO. But short of that potential resolution, which evidently came to naught when SAW refused PYCO's request to make the sale contingent upon PYCO's completion of due diligence

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<sup>14</sup> See Petition, Exhibit C, V.S. Lacy.

<sup>15</sup> Reply, V.S. Wisener at 4.

<sup>16</sup> Petition, V.S. Lacy at paragraphs 12-15 and Exhibit 4 (notes showing conversations between Lacy and other PYCO personnel and Wisener and other SAW personnel).

<sup>17</sup> See Petition at 5-6 and Exhibit A at Exhibit 8, Railroad Switching Log.

and the obtaining of financing, it took intervention by OCE before SAW itself restored adequate service to PYCO in the period from July through October 2005.<sup>18</sup>

In any event, the service problems began to recur in mid-November 2005. SAW did not provide any switching for 6 days at Plant No. 2 because of a breakdown experienced by one locomotive. While equipment failure might be a valid basis for a temporary service interruption, SAW states that it has six locomotives, and it has not provided any reason why one of the other five could not have been used to switch cars at Plant No 2 during that time.<sup>19</sup> Nor has SAW given any reassurances that it will provide switching regularly for PYCO should there again be difficulty with a locomotive.

Since mid-November 2005, PYCO plainly has not received enough empty railcars to load its products that are ready for transport. PYCO uses tank cars, gondolas, hopper cars, and boxcars to ship its products. PYCO itself owns a fleet of tank cars, and its customers provide PYCO with privately owned gondolas, but SAW has not delivered a sufficient number of these privately owned cars. Concerning boxcar supply, SAW claims that it cannot provide enough boxcars because of BNSF's decision in August 2005 not to store boxcars on SAW's lines for free. Nevertheless, SAW provided sufficient boxcars to PYCO during September and October 2005, after BNSF's policy change. Therefore, BNSF's action does not explain SAW's more recently claimed inability to provide sufficient boxcars.

A major reason for this inadequate railcar supply is SAW's refusal of PYCO's repeated requests for SAW to deliver empty railcars to PYCO's scale track. SAW claims that it would be unsafe to use that track because PYCO personnel must cross it and the track is very close to some of the plant buildings. We question the sincerity of that claim in this case, however, because WTL recently inspected the scale track and concluded that it is safe.<sup>20</sup>

SAW now asserts that all PYCO needs to do to receive adequate rail service at Plant No. 1 is to request a second daily switch. According to PYCO, SAW initially claimed that it lacked sufficient personnel to provide a second daily switch,<sup>21</sup> and only after PYCO filed this petition did SAW express any willingness to provide a second daily switch.<sup>22</sup> Thus, this offer, which could have been made much sooner,<sup>23</sup> appears to have

<sup>18</sup> See Petition at 6-7 and Exhibit A at Exhibits 3-7; Exhibit B.

<sup>19</sup> SAW January 6, 2006 clarification letter at 2.

<sup>20</sup> Rebuttal, V.S. Ellis at 2 ("WTL has inspected the tracks in question and believes service can be safely provided over these tracks. The idea that close clearances or crossings without warning devices within industrial areas could be used as a reason for not occupying those tracks is inconsistent with industry practice.").

<sup>21</sup> Rebuttal, V.S. Kring at paragraph 9f.

<sup>22</sup> Reply, V.S. Wisener at 1-2, 5.

been made only to avoid an order from the Board authorizing alternative service by a different carrier.

SAW suggests that PYCO simply is unwilling to pay the surcharge that would be imposed if the second daily switch were outside the crew's regular 12-hour day, and that PYCO's real complaint is that the charges it must pay are too high. Rates or charges that shippers believe are too high are not a basis to order alternative, interim rail service. See Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003) (denying alternative service order because "[r]ate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123"). Here, however, PYCO has made clear that it wants the service it needs, even if it has to pay the surcharge, as that would be less costly to it than the current situation.<sup>24</sup> Thus, we do not view PYCO's request for alternative service as driven by dissatisfaction with the level of charges.

If we were persuaded that SAW's eleventh-hour offer to provide a second daily switch would fully resolve the service inadequacies for PYCO, we would not need to order the alternative service requested by PYCO. But, given SAW's broader pattern of conduct—including its unexplained abrupt cancellation of the lease of the track on which PYCO had been storing its cars and SAW's refusal to allow continued use of the scale track—we are not persuaded that SAW will do what is necessary and what it has done in the past to provide satisfactory service to PYCO, which is served only by SAW, and is heavily dependent on rail service. Therefore, based on all of the circumstances presented here, we find that PYCO has made the required showing that SAW is unlikely to restore adequate rail service to PYCO within a reasonable time and that formal intervention by the Board is appropriate.

Interference with Operations. SAW does not dispute WTL's statement that WTL can provide safe, adequate transportation service to the shippers on SAW's line without degrading service to WTL's customers on its other lines.

Because we find no need to authorize alternative service to the other shippers, we must also consider whether WTL can provide PYCO with service without unreasonably interfering with SAW's service to the other shippers on this line. To address concerns raised by having two operators on SAW's lines in Lubbock, PYCO has suggested that we authorize WTL to control dispatch over the line weekdays from 9 a.m. to 2 p.m. While we agree that two operators can safely and efficiently share this line, we will not dictate

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<sup>23</sup> For example, when Mr. Wisener of SAW telephoned Mr. Lacy on November 17, 2005, to inform PYCO that SAW was installing the derail device, SAW could have offered to make a second daily switch, but did not do so. Instead, per Mr. Wisener's direction, SAW provided only one daily switch at Plant No. 1. Petition, Exhibit C, V.S. Lacy at Exhibit 4 (entry of Nov. 22, 2005: "Larry [Wisener] would only allow [SAW's crew] to do one pull per day.").

<sup>24</sup> Rebuttal at 3 and V.S. Kring at paragraph 9f.

specific terms at this point. Rather, we will order the two carriers promptly to enter into operating protocols that will allow for safe joint operations on this line. We recognize that it will require good faith on the part of both SAW and WTL for this arrangement to work, and we expect both parties to act in that manner. Accordingly, both SAW and WTL will be required to report to the Board that the required protocols are in place.

In sum, the criteria have been met for PYCO to obtain interim alternative rail service. Accordingly, we will grant PYCO's request for an order authorizing WTL to provide it with alternative service on SAW's line on an interim basis.

Under 49 CFR 1146.1(c), there is a rebuttable presumption that alternative service will need to continue for more than 30 days, but that presumption can be rebutted by the incumbent carrier, and a further Board order will be needed for alternative rail service to continue at the end of the 30-day period.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. PYCO's motion to strike SAW's clarification of January 6, 2006, is denied. SAW's January 6, 2006 clarification, PYCO's January 9, 2006 reply to the clarification, the letter submitted by SAW on January 19, 2006, and the letter submitted by PYCO on January 20, 2006, are accepted into the record.
2. WTL is authorized to provide alternative service to PYCO on SAW's lines, beginning at 11:59 p.m. on January 26, 2006 until 11:59 pm on February 25, 2006, under the provisions of 49 CFR 1146.1, and SAW is directed to allow such operations on its lines.
3. PYCO and SAW shall promptly enter into operating protocols that will allow for safe joint operations on this line, and they shall report to the Board that the required protocols are in place.
4. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary

37081  
EB

SERVICE DATE – JUNE 21, 2006

**SURFACE TRANSPORTATION BOARD**

**DECISION**

STB Finance Docket No. 34802

**PYCO INDUSTRIES, INC.—ALTERNATIVE RAIL SERVICE—  
SOUTH PLAINS SWITCHING, LTD. CO.**

STB Ex Parte No. 346 (Sub-No. 14C)

**RAIL GENERAL EXEMPTION AUTHORITY—MISCELLANEOUS  
AGRICULTURAL COMMODITIES—PYCO INDUSTRIES, INC.  
PETITION FOR PARTIAL REVOCATION**

Decided: June 20, 2006

In a decision served on January 26, 2006 (January Decision), we granted the petition of PYCO Industries, Inc. (PYCO), for an order pursuant to 49 U.S.C. 11123(a) and 49 CFR part 1146 authorizing West Texas & Lubbock Railway Company, Inc. (WTL), to provide interim alternative rail service to PYCO, over the lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX, for the initial statutory period of 30 days. We ordered amendments to the parties' operating protocols governing the use of SAW's lines for the duration of alternative rail service in a decision served on February 16, 2006 (February 16 Decision). We extended alternative service for an additional 120 days (until 1:59 p.m. on June 25, 2006) in a decision served on February 24, 2006 (February 24 Decision). SAW continues to serve the other shippers located on its lines.

SAW asked us to terminate alternative service in a petition filed on March 30, 2006 (Petition). In a pleading filed on April 6, 2006, PYCO opposed the termination request and asked us to continue alternative service at least through June 25, 2006 (the current expiration date), and to modify the existing operating protocols by requiring SAW to keep certain track clear.

SAW opposed PYCO's requested modification, asked for a different modification of the operating protocols, and responded to PYCO's opposition to termination of the alternative rail service, in a pleading filed April 13, 2006 (SAW Rebuttal). PYCO objected to SAW's Rebuttal as untimely and opposed SAW's requested modification, in a pleading filed April 19, 2006.

PYCO filed a Petition for Immediate Injunctive Relief or to Expedite a Protocol Modification to Address a Retaliatory SAW Blockade on May 17, 2006. SAW filed a reply on May 26, 2006.

On May 22, 2006, WTL filed a letter-request dated May 17, 2006, to modify the operating protocols. Having received that letter-request by facsimile copy, SAW filed a reply to it on May 19, 2006.

On May 24, 2006, SAW filed a Supplement to its Petition (Supplement), arguing that alternative rail service should not extend beyond the current expiration date because the majority of rail shipments to and from PYCO involve commodities that have been exempted from regulation, and SAW is prepared to provide all necessary rail service. On May 26, 2006, PYCO filed a partial reply to SAW's Supplement.

Also on May 26, 2006, US Rail Partners, Ltd. (USRP) sought leave to file the verified statement of its president.

On June 7, 2006, PYCO filed a Motion for Extension of Alternative Rail Service.

On June 13, 2006, SAW filed a Second Supplement to its Petition (Second Supplement).

On June 19, 2006, PYCO asked us to strike SAW's Second Supplement and also replied to it.<sup>1</sup>

We will deny SAW's requests to terminate alternative service and to modify the operating protocols. As explained below, we find that we have regulatory authority to order alternative service as to PYCO and will extend the alternative rail service authorization for an additional 120 days beyond the current expiration date, for a total of 270 days. Also, to remove any doubt, we will revoke the exemption from regulation for commodities shipped to, or received by, PYCO, to the extent necessary to allow the alternative service.

To promote safe operations on SAW's rail lines during the period of WTL's alternative service, we will grant the requests of PYCO and WTL for a modification of the operating protocols to require SAW to keep a specific section of its tracks clear. In light of this modification, we will deny PYCO's request for injunctive relief as unnecessary.

#### PRELIMINARY ISSUES

Citing 49 CFR 1146.1(d)(3), PYCO argues that SAW's Rebuttal was filed 2 days late. We will treat PYCO's request as a motion to strike the rebuttal. Because the rebuttal was SAW's first opportunity to reply to PYCO's request for modification of the operating protocols, we will deny the motion to strike.

Because no party will be harmed and it will lead to a more complete record, USRP's request for leave to file the verified statement of its president will be granted and the statement will be made part of the record.

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<sup>1</sup> In that June 19, 2006 filing, PYCO also sought revocation of the exemption in STB Finance Docket No. 33753 (Sub-No. 1), through which SAW acquired the trackage that is at issue in this proceeding. The revocation request will be addressed separately.



In light of PYCO's having taken the opportunity to reply to SAW's Second Supplement, we will deny the motion to strike it.

## BACKGROUND

In 1999, SAW acquired approximately 14.1 miles of rail lines in Lubbock, TX, formerly owned by The Burlington and Northern and Santa Fe Railway Company (BNSF).<sup>2</sup> From that time until recently, PYCO, a rail-dependent processor of cottonseed oil and related products, was served only by SAW, whose rail lines connect only with those of BNSF.

In the January Decision, we found that PYCO had experienced a substantial, measurable deterioration in rail service and that SAW was unlikely to restore adequate rail service to PYCO within a reasonable time. We authorized WTL to provide alternative rail service to PYCO for a 30-day period, and we noted that there was a rebuttable presumption that alternative rail service would need to continue beyond that period.

In the February 24 Decision, we found that the transportation emergency would continue to exist if alternative service were terminated, and we therefore ordered an additional 120 days of alternative rail service by WTL. SAW petitioned to terminate alternative rail service about a month after we ordered the 120-day extension.

## DISCUSSION AND CONCLUSIONS

We will first address the Board's regulatory authority to order alternative service to PYCO. Then we will discuss our reasons for not terminating, but instead continuing, the alternative service and granting some of the requested modifications of the operating protocols.

### I. Regulatory Authority to Order Alternative Service for PYCO.

SAW states that approximately 74% of the rail traffic to and from PYCO's plants consists of commodities (cottonseed, cottonseed hulls, and cotton linters) that have been exempted from regulation, in Rail General Exemption Authority, 367 I.C.C. 298, 310-12 (1983) (General Exemption) and 49 CFR 1039.10. SAW argues that because the exemptions at issue are essentially from the entirety of the Interstate Commerce Act, as amended (the Act), and because the statutory provision for alternative service is part of the Act, the Board lacks authority to extend (or initially to have ordered) alternative service to transport these commodities for PYCO. Concerning the remaining 26% of PYCO's traffic that does not involve exempt commodities, SAW contends that "it would not be practical [ ] or safe to provide for alternative rail service for a distinct minority of shipments from the same facility." Supplement at 5.

PYCO responds that the commodity exemptions do not preclude alternative rail service because the rail transportation for PYCO of regulated commodities is not segregated from the transportation of exempted commodities. Alternatively, PYCO seeks partial revocation of

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<sup>2</sup> BNSF has since changed its name to BNSF Railway Company. We will refer to both entities as BNSF.

General Exemption so as to permit alternative rail service for all of the commodities PYCO ships and receives by rail at Lubbock.

We find no merit to SAW's contention that, where the majority of shipments comprise exempt commodities, we may not authorize alternative service even as to commodities that are not exempt. SAW's argument would not give effect to our authority to prescribe alternative rail service under 49 U.S.C. 11123(a) whenever we determine that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy of rail service provided by the incumbent carrier. 49 CFR 1146.1(a). Therefore, we conclude that where there is a mix of regulated and exempted commodities being received and shipped and it would not be practical to provide separate service for the two types of traffic, the Board can order alternative rail service as to all of the shipments, so long as the criteria for alternative rail service are met, as they plainly have been in this case. Thus, we conclude that we lawfully authorized, and lawfully may extend, alternative rail service as to all of the rail service to PYCO without having to first revoke the exemption for the otherwise unregulated transportation.

In any event, we may revoke an exemption, in whole or in part, at any time under 49 U.S.C. 10502(d), if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. See Expedited Relief for Service Inadequacies, 3 S.T.B. 968, 976 (1998) (Expedited Relief).

Even if partial revocation of General Exemption were considered necessary, we conclude that the standard for revocation has been met here. The exemptions at issue were predicated on railroads not abusing their market power in transporting the exempted commodities. We view SAW's rail service as having been so inadequate as to amount to an abuse of market power. Therefore, to remove any doubt, we can and will revoke the exemptions, to the extent required to provide for alternative rail service. This action will ensure the continuation of a sound rail system to meet the needs of the shipping public. See 49 U.S.C. 10101(4).

In its Second Supplement, SAW claims that the tracks that are used to serve PYCO are excepted switching tracks and argues that, as a result, we lack authority to order alternative service over those tracks. We disagree that the tracks at issue are switching tracks that fall within 49 U.S.C. 10906. SAW sought and received authority under 49 U.S.C. 10901 to acquire these tracks. Moreover, the tracks are used by more than one shipper. Even if these tracks constitute switching tracks, however, such tracks are given an exception only from the entry and exit provisions at 49 U.S.C. 10901-10905 governing the construction, acquisition, operation, abandonment, or discontinuance of rail lines. 49 U.S.C. 10906. SAW relies upon Battaglia Distributing Co., Inc. v. Burlington Northern, 2 S.T.B. 323 (1997) for the proposition that, when track is within the exception at 49 U.S.C. 10906, the Board lacks authority to order alternative rail service over the track. Battaglia is distinguishable, however, because in that case the rail carrier asserted that it had previously abandoned the track and the case presented a request to restore service that already had ended lawfully. 2 S.T.B. at 326. Likewise, service previously had ended in another case on which SAW relies, Valley Feed Company v. Greater Shenandoah Valley Development Company d/b/a/ Shenandoah Valley Railroad Company, Docket No. 41068 (ICC served Dec. 21, 1995). Here, of course, the tracks have not been abandoned and service has been continual, even if inadequate for a period.

II. Merits of Termination or Continuation of Alternative Rail Service for PYCO.

SAW contends that the emergency that led to the need for alternative service has ended because PYCO's demand for rail service has returned to normal levels. SAW states that it is prepared to provide PYCO with whatever rail services are needed, that BNSF (rather than SAW) is at fault for the rail service problems PYCO has experienced, and that SAW has been punished enough by losing revenue from not providing PYCO's rail service.

PYCO counters that it has been operating its plants at full capacity because it still has a large cottonseed crop to process and that its corresponding demand for service is either the same or greater than when it filed its original petition for alternative service in December 2005. In light of recent actions taken by SAW,<sup>3</sup> PYCO questions the sincerity of SAW's claimed willingness to provide adequate rail service. PYCO also argues that BNSF is not responsible for the service inadequacies PYCO experienced from SAW, noting that WTL has coordinated with BNSF to provide adequate service. Finally, PYCO contends that SAW's loss of revenue is not an adequate basis to terminate alternative rail service. Accordingly, PYCO seeks the continuation of WTL's alternative rail service to the statutory limit of a total of 270 days. We discuss these arguments below.

PYCO has demonstrated that, throughout the alternative service period, it has been operating its plant nonstop. The statement of PYCO's general manager shows that PYCO's demand for service continues to be as high as when it originally sought alternative service. Therefore, we find that PYCO has a continuing need to ship a high number of rail cars of cottonseed products.

We now turn our attention to SAW's contention that it sincerely desires to provide adequate service to PYCO. We are concerned that SAW still has not taken any responsibility for the service failures that led to the January Decision in which we initially authorized alternative rail service. As stated previously, SAW contends that BNSF's actions have been a major cause of the service difficulties experienced by PYCO. However, as discussed above, these allegations have been convincingly rebutted by PYCO. Until it acknowledges its past service lapses, SAW is unlikely to be able to avoid the difficulties it experienced in the past in providing service to PYCO.

Moreover, SAW's continued actions belie its claimed willingness to now provide adequate service to PYCO. It is unrefuted that, until March 2006, SAW permitted PYCO to move PYCO equipment over a long-existing industrial crossing of the wye track separating PYCO's outdoor cottonseed stockpile from its Plant No. 1, at which cottonseed is processed. PYCO states that the stored cottonseed has a value of \$11 million. During the period of alternative service, however, SAW has stored empty rail cars on the wye track in a location that prevents PYCO's equipment from using the industrial crossing to get to the seed stockpile.

SAW would have us excuse its recent blockage of the industrial crossing because there is no document granting PYCO the right to cross SAW's tracks at that crossing. SAW also claims

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<sup>3</sup> See discussion of SAW's actions in the January Decision and February 24 Decision.

that it needs the revenue it earns from storing the rail cars at issue and states that it would have placed these cars on Track 9298 but for the protocol provision requiring that track to be kept clear for the staging of cars for PYCO. But as PYCO explains, SAW has other locations available to place these stored cars. The fact that SAW may have the right to store rail cars in a position that blocks the industrial crossing does not justify its doing so when the blockage harms PYCO and SAW has other locations in which to store the cars.

In addition, SAW evidently still does not participate in the daily telephone conference calls by which PYCO and BNSF address any service issues that arise, including congestion on SAW's rail lines or yard. A rail carrier that is committed to providing good rail service likely would participate. Taken together, the blockage of the industrial crossing and nonparticipation in the daily telephone calls give us good reason to question the credibility of SAW's assertion that it would provide adequate service to PYCO if alternative service were terminated now.

As for SAW's claim that it has been punished enough by the earlier alternative service orders, we note that an alternative rail service order is not to be viewed as a punitive measure against the incumbent rail carrier. Expedited Relief, 3 S.T.B. at 974. Rather, alternative service is intended to temporarily replace a rail carrier that is not providing adequate service until that carrier shows that it is once again able to provide such service.<sup>4</sup>

In light of these facts, we find that PYCO's transportation emergency will continue after June 25, 2006, and we will extend the alternative service to the maximum (270-day) period allowed by the statute, through October 23, 2006. Under the regulations at 49 CFR part 1146, alternative rail service to PYCO will not be available after October 23, 2006. We encourage the parties to work together before that time to reach a satisfactory solution to PYCO's continuing need for adequate rail service.

### III. Modifications of the Operating Protocols.

A. Unblocking the Industrial Crossing. PYCO asks us to order injunctive relief: that SAW immediately remove its blockage of the industrial crossing of the "wye" track separating PYCO's seed stockpile from its plant for the duration of alternative service. Alternatively, PYCO and WTL request modification of the existing operating protocols to prevent SAW from placing any equipment on the wye coming out of the south side of SAW's yard during the operating hours allocated to alternative service provider WTL. According to PYCO, either of these remedies would restore the wye to its status quo.

PYCO contends that keeping the wye clear of SAW equipment is needed not only to free the blockage but also to protect PYCO's and WTL's workers. PYCO documents occasions on which its workers felt endangered by SAW operations on the wye during the hours assigned to WTL for using the adjoining SAW yard. According to PYCO, the requested modification of the

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<sup>4</sup> SAW contends that alternative service should be terminated because it is a small railroad and cannot long sustain the loss of revenue from not transporting PYCO's traffic. We note, however, that this is not a reason to terminate alternative rail service. See 49 CFR 1146.1(d)(1).

protocols would enhance the safety of operations while there are two rail operators using SAW's lines.

PYCO explains that the nearby public road is not a feasible alternative to reach the stockpile because it would apparently require the approval of the Texas Department of Transportation (Texas DOT) as well as the City of Lubbock's authorization to construct a new road access. PYCO's request to Texas DOT is pending. But even if the necessary approval is obtained, the City or State could limit the hours in which PYCO could use any newly constructed road access. In any event, the public road access would not likely be available in time to prevent the loss of PYCO's stored cottonseed.

Accordingly, in light of the lack of a feasible alternative to reach the stockpile and the safety benefits from keeping the wye track clear, we will modify the current operating protocols to provide that, during the WTL operating hours, SAW may not place or have any equipment on the wye coming out of the south side of its yard. PYCO's request for immediate injunctive relief is rendered unnecessary because the modification would achieve the same result.

B. Preventing WTL From Storing Cars for PYCO on SAW's Main Track. SAW contends that WTL is "permanently" storing rail cars for PYCO on SAW's main track, Yard Tracks 1 and 5, and Tracks 9298 and 9200. SAW states that the operating protocols do not give WTL around-the-clock use of those tracks. SAW therefore asks us to modify the operating protocols to require that all of the tracks covered by the protocols shall be kept clear by WTL when not in use by WTL in providing rail service to PYCO and during SAW's operating window.

PYCO counters that the tracks assigned to it under the existing protocols historically have been used to stage cars for PYCO. In addition, it states that SAW does not need these tracks to serve any other shippers, that SAW has not shown harm to SAW or any of its shippers from WTL's use of these tracks, and that SAW has not complained to PYCO about WTL's use of these tracks.

We agree that SAW has not demonstrated any harm from WTL's use of the tracks to stage cars for PYCO. Accordingly, we will deny this requested modification of the operating protocols.

C. Requiring SAW to Observe the Protocols' Time Allotments and to Repair Tracks. PYCO and WTL express concern for the safety of WTL and PYCO personnel when SAW performs switches in its yard at the same time that WTL is supposed to be switching there, according to the operating protocols. SAW denies that its operations on Tracks Nos. 2, 3, 6, and a short portion of the main track at its east end create a safety hazard or interfere with WTL's service to PYCO, which is performed in the west end of the yard. However, we are concerned about the potential danger to all of the personnel involved when the protocols' time allotments are not followed. We expect SAW to observe the operating protocols by not performing any operations in its yard during the hours that the protocols provide for WTL to operate in SAW's yard.

WTL and PYCO claim that, during the period of alternative service, SAW has not inspected or repaired the sections of its trackage used by WTL to provide service to PYCO. PYCO claims that the SAW lead into PYCO's Plant No. 1 requires repair in order to avoid derailment. Both WTL and PYCO ask us to order SAW to inspect and repair all of its trackage used by WTL for the duration of alternative service. SAW replies that it has performed inspections and maintenance of trackage used by SAW and WTL as required.

In authorizing the extension of alternative service, we act to ensure the provision of adequate service to PYCO for the duration of the alternative service period. As the owner of the track that WTL is using to serve PYCO, SAW has the responsibility to inspect and adequately maintain the trackage used by WTL. We expect that SAW will adequately maintain the involved trackage. If WTL or PYCO continues to be concerned that track conditions are unsafe, the Federal Railroad Administration should be contacted to request an evaluation of the track.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. USRP is granted leave to file the verified statement of its president.
2. SAW's petition to terminate alternative rail service and request for a modification of the operating protocols are denied.
3. PYCO's requests to strike the SAW Rebuttal and SAW's Second Supplement and for immediate injunctive relief are denied.
4. The exemptions for any and all of the commodities that PYCO ships or receives by rail are revoked to the extent necessary to allow the provision of alternative rail service for all of PYCO's rail traffic.
5. The operating protocols attached to WTL's February 8, 2006 request, as modified by the decision served on February 16, 2006, are further modified by adding the following term, which shall apply for the same duration as the existing operating protocols:

During the hours allocated to WTL under these protocols, SAW may not place or have any equipment on the wye coming out of the south side of its yard.

6. WTL is authorized to provide alternative service to PYCO on SAW's lines for an additional period of 120 days, until 11:59 p.m. on October 23, 2006, under the provisions of 49 CFR 1146.1, and SAW is directed to allow such operations on its lines. The agreed-upon operating protocols, as amended in this decision and the decision served on February 16, 2006, shall continue to apply.

7. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary

Attachment F



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT OF MR. ROBERT LACY  
IN SUPPORT OF PETITION FOR  
ALTERNATIVE RAIL SERVICE

THE STATE OF TEXAS    §  
                                  §  
COUNTY OF LUBBOCK   §

BEFORE ME, the undersigned authority, on this day personally appeared **ROBERT LACY**, who after being duly sworn, stated under oath stated as follows:

1.     “My name is ROBERT LACY. I am over the age of eighteen (18) years, am competent to make this Affidavit, and affirm that the following statements are within my personal knowledge and are true and correct.
2.     I am presently employed by PYCO Industries, Inc. (“PYCO”) as Senior Vice President of Marketing. I have been continuously employed by PYCO for the previous 15 years. As part of my job responsibilities, I oversee rail shipments to and from PYCO’s facilities in Lubbock, Texas, known as Plant No. 1 and Plant No. 2. I also communicate with representatives of South Plains Switching Ltd. (“SAW”), including Mr. Larry Wisener, about the switching of railcars being utilized by PYCO.
3.     I began advising SAW in the early days of 2005 that PYCO’s switching needs would be increasing due to the company’s increased sale of cottonseed byproducts resulting from record cottonseed production. I spoke with Mr. Larry Wisener about the projected switching increases in January 2005, informing him that beginning approximately April 1, 2005, PYCO would be increasing its product shipments by rail.
4.     Mr. Wisener’s response at that time was that he could not promise any results to PYCO’s increased rail traffic because he was being hampered by the BNSF. When pushed for details, Mr. Wisener gave some details about an ongoing lawsuit between SAW and BNSF and essentially told me that he probably couldn’t accommodate any increases unless PYCO could help relieve switching pressures being placed on him by the BNSF.

5. Accordingly, PYCO contacted the BNSF and ultimately met with an attorney for BNSF, Mr. Don Herrmann, in March 2005. PYCO detailed its anticipated needs to Mr. Herrmann along with a suggested solution related to unlocking a particular switch, Switch #231, to perhaps relieve switching pressures. Mr. Herrmann vowed to relate the information to his client, BNSF, and we believe he did so.

6. During April 2005, Mr. Wisener's attitude towards PYCO stiffened after he mentioned that he learned of our meeting with the BNSF's lawyer. Correspondence was exchanged between our local attorney and Mr. Wisener's attorneys and it became evident to the management of PYCO that Mr. Wisener's bullying attitude was only growing worse and that switching was becoming more of a problem on a daily basis.

7. Accordingly, PYCO grew tired of trying to pursue an amicable solution among all the parties and contacted the Surface Transportation Board ("STB"). After we began discussions with the STB, and began drafting a formal complaint to the STB of which Mr. Wisener gained knowledge, switching operations suddenly began to steadily improve. Since this was PYCO's only goal to begin with, PYCO chose not to file a formal complaint with the STB, thinking that matters had been resolved.

8. On or about September 2005, Mr. Wisener informed me that he wanted to get out of the railroad business and was interested in selling SAW and wanted to know if PYCO was "interested in buying a railroad." I communicated this conversation to our management team at PYCO.

9. On October 11, 2005, PYCO's attorney, Gary McLaren, forwarded a letter he received from one of Mr. Wisener's attorneys, Jim Gorsuch, setting forth a Letter of Intent between PYCO and SAW. The Letter of Intent contained binding language for the purchase of a "shortline railroad business in East Lubbock" for \$5,500,000. A copy is attached as Exhibit "1". There was no listing of the assets included in the offer and no discussion had ever occurred between SAW and PYCO about specifics of such a sale, other than very generalized discussions. Mr. Wisener's lawyer wanted a response within 6 days, before the close of business on October 17, 2005.

10. Having further discussed the matter, we instructed our lawyer on October 13, 2005, to send to Mr. Gorsuch a simple proposed "due diligence" paragraph to be added to the Letter of Intent. This, we believed, was a minimal solution that would allow PYCO to gain financing of a possible solution and to assemble details to be approved by our board of directors. We also believed that a simple paragraph, as opposed to rewriting the entire document, might keep Mr. Wisener in a calm enough state to continue discussions about a purchase of certain assets. A copy is attached as Exhibit "2".

11. On November 3, PYCO received a letter from Mr. Wisener, a copy of which is attached to this verified statement as Exhibit "3". The letter cut off negotiations. This was the first time that PYCO was aware that SAW did not intend to move forward with revising the Letter of Intent or continuing with discussions about the purchase of SAW assets. Then matters between SAW and PYCO grew measurably worse.

12. On November 17, I received an angry call from Larry Wisener. He said that PYCO needed to come to his office and hear from him how things were about to change between SAW and PYCO. Having been to Mr. Wisener's office before in situations where Mr. Wisener progressively becomes more profane and begins discussing how he can "throw out" people that have opposing opinions, none of the PYCO management team wished to suffer through another of these unpleasant episodes.

13. During the November 17 telephone conversation with Mr. Wisener, I came to the conclusion that his tone and attitude represented a genuine business threat to PYCO. I reduced our conversation to written notes and began making contemporaneous notes concerning SAW beginning on November 17. These are attached as Exhibit "4".

14. I called Mr. Wisener on November 18 concerning a letter PYCO received from SAW canceling the lease of track #9298. Mr. Wisener was very belligerent and began telling me that he was in charge of SAW and that PYCO was going to have to fend for itself because doing business with SAW was about to become a lot more costly. It was apparent during the conversation that Mr. Wisener continued to be upset that PYCO did not "buy a railroad."

15. As my attached notes since November 17 indicate, there has been a substantial, measurable deterioration in rail service supplied by SAW since November 17, 2005. All efforts to resolve the switching problems with SAW have been unsuccessful and the attitude of Mr. Wisener towards PYCO continues to be just short of physically confrontational. PYCO management is concerned about possible physical retribution by Mr. Wisener.

16. PYCO utilizes about 6,250 railcars per year. At present, it is not feasible economically to convert any significant percentage of our product shipments from rail to truck due to the transcontinental nature of the shipments and the profit margin of the products being shipped. Consequently, it is imperative to the continued operations of PYCO that adequate rail service be restored.

17. PYCO's present service deficit amounts to 14 railcars per day at Plant No. 1. PYCO needs 26 cars per day at Plant No. 1 and SAW has reduced service to Plant No. 1 to only 12 railcars per day.

18. SAW failed to provide any service to PYCO's Plant No. 2 for approximately six days during the 2005 Thanksgiving holiday period. While

service has been presently restored to the requested 12 railcars per day since Thanksgiving, SAW continues to fail in providing at least one boxcar per day to Plant No. 2 as has been repeatedly requested.

19. Based upon the present number of switches by SAW, PYCO will run out of storage capacity for its products by mid-January 2005. Already the lack of adequate switching has resulted in delayed and cancelled orders with customers of PYCO.

20. PYCO could handle 26 railcars per day at Plant No. 1 if an alternative carrier could utilize SAW trackage. Currently, SAW has placed a derail in such a position so as to limit car movement to track owned by PYCO. Under the present derail placement, the maximum number of cars that PYCO can accommodate is 16 to 17 railcars per day; however, PYCO is forced to order only 12 cars per day because SAW will not place the cars where requested. Consequently, PYCO presently faces a 14 railcar per day shortage, and when coupled with the inability to get boxcar switching at Plant No. 2, PYCO incurs a daily loss as a direct result of SAW's inadequate switching.

21. As a direct result of SAW's switching deficiencies, PYCO is suffering economic losses on a daily basis resulting from delays in shipment by SAW. The slowness of PYCO's rail shipments is resulting in both delayed revenues from slowed shipments and lost sales. I directed PYCO staff to supply me with a summary of all delayed cars and also lost sales due to lack of cars. On the basis of that information, I have prepared the chart below which summarizes the losses mentioned herein that have accrued since November 17, 2005. There are two main sources of damages arising from the SAW service inadequacy: losses due to delays in shipment and losses due to lack of cars resulting in lost sales.

#### Calculation of Damages

| # Cars | lbs/tns per Car | Total lbs/tns | Avg Price (\$) | Total Revenue | Interest Cost | Carrying Cost (\$) | Total Damages (\$) |
|--------|-----------------|---------------|----------------|---------------|---------------|--------------------|--------------------|
|--------|-----------------|---------------|----------------|---------------|---------------|--------------------|--------------------|

#### \*Losses Arising from Delayed Cars:

|                                 |    |         |           |        |         |       |         |
|---------------------------------|----|---------|-----------|--------|---------|-------|---------|
| Tank Cars Behind Schedule (oil) | 8  | 185,000 | 1,480,000 | 0.33   | 488,400 | 6.00% | 29,304  |
| Box Cars Behind Schedule (lint) | 12 | 129,320 | 1,551,840 | 0.14   | 217,258 | 6.00% | 13,035  |
| Gondola Cars Behind Schedule    | 50 | 95      | 4,750     | 127.00 | 603,250 | 6.00% | 36,195  |
| Approximate Total Tons CS       |    |         | 9,375     |        |         | 25.00 | 234,375 |

#### Losses Arising from Lack of Cars Resulting in Lost Sales

|                   |     |         |           |        |           |  |           |
|-------------------|-----|---------|-----------|--------|-----------|--|-----------|
| Tank Cars         | 30  | 185,000 | 5,550,000 | 0.33   | 1,831,500 |  | 1,831,500 |
| Gondola Cars (CS) | 525 | 95      | 49,875    | 127.00 | 6,334,125 |  | 6,334,125 |

#### TOTAL CURRENT DAMAGES

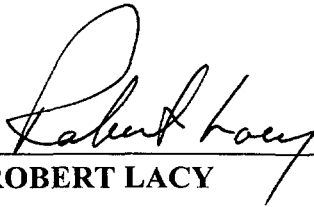
|             |
|-------------|
| \$8,478,534 |
|-------------|

\*Currently only Interest Cost and Carrying Cost damages. Continued delays will result in additional charges by customers or lost sales.

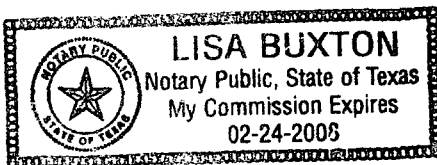
22. Should PYCO be forced to shut down operations as a result of the above-described switching problems, PYCO's very survival could be threatened. The corporation's value as a going concern is approximately \$150,000,000. Daily, PYCO is placed in the position of losing corporate goodwill and contractual integrity with its owners and customers as a direct consequence of switching problems. Focusing only on the value of the inventory that could be lost through a long term shut down, the inventory at risk is valued at approximately \$95,000,000.

23. All discussions with SAW since November 17, 2005, to restore adequate rail service have proven unfruitful. As a member of PYCO's management team, the present switching difficulties are an imminent threat to the financial wellbeing of PYCO and we have no reason to believe that adequate service is going to be restored within a reasonable period of time short of intervention by the Surface Transportation Board."

Further, Affiant saith not.

  
\_\_\_\_\_  
ROBERT LACY

SWORN TO AND SUBSCRIBED BEFORE ME on this the 15<sup>th</sup> day of December, 2005, to certify which witness my hand and seal of office.



  
\_\_\_\_\_  
Notary Public State of Texas

# **EXHIBIT 1**

**JAMES L. GORSUCH, P.C.***Attorney at Law*

4412 - 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424

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

October 11, 2005

**Via Facsimile:**

Mr. Gary R. McLaren  
**RICHARDS, ELDER, SRADER,  
PHILLIPS & McLAREN, L.L.P.**  
5214 68<sup>th</sup> Street, Suite 302  
Lubbock, Texas 79424

Re: Sale of Portion of the Assets and Obligations of South Plains Switching, Ltd. Co., to Pyco Industries, Inc.

**Letter of Intent**

Dear Mr. McLaren:

This Letter of Intent sets forth our agreement and understanding as to the essential terms of the sale to Pyco Industries, Inc. ("Purchaser"), by South Plains Switching, Ltd. Co. ("Seller"), of a portion of Seller's business ("Business") located in Lubbock County constituting a shortline railroad business in East Lubbock. The parties intend this Letter of Intent to be binding and enforceable and will inure to the benefit of the parties and their respective successors and assigns.

1. **Purchased Assets.** At the closing, Purchaser will purchase the specific assets set forth in the Sale Agreement associated with the Business, including all contracts and agreements, and all legally assignable assets and obligations.
2. **Assumed Liabilities.** Purchaser will assume as of Closing Date the liabilities and obligations set forth in the Asset Sale Agreement between South Plains Switching, Ltd. Co., and The Burlington Northern & Santa Fe Railway Company, executed in May of 1999. In addition, Purchaser will assume the liabilities and obligations arising in connection with the operation of the Business by the Purchaser after the Closing Date.
3. **Purchase Price.** The purchase price will be \$5,500,000.00, payable in cash in immediately available funds on the Closing Date.

October 11, 2005  
Page 2

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4. **Pre-closing Covenants.** The parties will use their reasonable best efforts to obtain all necessary third party and governmental consents, if required, including all certificates, permits and approvals required in connection with Purchaser's operation of the Business. The Seller will continue to operate the Business consistent with past practice. The parties agree to prepare, negotiate and execute a Purchase Agreement which will reflect the terms set forth in this Letter of Intent.
5. **Expenses.** Subject to the provisions of this Letter of Intent, each party will pay all of its expenses, including legal fees, incurred in connection with the acquisition of the Business.
6. **Confidentiality:** Any information obtained by Purchaser from Seller regarding this sale, will be kept strictly confidential.

Seller and Purchaser warrant that they have all required authority to enter into this Letter of Intent, and both Purchaser and Seller represent that they have full permission from the Board of Directors and the Officers to enter into this Letter of Intent.

If you are in agreement with the terms of this Letter of Intent, please sign in the space provided below and return a signed copy to James L. Gorsuch, P.C., by the close of business on October 17, 2005. Upon receipt of a signed copy of this letter, we will proceed with our plans for consummating the transaction in a timely manner.

Very truly yours,

**SOUTH PLAINS SWITCHING, LTD. CO.**

By: \_\_\_\_\_  
CHIEF OPERATING OFFICER

**PYCO INDUSTRIES, INC.**

By: \_\_\_\_\_  
CHIEF OPERATING OFFICER



**JAMES L. GORSUCH, P.C.***Attorney at Law*

•4412 - 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424

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

**FAX COVER SHEET**

**DATE:** *October 11, 2005*

**TO:** *Gary McLaren*  
*Fax 785-2521*

**FROM:** *Jim Gorsuch*

**RE:** *LETTER OF INTENT*

\*\*\*\*\*

***TOTAL NUMBER OF PAGES SENT, INCLUDING THIS PAGE: 3***

***If you do not receive legible copies of all pages, please  
telephone (806)771-6474 immediately and ask for JAN.***

\*\*\*\*\*

The information contained in this fax is considered by the sender to be confidential and may be of an attorney-client privileged nature. It is intended only for the use of the individual or entity named above. If the reader of this message is not the named recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is prohibited. If you have received this communication in error, please notify us by collect telephone and return the original message to us at the address above at our expense. This paragraph does not apply to pleadings or other documents intended for filing in public records, or for filing with any department or agency whose records are open to the general public for inspection.

## **EXHIBIT 2**

**PHILLIPS & McLAREN, L.L.P.**

ATTORNEYS AT LAW

JAMEY LANEY PHILLIPS  
jameyp@sbcglobal.net

3305 66<sup>TH</sup> STREET, SUITE 1A  
LUBBOCK, TEXAS 79413  
TELEPHONE (806) 788-0609  
TELECOPY (806) 785-2521

GARY R. McLAREN  
gmclaren@sbcglobal.net

October 13, 2005

Mr. James L. Gorsuch, P.C.  
Attorney at Law  
4417 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424  
**Via Telefax No. 771-6476**

RE: Letter of Intent

Dear Jim:

As you know, PYCO is still in the early stages of looking at the purchase of your client's assets. Much remains to be done in terms of investigation and evaluation of the purchase.

We would need to add the following provision to your proposed Letter of Intent in order to move forward.

**Purchase Conditional Upon Due Diligence and Financing.** Seller acknowledges and agrees that Purchaser's purchase of the assets made the subject of this Letter to Intent is conditional and contingent upon Purchaser's satisfaction with the results of Purchaser's due diligence in the investigation, evaluation and appraisal of said Assets, at Purchaser's sole discretion. Seller further acknowledges and agrees that Purchaser's purchase of said Assets is further conditional and contingent upon Purchaser's ability to obtain financing for the purchase of said Assets at terms and conditions favorable to Purchaser, at Purchaser's sole discretion. Seller further acknowledges and agrees that should Purchaser be dissatisfied with the results of its due diligence concerning these Assets, or be unable to obtain financing for the Assets at terms and conditions favorable to Purchaser, both at Purchaser's sole discretion, then Purchaser is entirely relieved of all obligations and duties arising under this Letter of Intent, save and except the duty and obligation of Confidentiality as provided for herein.

October 13, 2005

Page 2

Please let me know if this is acceptable.

Yours very truly,

Phillips & McLaren, L.L.P.

By:

Gary R. McLaren

GRM/cjh

# SENDING CONFIRMATION

DATE : OCT-13-2005 THU 16:33  
NAME : GARY MCLAREN  
TEL : 806 788 1807

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PHONE : 7716476  
PAGES : 3/3  
START TIME : OCT-13 16:32  
ELAPSED TIME : 00'23"  
MODE : ECM  
RESULTS : OK

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FIRST PAGE OF RECENT DOCUMENT TRANSMITTED...

C O V E R  
S H E E T

FAX

To: James L. Gorsuch  
Fax #: 771-6476  
Re: Letter of Intent  
Date: October 13, 2005  
Pages: 3 including cover sheet

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From the desk of...  
Gary R. McLaren  
Attorney at Law  
Phillips & McLaren, L.L.P.  
3305 68th Street, Suite 1A  
Lubbock, Texas 79413  
(806) 788-0809  
Fax: (806) 785-2621

# **EXHIBIT 3**

**South Plains Lamesa Railroad, Ltd.**

**South Plains Switching, Ltd. Co.**

**P. O. BOX 64299**

**LUBBOCK, TEXAS 79464**

**PHO: (806)828-4841**

**FAX: (806)828-4863**

November 3, 2005

NOV 03 2005

Mr. Robert Lacey  
PYCO Industries  
P. O. Box 841  
Lubbock, TX 79408

Dear Mr. Lacey:

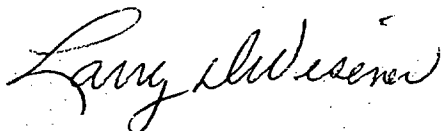
South Plains Switching, Ltd. Co., (SAW) has come to the conclusion after discussions with PYCO's attorney that an agreement on a letter of "intent to purchase" certain assets of SAW cannot be reached.

SAW is going forward with talks to other prospective buyers, if none are found to be satisfactory, SAW will continue to operate all its property in Lubbock.

However, in the interim, SAW feels it must request, for liability and violation of FRA Rules and Regulations, that PYCO Industries cease all plant operations on SAW property immediately. Storage of and placement of PYCO equipment needed for its operations needs to be addressed as soon as possible.

Please call or have a PYCO representative contact me at my office in Slaton, TX, to discuss future operational and rail service issues required of SAW. Your immediate attention to this matter will be appreciated.

Respectfully,



Larry D. Wisener  
President

# **EXHIBIT 4**



## South Plains Lamesa Railroad

November 17, 2005

3:45pm

Larry Wisener called to ask me if we had received his letter dated November 3<sup>rd</sup> (copy of letter available) and was wondering why we haven't been in touch with him to discuss our operational needs. I explained that we had received his letter and that we knew that he was going to make the rules and we didn't believe that we would have any input in his decisions. He said we were ignoring his requests and that we had been loading seed cars on his track again (track between dump 5 and seed stacks). I told him politely "no sir, we have been loading seed inside our plant." He accused me again of the same thing and I politely stated again that "we were loading inside our plant from seed house number one and that we did not have any fumigated seed in the area that he indicated." He started telling me that we were not going to be able to get on his tracks anymore and that he was putting in a derail to make sure that we couldn't get on his property to switch our cars. He said that we needed to sit down with him so he could tell us how much he was going to charge us to store our cars, to service our plant, and that he was canceling the lease on track #9298. He said he had 100 seed cars on that track and that he wasn't going to allow us to keep cars over there for free anymore. He mentioned other leases that he was looking at that he would be canceling soon and that we had better come over and talk. Larry said that he wasn't going to store cars for us anymore and was going to turn them back to the BNSF and they could store them for us.

November 18, 2005

8:30am

Lewis, Ronnie, Kelly, Les, and I went down into the plant to plan how we need to go about our business. Larry did put the derail on the track so that we could not get on his property and we told our people to do what they could do and we would request in writing anything that we needed the SAW to do to service our operation.

9:15am

Lewis came to the office with a plan to move our cars around inside of our plant and asked if we could call Larry and see if he could move the derail back about 100 feet to the drainage ditch where it was place last time. With the derail where it was currently, we did not have enough room to put a car on the switch in order to get it weighed. With the switch moved, we would be able to get all of the cars ready inside our plant in order to have the daily switches ready for them and make everything easier for both parties.

9:30am

Received a letter dated November 17<sup>th</sup> canceling the lease of track #9298 effective February 28, 2006.

11:00am

I place a call to Larry and ask him if he could move the derail back to the drainage ditch so that we could get all the cars weighed and ready for him daily. He said that he was busy and would have to look at it later. That is all that I wanted from him and asked if he would let me know. He told me that he had been going through all of the leases and encroachments and there were a lot of loose ends that he was going to cancel. He said that it included overhead conveyers and roads that he would be sending a letter out to cancel. And that he wasn't going to store any cars for us and needed us to come and talk to him about how much he was going to charge us for all services. I told him that if he was going to tell us what he was going to do, would there be any need in us coming to talk to him. He said if you care about your operation you need to come over. I said that if he already things set; we didn't need to go sit down with him just to listen to him vent and argue about everything. Larry said that we wouldn't argue about anything because there was nothing for us to argue about. I again said that we didn't need to sit down with him if he had things figure out already. Larry then told me that he was going to set charges for everything that he could and cancel leases and that we would have to try to figure out how to take care of ourselves. I told him that we are working on taking care of ourselves and he stated that is was going to cost a lot of money for us to continue doing

business with his railroad and that we would start receiving letters next week on cancellations and rates that he is going to charge us to switch and store cars. I replied that all I had only the one question for him about the derail and that I didn't intend on getting into any further discussions at this time. Larry then stated that the answer is no, he is not going to move the derail at all. I said okay thanks for your time, bye.

We faxed in the list of cars needed on Friday morning and did receive a switch at both plants at about 4:30pm.

November 21, 2005

9:00am

We sent in our switch list for the day and had everything lined out for them to pick up from within our plants. Les observed Larry and 2 other guys watching us switch from the derail that he had put in on Thursday. We have figured out how to just barely get one car on that at a time in order to get back to our scales and weigh the cars. I wouldn't be surprised if he did not move the derail slightly today so that the one car won't fit anymore.

3:00pm

SAW switched both plants between 3 and 4 pm. Lewis observed only two people on switch crew versus the usual 4-5, Rodney and Shad.

November 22, 2005

9:00am

Our guys have been looking at the track situation inside our plant because of only being able to handle about 12 cars a day currently. They decided that if they had the SAW switch our cars on the scale track instead of the shop track or if we could get cars on both, we would be able to handle more cars each day. Les asked Rodney (SAW) if we could get switched on both and he replied that Larry would only allow them to do one pull per day. They then asked if they would switch on the scale track today. Rodney asked Larry and he said that they would switch only on the shop track. The switch is inside our plant and we could lock it out and have the SAW set the cars where we need them without any input from the Larry.

11:00am

We sent in our request for the days switching a little late because we were waiting for the answer from the SAW concerning the scale track. We are leaving the switch on the shop track for now until we here from our attorney's.

3:30pm

The SAW picked up cars at 10am this morning and did not leave any cars for us to load. We had some seed cars that were not ready yet and they left them. After they were loaded they set them out on our shop track to be picked up this afternoon. This afternoon they pushed cars in on top of the seed cars instead of pulling them out limiting the number of empties that we could bring in to load. Les asked them if they would just put them on the scale track and was told that Larry wouldn't let them. Instead of making a big deal out of it today we conceded to take what we had and will still request in writing on Monday morning when we send our car list in that they set the cars on the scale track. We will see what happens then.

November 23, 2005

9:30am

We sent in our order list as usual this week. We did not specify which track that we wanted the cars to be placed. The SAW sent a notice to our office on the 22<sup>nd</sup> that they would be closed for the holiday and would not switch on the 24<sup>th</sup> and 25<sup>th</sup>. We will start requesting cars be put on scale track on Monday. Rodney (SAW) told Les that he would like to have our switch list by about 5pm for the next day. The next switch will not be until Monday morning and we were making the track change on the switch list so we aren't going to fax until early Monday morning. We did not get a switch at plant #2 today and now will not get any cars to load over the long weekend.

November 28, 2005

7:30am

I sent the switch list to the SAW railroad and requested that the cars be placed on the scale track and the loaded cars pulled from the shop track.

2:45pm

We got switched at plant #1 and they would not place the empty cars on the scale track. They pulled the cars from the shop track and then placed the empties back on the same track. Even though it would be easier to push in on one track and pull out on the other.

4:30pm

Les talked to Rodney and was told they were having problems with their engine today and would not be able to switch us at plant #2 again. We now have not had a switch at plant #2 since November 22nd. We sent the switch list to the SAW for tomorrow and sent a cover letter this time requesting that the inbound cars be placed on the scale track (copy attached) at plant #1 and that they switch as request on the 23<sup>rd</sup> and 28<sup>th</sup> at plant #2.

November 29, 2005

8:00am

Les said that Rodney called him this morning and told him that they would be switching at plant #2 this morning because they finally got their locomotive working again. He also told Les that he would pull from the shop track twice today if we could get cars loaded. He did not indicate which track he would push cars into our plant.

12:00pm

We finally got a switch at plant #2. Larry has complained about storing cars for us recently, but if the SAW would have switched us on the 23<sup>rd</sup> and 28<sup>th</sup>, we would have been able to load 36 more Gondolas and 6 more box cars by today.

12:30pm

We were switch on the shop track again today. The first day they could have said that they didn't see the instructions, but today there is no reason that the SAW didn't know that we wanted the cars pushed in on the scale track. Larry is being stubborn and is not going to switch the cars like we request. The answer to his problems about having to store our cars and the demurrage that we are incurring on our hopper cars can be attributed directly to the SAW not being willing to switch on the scale track. We could load an additional 5+ cars per day by using the scale track versus the shop track. Since this nonsense began the first part of November, PYCO plant #1 could have loaded an additional 80 cars. At this time we are behind 13 boxcars of Linters, 5 hopper cars, 40 Gondolas, and about 6 tank cars. This could have all been prevented and we would still be abiding by the rules that Larry put in place.

5:00pm

We faxed our list in to the SAW railroad that still shows that we want the cars placed on the scale track. We haven't taken any other steps until we get advice from counsel.



November 30, 2005

2:00pm

We received a switch at plant #2 as requested today. They pulled the cars from the shop track at plant #1 at about 2:30, but when they pushed in our empty cars about 15-20 minutes later it was on the shop track. This is the 3<sup>rd</sup> day in a row that the crew would not put the cars onto the scale track as requested. That is another 5+ cars that we could have loaded tonight that are going to be lost. It is costing PYCO a lot of money for him to deny our switching requests each day, not to mention we are getting further behind each day. I had noticed that I haven't seen any charges for surcharges, storage, or demurrage yet like was promised on one of our phone calls the other day. Not only has he not sent the charges, but also the letters that he was going to send to cancel all of our leases and easements.

4:45pm

We sent our switching request in along with the cover letter again telling the SAW that we want our cars pushed in on the scale track. This is the fourth day of asking and if it doesn't happen tomorrow, we will need to take additional steps to make sure that he has to switch us on the scale track.

December 1, 2005

11:30am

We were switched at plant #1 they pulled cars from the shop track and then came back and pushed the empties onto the same track. They still will not push the cars on the scale track where we requested.

1:30pm

We received our switch as ordered at plant #2. It seems that we are getting that worked out at the present time.

4:30pm

We sent the fax in to order cars for Friday.

December 2, 2005

8:20am

Rodney at the SAW called and said that they didn't receive the switch list that Kelly had faxed at 4:30pm on Thursday. Les gave Rodney the instructions over the phone and told him that we wanted the cars on the scale track.

11:00am

The SAW pulled from the shop track as requested and then they pushed the empties onto the same track. They still refuse to set the cars on the scale track. We are only ordering the cars that will fit on the shop track; we cannot order more cars until they start pushing the empties onto the scale track.

12:00pm

We received the cars that were requested at Plant #2.

4:30pm

We sent in our order for cars to be placed on Monday. We continue to order the cars for plant #1 to be placed on the scale track.

December 5, 2005

9:00am

We finally received an invoice today for charges incurred on the SAW railroad. The normal bills were received as in the \$20 per car surcharge that the SAW starting sending a while back and \$150 per loaded oil car sent from plant #2 to Plant #1. Those two invoices were normal, but now we are getting an invoice for \$150 per car for each car that is constructively placed at either one of our plants. So far he has only billed us for November 21<sup>st</sup>, 22<sup>nd</sup>, and 23<sup>rd</sup> which are a few days after we started keeping this log again. The \$150 charge is on his new tariff that he sent to us in May.

10:30am

The SAW pulled the cars from the shop track and pushed them back onto the same track, they did not give us the gondolas we ordered only the tank cars and hoppers. Les told Rodney again today that we needed the cars pushed on the scale track and was told that Larry still would not allow him to push the cars on the scale track. There is no reason that Larry should be able to dictate which track our cars get placed.

5:00pm

We still have not been switched at plant #2, but Rodney told Les he would get it done before they went home. We will see in the morning. We are sending the list to the SAW for Tuesday.

December 6, 2005

8:00am

We finally got switched at plant #2 at about 6pm last night. Les also told me that at plant #1 we did not get any Gondolas to load yesterday, only tanks and hoppers. Les said that when he would ask Rodney to push the cars on the scale track he would only say that Larry wouldn't let him do it that way.

11:30am

The SAW switched our cars to us, but we had asked for 12 Gondolas and 3 Tank cars and they only had 11 Gondolas and they tried to give us 4 tank cars. We did not need the extra tank car and told Rodney to keep the car.

1:30pm

We received all of the cars that we ask for, but they were pushed in on the shop track again. Les said that he asks Rodney about the scale track every time they talk.

December 7, 2005

9:00am

I had an opportunity to sell 50,000 more tons of cottonseed at \$120 today, but did not take the bid because of our switching situation. This is another case where the SAW is costing PYCO money by preventing us from shipping the seed that we will need to move in order to hold everything that we will receive.

11:00am

The SAW pulled the loaded cars at plant #2 and did not push anything into us today. We had ordered 12 Gondolas and Les was told that they didn't have any empty Gondolas to bring.

11:30am

Rodney pulled the loaded cars from the shop track today and then set in 4 Gondolas to us, allowing us to pull them over to the meal track before he set any more cars. This allowed us to take 16 cars today versus the normal 12 that we have been getting on the shop track. Larry still will not let his employees switch us on the scale track, but Rodney bent the rules a little and let us pull those cars to the other track before he set the ones that we had ordered.

December 8, 2005

10:00am

We received our switch at plant #1. We did not ask for any Gondolas because we were told they did not have any in town, but we did ask for 6 tank cars and 6 box cars to load. We received the 6 tank cars and only 2 of the boxes because we were told that they had run out of box cars also. We have a written order in with the SAW for a certain number of box cars each day and he is responsible for getting them ordered from the BNSF. We did not order any gondolas for plant #2 either, but we ordered 4 boxcars. We were told that they would not switch today because they have no boxcars available. It doesn't look like we are the ones that are sitting on cars and making the SAW use their tracks to store our empty cars. We were loading 6 tank cars, 2-4 boxcar, 2 hoppers, and up to 15 gondolas per day at plant #1 so if they would let us go, we would not have too many cars in town waiting to be loaded.

December 9, 2005

11:00am

We did not order any gondolas for plant #2 for today; only 4 boxes were requested the day before and not received. This morning we received 12 empty gondolas and no boxes. The reason for not ordering gondolas was that we wouldn't be able to load any until Monday because the tarp couldn't be pulled from the fumigated pile until Monday morning. We really need boxcars to load our linters in at both plants, but at plant #2 we have to stack them on the ground because we are out of room.

5:00pm

We finally got a switch today but they only set in 7 tank cars (4-empty, 3-loaded). We didn't get any boxes at plant #1 either which is going to put us further behind each day. We order boxcars a month at a time for both plants and tell the SAW how many cars we need each day. The SAW will send the order to the BNSF or UP railroad on most equipment that we order, but on the boxcars he doesn't. He has a contract to store boxcars for the railroad and says that he can get any boxcars that we need. I would say that isn't the case right now and we are in need of boxcars quick.

December 12, 2005

9:00am

Kelly Jack talked to the SAW about our lack of boxcars today and Dale told him that they sent our order to the BNSF on November 21<sup>st</sup>, when they received it in their office. Kelly called the BNSF and was told that they don't have an order in from PYCO and haven't seen on since the November order was placed at the end of October. I told Kelly to send in an order immediately to both the SAW and the BNSF so that we could get on record needing the boxcars. I don't know who was at fault on the order, but it wasn't a mistake in our office. The SAW did get the order from us and the problem is between the SAW and the BNSF.

12:00pm

We received 12 gondolas at plant #2, but no boxes. At plant #1 we received 7 tank cars, 4-empty and 3-loaded on the shop track. We still need to get some boxcars in town for us to get caught up on our linter shipments.

December 13, 2005

2:00pm

We received our switch at plant #2 and received 12 gondolas and 2 boxcars as requested. Plant #1 was switched later and we 6 tank cars and 2-hoppers (we just ordered 1) and no boxcars even though we ordered 5. We are still in need of boxcars to ship out our linters.



Attachment G

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. -- Alternative Rail Service  
-- South Plains Switching, Ltd.

F.D. 34889

I, Eldon Martin, make this Declaration, pursuant to 28 U.S.C. § 1746, for use in the alternative service proceeding captioned above and in related proceedings before the Surface Transportation Board.

1. I am the president of Martin Railroad Construction, 9325 W. 19<sup>th</sup>, Lubbock, TX. My company constructs railroad track and repairs railroad track. I have had 33 years experience in the industry and am well familiar with Federal Railroad Administration requirements regarding track construction, repair, maintenance and inspection, including inspection and maintenance of switches. That is fact is my area of expertise.

2. On June 14, West Texas and Lubbock Railroad (WTL) experienced a derailment on trackage owned by South Plains Switching, Ltd. on the west side of the BNSF mainline in the area of Farmers Cooperative Compress (roughly 50<sup>th</sup> and Southeast Drive). After inspecting the site of the derailment, I concluded that it was the result of a defective, poorly maintained switch. In determining causation, one is looking for an explanation of how the wheel flanges picked the switch. I examined the wheel flanges and found no defects which would enhance the chance of derailment. However, there were a number of problems with the switch

immediately obvious on examination. The problems indicate a failure by the owner of the railroad properly to inspect and to repair switches. At the request of WTL, which must operate over the switch to provide service for PYCO Industries, my company repaired this switch and an adjacent defective SAW switch, and in addition assisted in re-railing the cars.

3. In my opinion, the derailment more specifically resulted from failure by South Plains Switching Ltd. to maintain the switch consistently with Federal Railroad Administration Track Safety Standards Compliance Manual, United States Department of Transportation, Office of Safety Assurance and Compliance, January 1, 2002, section 213.135 (switches), pp. 5.105-5.110. In particular, the following defect codes are relevant:

- Defect code 135.11: unusually chipped or worn switch point, p. 5.110.

- Defect code 135.03: improper fit between switch and stock rail, p. 5.110.

- Defect code 133.06: loose, worn, or missing switch rod bolts, p. 5.104.

- Defect code 133.07: worn or missing cotter pins, p. 5.104.

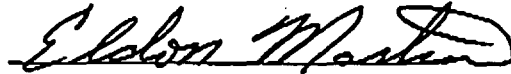
In addition, there is a recommendation at p. 5.109 that all bolts, nuts, cotter pins and other fasteners be in place, in good condition and properly tightened. This was not the case at the point of derailment.

4. I attach below some explanations and photographs illustrating the problem.

5. Martin Railroad Construction has submitted an invoice to WTL for \$23,134.50 for re-railing and switch repairs.

Pursuant to 28 U.S.C. § 1746, 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 6-30-06



## 133.07 Worn or missing cotter pin

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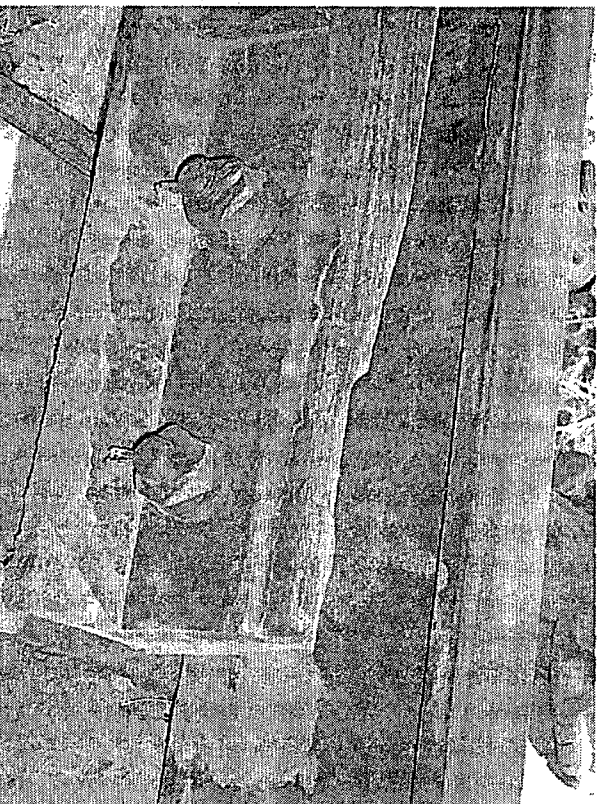
- ☐ Next picture will show the defect 133.07 and 133.06.
- ☐ If you notice the nut on the switch bolt is almost off.
- ☐ The nut should be screwed down to the jaw clip, with a cotter key, to prevent the nut from screwing off

# Left hand nut and bolt, #1 connector rod



# Right Hand Switch Point

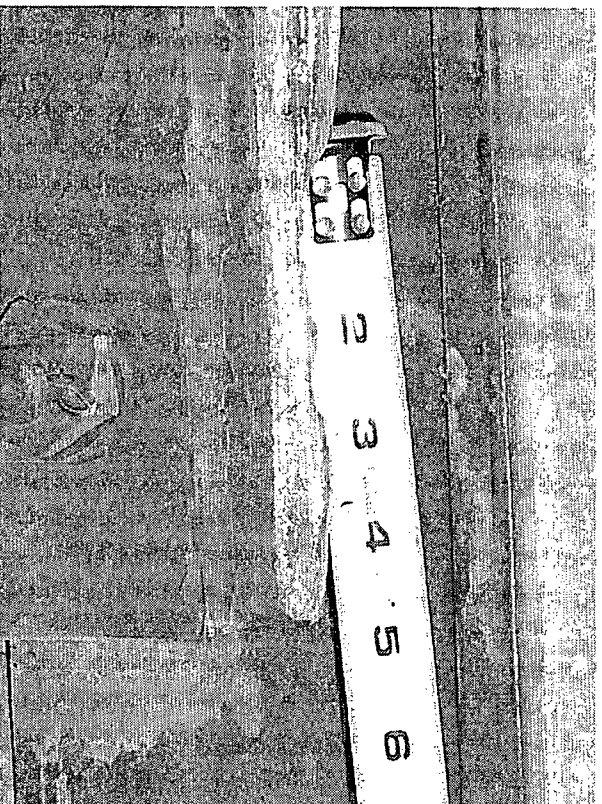
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- ❑ This picture illustrated the wear and tear of the point of the switch point.
- ❑ The missing part of the point would make it difficult for the point of switch to fit properly against the stock rail.
- ❑ Point must fit securely under the lip of the rail with no type of gap in-between.

# Measurement R.H. switch point

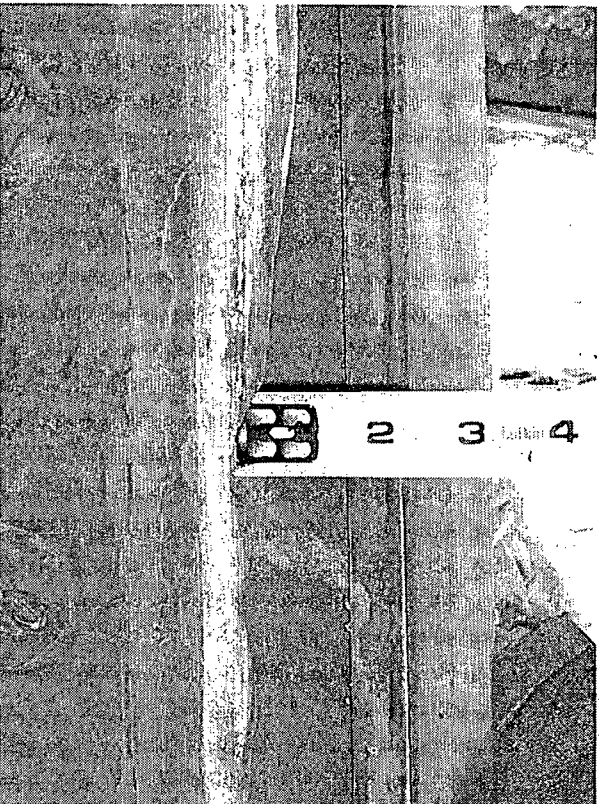
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- This picture illustrates 4" back from the end of point all the way down to the base of switch point.

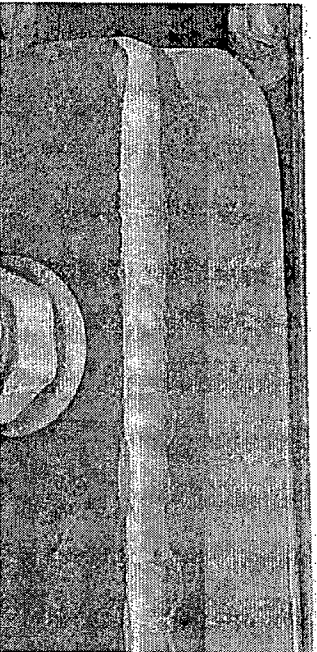
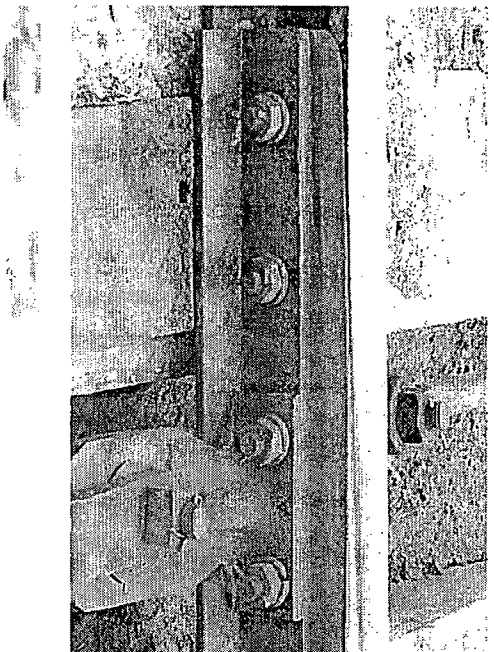


- Show 2" loss of point in height that could as well prevent a proper fit from point to stock rail.



# Ex: Switch points

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- Here is two examples of the way a switch point should look and fit against the rail. If you notice on picture 2 the point of the switch fits securely against the rail and underneath the lip of the rail. These points were not involved in the derailment itself, just used as an example to give a visual of a properly maintained switch point.



Attachment H

BEFORE THE SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LLC  
-- ACQUISITION EXEMPTION --  
BNSF RAILWAY COMPANY

Finance Dkt. No. 33753 (Sub-no. 1)

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DECLARATION OF  
O.E. FLOYD

I, O.E. Floyd, make this Declaration, pursuant to 28 U.S.C. § 1746, in support of the petition to revoke the acquisition exemption in F.D. 33753 (Sub-no.1) by which South Plains Switching LLC ("SAW") acquired certain lines of railroad in Lubbock from BNSF Railway.

1. I am general manager of Floyd Trucking Company, a family owned business, in Lubbock, Texas. My business address is 6201 Martin Luther King Blvd., Lubbock, TX 79404. Floyd Trucking Company has been in business for over forty years as a sand and gravel hauler, with up to 75 trucks at a time. My family is also part owner of Wes-Tex Manufacturing Company, which constructs "belly dumpers" and other special applications for trucks. Although Wes-Tex has some interest in rail service, I will focus my Declaration on the interests of Floyd Trucking Company.

2. Despite repeated efforts by Floyd Trucking Company, we have been unable to obtain rail service on reasonable terms from SAW. This problem dates from the inception of SAW's acquisition of its trackage in Lubbock pursuant to South Plains Switching

LLC -- Acquisition Exemption -- BNSF Railway, F.D. 33753 (Sub-no. 1), served July 15, 1999. As a result of SAW's failure to provide rail service on reasonable terms, Floyd Trucking Company has repeatedly lost business opportunities and sustained losses. As a result of our experience, Floyd Trucking Company believes that shippers and potential shippers will be able to obtain reasonably efficient, reliable, and non-discriminatory service only if SAW is replaced as the provider of rail services in Lubbock. To this end, regulation by this Board is needed. Floyd Trucking therefore supports either the revocation of the exemption under which SAW acquired its Lubbock trackage, or other appropriate relief to ensure management of the lines consistent with discharge of common carrier obligations.

3. Floyd Trucking purchased property located at 6201 Martin Luther King Blvd in Lubbock, Texas, in 1999. The location is depicted on the map attached. Appendix 1. The property has a railroad spur track (switch #0390), approximately 2500 feet long, which parallels on the north side a line of track owned by SAW. Another switch off that spur track branches to the north and then west for about 400 or 500 feet. Prior to my company's purchase of the property at 6201 Martin Luther King Blvd., the spur had been used to load scrap metals and to unload rock. When we acquired the property, I met with representatives of BNSF Railway and Hanson Aggregates for the purpose of making arrangements to upgrade the spur by installing sufficient track to place 100 cars on location to be unloaded. At the time I met

with BNSF, BNSF still owned the switching tracks now owned and operated by SAW. In particular, Floyd Trucking planned to extend our 2500 foot spur to the west and to install a switch into the existing line. This would create a loop facilitating movement of cars onto and off of our property. Although BNSF had been supportive of the plan, BNSF sold its interests to SAW. Our plan was unable to move forward because Mr. Larry Wisener, manager of SAW, told me that our switch was out of service. Two potential customers, DePauw Fly Ash and Capitol Aggregates, supplied me with letters dated September 19 and September 23, 2002, respectively, noting that problems in relation to the spur made them unwilling to do business with my company. Capitol Aggregates indicated that SAW said it would not service Floyd Trucking's spur; DePauw stated it was "extremely wary" and questioned reliability of service. Copies of these letters are attached in Appendix 2. This defeated one of the purposes for which we acquired our property.

4. I telephoned Ms. Nancy Beiter at the Surface Transportation Board, asking her if the track served by switch 0390 was out of service. After checking, Ms. Beiter said that it was not, and further that Mr. Wisener could not deny service. I then telephoned Mr. Wisener stating that STB informed me that the spur was in service and that SAW was required to serve it. Mr. Wisener said that he now owned the switching railroad tracks and that he would never provide service to Floyd Trucking Company's spur.

5. I continued my efforts to obtain service from SAW. Mr. Wisener claimed that the switch was defective and needed repair. Eldon Martin, of Martin Construction, engages in track construction and repair in the Lubbock area. Mr. Martin had performed work on the tracks at the Floyd Trucking facility before its purchase by us. We arranged for Martin Construction to rehabilitate the tracks. Mr. Martin inspected the switch and found no problem. Appendix 3. On September 25, 2002, I had Mr. Rickey Phillips, Motor Track Inspector for BNSF, inspect the switch. Mr. Phillips concluded that the switch and track "qualifies as class one." He "found no defect to render this track out of service." His handwritten report dated 9/25/02 is attached as Appendix 4. We ordered a car of 1" concrete rock from Vulcan Materials, but were denied service. Instead, Mr. Wisener states that he would provide service on trackage approximately two miles away. Appendix 5. By letter dated November 19, 2002, we complained to the Office of Compliance and Enforcement of the Surface Transportation Board, noting that Mr. Wisener was threatening to remove the switch. We also noted that at least three other potential shippers appeared to be experiencing similar problems with SAW but "wish to remain nameless, for fear of reprisal." Appendix 6.

6. At approximately the same time Floyd Trucking complained to OCE, SAW removed the switch. This action can only be explained as an action of retaliation and reprisal.

7. The Director of STB's OCE (Mr. Clemens) on November 25,



2003, wrote Mr. Wisener that SAW was obligated to provide service pursuant to 49 U.S.C. 11101(a), attaching a copy of the BNSF inspection report concerning the switch. Appendix 7. By letter of January 17, 2003, Mr. Clemens complained to Mr. Wisener that Mr. Wisener had not responded. Appendix 8.

8. By letter dated January 15, 2003, copied to Mr. Clemens, Mr. Wisener informed me that it would cost \$30,000 to replace the switch, requesting Floyd Trucking to pay \$25,000 of that amount. The letter also expressed a series of other concerns, conditions, and limitations on SAW's willingness to provide rail service to our spur. Appendix 9. Mr. Clemens responded with a letter dated February 20, 2003, indicating that SAW was not acting in accordance with its common carrier obligations. Appendix 10. Mr. Wisener then retained Mr. McFarland to represent him. Mr. McFarland apparently dissuaded OCE from initiating a complain proceeding. Mr. McFarland wrote me asking, as I understood him, whether our volume of business would justify restoring the switch, but ultimately, evidently under pressure from OCE (letter, OCE to McFarland, dated March 7, 2003), in a letter dated March 13, 2003, appeared to agree that SAW must restore the switch at SAW's expense, and provide rail service to Floyd, "both upon Floyd's reasonable request." Mr. McFarland indicated that a "reasonable request" is specific as to volume, commodity and time of shipment. Appendix 11 (various letters).

9. SAW continued to fail to restore the switch. On

February 25, 2004, I faxed to Mr. Clemens at STB OCE a commitment from D&J Materials to a job that required use of Floyd Trucking's rail spur. Appendix 12. I believe that Mr. Clemens suggested I request service in writing. I then informed SAW by certified mail (delivered 3/8/04 to Mr. McFarland and to SAW) that Floyd Trucking intended to ship 75,000 to 100,000 tons per year of lightweight aggregate, 60 to 80 carloads a month. Appendix 13. By letter dated March 10, 2004, Mr. Wisener stated that he was forwarding a copy of an industry track agreement that previously existed between BNSF and Lubbock Iron & Metal with respect to what is now Floyd Trucking trackage. Mr. Wisener indicated he was preparing a contract between SAW and Floyd Trucking that would contain many of those provisions. However, Mr. Wisener's letter did not contain the BNSF industry track agreement. Appendix 14. On March 19, I requested that agreement and also informed Mr. Wisener that we expected to need service by April 15, 2004. Appendix 15.

10. I then received a letter dated March 22, 2004, from Mr. Wisener, but that letter did not include the BNSF contract. Instead it contained a draft contract made out for Floyd Trucking to sign with SAW. The contract was deficient in numerous particulars. For example, Article I, paragraph 3 required us to "pay the entire cost (or an equitable share thereof) in case other industries shall be serviced by the INdustry Track or a part thereof." This requirement is virtually unintelligible. In any event, since Floyd Trucking

owned and was obligated to repair its own track, we obviously would not obligate ourselves to pay SAW if SAW used the track for other industries. Article I, paragraph 4 spoke of operating a Plant during the term hereof. No term was specified in Article I, and we were not operating a Plant; we sought to provide an unloading facility for aggregates. SAW's true intent is clarified by Article III. In that Article, SAW states that the term is two years, and thereafter can be terminated by either party on three months notice. If terminated, SAW provided that it could acquire and remove Floyd Trucking Company's track upon payment of salvage value. In other words, after two years, SAW would have the right to remove our track upon payment of salvage value. This was wholly unacceptable when dealing with a switching railroad that had indicated it did not wish to provide us any service at all. The unfairness was further compounded by the fact that SAW provided it could terminate the agreement sooner if the nonexistent "Plant" did not operate six out of twelve months. Article II, paragraph 2. This seems wholly arbitrary for possibly seasonable demand, and also given SAW's hostility to our spur generally. A copy of this proposed agreement is attached as Appendix 16.

11. Because the track agreement tendered by SAW was inconsistent with honoring SAW's common carrier obligations, Floyd Trucking declined to sign the agreement. Mr. Wisener is well-known for refusing to negotiate and for using what is commonly called coarse language in dealing with parties who do

not capitulate to his will; his attitude is that what he tenders is non-negotiable, take it or leave it.

12. On April 6, 2004, Mr. McFarland advised STB OCE that the switch was finally restored and that prior to that date SAW's "standard contract for Industry Track" was furnished to Floyd Trucking. Mr. McFarland evidently construed that unacceptable draft agreement SAW prepared for use with Floyd Trucking as SAW's "standard contract." At this point, I throw in the towel, figuring that it would be impossible, as Mr. Wisener has indicated, to obtain service from SAW. On June 3, 2004, Mr. McFarland wrote STB OCE that SAW had spent \$15,000 to restore the switch, but that Floyd Trucking had not signed the industry track agreement, made a single rail shipment, nor contacted SAW. Copies of these letters are attached as Appendix 17.

13. SAW's passive aggressive business style makes it impossible for potential shippers to rely upon it to provide common carrier rail services. Our impression is that customers and potential customers of SAW are afraid to criticize SAW because of SAW's track record of retaliating against them, as it did to us. Floyd Trucking continues to wish to market its site as served by rail. Unfortunately, SAW is unwilling to provide any rail service on reasonable request. This has cost us numerous business opportunities, and results in unnecessary costs and inefficiencies in the transportation system. The public convenience and necessity are undermined by SAW's

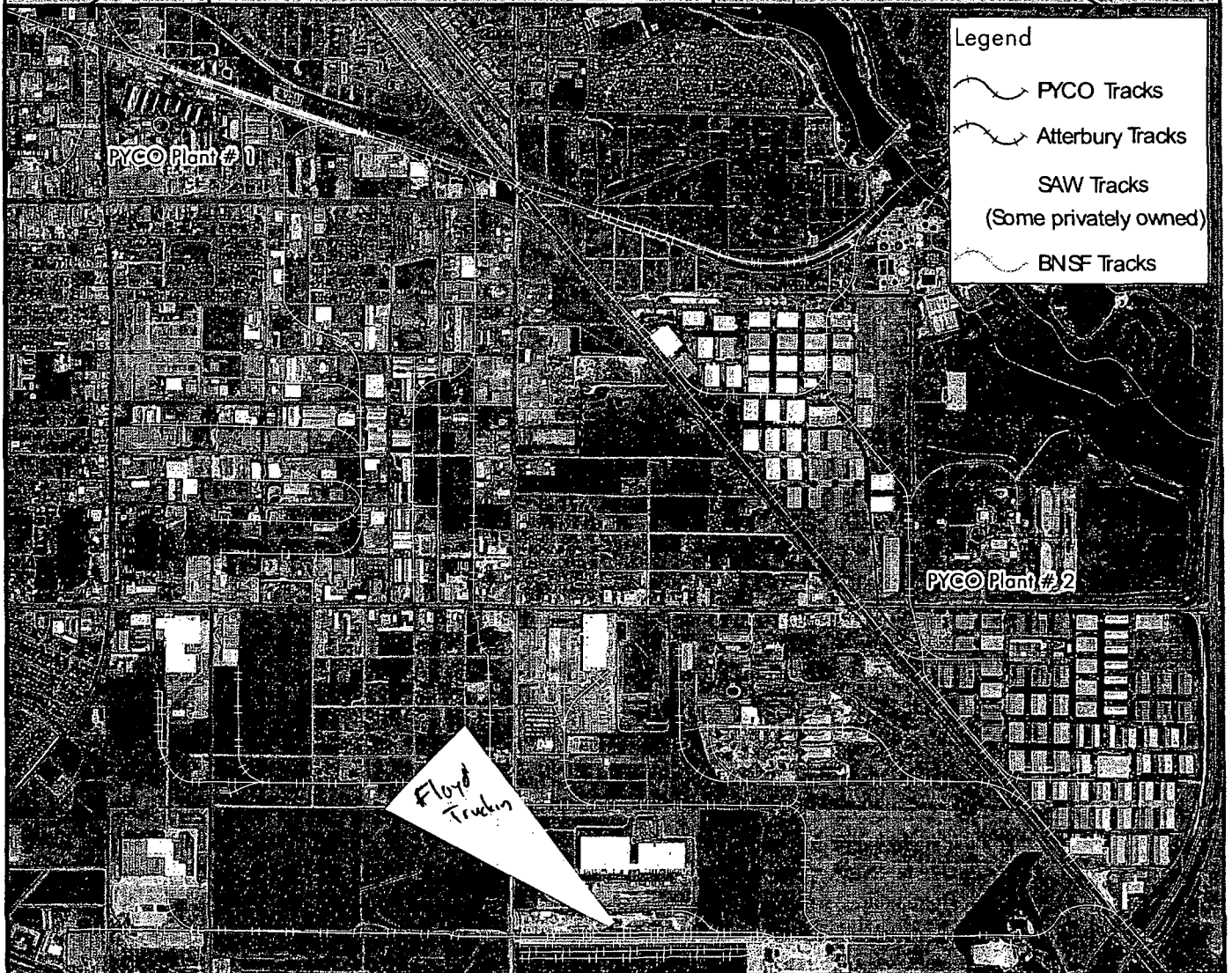
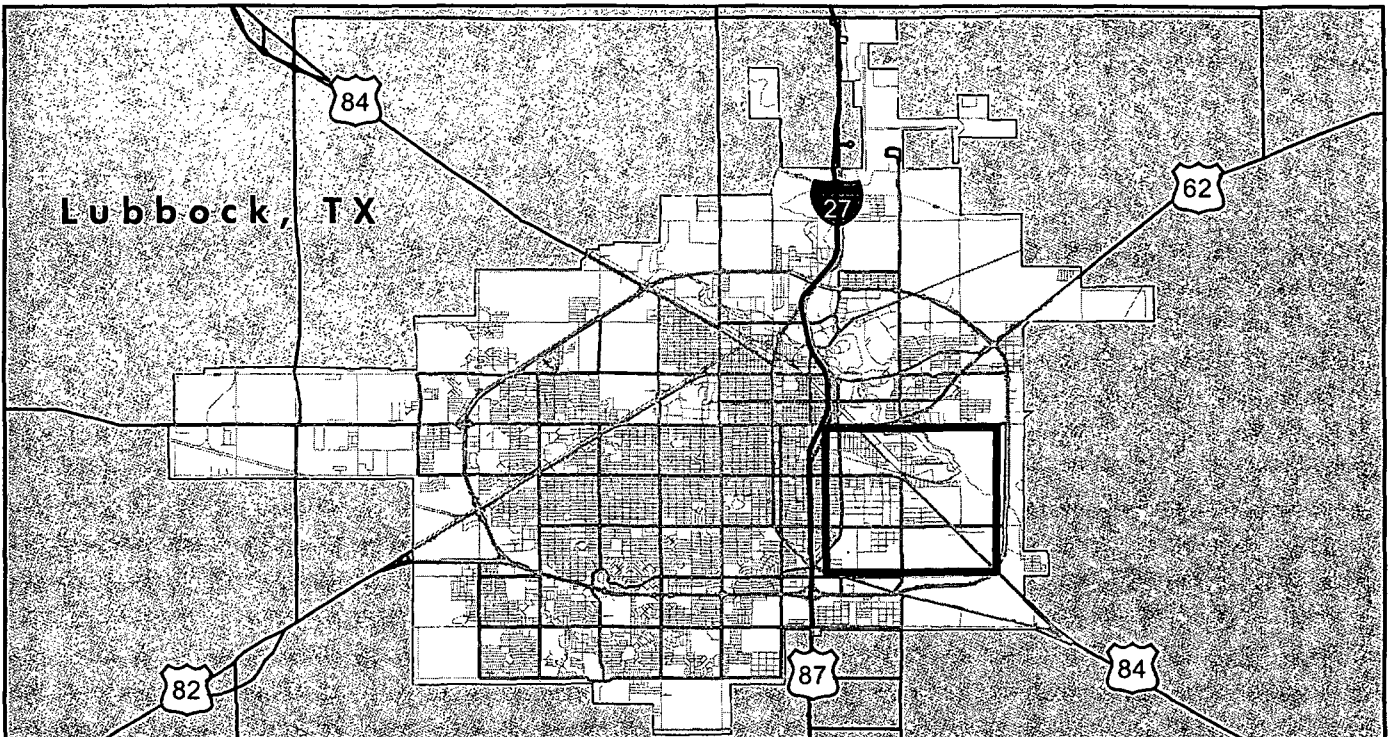
conduct. The Surface Transportation Board should either revoke the notice of exemption under which SAW's acquisition was authorized, or take other appropriate action to assure that the rail lines are placed under responsible management which understands and is ready, willing and able to discharge common carrier obligations in respect to the lines.

Pursuant to 28 U.S.C. § 1746, 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 3-15-06.

D. E. Floyd

## Appendix 1



## Appendix 2



**DePAUW**  
**FLY ASH**  
AMARILLO • PHOENIX

P.O. Box 3039

Amarillo, Texas 79116-3039

806/383-7511

Fax 806/381-8169

September 19, 2002

Floyd Trucking Inc  
P O Box 3456  
Lubbock Tx 79452

Dear Mr. Floyd,

I spoke with you during July, 2002 regarding the availability and use of the rail spur at your Lubbock, Texas yard. The facility itself would have been a very good location for DePauw. However I was extremely wary of the circumstances surrounding that Spur. I was not confident that we could rely on and maintain the type of consistency at that spur that we need. That lack of confidence forced DePauw to move to another spur in Lubbock and set up operations.

We installed scales and two large storage guppies and have moved approximately 200 tons a week through this facility since July 23<sup>rd</sup>. We estimate 12,000 to 15,000 tons through our Lubbock spur per year. I regret that DePauw felt compelled to use this alternate spur, but under the circumstances we made the only logical choice available to us.

Sincerely,



Doug Beasley

DB/lb

This was another potential customer that declined usage of our rail spur due to the refusal of rail service from South Plains Switching (Larry Wisener, Owner)

With regards,

Floyd Trucking, Inc



**CAPITOL AGGREGATES, LTD.**  
TRANS-PECOS MATERIALS DIV.  
P.O. BOX 60408 ATS, MIDLAND, TEXAS 79711, (915) 570-8588

Monday, September 23, 2002

O.E. Floyd  
Lubbock, Texas

Dear Sir:

Mr. Floyd, my name is Eddie Hickman. I represent Capitol Aggregates. Capitol is a  
Aggregate supplier for Highway Construction. We are located near Pecos, Texas.

Capitol was interested in the Lubbock market. However, **South Plains Switching** told us  
That switch # 0390 was not in service, that your track could not be serviced until you  
Complied to regulation violations. Mr. Floyd when you get this matter resolved, please let us  
Know, we are very interested in your location for the Lubbock Area.

Sincerely,

Eddie Hickman

Operations Manager

Appendix 3

**MARTIN CONSTRUCTION**

9325 West 19th  
Lubbock, Texas 79407  
806/784-0846

April 02, 2003

To Whom It May Concern:

RE: Floyd Trucking - Lubbock, Texas

Martin Construction has worked on the tracks at Floyd Trucking facility on Martin Luther King Blvd. in Lubbock numerous times in the past. The first time was in June, 1998 when Vulcan had the facility and was unloading rock from gondolas. The track had relay ties installed where needed and regauged, raised, lined and tamped, with walkways provided for trainmen.

Vulcan later moved to a track near the cemetery, and Martin Construction also repaired those tracks. The relocation of Vulcan to this location was due to the facility at M.L.K Blvd. being listed for sale. Mr. O.E. Floyd purchased the property and began to clean up the facility and contacted Martin Construction to inspect and rehab the tracks.

Martin Construction began the rehab of tracks September 24, 2001 through September 30, 2001. Later, Mr. Floyd contacted Martin Construction and said Mr. Larry Wisener refused to provide service, no matter what he did to his tracks. Mr. Floyd then instructed Martin Construction to delay completion on tracks until he resolved the matter with Mr. Wisener.

Mr. Floyd contacted the proper authorities when he had no recourse left, and acted on their recommendation. At some point in time, Mr. Wisener stated the switch on his track was not operable. Afterward, Mr. Floyd contacted Martin Construction and requested us to look at the switch. I, Eldon Martin, owner, inspected the switch and found it to be well within F.R.A. regulation, as stipulated in U.S. Department of Transportation Track Safety Standards. I suggested Mr. Floyd get a neutral party to inspect the switch so there would be no question of conflict of interest, since Martin Construction was contracted to do the work for Mr. Floyd.

Mr. Floyd knew of a Union Pacific track inspector from out of town, and I told him I knew of a local track inspector that was familiar with the track because it used to be in his territory. I then contacted Ricky Phillips and he said he was on vacation and would not mind taking a look at the tracks and the switch in question at this time (September 25, 2002). Mr. Phillips inspected the switch and concurred that it was within the Track Safety Standards published by U.S. Department of Transportation. Photos were taken to show these facts and sent to the proper authorities.

After the proper authorities contacted Mr. Wisener and confronted him on the switch, he removed the switch without notifying anyone. This is the best of my recollection as to the occurrences and as to date, March 18, 2003. Mr. Floyd still has no service and no switch to get service.

Sincerely,



Eldon Martin, Martin Construction

## MARTIN RAILROAD CONSTRUCTION ELDON & GWEN MARTIN

MARTIN RAILROAD CONSTRUCTION  
9325 WEST 19TH  
LUBBOCK TEXAS 79407

Phone 806/784-0846  
Fax 806/784-0868

### BUSINESS HISTORY

Eldon and Gwen Martin founded Triple T Railroad Construction in 1974 with two partners. We bought the two partners out in 1984 and formed Martin Construction. Martin Construction is owned and operated as a family business. Eldon and Gwen Martin are the primary owners with their three children Chuck, Kirk and Lori Martin as secondary owners.

### QUALIFICATIONS

29 years of Railroad Construction Experience for Owner  
All MOW Employees are Certified in Code of Operating Rules and Worker Protection Act.  
Qualified by Federal Railroad Administration  
Fully Insured and Bondable.  
Qualified Supervisory Personnel.  
In excess of 100 years combined total years Railroad Construction Experience for key personnel.

### WORK HISTORY

#### Eldon Martin

1973-1984

Worked for Burlington Northern Railroad. Foreman in Amarillo yards in 1974. Foreman in charge of laying first ribbon rail in Texas for BN from Amarillo, Tx North from 1975 to 1976 and then from Texline, Tx South from 1976 to 1977. Rebuilt all of Texline yards in 1976. Foreman of tie gangs from 1977 to 1979. Rehabbed Plainview, Tx. yards and main track from Plainview, Tx. to Dimmitt, Tx. from 1980 to 1981. From 1982 to 1984, as Foreman assisted in rehab of track from Estelinc, Tx to Plainview, Tx. *Eldon has numerous years experience with derailments and building new track and because of his expertise was called out to coordinate the rebuilding of track after a derailment had occurred.*

**Railroad Qualifications:** EIC, Supervisor, Track Inspection, Operate following: Backhoe, Loader, Ballast Regulator, Tamper, Fork-lift, Tie Crane, Speedswing, Spike Driver, Tie Insertter, Motor Grader, Dozer, Hi-Rail, Orgo-Thermit Welds

**Roadway Worker Protection Rules Certified - EIC Qualified**

**FRA Qualified**

**Current Drivers License - TX 04691313**

1984-Present

#### Gwen Martin

Co-Primary Owner of Martin Construction. Set up and organized business & bookkeeping systems. Actively work as estimator, scope of work planner, on site supervision, operate track equipment.

**Railroad Qualifications:** EIC, Supervisor, Track Inspection, Operate following: Backhoe, Loader, Tamper, Fork-lift, Tie Crane, Spike Driver, Tie Insertter, Hi-Rail.

**Roadway Worker Protection Rules Certified - EIC Qualified**

**FRA Qualified**

**Current Drivers License - TX 05293323**

- Chuck Martin**  
**1984-1998** While attending High School and College, I worked for our family business. I assisted in building track, switches, crossings, surfacing track, installing ties, dirtwork and office work.
- 1998** Project Coordinator for Raymond Construction in Dallas, Tx. As Project Coordinator for the Dallas/Ft. Worth and Austin areas, I worked with Architects, Engineers and Subcontractors for six projects worth \$10 million dollars. I also wrote the contracts to the subcontractors, did change orders, as built and schedules.
- 1999-Present** Project Supervisor/Owner for Martin Construction. I coordinate with Owners and Engineers for the jobs being done. I do job estimates and job scheduling for our company.

#### **Martin Construction**

**1984-Present** In 1984 we completely rehabbed 17 miles of track and 23 switches for Cargill Inc. in Plainview, Tx. We have built new track and rehabbed existing track for Cargill, ADM and other large companies over the years. We did a 5 year RR budget plan for the V.L.A. (Very Large Array - Radio Telescope) in Socorro, NM. We have installed numerous State Highway RR Crossings in the Lubbock area. While doing these crossings, we have developed a good working relationship with Texas Department of Transportation, City of Lubbock, County of Lubbock and West Texas & Lubbock Railroad. We also have either built or rehabbed numerous spur tracks off of Union Pacific, Southern Pacific and Burlington Northern Santa Fe Railroad Companies and have an excellent rapport with the officials of the serving railroads. We have successfully performed Maintenance Contracts with Seagraves Whiteface & Lubbock Railroad and with RailAmerica subsidiaries West Texas & Lubbock Railroad and Texas New Mexico Railroad. We surfaced approximately 60 miles of track and installed thousands of ties in approximately 65 miles of track for West Texas & Lubbock Railroad. We have installed over 8000 ties for Gulf Colorado San Saba RR and 27 track panels. ( Please see attached for list of other clients.) We are on the approved contractors' list for Burlington Northern-Santa Fe and Union Pacific Railroads.

#### **EDUCATION & QUALIFICATIONS**

- Given Martin**  
**1981-1983** Associate of Science in Business, Clarendon College

- Chuck Martin**  
**1992-1995** Associate of Science, South Plains College  
**1993-1998** Bachelor of Science in Engineering Technology, Texas Tech University  
 The CTEC program specializes in Construction Management, Scheduling, Economic Analysis, Surveying, Estimating and Soil Analysis.  
 Student Member of AGC, Association of General Contractors  
 Student Member of CSI, Construction Specifications Institute  
**Railroad Qualifications:** FIC, Supervisor, Track Inspection, Operate following: Backhoe, Loader, Ballast Regulator, Tamper, Fork-lift, Tie Crane, Speedswing, Spike Driver, Tie Inserter, Motor Grader, Dozer, Hi-Rail, Orgo-Thermit Welds.  
**EMT-B Expires 08/31/2005**  
**Roadway Worker Protection Rules Certified - FIC Qualified**  
**FRA Qualified**  
**OSHA Certified**  
**Commercial Drivers License Current TX CDL 12583941**

**OTHER KEY EMPLOYEES WORK HISTORY*****Melvin Justus - Estimator & Sales for Martin Construction***

Adjusting and Estimating - Oklahoma State University

Supervisor &amp; Foreman - Burlington Northern Railroad

Helped build north Ft. Worth yards in early 70's

Rip Track Foreman &amp; Estimating - Rock Island Railroad, Ft. Reno, OK

Car repair and derailments

Estimator - Cochrane-Stewart, Oklahoma City, OK (private company)

I worked for this company for several years estimating and sales. I completed jobs from a few dollars to 6.3 million for the U.S. government.

**Railroad Qualifications:** EIC, Supervisor, Track Inspection, Operate following: Backhoe, Loader, Ballast Regulator, Tamper, Fork-lift, Tie Crane, Speedswing, Spike Driver, Tie Inserter, Hi-Rail**Roadway Worker Protection Rules Certified****FRA Qualified****Drivers License Current TX 10018963*****Leslie Taylor - Supervisor Martin Construction***

Supervise production tie gangs &amp; surface track - Martin Construction

Built new track &amp; installed switches - Martin Construction &amp; Hulcher Services

Built up Switch Points, Frogs, Scale Rails, Repaired unloading pits, Worked derailments,

Rehab track, Built roadbed, Installed hwy/rr crossings - WTL, TNMR, GCSR &amp; Industries

Section Foreman - Martin Construction on TNMR, WTL

**Railroad Qualifications:** EIC, Supervisor, Track Inspection, Operate following: Backhoe, Loader, Ballast Regulator, Tamper, Fork-lift, Tie Crane, Speedswing, Spike Driver, Tie Inserter, Motor Grader, Dwyer, Hi-Rail.

Certified Welder - Orgo-Therm welds, Switch Repair, Fabrication RR Crossing Panels

**Roadway Worker Protection Rules Certified****FRA Qualified****Commercial Drivers License Current TX CDL 18862927*****Sam Garcia - 1968 to 2000 worked for Santa Fe Railroad. From 1968 to 1973 worked as trackman and machine operator. From 1973 to 2000 worked as foreman and track supervisor. Railroad Certifications:*** EIC, Loader, Backhoe, Autospike, Inserter-Extractor, Ballast Regulator, Tamper, Speed Swing, Tie Crane, and various other on-track equipment.**Roadway Worker Protection Rules Certified****FRA Qualified****Current Drivers License TX 05091650*****Margarito Banda - Railroad Certifications:*** EIC, Loader, Backhoe, Autospike, Inserter-Extractor, Ballast Regulator, Jackson 2300 Tamper, Hi-Rail Pick-up.**Roadway Worker Protection Rules Certified****FRA Qualified****Current Drivers License TX 06641798**

**Esequiel Talamnuez, Jr.-Railroad Certifications: FIC, Engineer, Conductor, S.I.F., Loader,  
Backhoe, Autospiker, Tie Insertor-Extractor  
Roadway Worker Protection Rules Certified  
FRA Qualified  
Current Drivers License - TX 14101260**



Appendix 4



RICKY PHILLIPS  
Motor Track Inspector  
Lubbock, Texas

Burlington Northern Santa Fe

P.O. Box 2469  
Lubbock, Texas 79408  
806-765-3955  
806-745-1395 Home  
888-858-7243 Pin 114948  
806-786-0893 Cellular

9/25/02

To whom it may concern

I inspected switch 039D 9/25/02

And found that this switch and track  
qualifies under 213.53 class 1

under 213.63 class 1 qualifies

no defects under 213.133

qualifies under 213.143 class 1

qualifies under 213.135 class 1

qualifies under 213.109 class 1

This switch and Track qualifies as class  
one and found no defect to render this  
track out of service

Ricky Phillips employee # 646566  
Track supervisor BNSF Ry Co.

Track Safety Standards Part 213

Subpart A to F class 1-5

~~Print Date~~ June 9 2001 All Revision include  
Print Date Feb 1 2002

## Appendix 5

SOUTHWEST DIVISION  
VULCAN CONSTRUCTION MATERIALS LP  
BROWNWOOD PLANT  
P.O. BOX 791550  
SAN ANTONIO, TX 78279-1550

NOV 9080  
No. BR 96002

10-39-02 08:01 PM  
260800 1b GR LBS. GROSS  
LBS. TARE

TONS

29.70

LBS. NET

CUSTOMER COPY

P/M ☐ 1/4 ☐ C ☐ CC ☐ B ☐ BB  
☐ AA ☐ AA Mod ☐ Black Base  
P/C - C/S: 1 2 3 4 5 6  
Ballast Flexible Base Other 1"

ORDER NUMBER

61400\*1b TA

MATERIAL CODE

199400 1b NT

CUSTOMER NUMBER

FREIGHT CODE

WEIGHED BY L.S.

BUYER Floyd

DESTINATION

Cubber K

The description and weight indicated  
on this bill of lading are correct.

Subject to verification by the

WESTERN WEIGHING & INSP. BUREAU  
According to Agreement.

1054

①

**VULCAN MATERIALS COMPANY  
BROWNWOOD PLANT  
SWITCH LIST**

DATE 9-12-02

| INITIALS  | CAR NO.  | TONS    | WEIGHT  |
|-----------|----------|---------|---------|
| Floyd     | -        | Lubbock |         |
| 1 L       | Gond     | -       | 1"      |
| R999      | 9070     | 99.70   | 1994/00 |
| CUST      | 513742   |         |         |
| JOB       | 750450   |         |         |
| DEST      | 02       |         |         |
| MTRL      | 057      |         |         |
| FRY       | Prepaid  |         |         |
| Tons      | 99.70    |         |         |
| Contract# | C-302347 |         |         |
| Gundolas  |          |         |         |
| Verbal    |          |         |         |

## THIS SHIPPING ORDER

must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

CONTROL NO.

025445

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood through this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classification in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

OUR B/L NUMBER

750450

CARRIER

ATSF

FROM

Vulcan Materials Company

PLANT

BROWNWOOD STN

AT

BROWNWOOD

DATE

09/13/2002

CUSTOMER ORDER NO.

OUR ORDER NO.

750450

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor)

CONSIGNEE TO

TRACK #0390  
LUBBOCK, TEXAS

DESTINATION

TYPE CAR

CONDOLAS

ROUTE

ATSF

DELIVERING CARRIER

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Pre Paid

CAR INITIALS AND NUMBER

RPMX 9970

GROSS WEIGHT

2608

TARE

614

NET WEIGHT

1994

CODE

057

SIZE &amp; DESCRIPTION

1" CONC AGG, 96002

RATE

96002

CHECK COL

Rec'd \$  
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per  
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

\$  
"Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission."

"If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE-Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.  
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

This shipment is correctly described. Correct weight is:

Lbs.

LOADED TO FULL VISIBLE CAPACITY

\$8.00, Per Net Ton

VULCAN MATERIALS CO., Shipper, Per

Her Mauck

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

Permanent post-office address of shipper,

BIRMINGHAM, ALABAMA

FORM 60-661-ACI  
REV. 4-90

AGENT'S COPY

See Product Warning on Reverse Side

Appendix 6

# FLOYD TRUCKING, INC.

CERTIFIED DBE & HUB CONTRACTOR

P.O. BOX 50

BROWNFIELD, TEXAS 79316

PH. 806-745-2729

November 19, 2002

Surface Transportation Board Office  
Compliance and Enforcement  
Suite 780 1925 K Street North West  
D.C. 20423-0001

Attention: Mel Clemens

Dear Mr. Clemens:

I am O. E. Floyd, and I bought some property in Lubbock, Texas, (6201 Martin Luther King Blvd) in 1999. The property has a railroad spur (Switch # 0390), used to load scrap metal originally and later for a site to unload rock. When we bought this property I met with Hanson Aggregates' representatives, Ronnie Finley and Neal Young and Burlington Northern Santa Fe representative, Wesley E. Mailhos here on location. At that time we were prepared to install enough track to place 100 cars on location to be unloaded. I called Larry Wisener, South Plains Switching, about service. He told me the track was out of service. I was advised to call Surface Transportations board in Washington, D.C.. I called December 6, 2001 and talked with Nancy Beiter, telling her about the problem. Ms. Beiter asked for the switch number (0390). She then looked the information up on the computer and told me the track was never out of service and Mr. Wisener could not deny service. I then called Mr. Wisener again advising him the track was never out of service and he told me it didn't make any difference that he owned the short line and he would never give service to this spur.

We have been trying to obtain service from South Plains Switching (Larry Wisener, owner) since 1999. Mr. Wisener has stated the switch is defective and needs to be repaired. He also stated he is considering removing the switch completely.

Mr. Rickey Phillips, Motor Tract Inspector with BNSF did an inspection on 09/25/02 (Ref. his letter) and found no defects. We are enclosing photos and statement of inspection from Mr. Phillips. Also, enclosed are documents pertaining to potential customers that declined usage of our rail spur due to the refusal of rail service from South Plains Switching. We were denied service on one railcar of 1" concrete rock from Vulcan Materials consigned to switch # 0390.

There are three (3) more potential customers, who, at this time, wish to remain nameless, for fear of reprisal. Trusting you to assist us in solving this situation as soon as possible.

Sincerely,



O. E. Floyd  
Floyd Trucking, Inc.



Appendix 7



**Surface Transportation Board**  
**Washington, D.C. 20423-0001**

November 25, 2002

*Office of Compliance and Enforcement*

1925 K Street, N.W., Suite 780

Washington, DC 20423-0001

Mr. Larry Wisener, President

South Plains Lamesa Railroad Ltd.

P. O. Box 676

Slaton, TX 79364-0676

202-565-1573  
FAX 202-565-9011

Dear Mr. Wisener:

The purpose of this letter is to advise you of a complaint received by this office from Mr. O. E. Floyd, Floyd Trucking, Inc., (copy enclosed). The complaint outlines the South Plains Lamesa Railroad's (SLAL) refusal to serve Mr. Floyd's facility located in Lubbock, Texas. Further, Mr. Floyd states that they have been attempting to obtain service from the SLAL since 1999 and have been told by you that you did not intend to provide service to this facility. Apparently because of your service refusal and your contention that the track servicing Mr. Floyd's facility is out of service due to a defective switch, Mr. Floyd sought assistance from the Burlington Northern Santa Fe Railway (BNSF). Enclosed is a copy of an inspection report from a BNSF supervisory track inspector indicating that no defects were found as of the date of the report, Sept. 25, 2002.

It is my responsibility, as the Board's chief enforcement official, to advise you that, pursuant to 49 U.S.C. 11101(a), your obligation as a common carrier by railroad requires you to provide transportation or service on reasonable request. Failure to do so constitutes a failure of your obligation and an interruption of interstate commerce. With this in mind, I am requesting that you immediately commence performance of your common carrier obligation by providing the service requested by Floyd Trucking. If Mr. Floyd's requests for service are not satisfied, I will have no alternative but to recommend to the Board that it institute, on its own motion, a formal complaint proceeding to address the lawfulness of your actions and the appropriateness of damages to Floyd Trucking.

Finally, based on your February 15, 2000, verified statement to the Board in Finance Docket 33842 (copy enclosed), which stated that the mission of the SLAL "is to provide safe, timely, railroad service consistent with our customers expectations", I have every reason to assume that you understand your obligations as a rail common carrier. Inasmuch as this is the second such service complaint we have received in recent months, your prompt attention to this complaint is required. Do not hesitate to contact me if you have any questions regarding your duties and responsibilities as a common carrier, or my intentions with respect to assuring compliance with Federal statutes.



**Surface Transportation Board**  
Washington, D.C. 20423-0001

January 17, 2003

*Office of Compliance and Enforcement*

1925 K Street, N.W., Suite 780  
Washington, DC 20423-0001

202-565-1573  
FAX 202-565-9011

Mr. Larry D Wisener, President/Manager  
South Plains Lamesa Railroad, Ltd.  
P. O. Box 676  
Slaton, TX 79364

Dear Mr. Wisener:

It has been one month since our meeting and to date I have not heard from you regarding what actions are to be implemented to resolve the lack of service to Floyd Trucking. I have, however, heard from Mr. Floyd. who informed me that he also has not heard from you or your representative nor has he received any service from the South Plains Lamesa Railroad.

As I spelled out in my November 25<sup>th</sup> letter to you, it is my responsibility, as the Board's chief enforcement official, to advise you that, pursuant to 49 U. S. C. 11101(a), your obligation as a common carrier by railroad **requires** you to provide transportation or service on reasonable request. Failure to do so constitutes a failure of your obligation and an interruption of interstate commerce. Your duties and responsibilities have been clearly defined and there is no further need to continue delaying actions. In order to prevent a more formal action on the part of the Board I would urge you to begin implementing a service plan for this customer promptly and to provide this office with the plan.

Sincerely,

Melvin F. Clemens, Jr.  
Director

cc: Mr. O. E. Floyd, Floyd Trucking, Inc.

Appendix 8



**Surface Transportation Board**  
**Washington, D.C. 20423-0001**

January 17, 2003

*Office of Compliance and Enforcement*

*1925 K Street, N.W., Suite 780  
Washington, DC 20423-0001*

*202-565-1573  
FAX 202-565-9011*

Mr. Larry D Wisener, President/Manager  
South Plains Lamesa Railroad, Ltd.  
P. O. Box 676  
Slaton, TX 79364

Dear Mr. Wisener:

It has been one month since our meeting and to date I have not heard from you regarding what actions are to be implemented to resolve the lack of service to Floyd Trucking. I have, however, heard from Mr. Floyd, who informed me that he also has not heard from you or your representative nor has he received any service from the South Plains Lamesa Railroad.

As I spelled out in my November 25<sup>th</sup> letter to you, it is my responsibility, as the Board's chief enforcement official, to advise you that, pursuant to 49 U. S. C. 11101(a), your obligation as a common carrier by railroad **requires** you to provide transportation or service on reasonable request. Failure to do so constitutes a failure of your obligation and an interruption of interstate commerce. Your duties and responsibilities have been clearly defined and there is no further need to continue delaying actions. In order to prevent a more formal action on the part of the Board I would urge you to begin implementing a service plan for this customer promptly and to provide this office with the plan.

Sincerely,

Melvin F. Clemens, Jr.  
Director

cc: Mr. O. E. Floyd, Floyd Trucking, Inc.

Appendix 9

**South Plains Lamesa Railroad, Ltd.**  
**P. O. BOX 676** **SLATON, TEXAS 79364**  
**PHO: (806)828-4841** **FAX: (806)828-4863**

January 15, 2003

Mr. O. E. Floyd  
Floyd Trucking, Inc  
PO Box 50  
Brownfield, TX 79319

Dear Mr. Floyd:

First, let me say South Plains Switching (SAW) desires rail business and will make every effort to serve any customer.

Please refer to your letter of November 19, 2002, to Mr. Clemens of the Surface Transportation Board about rail service to track #0390.

Your letter stated you had a meeting with Hanson Aggregates representatives and a BNSF representative, Wesley Mailhos at your location. The BNSF representative should have informed you at this meeting that BNSF had sold the track in question along with the business located on said track. Your letter further stated service was requested for one (1) car of rock to property identified as being served from switch #0390.

You were offered use of SAW team track and SAW track #9200 for the unloading of this one (1) car (both are less than 2 miles from your facility). You refused either of these services.

Track #0390 has been out of service since we started operation in July 1999. We also understand the track was out of service prior to that date. The connecting switch has been "spiked" in a straight position since July of 1999. BNSF's failure to furnish Track Inspection Reports prevents SAW from knowing the reason switch #0390 was originally spiked.

If a Track Inspection was requested from SAW as according to CFR 49 Part 213.7, conversations with the appropriate parties would have commenced.

*A number of operating and service provisions must be in place before service can be provided. These items are outlined below.*

A customer requesting rail service is required to have a track lease agreement with SAW. This document outlines condition of track, maintenance on the lead and industry track and the like. This is a straightforward, standard lease.

All shipments on South Plains are governed by our Demurrage and Special Services Program issued May 1, 2000. This document outlines terms of service, car free time, special service requests and the like. A copy is attached for your reference. We mailed each customer a copy of this document at the time of sale. Your facility was not active at that time and therefore was not provided a copy.

The lead track to your facility had what is known as a "frog" which is a track device allowing automatic switching of cars between two rails. As there was no traffic to your lead, and as the frog was defective and a safety issue, it was removed in November 2002.

Since the sole function of this device is to serve your siding, it needs to be replaced. The cost to replace this device is \$30,000. South Plains is willing to absorb \$5,000.00 of the cost of this unit and request you to fund the other \$25,000.00 of the cost. This would be an up front expense for both of us before any car is moved.

It will also be necessary to inspect your industry track to determine if it is safe for rail service. The industry lease agreement will outline the track safety and inspection process. This inspection must be by a South Plains authorized inspector, and an inspection by someone else is not sufficient.

Our only access between BNSF yard and your facility is via our Orchard lead track. This track winds down city streets and has many road crossings. It is not possible, nor safe to the public, to move large cuts of cars over our Orchard lead. We have negotiated with BNSF on the large rock shipments a provision such that BNSF interchanges larger cuts of cars with us on interchange track #0370. Service to your siding will require a similar agreement with the BNSF.

We are not aware of your ability to quickly unload cars. This impacts car hire charges from BNSF for South Plains and demurrage charges for you. SAW will need to know who will be responsible for any demurrage charges.

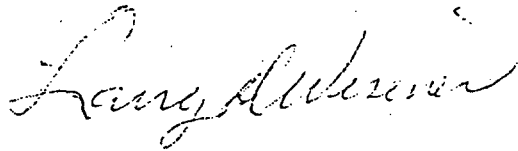
Through rail rates are set by BNSF. South Plains Switching, Ltd. Co. (SAW) has no rail rate making authority. It will also be necessary for you to determine what rail rates would apply for your shipments; or for those by other potential customers from BNSF.



SAW would need to know the shipper, the rates, and the quantity of material shipped as car storage space is limited.

We are willing to work with you to complete the required contracts and agreements needed to provide you with rail service. I look forward to hearing from you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry Wisener".

Larry Wisener  
President/Manager  
South Plains Switching

Cc: Mr. Melvin F. Clemens, Jr.  
Director  
Surface Transportation Board

Appendix 10



**Surface Transportation Board**  
Washington, D.C. 20423-0001

February 20, 2003

*Office of Compliance and Enforcement*

1925 K Street, N.W., Suite 780

Washington, DC 20423-0001

Mr. Larry Wisener, President

South Plains Lamesa Railroad Ltd.

P. O. Box 676

Slaton, TX 79364-0676 (And by Facsimile-(806-828-....),

OPTIONAL FORM 99 (7-90)

**FAX TRANSMITTAL**

# of pages > 2

|                           |                                  |
|---------------------------|----------------------------------|
| To <i>O.E. FLOYD</i>      | From <i>MELVIN CLEMONS</i>       |
| Dept./Agency              | Phone # <i>202-565-1573</i>      |
| Fax # <i>806-745-2741</i> | Fax # <i>SURFACE TRANS BOARD</i> |

NSN 7540-01-317-7368

5099-101

GENERAL SERVICES ADMINISTRATION

Re; Floyd Trucking complaint, Lubbock, Texas

Dear Mr. Wisener:

This follows my letter to you of November 25, 2002, and our December meeting regarding a complaint received by this office from Mr. O. E. Floyd, Floyd Trucking, Inc., a prospective shipper on the South Plains Lamesa Railroad (SLAL) in Lubbock, Texas which has been seeking rail service since 1999, and our discussions regarding my concerns for your failure to satisfy your common carrier obligation under 49 U.S.C. 11101(a), based on your refusal to provide service to Floyd Trucking. At that meeting I requested that you provide Mr. Floyd and this office with a plan for the provision of the requested rail common carrier services.

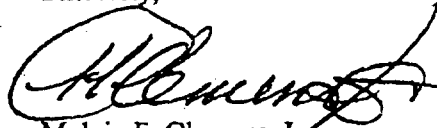
I am in receipt of your letter to Mr. Floyd, dated January 15, 2003, purporting to provide such a plan (copy enclosed). The letter outlines the conditions Mr. Floyd must meet in order to receive service, including entering into a track lease agreement with your company, establishing the time period in which cars can be unloaded even though no service is being provided, determining from Burlington Northern Santa Fe Railway (BNSF) what its rates will be for the service Mr. Floyd intends, and subsidizing SLAL's installation of the switch connection to the line on which Mr. Floyd's facility is located in the amount of \$25,000.

Let me begin by clarifying the statutory obligations. First, 49 U.S.C. 11103(a) provides that, on application of the owner of a lateral branch line of railroad or a shipper tendering interstate traffic for transportation, a rail carrier providing transportation subject to the jurisdiction of the Board must construct, maintain and operate a switch connection to connect that branch line or side track with the railroad when the connection is reasonably practicable, can be made safely, and will furnish enough business to justify its construction and maintenance. It is well settled that it is the obligation of the railroad to connect shippers with the rail system in order to provide its common carriers services, and to adopt and observe reasonable practices for the installation and maintenance of switch connections and the prompt delivery of freight. Therefore it is my opinion that it would be considered unreasonable for SLAL to attempt to impose a fee upon a shipper for the installation or reinstallation of a switch connection, and that an effort to impose such a condition would be viewed as an economic embargo and considered unlawful. Moreover, so long as rate making is the responsibility of BNSF, as you have indicated it is, neither Floyd Trucking or any other shipper would responsible to discuss those rate negotiations with SLAL. The presumption is that your revenue relationship would be with BNSF, with the exception of demurrage and charges for ancillary services.

Letter to Larry Wisener, Page 2.

Finally, considering the time period during which Mr. Floyd has been attempting to obtain service from SLAL (since 1999), and the time this matter has been before this office, I believe that you have been given a fair opportunity to address these service issues. As such, I will expect a resolution of these service issues by COB February 28, 2003. Failure to resolve these issues will result in my recommendation to the Board that it institute, on its own motion, a formal complaint proceeding to address the lawfulness of your actions involving Floyd Trucking and possibly other shippers, and the appropriateness of damages for any service failures or unlawful assessments.

Sincerely,

A handwritten signature in dark ink, appearing to read 'M. Clemens, Jr.', with a large, stylized initial 'M' and a long, sweeping horizontal stroke extending to the right.

Melvin F. Clemens, Jr.  
Director

Enclosures

cc: Mr. O. E. Floyd, Floyd Trucking, Inc.

## Appendix 11

LAW OFFICE  
THOMAS F. MCFARLAND, P.C.  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1194  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
*mcfarland@aol.com*

THOMAS F. MCFARLAND

February 26, 2003

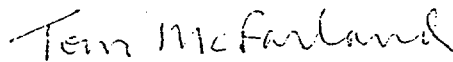
Mr. O.E. Floyd  
Floyd Trucking, Inc.  
P.O. Box 50  
Brownfield, TX 79319

Dear Mr. Floyd:

I represent South Plains Switching, Ltd. Co. (SAW).

In order to determine the propriety of construction of a switch connection to trackage at your place of business at Lubbock, TX, please provide your estimate of the volume of rail traffic that would be transported as a result of that connection and the basis for that estimate.

Very truly yours,



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

*TMcf:kl:wp8.0\921\ltroefl*

cc: Mel Clemens, STB  
Larry Wisener, SAW  
Bill Power  
Dennis Olmstead



**Surface Transportation Board**  
**Washington, D.C. 20423-0001**

March 7, 2003

*Office of Compliance and Enforcement*

1925 K Street, N.W., Suite 780  
Washington, DC 20423-0001

202-565-1573  
FAX 202-565-9011

Mr. Thomas F. McFarland, Esq.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1194 (And by Facsimile (312-201-9695))

Re: South Plains Switching, Ltd. Co.,  
Service to Floyd Trucking, Lubbock, Texas

Dear Mr. McFarland:

This confirms receipt of your letter to me of February 26<sup>th</sup>, informing me that you have been retained by Larry Wisener, of South Plains Switching Ltd. Co. (SAW), and Mr. Wisener's letter of February 25<sup>th</sup>, responding to my February 20<sup>th</sup> notice to SAW of my intention to proceed with a complaint against SAW for its failure to fulfill its common carrier obligation by refusing service to Floyd Trucking, a shipper on SAW's line in Lubbock.

I appreciate your opinion that a complaint against SAW is premature, however, I do not agree. This entire matter is predicated upon Mr. Wisener's unilateral action to remove the switch connecting Mr. Floyd's facility to SAW's line. Now, Mr. Wisener has set an unsubstantiated and, in my view, exorbitant cost (\$30,000) to replace the switch-connection that he removed. Apparently, he believes that he should be made whole by the shipper for costs entirely associated with his actions, which is not contemplated by the statute. As I outlined in my February 20<sup>th</sup> letter to Mr. Wisener, the statute places an affirmative obligation on a rail common carrier to construct, maintain, and operate switch connections when such is reasonably practical. In this case the construction was done and, except for Mr. Wisener's unilateral actions, the existing switch would likely have required only maintenance. Also indicated in my letter to Mr. Wisener of February 20<sup>th</sup>, was my expectation that, based on the ample time Mr. Wisener has had to resolve this situation, resolution would occur finally by February 28<sup>th</sup>. Instead, you and Mr. Wisener have only placed additional demands on Mr. Floyd.

This is to inform you that I intend to move forward with the complaint, and an investigation of all of Mr. Wisener's operations. As Counsel, you may want to advise Mr. Wisener of the breadth of the Board's authority with respect to determining damages, making findings of unreasonable practice, and the possible issuance of an order revoking his authority for obstruction of interstate commerce and any other unlawful acts.

Sincerely,

Melvin F. Clemens, Jr.  
Director

cc: Mr. O.E. Floyd, Floyd Trucking, Inc.

LAW OFFICE  
THOMAS F. MCFARLAND, P.C.  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1194  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
mcfarland@aol.com

THOMAS F. MCFARLAND

March 13, 2003

By fax to 202-565-9011.  
w/confirmation by mail

Mr. Melvin F. Clemens, Jr.  
Director  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street, N.W. - Suite 780  
Washington, DC 20423-0001

Re: South Plains Switching Ltd. Co.,  
Service to Floyd Trucking, Lubbock, Texas

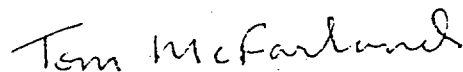
Dear Mel:

This refers to your letter to me of March 7 and prior correspondence about the above subject.

South Plains Switching, Ltd. Co. (SAW) hereby commits to restore the switch connection to the trackage of Floyd Trucking, Inc. (Floyd) at SAW's own expense, and to provide rail service to Floyd, both upon Floyd's reasonable request. A reasonable request by Floyd would be one that is specific as to the volume, commodity and time of shipment. *See CSX Transportation, Inc. -- Aban. -- betw. Bloomingdale and Montezuma, in Parke County, IN, 2002 STB LEXIS 535 at \*21 (2002), and decisions there cited.*

Please let me know if this commitment satisfies your concerns.

Very truly yours,



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

TMcf:kl:wp8.0\921\lrmfc2

cc: Messrs. O.E. Floyd  
Larry Wisener  
Bill Power  
Dennis Olmstead



## Appendix 12

Floyd Trucking, Inc  
P.O. Box 3456  
Lubbock, Texas 79452-3456  
Phone # 806-745-2729 / Fax # 806-745-2741

FAX

TO: Melvin Clemens      DATE: 2/25/04

FROM: D.E. Floyd

PHONE/FAX 202-565-9011

SUBJECT: Rail Spur

NO. OF PAGES (INCLUDING COVER SHEET) 6

COMMENTS:

February 25, 2004

Melvin Clemens, Jr  
Director  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street, N.W Suite 780  
Washington, DC 20423-0001

Mr. Clemens,

Following are correspondence letters from Doug Beasley from D&J Materials. The letter dated February 20th, 2004 is a commitment for a job that needs our rail spur to be working in the near future. The second letter was sent to us in January of 2004. It is approximating the amounts and the possibility of obtaining the supply of material for the activity stated in the first letter. The third letter was received by us in May of 2002. This letter shows the business that we could have had if our rail spur had been accessible at that time and the loss of revenue that occurred because comparable facilities were not available. Please review these letters and contact me if you have any questions.

Thank you,

A handwritten signature in black ink, appearing to read "O.E. Floyd", with a stylized flourish extending from the end.

O.E. Floyd

# FLOYD TRUCKING, INC.

CERTIFIED DBE & HUB CONTRACTOR

P.O. BOX 50

BROWNFIELD, TEXAS 79316

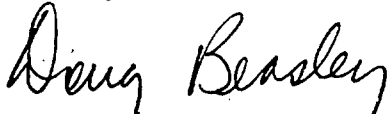
PH. 806-745-2729

February 20, 2004

Mr. Floyd,

As of Monday, February 16, 2004 the prospects of D& J Materials having a supply of Type C Fly Ash for the Lubbock market is highly probable. This agreement would be for approximately 10 years and allow us at least 30,000 tons of fly ash per year to rail into this market. The contract regarding this ash will be signed and completed by June 2004, and will begin with D&J Materials in Lubbock immediately thereafter. Please solidify and finalize any details regarding our availability to your rail spur as we currently have commitments from customers within Lubbock at this time.

Sincerely,



Doug Beasley  
D&J Materials  
Amarillo, Texas

D&J Materials. LLC

Amarillo, Tx

806-354-8007

Mr. Floyd,

You and I discussed the use of your rail spur by DePauw Const. in and around May, 2002. Our intent at that time was to rail flyash from Kansas into Lubbock and distribute it in that immediate market. As president of DePauw, it was my responsibility to locate a spur and help in developing a market for approximately 30,000 tons of this flyash. As we were discussing this with you, we were also approached by TXI Cement Company to locate a spur and provide off loading and delivery services for cement sold on the Crosstown Expressway in Lubbock. This made it extremely important that we find a spur with the capacity to handle this volume.

You were unable to get your spur opened and we settled for a spur on the North side of Lubbock just inside the loop. However, this spur could only accommodate 3 rail cars at a time. We realized the need for storage and moved three 300 ton guppies or pigs to this particular yard, and at considerable expense. DePauw leased six rail cars to haul the flyash, as more cars would have been useless with so little spur space available. With two turns per rail car per month, we were able to haul and market approximately 1,200 tons of flyash per month, or 14,000-15,000 tons per year. Our expectations and goals had been 30,000 tons per year. This difference in revenue caused the spur to become non-viable. In terms of gross income the difference was considerable:

30,000 tons @ \$26.00/ton = \$780,000 per year

15,000 tons @ \$26.00/ton = \$390,000 per year

I resigned from DePauw in October, 2002 and they viewed the spur as non profitable and withdrew from the flyash business in Lubbock in October, 2003. Our company, D&J Materials, now has the opportunity to market this same 30,000 tons of flyash into this market. In the meantime prices have changed somewhat resulting in a realistic \$28.00/ton market or around \$840,000 of gross income. It is impossible for us to pursue this market without the availability of a spur at least equal in capacity to yours. We have done the research in this market and are positive that it is there for us. As you can readily see the difference in 15,000 tons per year and 30,000 tons per year results in lost revenue to us of approximately \$35,000 per month. Again, we would have to look at the viability of presense there at all.

D&J is also pursuing a lightweight aggregate market in Lubbock and estimating around 10,000-12,000 tons of rock per year @ approximately \$36.00/ton, or \$360,000-\$420,000 per year. This makes the capacity of a spur such as yours even more important. Realistically, the lack of availability of your spur, or one comparable, probably cost DePauw in the neighborhood of \$550,000 over those seventeen months. But I cannot speak

for DePauw. D&J has a very realistic market for flyash and rock of over \$1,000,000 per year in the Lubbock market with opportunities to grow. It is a waste to have available an asset such as your spur and not take advantage of the economic impact it can have on our company and the local economy. Please review every effort available to you to put this spur in working order and please continue your contact with us regarding that availability.

Sincerely,

  
Doug Beasley

Appendix 13

# FLOYD TRUCKING, INC.

CERTIFIED DBE & HUB CONTRACTOR  
P. O. BOX 3456  
LUBBOCK, TEXAS 79452  
PH. 806-745-2729 FAX 806-745-2741

Re: South Plains Switching Ltd. Co.  
Service to Floyd Trucking, Lubbock, Texas

Mr. Larry Wisener,

This refers to your letter to me of March 13, 2003. Where South Plains Switching, Ltd. Co. (SAW) hereby commits to restore the switch connection to the trackage of Floyd Trucking, Inc. (Floyd) at SAW's own expense, and to provide rail service to Floyd, both upon Floyd's reasonable request. A reasonable request by Floyd would be one that is specific as to the volume, commodity and time of shipment.

Volume: 75,000 to 100,000 tons per year  
Commodity: Lightweight Aggregate  
Time: 60 to 80 cars per month

Storage, unloading and delivery from the railcars will be provided by Floyd Trucking for each of these products. Trucking into Lubbock is not an option because of the origins of each product. Your immediate response is requested as we have customers ready for these materials now. We ask these discussions remain confidential for obvious reasons.

Sincerely,

*O. E. Floyd*  
O. E. Floyd  
General Manager  
Floyd Trucking, Inc.

cc: Mel Clemens, STB  
Bonnie Murphy, FRA  
Vince Haggard, FRA

## SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

*South Plains Switching Ltd. Co.*  
*P.O. Box 676*

*Stanton, TX 79364*

2. Article Number

(Transfer from service label)

*7003 2260 0004 2217 88*

PS Form 3811, August 2001

## COMPLETE THIS SECTION ON DELIVERY

A. Signature

*X [Signature]*

B. Received by (Printed Name)

*9/26/20*

C. Date

*3/8*

D. Is delivery address different from item 1? ☐

If YES, enter delivery address below: ☐

3. Service Type

- ☐ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Mail  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐



**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**

THOMAS McFARLAND  
208 SOUTH LA SALLE  
ST 1890  
CHICAGO, IL 60604

**COMPLETE THIS SECTION ON DELIVERY**

**A. Signature**

*Thomas McFarland* ☐ Agent ☐ Addressee

**B. Received by (Printed Name)**

*3-8-04* ☐ Date of Delivery

- D. Is delivery address different from item 1?** ☐ Yes ☐ No  
If YES, enter delivery address below:

**3. Service Type**

- ☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

- 4. Restricted Delivery? (Extra Fee)** ☐ Yes

**2. Article Number**

(Transfer from service label)

7003 2260 0004 2217 8887

PS Form 3811, August 2001

7003 2260 0004 2217 8887

107595-02-M-1540

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
*South Plains Finance RR*  
*P.O. Box 676*  
*Slaton, TX 79364*

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature *[Signature]* ☐ Agent ☐ Addressee

B. Received by (Printed Name) *Shadler D.* C. Date of Delivery *3/8/04*

D. Is delivery address different from item 1? ☐ Yes ☐ No  
 If YES, enter delivery address below:

3. Service Type  
☐ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number  
 (Transfer from service label) *7003 2260 0004 2217 8820*  
 PS Form 3811, August 2001

*7003 2260 0004 2217 8820*  
 102595-02-M-1540

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
*Larry Wisener*  
*South Plains Suthings*  
*PO Box 676*  
*Slaton, TX 79364*

3. Service Type  
☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number  
 (Transfer from service label) *7003 2260 0004 2218 2544*  
 PS Form 3811 August 2001

*7003 2260 0004 2218 2544*  
 Domestic Return Receipt  
 102595-02-M

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature *[Signature]* ☒ Agent ☐ Addressee

B. Received by (Printed Name) *Larry Wisener* C. Date of Delivery *3-22-04*

D. Is delivery address different from item 1? ☐ Yes ☐ No  
 If YES, enter delivery address below:

**CERTIFIED MAIL**

SAW/SLAL  
 P.O. BOX 676  
 SLATON, TX 79364-0671



*7099 3220 0001 3189 6493*



*9264 79316*

U.S. POSTAGE  
 PAID  
 SLATON, TX  
 MAR 11 2004  
 \$4.42  
 00045907-01

RETURN RECEIPT REQUESTED

Mr. O. E. Floyd  
 Floyd Trucking, Inc.  
 P. O. Box 50  
 Brownfield, TX 79316

*79316*



*Received*  
*3-15-04*

79316/0050

Appendix 14

**South Plains Lamesa Railroad, Ltd.**  
**South Plains Switching, Ltd. Co.**  
**P. O. BOX 676** **SLATON, TEXAS 79364**  
**PHO: (806)828-4841** **FAX: (806)828-4863**

March 10, 2004

Mr. O. E. Floyd  
Floyd Trucking, Inc.  
P. O. Box 50  
Brownfield, TX 79319

Dear Mr. Floyd:

This refers to your letter to me, received on March 8, in which you request that South Plains Switching (SAW) restore the switch connection to the trackage of Floyd Trucking, Inc. and provide rail service to Floyd Trucking.

Your request is sufficiently specific as to volume and commodity, but not as to time of shipment. Bearing in mind that it will take a short time to install the switch connection, please advise regarding your estimate of the first date on which you propose to make or receive rail shipments.

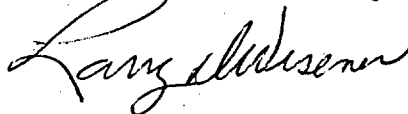
Prior to receiving rail service, you will be expected to execute SAW's standard contract for industry track. I have attached a copy of the contract for industry track between the Santa Fe Railway and Lubbock American Iron & Metal that governed the track that you will use. Most of the provisions of that contract for industry track will be contained in the contract between SAW and your company. The contract for industry track will be provided to you shortly for your signature. At the same time, you will also be provided with a copy of SAW's tariff governing demurrage and ancillary services.

You are requested to provide advance notice to SAW each time shipments move from origin to your track. You should be aware that SAW does not have track space in the Lubbock area for storage of railcars. Consequently, you should not arrange for shipments of railcars in excess of the capacity of your trackage.

All aggregate commodities in Unit trains are received on Track No. 380 in Lubbock. You are requested to contact BNSF to arrange for spotting of your traffic on Track No. 380 in Lubbock.

SAW looks forward to transporting your traffic.

Very truly yours,



Larry D. Wisener, President  
South Plains Switching, Ltd. Co.

Appendix 15

March 19, 2004

Larry Wisener  
South Plains Switching, Ltd. Co.  
P.O. Box 676  
Slaton, TX 79364

Dear Mr. Wisener,

In response to your letter dated March 10, 2004, we are needing rail service beginning April 15, 2004. The contract that you mentioned between South Plains Switching Ltd. and Floyd Trucking, Inc was not attached with your letter. Please send us this contract so that we may begin receiving shipments as soon as possible. Thank you for your attention in this matter.

Thanks,

A handwritten signature in cursive script, appearing to read "O.E. Floyd", with a long horizontal flourish extending to the right.

O.E. Floyd  
Floyd Trucking, Inc.

Appendix 16

**South Plains Lamesa Railroad, Ltd.  
South Plains Switching, Ltd. Co.  
P. O. BOX 676 SLATON, TEXAS 79364  
PHO: (806)828-4841 FAX: (806)828-4863**

---

**March 22, 2004**

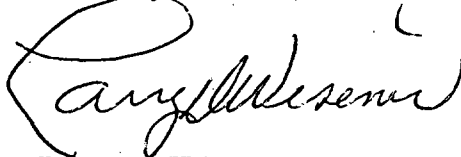
**Mr. O. E. Floyd  
Floyd Trucking, Inc.  
P. O. Box 3456  
Lubbock, Texas 79452**

**Dear Floyd:**

**In response to your letter of March 19, 2004, enclosed please find for your review the Contract of Industry Agreement with Attached Exhibits.**

**Your letter states that you will need rail service beginning April 15, 2004. It is important that you understand that South Plains Switching will do everything possible to service our customers however, with track work that must be performed and inspection of your industry track and contracts that must be signed, I do not feel that I can make any guarantees that all will be ready for full service at your facilities by April 15, 2004.**

**Sincerely,**



**Larry D. Wisener  
President**





## CONTRACT FOR INDUSTRY TRACK

Agreement, Made as of this **DRAFT** day of \_\_\_\_\_ 20\_\_\_\_

between South Plains Switching, Ltd. Co., hereinafter called the "Railway Company" party of the first part, and Floyd Trucking, Inc., hereinafter (whether one or more persons or corporation) called the "Industry," party of the second part.

**RECITALS:** - The Industry has requested the Railway Company to operate a track or track extension, as the case may be, about 2330 feet in length, hereinafter in its entirety referred to as "The Track", at or near the station of Lubbock, Lubbock County, Texas to serve a site for aggregate unloading and storage (hereinafter called the "Plant"), to be operated by the Industry. That portion of The Track, about 172 feet in length, which shall belong to the Railway Company, is shown in bold, and that portion of The Track, which shall belong to the Industry, is shown upon the print hereto attached, marked "Exhibit A" and made a part hereof.

### AGREEMENT:

#### ARTICLE I.

In consideration of the covenants of the Railway Company, the Industry agrees as follow:

1. That it will and hereby does grant to the Railway Company for the term of this agreement, free of cost, a right of way, eight and one-half (8 1/2) feet on each side of the center line thereof, for all that portion, if any, of The Track located on property belonging to the Industry, with the right to operate The Track thereon, and where any part of The Track will lie on a public street or alley, or upon property belonging to third persons or corporations, that it will secure to the Railway Company by ordinance or grant, as the case may be, in form satisfactory to the Railway Company's counsel, and without cost to the Railway Company, the right to operate The Track thereon, together with the right to remove the same; in the case

of a grant, the right of way shall be eight and one-half (8 1/2) feet on each side of the center line of The Track.

2. That Industry trackage will meet Railway Company's standards and specifications and be inspected by a representative of Railway Company and accepted as being safe for service before being placed in operation.
3. That it will pay to the Railway Company, from time to time, within twenty (20) days after bills are rendered therefore, the entire cost (or an equitable share thereof) in case other industries shall be served by the Industry Track or a part thereof. By maintaining and renewing that portion of the Industry Track beyond the clearance point, the Railway Company is to be the judge of the necessity for and character of maintenance required on the Industry Track. It is understood that the expense of maintaining and renewing the Industry Track shall include any expense to which the Railway Company may be put in the way of paving, sewers, crossing protection, or other work, because of the existence of the Industry Track.
4. That it will operate the Plant during the term hereof.
5. The Industry agrees to indemnify and hold harmless the Railway Company for loss, damage or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about The Track; and if any claim or liability shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.
6. That it will at all times keep a space of eight and one-half (8 1/2) feet from the nearest rail of any railroad track entirely clear of structures, material and obstructions of every sort and will observe an overhead clearance of not less than twenty-five (25) feet above the top of rail; provided, however, if by statute or order of competent public authority different clearances shall be required than those provided for in this Section 6, then the Industry shall strictly comply with such statute or order. In case of a breach of these obligations, or any of them, the Industry assumes and agrees to indemnify the Railway Company against all liability for loss, damage, injury, and death arising therefrom and to reimburse the Railway Company for any sums which the Railway Company may have been required to pay in the way of damages, fines, penalties or other expense resulting from the violation by the Industry of any statute or order as aforesaid.

**DRAFT**

## ARTICLE II.

In consideration of the covenants of the Industry, and the faithful performance thereof, the Railway Company, subject to the provisions of Section 2 and 3 of Article I hereof, agrees to operate and maintain the Industry Track during the term of this agreement, unless its obligations to maintain it may be sooner terminated as herein provided, and to transfer cars, loaded or empty, thereover to and from the Plant subject to any lawful charges that may be imposed by the Railway Company for such transfer in accordance with South Plains Switching, Ltd. Co.'s, "Demurrage and Rates Program, marked Exhibit "B" (attached).

## ARTICLE III.

The parties mutually agree as follows:

1. The title to the Bold Track and to all property furnished in the maintenance thereof shall be in the Railway Company. Title to the Industry Track and to all the property furnished in the maintenance thereof shall be in the Industry. The Railway Company shall have the right to use The Track for other than the express purpose of serving the Plant.
2. If the Industry shall fail for a period of six (6) months in any period of twelve (12) months to operate the Plant, or shall fail or refuse to comply with or carry out any of the covenants or agreements herein contained, the Railway Company may, at its option, expressed in writing, terminate this agreement; but no termination shall release the Industry from any liability or obligation under this agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination.
3. Unless earlier terminated as herein provided, this agreement shall be in force for the term of **TWO YEARS** from its date and thereafter until terminated by either party giving the other three (3) months' written notice of its desire to terminate the same. Upon such or any other termination, the Railway Company shall pay to the Industry the salvage value, at the time, of the materials in such portion of the Industry Track as shall have been paid for by the Industry under the provisions of this agreement and the Railway Company shall have the right to remove the Industry Track and every part thereof. This agreement shall also terminate forthwith in the event the Railway Company shall be dispossessed of the right to operate over any privately owned track.
4. Any notice to be given by the Railway Company to the Industry hereunder shall be deemed to be properly served if the same be delivered to the Industry, or if left at the Plant with any of the agents, servants or employees of the

DRAFT

Industry, or if posted on the Plant, or if deposited in the post office, postpaid, addressed to the Industry at Floyd Trucking, Inc., P.O. Box 3456, Lubbock, Texas 79452.

- DRAFT
5. In the event that the Industry embraces two or more persons or corporations, all the covenants and agreements of the Industry herein shall be the joint and several covenants and agreements of such persons or corporations.
  6. All the covenants and provisions of this agreement shall be binding upon the successors, legal representatives and assigns of the Industry to the same extent and effect as the same are binding upon the Industry, and each and every covenant herein shall inure in favor of and run to the successors and assigns of the Railway Company and to each and every person, firm or corporation which may hereafter own or be in possession of or operate the railroad of the Railway Company to the same extent and as fully as though such person, firm or corporation were specifically named in this agreement in the place and stead of the Railway Company; provided, however, no assignment hereof by the Industry, its successors, legal representatives or assigns, or any subsequent assignee, shall be binding upon the Railway Company without the written consent of the President or a Vice-President of the Railway Company in each instance.
  7. All of the provisions of Section 5, Article I, are expressly applicable during the operative period of this contract.
  8. Industry shall at all times, and at its sole expense, maintain, or cause to be maintained, the Industry Track, in such safe and satisfactory condition as necessary to conform with Railway Company standards and specifications, and to conform with all applicable standards promulgated by the Federal Railroad Administration and other governmental agencies. Railway Company may at any time, at its option, refuse to operate over or transfer cars upon the Industry Track whenever Railway Company, in its judgment, determines that the track is unsafe. If and when, in Railway Company's judgment, such unsafe condition has been remedied, Railway Company shall resume such operation and transfer of cars upon the Industry Track.
  9. Unless otherwise required by statute or order of competent public authority, Industry may, notwithstanding anything contained in Section 6 of Article I hereof to the contrary, at its sole cost and expense and in a manner satisfactory to Railway Company, construct, maintain and use a gate (equipped with private lock and switch lock) across The Track at the locations shown on said "Exhibit A". said gate to be opened whenever necessary to enable Railway Company to operate over The Track. Said gate shall be deemed to be a part of the Plant, and notwithstanding anything contained in this agreement to the

contrary, Industry shall and will at all times indemnify and save harmless Railway Company against all claims, demands, actions or causes of action arising or growing out of loss of or damage to property, including said gate, and injury to or death of persons, including employees of Railway Company and employees of Industry, resulting in any manner from the construction, maintenance, use, state of repair or presence of said gate across The Track, whether such loss, damage, injury or death be caused or contributed to by the negligence of the Railway Company, its agents or employees, or otherwise and that it will promptly pay to Railway Company the full amount of any loss or damage which Railway Company may sustain, incur or become liable for and all sums which Railway Company may pay or be compelled to pay in settlement of any claims on account thereof.

IN WITNESS WHEREOF, the parties have executed this agreement in duplicate the day and year first above written.

South Plains Switching, Ltd. Co.

by: Larry D. Wescher

Its President/Operating Manager  
Title

Floyd Trucking, Inc

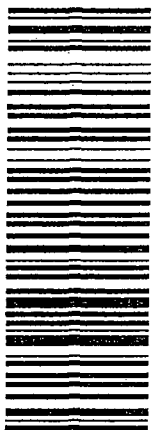
by: O. E. Floyd

Its  
Title

With 10/11/11  
P.O. Box 676  
Milton, Iowa 79364

Return  
Receipt Requested

OF THE RETURN ADDRESS, FOLD AT DOTTED LINE  
**CERTIFIED MAIL<sup>TM</sup>**



7003 3110 0001 1831 9196

Mr. D. E. Lloyd  
Lloyd Trucking, Inc.  
P.O. Box 3456  
Futrock, Iowa 79452

over 7



9264



79452

3/20

Appendix 17



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

THOMAS F. MCFARLAND

April 6, 2004

Mr. Melvin F. Clemens, Jr.  
Director  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street, N.W. - Suite 780  
Washington, DC 20423-0001

Re: South Plains Switching Ltd. Co.,  
Service to Floyd Trucking, Lubbock, Texas

Dear Mel:

As a follow-up to my letter to you of March 10 about the above subject, this is to advise that as of April 1 the switch connection to the Floyd Trucking trackage at Lubbock, TX was restored. Prior to that date, South Plains Switching's standard contract for Industry Track was furnished to Floyd Trucking.

Very truly yours,

*Tom McFarland*

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

*TMcF:kl:wp8.0\921\lrmfc6*

cc: Mr. O.E. Floyd  
Mr. Larry Wisener  
Mr. Dennis Olmstead

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

June 3, 2004

Mr. Melvin F. Clemens, Jr.  
Director  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street, N.W. - Suite 780  
Washington, DC 20423-0001

Re: South Plains Switching Ltd. Co.,  
Service to Floyd Trucking, Lubbock, Texas

Dear Mel:

This is a further follow-up to my letters to you of April 6, 2004 and March 10, 2004 about restoration of rail service to Floyd Trucking at Lubbock, Texas.

At the specific request of Floyd Trucking, South Plains Switching reinstalled the switch connection to Floyd Trucking's trackage at Lubbock, Texas as of April 1, 2004. The cost of the reinstallation was approximately \$15,000. Prior to that date, South Plains Switching's standard contract for industry track was furnished to Floyd Trucking.

Now over two months later, Floyd Trucking has not signed the industry track contract; has not made a single rail shipment; and has not contacted South Plains Switching to advise of its intentions.

Mr. Larry Wisener, President of South Plains Switching, asked me whether Floyd Trucking, having specifically requested reinstallation of the switch connection, could be forced to ship by rail after the reinstallation, in light of the fact that South Plains Switching was forced to reinstall the switch connection at its own expense. I responded that Floyd Trucking is not required by law to ship anything by rail. I agreed with Mr. Wisener's statement that it is unfair that Floyd Trucking can force South Plains Switching to reinstall the switch, but South Plains Switching cannot force Floyd Trucking to ship by rail after the reinstallation.

THOMAS F. MCFARLAND

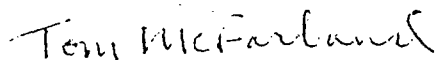
Mr. Melvin F. Clemens, Jr.

June 3, 2004

Page 2

I want you to be aware that South Plains Switching abided by the law at significant cost at the request of Floyd Trucking, but Floyd Trucking has made no use of the rail service that it requested.

Very truly yours,



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

*TMcF:kl:wp8.0\921\lrmfc7*

cc: Mr. O.E. Floyd  
Mr. Larry Wisener  
Mr. Dennis Olmstead

Attachment I

# FARMERS COOPERATIVE COMPRESS

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P.O. Box 2877  
Lubbock, Texas 79408-2877  
Phone: 806/763-9431  
FAX: 806/763-3251

June 9, 2006

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20036

Re: PYCO Industries-Feeder Line Application  
STB Finance Docket 34844

Mr. Williams:

Farmers Cooperative Compress (FCC) is a shipper of cotton bales that are marketed all over the world. We are concerned about the problems that PYCO is having with SAW. FCC is aware of incidents in which SAW management has blown up at shippers who seek to raise issues with their service, and has threatened retaliation. PYCO Industries included a statement by the manager of Hi Plains Bag and Bagging to that effect in its feeder line application. In another statement, the manager of Floyd Trucking discussed how he finally gave up on obtaining service from SAW. More recently, SAW management threatened PYCO and so degraded service to PYCO that PYCO sought and obtained alternative rail service. When a switching railroad takes these kinds of actions toward some of its shippers, it can no longer be regarded as reliable by any of its shippers because they may become the subject of similar retaliation or service degradation at any time. Thus service by SAW has become inadequate and unreliable for our merchant customers and company.

Sincerely,

Ron Harkey  
President

# Attebury Grain, LLC

P.O. BOX 2707 - AMARILLO, TEXAS 79105  
Capacity Over 150,000,000 Bushels  
Telephone: (806) 335-1639  
Fax: (806) 335-1165

June 9, 2006

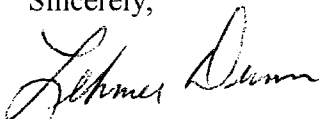
Honorable Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D. C. 20423

RE: PYCO Feeder Line Application, STB Finance Docket 34844

This letter is in reference to the above-mentioned Docket. Attebury Grain, LLC is aware of incidents in which SAW management has blown up at shippers who sought to raise issues with their service, and SAW has threatened retaliation. PYCO Industries included a statement by the manager of Hi Plains Bag and Bagging to that effect in its feeder line application. In another statement, the manager of Floyd Trucking discussed how he finally gave up on obtaining service from SAW. More recently, SAW management threatened PYCO and so degraded service to PYCO that PYCO sought and obtained alternative rail service. When a switching railroad takes these kinds of actions toward some of its shippers, it can no longer be regarded as reliable by any of its shippers because they may become the subject of similar retaliation or service degradation at any time. On this basis, we feel that the service by SAW has become inadequate and unreliable for our purposes and our company.

Our Company, which uses rail service provided by SAW, supports PYCO's feeder line application.

Sincerely,



Lehmer Dunn  
Vice President

**MEMBER:** National Grain and Feed Association, Texas Grain and Feed Association,  
Oklahoma Grain and Feed Association, Panhandle Grain and Feed Association,  
Kansas Grain and Feed Association.

Attachment J



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## Permian Basin Railways

Texas-New Mexico Railroad  
West Texas & Lubbock Railway  
Post Office Box 618181  
Chicago, IL 60661

---

June 29, 2006

Mr. Gail Kring  
Chief Executive Officer  
PYCO Industries, Inc.  
P. O. Box 841  
Lubbock, TX 79408

Dear Mr. Kring:

We have read the Petition for Alternative Rail Service – Temporary Relief for Service Inadequacies under 49 CFR Part 1147.

West Texas & Lubbock Railway stands ready to provide the service contemplated by the Petition on and after October 23, 2006.

Sincerely,

Steve Gregory  
Vice President



**JOHN D. HEFTNER, PLLC**

1920 N STREET, N.W.

SUITE 800

WASHINGTON, D.C. 20036

(202) 263-4180

FAX (202) 296-3939

j.heftner@verizon.net

June 29, 2006

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

RE: STB Finance Docket No. 34899, Verified Petition of  
PYCO Industries, Inc., for Alternative Rail Service,  
Temporary Relief for Service Inadequacies, 49 CFR Part 1147

Dear Mr. Williams:

I am writing on behalf of my client, West Texas & Lubbock Railway Co., Inc. ("WTL") in connection with the above-captioned proceeding. Subject to the caveats and conditions identified below and pursuant to the Board's regulations at 49 CFR 1147 (Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies), WTL is willing to provide alternative rail service for PYCO Industries, Inc. (PYCO) and other customers currently served by the South Plains Switching LTD. (SAW) at Lubbock, TX.

WTL is a class III short line railroad owned by Permian Basin Railways, Inc. (Permian), a short line railroad holding company headquartered in Chicago, IL. WTL currently owns and operates over 100 miles of track in and around Lubbock, TX, and contiguous areas. WTL currently handles approximately 4000 carloads of traffic annually utilizing 3 engines and 10 employees. WTL connects with the BNSF Railway, Inc. (BNSF) at Lubbock. WTL is currently providing alternative rail service to PYCO under orders issued by the Board in FD. No. 34802. Absent any extension, that service is scheduled to end on or about October 23, 2006. WTL's owner, Permian Basin, currently owns three other short lines in the western half of the country. Its senior management collectively has over 125 years of experience in providing railroad service, much of

it obtained through employment with either class I carriers or other regional or short line railroads before starting Permian Basin in 2002.

PYCO seeks alternative service from WTL because, as the Board has previously found in FD No. 34802, its current carrier (SAW) is either unwilling and/or unable to provide service. Barring relief from the Board, PYCO and SAW's other Lubbock area customers will either be forced to turn to truck service permanently or even shut down operations. WTL has reviewed the Board's regulations under 49 CFR 1147 and believes that PYCO and SAW's other Lubbock area customers are entitled to relief.

Briefly, the Board's regulations require that the alternative rail service provider -- WTL here -- 1) commit to providing service, 2) be able to provide service safely without degrading service to its existing customers, and 3) be able to provide service without unreasonably interfering with the incumbent carrier's ability to service the needs of its own customers.

In response, WTL states:

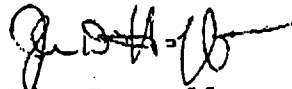
1. Subject to its making appropriate arrangements with BNSF for continuation of its present interchange of PYCO's traffic and the traffic of SAW's other Lubbock area customers and commercial arrangements with BNSF for transfer of freight and further subject to WTL's determining that it can continue to safely operate over the subject track, WTL will commit to providing service to PYCO and other customers on the subject line of SAW. The fact that WTL has a longstanding, good relationship with BNSF generally and its people in Lubbock specifically should help to insure a smooth takeover of operations.
2. WTL represents that it can continue to undertake to provide the requested service without jeopardizing service to its current customers. The fact that WTL has been providing alternative rail service under 49 CFR Part 1146 over the subject trackage since January 25, 2006 without adversely affecting service to shippers on its own railroad provides proof that it can continue to do so under 49 CFR Part 1147. WTL has

sufficient locomotives, crews, equipment, and experience that it can continue providing service over SAW without affecting service over its own railroad. In that regard, WTL will continue assigning one of its own engines to serve customers on the affected trackage and can provide additional power as may be necessary. Furthermore, because WTL's railroad is physically separate from SAW's Lubbock trackage, there should be no operating conflicts or other operational problems.

3. Because PYCO seeks alternative rail service authority covering all of SAW's trackage needed to serve its facilities and WTL has been providing that service under 49 CFR Part 1146 since January 25, 2006, WTL believes that it can continue those operations without adversely affecting those of the incumbent carrier [SAW].

Please contact me if you have any questions

Sincerely yours,



John D. Heffner  
Counsel for West Texas  
& Lubbock Railway Co., Inc.

Attachment K

**c.montange**

---

**From:** "Hyer, Michael (Irving) NA" <Michael.Hyer@hanson.biz>  
**To:** <c.montange@verizon.net>  
**Cc:** "Dacus, Stan (Irving) NA" <Stan.Dacus@hanson.biz>  
**Sent:** Monday, June 12, 2006 11:23 AM  
**Subject:** PYCO Industries - Feeder Line Application, STB 3484

Mr. Montange,

This confirms our conversation that you are authorized to state in the above referenced Surface Transportation Board proceeding that Hanson Aggregates, Inc. ships constructions aggregates into Lubbock using South Plains Switching LLC rail service and believes that service is inadequate.

Please let me know if you have any questions in this regard.

Mike

Michael H. Hyer  
Vice President and General Counsel  
Hanson Building Materials America, Inc.  
8505 Freeport Parkway, Suite 138  
Irving, Texas 75063  
Tel (469) 417-1300  
Fax (469) 417-1487  
michael.hyer@hansonamerica.com

*This message and any attached documents contain information from the General Counsel of Hanson Building Materials America, Inc. that may be confidential and/or privileged. If you received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message. Thank you.*

6/13/2006

Attachment L

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC.  
-- FEEDER LINE APPLICATION --  
LINES OF SOUTH PLAINS SWITCHING, LLC,

Finance Dkt. No. 34844

---

SOUTH PLAINS SWITCHING, LLC  
-- ACQUISITION EXEMPTION --  
BNSF RAILWAY COMPANY

Finance Dkt. No. 33753 (Sub-no. 1)

---

DECLARATION OF  
CALVIN KIDWELL

I, Calvin Kidwell, make this Declaration, pursuant to 28 U.S.C. § 1746, in support of the Feeder Line Application filed by PYCO Industries, Inc., in F.D. 34844, and in support of the petition to revoke the acquisition exemption in F.D. 33753 (Sub-no.1) by which South Plains Switching LLC ("SAW") acquired certain lines of railroad in Lubbock from BNSF Railway.

1. I am the general manager of Hi-Plains Bag and Bagging Company (HPBB), whose business address is 707 East 44th St., Lubbock, TX 79404. HPBB is not a large rail user like PYCO Industries, but we do receive several inbound shipments per month of twine for cotton bales. This represents a significant cost savings over alternative forms of shipment for us. Our local

switching provider is SAW.

2. To get to the point, SAW's management is scary. Last year, a car was spotted for us in a fashion which we could not unload it. I called SAW's office, and happened to speak with Mr. Larry Wisener. I politely requested that SAW re-spot the car so we could have access. Mr. Wisener went ballistic. He started screaming. He said he could cut us off and do whatever he wanted because it was his railroad. I construed this as it was intended: a threat to retaliate and to deprive us of service if we did not do exactly what he told us to do. I tried to respond that we certainly wished to cooperate, but did not know when his crews would deliver our cars, and asked if SAW would telephone in advance. This got nowhere, and provoked more talk from Mr. Wisener about our incompetence, his power, and his willingness to wield it. He intended to and did scare the heck out of us. We told our staff to listen for his engine, and if they heard it to go to our loading area to make certain that if there was a car it was spotted correctly.

3. A SAW shipper lives in fear that SAW management on a whim will cease service. We are concerned that this Declaration itself will result in retaliation, and if so, we request immediate relief from SAW pursuant to the alternative service order PYCO Industries already has in place. SAW management is not compatible with a common carrier railroad. We support revocation of SAW's exempt



acquisition, or else the immediate sale of SAW's lines to PYCO pursuant to PYCO's feeder line application.

Pursuant to 28 U.S.C. § 1746, 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

04/10/06

Calvin Tidwell