

ENTERED
Office of Proceedings

JUL 17 2006

Part of
Public Record

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

14 July 2006
by Federal Express



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

Re:

PYCO INDUSTRIES, INC. --	)		
ALTERNATIVE RAIL SERVICE --	)	F.D. 34802	217056
SOUTH PLAINS SWITCHING LTD.	)		
 PYCO INDUSTRIES, INC. --	)		
ALTERNATIVE RAIL SERVICE --	)	F.D. 34889 34889	217062
SOUTH PLAINS SWITCHING LTD.	)		
 PYCO INDUSTRIES, INC. --	)		
FEEDER LINE DEVELOPMENT --	)	F.D. 34890	
SOUTH PLAINS SWITCHING LTD.	)	(revision of F.D. 34844)	217059
 PYCO INDUSTRIES, INC. v.	)	F.D. 34838 34870	217063
SOUTH PLAINS SWITCHING, LTD.	)		
 SOUTH PLAINS SWITCHING, LTD. --	)		
ACQUISITION EXEMPTION --	)	F.D. 33753 (Sub-no. 1)	217061
BNSF RAILWAY COMPANY	)		

Motions for Enforcement of Protocol, to Void
a Sale, to Halt Retaliatory Actions, and to Preserve Status quo

Action requested no later than August 4, 2006

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc. ("PYCO"), enclosed please find an original and 54 copies of a motion for protocol enforcement, to void an illegal sale by South Plains Switching ("SAW ") (allegedly headed by Mrs. Wisener) to Choo Choo (Mr. Wisener), to stay a series of retaliatory lease and permit terminations by the Wiseners, and for similar kinds of relief. This pleading is precipitated by SAW's apparent transfer of portions of its rail yard and adjoining trackage to Larry Wisener d/b/a Choo Choo Properties, who has purported to terminate PYCO permits and leases. The transfer is without this

Board's authorization. It also appears contrary to the BNSF/SAW contract. Mr. Wisener seeks by this paper transfer of ownership to evade the processes and jurisdiction of this Board while he proceeds to implement his threat dating from November 18, 2005, to disable PYCO's rail service and operations in retaliation for PYCO's refusal to pay him \$5.5 million and for seeking relief from this Board.

Because of the exigency of the circumstances, we request action by this Board no later than August 4, and as far in advance of that date as possible.

I hereby certify service of the foregoing by express, for July 17 delivery (i.e., next business day), upon the following counsel at their address of record:

- Thomas McFarland, Esq. (for SAW)
- Michael Roper, Esq. (for BNSF)
- William Sippel, Esq. (for USRP)
- John Heffner, Esq. (for WTL)

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange
counsel for PYCO Industries

Encls. (55 copies, 11 for each of 5 proceedings)

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	)	
PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34899
SOUTH PLAINS SWITCHING LTD.	)	
PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	(revision of F.D. 34844)
PYCO INDUSTRIES, INC. v.	)	F.D. 34838
SOUTH PLAINS SWITCHING, LTD.	)	
SOUTH PLAINS SWITCHING, LTD. --	)	
ACQUISITION EXEMPTION --	)	F.D. 33753 (Sub-no. 1)
BNSF RAILWAY COMPANY	)	

PETITIONER PYCO INDUSTRIES'

- (1) MOTION FOR ENFORCEMENT OF PROTOCOL IN F.D. 34802;
- (2) MOTION FOR ORDER STAYING RETALIATORY ACTIONS BY
INCUMBENT RAILROAD (SAW) IN F.D. 34802 AND 34899;
- (3) MOTION TO STAY ANY PURPORTED SALE OF PROPERTY TO
CHOO CHOO PROPERTIES AND CERTAIN RETALIATORY ACTIONS
BY CHOO CHOO PROPERTIES
(OR ANY OTHER NOM DE GUERRE OF SAW OR LARRY WISENER)
IN F.D. 34890, 34802, AND 34899;
- (4) MOTION TO PRESERVE STATUS QUO IN COMPLAINT
PROCEEDING (F.D. 34838);
- AND (5) MOTION TO SUBMIT NEW EVIDENCE IN SUPPORT OF
PETITION TO REVOKE IN F.D. 33753 (SUB-NO.1)

Action requested by or before August 4, 2006

This pleading is necessary in light of a sequence of retaliatory actions taken by SAW management (Larry Wisener) d/b/a Choo Choo Properties, Inc. ("Choo Choo") against PYCO Industries, Inc., and a series of violations by incumbent rail carrier South Plains Switching, Ltd. (SAW) of the Board-

ordered service protocol in Finance Docket 34802 (the 49 C.F.R. Part 1146 alternative use proceeding).

The SAW protocol violations are impeding PYCO's ability to switch rail cars, and the SAW retaliatory actions involving Choo Choo are threatening the continued ability of PYCO to operate in Lubbock, much less ship rail cars.¹ There is no railroad reason for SAW/Choo Choo's retaliatory actions against PYCO.² PYCO accordingly seeks this Board's further assistance in F.D. 34802 to prevent SAW's continued protocol violations. As to SAW's purported sales and transfers to Choo Choo, PYCO seeks orders from this Board in the alternative use proceedings (F.D. 34802, 34889), the feeder line proceeding (F.D. 34890), and the complaint proceeding (F.D. 34838) to protect the integrity of this Board's processes and to preserve the status quo in the condition it was before SAW's retaliatory actions

¹ Additional Declaration of Robert Lacy, Exhibit A, ¶8 (SAW/Choo Choo retaliatory moves "essentially shuts down PYCO's ability to ship by rail of for that matter to operate our plant").

PYCO has pointed out that it is not really possible to rally shipper support for a feeder line application in the climate of intimidation fostered by SAW in Lubbock, Texas. SAW's escapades for the past eight months in inflicting degraded service and economic retaliation on PYCO first for refusing to pay off SAW and otherwise do its bidding, and then for complaining to STB are obvious to the entire shipper community in Lubbock. SAW's tactics have served to silence the shipper community, conceal the truth, and raise fears of retribution against those shippers who were brave enough to step forward with statements of their own experience of physical or economic threats and retaliation by SAW. Something must be done to counter SAW's abusive misconduct and passive-aggressive tactics, all of which are for the purpose of thwarting and confounding the intent of this Board's orders.

² Additional Dec. of Robert Lacy, Exhibit A, ¶ 13.

commencing November 18, 2005, pending further orders of this Board. In all events, SAW's sales and transfers to Choo Choo must be voided as a violation of 49 U.S.C. § 10901, an attack on the integrity of this Board's processes, and a clear attempt by SAW and Larry Wisener to subvert the jurisdiction of this Board.

Action needed by August 4 at the latest. Because SAW/Choo Choo's latest round of lease and permit terminations will begin to be effective on August 5, 2006,³ and SAW personnel can reasonably be expected to begin demolition of essential PYCO facilities on that date,⁴ PYCO requests action from this Board in response to this pleading no later than August 4, and the sooner the better in light of the adverse effects of SAW's actions on PYCO's cottonseed stockpile.⁵

I. General Protocol Violations by SAW

Under the protocol ordered by this Board in F.D. 34802, PYCO's alternative service provider [West Texas & Lubbock Railroad ("WTL")] is assigned exclusive use of the SAW yard from 7 AM to 10 AM, 2 PM to 7 PM, and 7 PM to 7 AM.⁶ This protocol now specifically applies to require SAW to keep the "wee"

³ Additional Declaration of Robert Lacy, Exhibit A, ¶¶ 7-9 and Attachment II.

⁴ Exhibit A, ¶ 9.

⁵ Exhibit A, ¶ 6 (some of the seed has already "degraded").

⁶ A copy of the agreed upon portion of the protocol specifying the times 7 AM to 10 AM and 2 PM to 7 PM is set forth in Attachment III to the Additional Declaration of Robert Lacy, Exhibit A hereto. In its February 16 decision in F.D. 34802, this Board added the 7 PM to 7 AM time.

adjacent to PYCO's Plant No. 1 clear during the WTL protocol hours.⁷ SAW has repeatedly violated the protocol by operating equipment from 7 AM to 10 AM or by spotting cars on tracks that block or impede PYCO switching during those hours. WTL's "SAW Event Log" (attached as Exhibit B) documents a series of violations through this spring. In partial response to these violations,⁸ WTL since May 15 has attempted to keep clear of the entire yard until 2 PM. However, PYCO necessarily switches immediately adjacent to the yard during the morning, and SAW's violations from May forward continue to plague PYCO. These violations from the date of this Board's June 21 order are documented in Attachment IV to the Additional Declaration of Robert Lacy (Exhibit A). The violations are impeding PYCO's ability to load cars for switching by PYCO's alternative service provider (WTL) and are endangering PYCO employees. See Exhibit A, ¶ 14 and Attachment I thereto.

PYCO requests that this Board take such action as is appropriate and effective to compel SAW to stop operating in the yard and on the wye during the protocol hours assigned to WTL for PYCO's switching.

II. SAW's Purported Sale of Property to Choo Choo and Use of Choo Choo to Retaliate against PYCO

On November 18, 2005, Mr. Larry Wisener as president of SAW informed PYCO's Robert Lacy that he intended to cause his

⁷ Board Dec. in F.D. 34802, served June 21, 2006.

⁸ WTL's May 15 entry indicates that they also hoped the change would improve coordination with BNSF.

railroad (SAW) to retaliate against PYCO by degrading service, terminating PYCO's leases, and otherwise making life miserable for PYCO because PYCO had refused SAW's demand that PYCO pay SAW \$5.5 million for undisclosed SAW assets in return for continued rail service.⁹ Mr. Wisener's railroad commenced degrading service to PYCO from that date. The degradation included limiting service to PYCO's plant no. 1 to one switch per day of no more than 12 cars, placing derails to inconvenience internal plant switching, terminating leases to trackage (track no. 9298) customarily used to stage cars for PYCO's plant no. 2, and otherwise hamstringing PYCO's rail dependent operations. PYCO responded on December 19 with a petition for alternative rail service, F.D. 34802.

This Board granted alternative rail service to PYCO by decision served January 26, 2006. This decision has been extended twice (decisions served February 24, 2006 and June 21, 2006). This Board also issued amendments to the "agreed upon" service protocol,¹⁰ specifically to prevent SAW from blocking WTL's use of tracks 9298 and 9200 to stage cars for PYCO (their traditional use) by requiring SAW to keep clear of those

⁹ See Additional Dec. of Robert Lacy, Exhibit A, ¶ 2.

¹⁰ The "agreed upon" service protocol was only agreed to by PYCO's alternative service provider when SAW's management demanded that WTL sign the agreement. WTL did not believe the agreed upon protocol would work, it did not, and both WTL and PYCO sought amendments to it. WTL's pleading in that regard is Attachment III to the Additional Dec. of Robert Lacy, Exhibit A. PYCO's pleading is set forth in the F.D. 34802 docket and incorporated herein.

tracks.¹¹

Almost immediately when this Board issued the alternative service order on January 26, 2006, SAW filed a petition to terminate the order on the ground that it had ousted Larry Wisener from all management responsibilities and replaced him with his wife, Delilah Wisener.¹² PYCO responded that the leopard could not so easily change its spots,¹³ and based on the evidence, the Board agreed.¹⁴

It turns out that PYCO and the Board not only were right that Delilah Wisener was not a material change; it turns out that the alleged change was essentially a ruse from start to finish: Larry Wisener and his wishes to retaliate against SAW remain the governing force at SAW. This fact is demonstrated by the latest SAW antics involving Larry Wisener's Choo Choo.

In response to PYCO's complaints to this Board concerning SAW's spotting of non-revenue cars to thwart PYCO's access across its long-established industrial crossing to move cottonseed from its multi-million dollar stockpile to its Plant No. 1, this Board ordered SAW to clear its cars from the

¹¹ F.D. 34802, served Feb. 16, 2006.

¹² The alleged resignation of Larry Wisener and substitution of his wife as President and General Manager was one of the grounds SAW asserted in its (first) Petition of Terminate Alternative Rail Service in F.D. 34802, pleading filed February 9, 2006, less than two weeks after commencement of alternative service.

¹³ PYCO's Opposition, F.D. 34802, Feb. 15, 2006, at p. 5 citing Jeremiah 13:23.

¹⁴ Decision in F.D. 34802, served Feb. 24, 2006.

crossing.¹⁵ SAW cleared the cars but otherwise continued to block the crossing with signs and threatening personnel. PYCO sought and obtained a United States District Court temporary restraining order to prevent SAW from blocking the crossing. When SAW personnel continued to impede PYCO, local police intervened to enforce the court order.¹⁶ PYCO repaired the crossing and immediately commenced its former use to transport its seed for processing and rail shipment.

However, SAW's Lubbock attorney, Mr. Gorsuch, immediately intervened in the United States District Court proceeding on behalf of "Choo Choo Properties, Inc." There is no recorded deed from SAW to Choo Choo; the Wiseners are evidently keeping that one a secret.¹⁷ Although there is no recorded deed from

¹⁵ Decision in F.D. 34802, served June 21, 2006.

¹⁶ On July 3, PYCO filed a Part 1147 alternative rail service petition in Finance Docket 34899. That petition was supported by Declarations of Les Howell (Attachment C discussing SAW staff blocking the industrial crossing and police intervention) and Gary McLaren (Attachment B, discussing court filings, the TRO, and Choo Choo's intervention). These Declarations and their exhibits are hereby incorporated herein.

The Additional Declaration of Robert Lacy, Exhibit A, ¶7 summarizes subsequent events recounted in the text.

¹⁷ Lacy Declaration, Exhibit A, ¶ 10.

PYCO, of course, since May 4, 2006 has had a discovery request pending against SAW for documents relating to any sales of property (Exhibit P to Feeder Line Application in F.D. 34844, incorporated into Revised Feeder Line App in F.D. 34890). Because SAW's counsel claimed it inconvenient to respond to the discovery request until after SAW files its reply to the feeder line application on August 2, this Board in its order of July 13, 2006 in F.D. 34890 allowed PYCO to enter to inspect SAW's premises on July 24, but provided for SAW to respond to the document discovery on August 4. Unfortunately, that August 4 date is too late for purposes of this motion, because SAW/Choo Choo's lease cancellations begin to bite PYCO on August 5.

SAW to Choo Choo, Larry Wisner (Choo Choo) claims to have bought all the real estate, track and ties from SAW in the "we," and evidently other undisclosed property in and around the SAW yard adjacent to PYCO Plant No. 1.¹⁸ In presentations to the court, Choo Choo claimed to have purchased the property from SAW on or about June 12, 2006 for less than \$2000 (Mr. Wisener's testimony) or \$1800 (Mrs. Wisener's testimony).¹⁹ Mr. Larry Wisener testified that Choo Choo belonged to him entirely.²⁰ Choo Choo claimed the right to block the industrial crossing notwithstanding this Board's order to SAW. Because this Board's order did not cover Larry Wisener, his Choo Choo, or any other nom de guerre that he or SAW decides to employ, the U.S. District Court dissolved the TRO. Choo Choo/Larry Wisener then obtained a temporary restraining order in state court barring PYCO from use of its industrial crossing.²¹ PYCO is thus again without use of the industrial crossing.

To make matters worse, Mr. Wisener d/b/a Choo Choo by

However, the sworn testimony of the Wiseners (summarized in Exhibit C) and their actions against PYCO (summarized in Exhibit A and Attachment II thereto) are sufficient to permit the Board to act to preserve the status quo pre-retaliation.

¹⁸ See Gary McLaren Dec., Exhibit C, ¶ 6 (relevant sworn testimony of the Wiseners attached). The Choo Choo buy from SAW evidently included as much as the entire SAW yard. See Exhibit A ¶ 7 (Choo Choo purports to terminate leases outside we area implying it owns broad area).

¹⁹ Exhibit C, ¶¶ 6-7.

²⁰ Exhibit A, ¶ 5.

²¹ Additional Declaration of Robert Lacy, Exhibit A, ¶ 7.

letter from SAW's attorney dated July 6 has now purported to terminate PYCO licenses and leases for conveyor belts, electrical conduits, pipelines, and crossings in Lubbock in and outside the area of the "we." See Lacy Declaration, Exhibit A, ¶ 7 and Attachment II. Some of the terminations, by the terms of the leases or permits in question, are effective as early as August 5, 2006.²² On that date, PYCO expects that Mr. Wisener or the SAW staff will be out demolishing portions of PYCO's rail-dependent facilities. Id. ¶ 9. The effect will be to disrupt and shutdown PYCO operations in Lubbock, such that PYCO will not be able to ship product by rail. Id. ¶ 9. The harm will be irreparable, not just to PYCO but to the Texas cotton industry which PYCO serves. Id. ¶ 9. The actions of SAW and Wisener d/b/a Choo Choo are exactly to promote the rail service inadequacy to PYCO that this Board has been endeavoring since January 26 to alleviate. Id. ¶ 11.

III. Remedies to Preserve the Integrity
of the Board's Processes and to Protect the
Status Quo Prior to Commencement of SAW Misconduct

SAW's entire scheme involving Choo Choo is a transparent contrivance to avoid this Board's authority. Mr. Wisener and SAW should not be permitted to accomplish through Choo Choo or any other entity they conjure up what this Board would not permit SAW and Wisener to do through SAW directly. This Board should

-- assume jurisdiction over the purported sale to Choo Choo,

²² Exhibit A, ¶ 9.

declare any such sale without this Board's prior authorization null and void;

-- order SAW not to engage in any further sales of railroad property covered by any of the above-captioned proceedings without prior authorization from this Board;

-- and order the purported lease and license terminations by Choo Choo as set forth in Exhibit B to be rescinded pending further order of this Board.

In light of SAW's continued and egregious misconduct and devious efforts to thwart this Board's jurisdiction, PYCO further requests that this Board issue an order pursuant to 49 U.S.C. § 721(b)(4) and any other appropriate authority to preserve the status quo as it existed prior to November 18, 2005, when SAW embarked on plan to cripple service to PYCO. The order should

-- enjoin SAW from any further sales of its property to any third party without prior authorization by this Board;

-- enjoin SAW from terminating any lease, license, or other right held by PYCO (or any shipper supplying a statement in support of PYCO) without prior authorization from this Board;

-- and enjoin SAW from any further interference with PYCO's use of any crossing, conveyor belt, conduit, or other use of SAW property if that use existed as of November 18, 2005.

At this time, such an order is necessary to allow adequate rail service to PYCO's rail dependent business, to preserve status quo pending the outcome of the various administrative

cases, to prevent irreparable injury, and to protect the integrity of this Board's processes and this Board's jurisdiction.

In pleadings filed in Finance Docket 34802 and in some of the other dockets in litigation with PYCO, SAW has claimed the trackage involved in these proceedings are excepted switching tracks under 49 U.S.C. § 10906 and that the Board lacks authority over the trackage. SAW argued as a result it could do whatever it wanted to PYCO (and presumably any other shipper). We anticipate that SAW will make this same argument in response to PYCO's motions and requests for relief in this pleading. Fortunately for PYCO, this Board has already considered and dismissed SAW's argument. In this Board's decision in F.D. 34802 and Ex Parte No. 346 (Sub-no. 14C) served June 21, 2006, at p. 4, this Board stated as follows:

"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."

Since this Board has already found that the trackage is not excepted under section 10906, several legal conclusions follow. First and foremost, the Board certainly has authority to issue orders to preserve the status quo prior to retaliatory actions by SAW; and second, the Board certainly also the authority to preserve the integrity of its processes. One of the Board's key "processes" is the "process" for abandonment or transfer of rail

property as set forth in 49 U.S.C. § 10901. In particular, no rail line may be transferred or abandoned without the Board's prior authorization. SAW's transfer of assets to Choo Choo amounts either to a transfer of regulated (i.e., non-10906) assets without prior authorization or an abandonment of regulated (i.e., non-10906) assets without prior authorization. In either event, SAW must obtain a prior Board authorization for the transfer of the trackage from SAW to Choo Choo. See 49 U.S.C. § 10901-06.²³ Since there was no authorization by this Board for either abandonment or transfer of the assets to Choo Choo, and since Choo Choo in any event is an obvious contrivance by SAW and Larry Wisener to subvert the jurisdiction of this Board, the sale should be declared null and void.²⁴

²³ The transfer also appears to be void under the SAW/BNSF contract, ¶ 7(b). {A copy of the SAW/BNSF contract is already contained in the various dockets, and is most recently set forth as Attachment D to the Part 1147 Petition in F.D. 34889.} Mrs. Wisener (SAW) testified that she did not view Mr. Wisener (Choo Choo) as an "affiliated" railroad, in which case under ¶ 7(b) SAW should have tendered the sale to BNSF first for exercise of BNSF's right of first refusal. SAW of course did no such thing. McLaren Dec., Exhibit C, ¶ 10 citing sworn testimony of Mrs. Wisener.

²⁴ Even where parties sought this Board's prior authorization for a transfer, this Board has declared transfers of rail property null and void or ordered reconveyance when it has perceived the transfer to be contrary to the integrity of the Board's regulations. E.g., The Land Conservancy of King County -- Acquisition and Operation Exemption -- The Burlington Northern and Santa Fe Ry Co., F.D. 33388, served Sept. 26, 1997 (orders reconveyance). Accord, Jefferson Terminal RR co.-- Acquisition and Operation Exemption -- Crown Enterprises, Inc., F.D. 33950, served March 15, 2001 (revokes authority to acquire in order, among other things, to protect integrity of processes). See also ICC v. American Trucking Ass'ns, 467 U.S. 354, 364-65 (1984) (agency has inherent authority to protect its statutory processes from abuse); Permian Basis Area Rate Cases,

Even if the trackage in question in the wye were excepted switching track, there is no question but that PYCO had put SAW on notice as early as January 8 (PYCO's Reply to SAW's Part 1117 Petition at p. 11, in F.D. 34802) that PYCO anticipated filing a feeder line application. PYCO filed such an application for the entire line as well as Alternative Two on May 4, 2006. Feeder line applications, like offers of financial assistance, look to continued rail service. Such service cannot be provided if the party seeking to acquire the rail property were deprived of spur, industrial, side, passing or switch track appurtenant to the "main" or "branch" lines. Accordingly, such tracks are included in so-called "forced sales," and applicable precedent confirms this practice. E.g., Railroad Ventures, Inc.-- Acquisition and Operation Exemption -- Youngstown & Southern Railroad Company, F.D. 33385, served Oct. 4, 2000, slip op. p. 11, aff'd Railroad Ventures v. STB, 299 F.3d 523 (6th Cir. 2003).

Moreover, once a railroad is put on notice that a party intends to invoke "forced sale" remedies, subsequent attempted transfers of subsurface and air rights, or land rights, "contravene [the Board's] continuing and exclusive regulatory jurisdiction over the rail line prior to abandonment." Railroad Ventures, supra, F.D. 33385, slip at 11. In the feeder line proceedings, PYCO seeks all the SAW property that SAW has

390 U.S. 747, 780 (1968) (agency can take action that is imperative for achievement of the statute's ultimate purpose).

purported to transfer to Choo Choo. In such circumstances, the Board's precedent is "to assume that the entire property is needed for effective transportation services" because that is what the property was assembled for and dedicated to. Moreover, without that presumption, it would not be possible to meet regulatory deadlines. Id. slip at 10.

Based on the transfer from SAW to Choo Choo, Choo Choo has already purported to terminate -- for no rail reason whatsoever²⁵ -- rights that PYCO needs in order to continue to operate its rail dependent plant. As in the Rail Ventures case, PYCO as applicant to acquire the property must possess rights sufficient "to determine unimpeded who may enter the right of way at what times and under what circumstances, as well as whether any underground or additional overhead cables or similar structures would interfere with its own rail use of the right-of-way." Id. at 10.

Just as in Rail Ventures, SAW's "attempts to sell portions of the right-of-way to [Choo Choo], after [SAW] was placed on notice that [PYCO] would be submitting [a feeder line application], was a blatant effort to strip away as much of the property as possible to avoid including those portions of the property in the [forced] sale. ... allowing these transfers of property would undermine the ... sale by jeopardizing [PYCO's] ability to provide effective, uninterrupted rail service." Rail

²⁵ Choo gives none, and it is not a railroad so it has none. Moreover, see Exhibit A, ¶ 13.

Ventures, slip at 11-12. Again, to protect the integrity of the Board's processes, the transfers and sales to Choo Choo must be voided. Id. at 12.

This is all the more the case because the purported transfer and sale is part and parcel of an effort by SAW to circumvent this Board's effort to assist PYCO in securing adequate rail service in F.D. 34802. SAW's president from 1999-2006 (Larry Wisener) indicated to PYCO on November 18 he would debase PYCO's rail service and use SAW to endeavor to put rail-dependent PYCO in business misery. In order to avoid enforcement of this Board's orders against SAW in U.S. District Court to counter Wisener's efforts, SAW claims to have transferred property interests to Choo Choo (Larry Wisener) in June for the specific purpose of avoiding such enforcement, and so used the transfer in July to avoid enforcement. A clearer case for this Board to void the transfers for the purpose of protecting the integrity of the Board's processes, authority, and jurisdiction is hard to imagine.

IV. Relevance for Revocation Proceeding
[AB 33753 (Sub-no. 1)]

SAW's abusive transfer to Choo Choo and blatant effort to circumvent this Board's processes further illustrates that it did not intend to operate a common carrier railroad when it acquired the lines in question from BNSF. Instead, SAW intended to operate something tantamount to an extortion racket.

V. Conclusion

For the safety of PYCO employees and to allow PYCO to

accomplish its switching at Plant No. 1, the protocol hours must be enforced. To preserve the integrity of this Board's processes, to effectuate the Board's intent that PYCO receive adequate rail service, to preserve the status quo, and to prevent irreparable injury, all sales and transfers by SAW to Larry Wisener's Choo Choo must be voided. All lease and permit terminations by Choo Choo must be rescinded. Pending further order of this Board, this Board should bar SAW from any further sales or transfers of its rail properties to third parties, and also bar SAW from any further lease/permit terminations aimed against PYCO, or any other shipper that files a statement in support of the feeder line application.

Because PYCO has already sustained a quarter million dollars in damages due to SAW's machinations in respect to the seed stockpile,²⁶ and because further SAW/Choo Choo lease terminations will become effective commencing August 5, PYCO requests favorable action on the motions contained herein as soon as possible and certainly by August 4.

²⁶ Additional Dec. of Robert Lacy, Exhibit A, ¶6.

Respectfully submitted,



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

Of counsel:

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

Exhibits:

A -- Additional Declaration of Robert Lacy

B -- WTL log

C -- Declaration of Gary McLaren

Exhibit A

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	)	
PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34899
SOUTH PLAINS SWITCHING LTD.	)	
PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	(revision of F.D. 34844)
PYCO INDUSTRIES, INC. v.	)	F.D. 34838
SOUTH PLAINS SWITCHING, LTD.	)	
SOUTH PLAINS SWITCHING, LTD. --	)	
ACQUISITION EXEMPTION --	)	F.D. 33753 (Sub-no. 1)
BNSF RAILWAY COMPANY	)	

Additional Declaration of
Robert Lacy

I, Robert Lacy, make this declaration in support of PYCO Industries' motions to abate the various actions of South Plains Switching Ltd. (SAW) and its owners to circumvent the orders of the Surface Transportation Board and to retaliate against PYCO Industries for seeking relief from the Board.

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

2. I have repeatedly explained in my various statements to this Board that SAW's president, Larry Wisener, in anger over

PYCO's request for a due diligence clause in response to his demand that PYCO buy unspecified SAW assets for \$5.5 million, personally told me last November in effect he was going to make life miserable for PYCO, and that PYCO would have to figure out how to take care of itself. SAW has never denied this fact. I understood him to mean that he would cause SAW to retaliate against PYCO economically. SAW in fact did retaliate. SAW took a series of actions that dramatically curtailed service to PYCO. SAW terminated PYCO's track lease for 9298, which track traditionally was used to stage cars (mainly tankcars for cottonseed oil) for Plant No.2. SAW informed its crew to provide PYCO with only one switch per day at Plant No. 1, and then put a derail in to prevent PYCO from using its trackmobile to move cars around, effectively cutting service to Plant No. 1 in half. SAW imposed a discriminatory charge for "constructive placement" (i.e., storage) of PYCO cars as they became backed up by the reduction in service. SAW failed to supply service on some days to Plant No. 2 on grounds of equipment failure or lack of adequate staff. Because SAW's service was so inadequate, PYCO's product inventory began to grow to the point the plant faced shutdown. PYCO was forced to file a petition for alternative rail service in F.D. 34802. This Board granted the petition on January 26, 2006. Service essentially doubled under alternative service provider West Texas & Lubbock Railroad (WTL), notwithstanding lack of cooperation from SAW.

3.. (a) In response to this Board's authorization of alternative service, SAW claimed that it dismissed Larry Wisener from management of SAW and substituted his wife Delilah Wisener. However, Ms. Wisener proved as difficult to work with as Larry Wisener. A classic example occurred almost immediately when she refused to negotiate (by hanging up) during a telephone conference (in which Mr. Kring, myself, and our rail attorney were listening in) between WTL and SAW to negotiate a viable service protocol. This Board had to impose additional terms, in a decision served February 16.

(b) The agreed-upon portion of the protocol provided that WTL was assigned the hours of 7 AM to 10 AM, and 2 PM to 7 PM for use of the yard. The Board amended the protocol to authorize WTL also to operate during the evening and night from 7 PM to 7 AM. Moreover, the Board required SAW to keep tracks 9200 and 9298 clear so they could be used to serve PYCO. The Board also ordered SAW to make a contact person available 24/7 to address issues.

4. As I have explained in prior statements, SAW has operated outside protocol hours endangering PYCO and (we believe) WTL employees during switching activities at Plant No. 1. I attach (Attachment I) an example of SAW's operations contrary to the protocol in the form of a "incident report" dated April 12.

5. In April, SAW also began using railcars it was storing for persons who are not shippers on SAW's lines to block PYCO's access

over the industrial crossing located across the SAW "wye" just south of the rail yard. PYCO uses that industrial crossing to move seed to Plant No. 1 for processing and rail shipment. PYCO's seed stockpile is worth around \$11 million. It must be processed or it will rot. SAW's behavior risked loss of the stockpile. PYCO requested the Board to modify the protocol to require SAW to clear the "wye" of equipment so PYCO could access its seed stockpile. In this Board's June 21 decision in F.D. 34802, this Board modified the protocol to so provide.

6. Although SAW moved the cars it had used to block the crossing, SAW continued to block the crossing with signs and personnel. PYCO obtained a temporary restraining order from the U.S. District Court to require SAW to allow the crossing. Lubbock police were called out to enforce the opening over SAW objection. PYCO immediately repaired the crossing and began using it. By that time, PYCO had already expended an additional approximately \$250,000 to handle its seed stockpile, not counting legal bills, and some of the seed has already degraded.

7. Unfortunately, our ordeal with SAW was not and is not over. SAW, owned by the Wisener family, purported to sell the "wye" and evidently other rail property, to Larry Wisener doing business as "Choo Choo Properties." Choo Choo intervened in the U.S. District Court proceeding through SAW's attorney and successfully argued that it was not bound by this Board's orders.

The District Court dissolved the temporary restraining order. PYCO desperately offered SAW/Choo Choo/Wisener in compromise to use the wye for one month simply to move its seed without prejudice to legal positions, but SAW/Choo Choo/Wisener refused. SAW d/b/a Choo Choo then obtained a temporary restraining order in state court to prevent PYCO from entering the crossing. To make matters worse, SAW d/b/a Choo Choo then terminated other PYCO leases, permits, and rights to use pipe, electrical conduit, conveyors and other crossings of its property. See letter dated July 6, 2006, from SAW attorney Gorsuch on behalf of Choo Choo to Gary McLaren, PYCO's Lubbock counsel, Attachment II. SAW has refused so far to supply any documentary (or other) discovery to PYCO, and neither it nor Choo Choo has furnished a copy of the deed to Choo Choo. However, most of PYCO's leases and permits that Choo Choo has purported to terminate are on SAW properties well outside the "wye." Thus, unless this notice of termination by Choo Choo's lawyer is fraudulent, it would appear that SAW has deeded property, perhaps its entire yard, to Choo Choo.

8. PYCO's Plant No. 1 reflects PYCO's intimate dependency on rail service. Plant No. 1 facilities are constructed north and south of the yard, and east and west of the "wye" trackage coming off of the southern portion of the yard. Termination of all leases, licenses, and other rights essentially shuts down PYCO's ability to ship by rail or for that matter to operate our plant.

9. Under the terms of the various leases, licenses, and other permits, the lessor (now purportedly Choo Choo) must give PYCO in some cases as little as 30 days notice. Since notice was dated July 6, lease/permit terminations begin to occur on August 5. We expect Mr. Wisener or SAW personnel to be out with their equipment to begin destroying our conduits, pipelines, conveyors and other facilities on that date, unless this Board takes action to prevent it. In short, within as little as 30 days of July 6, PYCO faces shutdown of its rail dependent operations and its plant no. 1. The losses to PYCO (as great as \$100 million) far exceed the ability of Larry Wisener, Choo Choo, or SAW to compensate PYCO in damages. If shut down occurs, the losses will be irreparable injury to PYCO. Since PYCO is an agricultural cooperative serving the Texas cottonbelt, the losses will cause irreparable injury throughout the Texas cotton industry. These losses serve no rail purpose and are not in the public interest.

10. To summarize key facts, as of July 12, 2006, PYCO could find no recorded deed from SAW to Choo Choo. However, in the U.S. District Court proceeding, Mr. Wisener testified that he owned all of Choo Choo, and that he purchased the "we" property on June 12, 2006. Choo Choo and Wisener did not present any deed. The letter dated July 6 from the attorney for SAW/Choo Choo/Wisener terminates leases or permits well outside the "we" area. Either Choo Choo's purchase from SAW included trackage and land beyond the "we," or

Choo Choo is engaged in misleading terminations and other misrepresentations.

11. It is very apparent that the purported transfer of SAW's rail properties in the "wye" and elsewhere are a ruse to try to avoid this Board's jurisdiction over SAW's retaliatory actions. In all events, Mr. Wisener through Choo Choo is doing what Mr. Wisener through SAW all along has been doing: degrading rail service and PYCO's ability to operate, exactly as Wisener told me that he would do on November 18, 2005. This establishes that SAW's claim to this Board to have taken management responsibility from Larry Wisener is false: Mr. Wisener is representing in court that he is in control of the relevant SAW property, and he is obviously calling the shots.

12. BNSF informs PYCO that BNSF never approved or authorized any sale of SAW property to Choo Choo or some other alter ego of Larry Wisener under the BNSF/SAW contract. Neither SAW nor Choo Choo sought or obtained STB authorization for any sale of the property in question.

13. There is no railroad reason for the termination of any lease, permit or license for any PYCO facility that currently crosses SAW (or SAW/Choo Choo) property. No SAW employee has sustained any injury by reason of the leases, permits or licenses. Since Choo Choo has terminated the leases and permits, and Choo Choo has no authority to operate or own a railroad, Choo Choo cannot claim a railroad reason in any event.

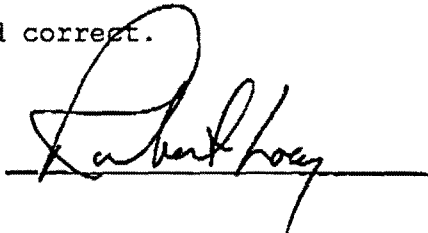
14. When PYCO requested this Board to amend the protocol to require SAW to keep the "wye" trackage clear of cars during the hours allocated to WTL (namely 7 AM to 10 AM, 2 PM to 7 PM, and 7 PM to 7 AM), PYCO gave two reasons: safety of its employees and WTL employees due to the closeness of the wye trackage to PYCO trackage and switching operations (indeed, the incident report in Attachment I illustrates this problem), and PYCO's critical need to use its industrial crossing so it can continue its rail dependent operations. In PYCO's feeder line application, PYCO wishes to acquire and to use for rail purposes the "wye" trackage purportedly sold to Choo Choo. Indeed, although we are uncertain what Choo Choo acquired (because Choo Choo and SAW will not reveal it), PYCO at this time wishes to acquire and to use for rail purposes all the property which SAW has sold to Choo Choo. If it is surplus to SAW, it is not to us. If it was sold to Choo Choo simply to allow Larry Wisener to punish PYCO, that is an anti-rail reason for the sale. The "sale" to Choo Choo is simply another effort by Mr. Wisener and SAW to subvert this Board's processes and PYCO's efforts to employ lawful remedies to secure adequate rail service in Lubbock for its rail dependent operations.

15. PYCO began keeping a log of SAW violations of the protocol hours assigned for switching at Plant No. 1 on June 21, 2006, the date of this Board's decision in F.D. 34802 extending alternative rail service until October 23, 2006 and requiring SAW

to clear the "we" so PYCO could use its crossing. SAW is repeatedly violating the protocol assigning use of the trackage in the rail yard adjacent to PYCO's Plant No. 1 to PYCO's alternative service provider, West Texas and Lubbock Railroad (WTL), between 7 A.M. and 10 A.M. (For the Board's convenience, I attach as Attachment III a copy of a fax transmission of the protocol by WTL to this Board in F.D. 34802. This attachment contains the agreed-upon protocol, prior to Board amendments adding additional conditions.) Our log of violations from June 21 forward is attached as Attachment IV. SAW's violation on July 11 was particularly severe. SAW spotted cars (see Attachment V) such that PYCO could not switch cars inside Plant No. 1 all morning. SAW refused to correct the condition until 2 PM.

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 July 14, 2006

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

Attachment I -- incident report

Attachment II -- letter from Choo Choo cancelling leases, etc.

Attachment III -- WTL filing in FD 34802 containing agreed upon protocol (STB ordered revisions to this in decisions served Feb. 15 and June 21)

Attachment IV -- log of protocol violations from June 21

Attachment V -- photograph of SAW obstruction of PYCO switching on July 11

Attachment I

INCIDENT REPORT

By Les Howell

Parties involved: SAW Railroad, WTLC Railroad & PYCO's Switch Crew

Date & Time: April 12, 2006 @ 9:45am.

Where: SAW's Yard tracks and PYCO's tracks.

Subjects: Disregard for STB protocol and unsafe working environment.

SAW almost caused what could have been a fatal collision between their switch engine and our switch crew. Our switch crew was trying to switch to our scale track from the shop track to allow WTLC to bring cars in by using the switch that goes off Y-track that connects to #6 track, when SAW's engine came down #6 track headed west. WTLC was pushing cars off of #1 track east coming down #6 track to our shop track. Both WTLC and PYCO's switch crews stopped and backed up to allow SAW's engine to pass. SAW did not give a warning to either crew that they were on the tracks and moving. SAW engine proceeded down #6 track headed west, switched on to the Y-track and coupled up to three flat cars. SAW then pulled the three flat cars off of the Y-track onto #6 track and proceeded down #6 track headed east. During all this time SAW never signaled once when they were switching nor yield to when approaching the other engines. SAW is not scheduled to be on the tracks from 7am to 10am.

This situation has become very dangerous for our employees and for WTLC. There is no form of communication between SAW and the WTLC. SAW is not obeying the STB set protocol on switching. SAW switches whenever they want, with total disregard to the safety of our employees and WTLC employees. I have instructed our switch crew, if they see SAW on the yard switching, they are to stop and get off the tracks. I will not take chance on someone getting hurt or possibly killed because of the irresponsible acts of SAW management. Something needs to be done before it comes to that!

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.

 4/17/06

Attachment II

JAMES L. GORSUCH, P.C.*Attorney at Law*

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

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

July 6, 2006

Via CM/RRR 7005 0390 0000 8941 3085

Mr. Gary R. McLaren

PHILLIPS & McLAREN, L.L.P.

3305 66th Street, Suite 1A
Lubbock, Texas 79413

Re: Cancellation of Leases, Permits and Contracts Held By Choo-Choo Properties, Inc.

Cancellation Notice

Dear Mr. McLaren:

As you know, this firm represents Choo-Choo Properties, Inc., in connection with various matters dealing with your client, Pyco Industries, Inc. Choo-Choo Properties, Inc., has bought and become a party of the various leases, permits and contracts as set out below.

Regarding each of the leases set out below:

1. Industrial Track Agreement No. FD 8771, dated May 16, 1973; Plains Cooperative Oil Mill, as original Lessee, Fort Worth & Denver Railway Company, as original Lessor; Six (6) month's notice of termination is given under Paragraph 15 of this agreement by Choo-Choo Properties, Inc. The lease will be considered terminated six (6) months from the date of this letter.
2. Private Track Agreement No. FD 7802 dated May 8, 1966, with Jerre T. Kirk and G. B. Lindsey, as original Lessees, and Fort Worth & Denver Railway Company, as original Lessor; Pursuant to Article 8, thirty (30) day's notice of cancellation or termination of the lease is hereby provided by Choo-Choo Properties, Inc., to Pyco.
3. Lease No. FD 4677 dated February 13, 1979, with Plains Coop Oil Mill, Inc., as original Lessee, and Fort Worth & Denver Railway Company, as original Lessor; Notice is given under Paragraph 6 of thirty (30) days' notice of termination from Choo-Choo Properties, Inc., to Pyco.
4. Contract for Pipe Line Across or Along Right of Way No. 8678 dated October 8, 1972, Plains Cooperative Oil Mill, as original Lessee, Fort Worth and Denver

July 6, 2006

Page 2

Railway Company, as original Lessor. Choo-Choo Properties, Inc., by this letter, is giving sixty (60) days' notice to Pyco of the termination of Pyco's status as Licensee under the contract.

5. Private Crossing Contract No. 6793 dated March 30, 1962; Plains Cooperative Oil Mill, Inc., as original Lessee, Fort Worth and Denver Railway Company, as original Lessor; Choo-Choo Properties, Inc., is exercising its option of giving ninety (90) days' notice of termination of the Private Crossing Contract with Pyco pursuant to Paragraph 4 of the contract.
6. Pipeline Permit No. PX91-12021 dated April 25, 1991, with Plains Cooperative Oil Mill, as original Permittee, and The Burlington Northern Railway Company, as original Permitter, regarding an underground electric line; Thirty (30) day's notice of cancellation of this permit is given by Choo-Choo Properties, Inc., under Paragraph 10 of the agreement.
7. Lease No. FD 4536 dated January 13, 1976, with Plains Cooperative Oil Mill, as original Lessee, and the Fort Worth and Denver Railway Company, as original Lessor; Notice is given under Paragraph 6 of the agreement that the lease will be terminated thirty (30) days' from the date of this notice by Choo-Choo Properties, Inc.
8. Pipeline Permit No. PX91-12025 dated April 25, 1991, with Plains Cooperative Oil Mill, as original Permittee, and Burlington Northern Railroad Company, as original Permitter, regarding an overhead conveyor structure; Choo-Choo Properties, Inc., gives notice of the cancellation of the Pipeline Permit under Paragraph 10. The permit will be cancelled thirty (30) days from the date of this notice.

On each of the leases, permits or contracts set forth above, Pyco is expected to have all of its improvements, pipelines, conveyors, equipment, buildings and all other property off of the subject premises within the notice periods in each lease, permit or contract.

We remain,

Very truly yours,

JAMES L. GORSUCH, P.C.



James L. Gorsuch

JLG/jeb

July 6, 2006

Page 3

cc: Mr. Larry Wisener
CHOO-CHOO PROPERTIES, INC.
15807 FM 1730
Lubbock, Texas 79424

Attachment III

215767



ENTERED
Office of Proceedings

FEB 8 2006

Part of
Public Record

JOHN D. HEFFNER, PLLC
1920 N ST., N.W., Suite 800
WASHINGTON, D.C.
20036

PHONE: (202) 263-4180
EMAIL: j.heffner@verizon.net

FAX: (202) 296-3939

FD 34802

DATE: 2/7/06

TO: *Indon Clewan 585-9011*
Office of Proceedings 185-9002
FROM: John D. Heffner
FAX Number: *Direct Line: (202) 263-4180*
Number of Pages: Cover + 5
Client/Matter: 9212

The information contained in this facsimile transmittal is information intended only for the use of the individual or entity named above, and may be subject to the attorney/client privilege and is confidential. If the reader of this message is not the intended recipient, you are hereby notified that any distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us by telephone and destroy the facsimile message received. Thank you.

MESSAGE:

cc: *Chas. Montange, Esq* 206-546-3739
Thomas McFarland, Esq 312-201-9695

If you have any problems with this fax, please call (202) 263-4180

JOHN D. HEFFNER, PLLC

1920 N STREET, N.W.

SUITE 800

WASHINGTON, D.C. 20036

(202) 263-4180

FAX (202) 296-3939

j.heffner@verizon.net

BY FAX AND MAIL

February 7, 2006

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

RE: STB Finance Docket No. 34802, Petition of Pyco
Industries, Inc., for Alternative Rail Service over the
tracks and facilities of South Plains Switching Ltd.

Dear Mr. Williams:

I am writing on behalf of West Texas & Lubbock Railway
Company, Inc. (WTLC) in connection with the above-captioned
alternative rail service proceeding.

On January 26, 2006, the Board served a decision
authorizing WTLC to provide alternative rail service over
the lines of South Plains Switching, Ltd. Co. (SAW) for an
initial 30 day period to serve the needs of Petitioner Pyco
Industries, Inc. (PYCO). At ordering paragraph 3 of that
decision, the Board directed PYCO (we believe it meant to
say WTLC) and SAW to promptly enter into protocols that
would allow for safe joint operations on this line and to
report to the Board that the required protocols are in
place.

By this letter, I am advising the Board that the
parties have met or talked on several occasions in an
attempt to negotiate a mutually satisfactory protocol.
Counsel for SAW has prepared the enclosed letter dated
February 1, 2006, purporting to represent such a protocol.
Initially, WTLC did not sign this document because it had
serious reservations about the ability of both WTLC and SAW
to serve their respective customers under this protocol.
At the urging of the Board's Melvin Clemens, WTLC has now

ENTERED
Office of Proceedings
FEB 8 2006
Part of
Public Record

signed and is now filing the enclosed protocol with the following addendum:

1. SAW presented WTLC with an ultimatum Thursday. WTLC proposed one change and that was not considered.

2. In order to provide service to all customers, WTLC believes the following need to be added:

a. Track 9200 will be used for storage of inbound empties for PYCO. This will maintain the capacity available for handling PYCO empties that was in effect before Feb. 1. WTLC will have the right to switch cars as necessary on both tracks 9200 and 9298 to facilitate handling of PYCO empties and access to PYCO Plant 2.

b. The protocol clearly authorizes WTLC to make use of the route (track numbers unknown) between tracks 9200/9298 and Plant 2, irrespective of any questions of ownership or control of tracks on this route.

c. WTLC will have the right to operate after 7pm or before 7am.

Please contact me if you have any questions

Sincerely yours,


John D. Heifner

Enclosure

cc: Mr. Melvin Clemens (by fax)
Charles Montange, Esq.
Thomas McFarland, Esq.
Mr. Steve Gregory
Mr. Edwin Ellis

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

February 6, 2006

By electronic mail

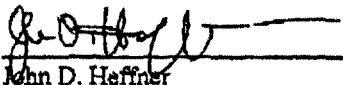
Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

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

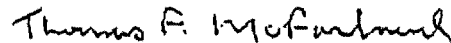
Dear Mr. Williams:

Pursuant to ordering paragraph 3 of the Board's decision in the above proceeding served January 26, 2006, South Plains Switching, Ltd. Co. (SAW) and West Texas & Lubbock Railway Company, Inc. (WTL) hereby jointly report to the Board that the operating protocols required in the decision are now in place. A copy of those protocols is attached to this joint report. SAW and WTL acknowledge and appreciate the efforts of Mr. Mel Clemens of the Board's staff in furthering negotiations for the operating protocol.

Very truly yours,



John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W., Suite 800
Washington, DC 20036
202-263-4180
Attorney for West Texas & Lubbock
Railway Company, Inc.



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

T:\McF.L\enc:\wp8.0\1144\w-fls\stb4

cc: Charles H. Montange, Esq., by fax to 206-546-3739
Gary McLaren, Esq., by fax to 806-785-2521
Mrs. Delilah Wisener, by fax to 806-828-4863
Mr. Dennis Olmstead, by fax to 970-249-4099

Feb 03 06 02:08p Delish Wisener
02-01-2006 10:12:16 From: T MCFARLAND

8086283345 p2
312 381 3833 T-661 P.002/003 P-003

LAW OFFICE
THOMAS E MCFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 291-9696
mcfarland@aol.com

THOMAS E MCFARLAND

February 1, 2006

By e-mail to j.hoffner@verticon.net

John D. Hoffner, Esq.
John D. Hoffner, PLLC
1920 N Street, N.W., Suite 800
Washington, DC 20036

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

Dear John:

This is intended to implement the agreement on operating protocols and other issues that were reached during conference telephone calls on January 30 and January 31.

During the period between January 27, 2006 and February 26, 2006, inclusive, control of dispatch over tracks used to provide rail service to PYCO Plant 1 and Plant 2, as identified below, shall be as follows, seven days per week:

- (1) 7 AM to 10 AM - WTL at PYCO Plant 1, SAW at Farmers' Plants 1 and 2, or Amertbury Grain
- (2) 10 AM to 2 PM - WTL at PYCO Plant 2, SAW in Yard
- (3) 2 PM to 7 PM - WTL at Yard, PYCO Plant 1 or PYCO Plant 2

Those times shall be flexible in the sense that neither party shall object to the other party holding over for short periods of time not to exceed 15 minutes in duration.

The control of dispatch shall apply to the following tracks:

- (1) Track No. 1, Track No. 5 and the main track in SAW's Lubbock yard;
- (2) The lead track used to provide service to PYCO Plant 1;
- (3) Track 9298 as the primary means to provide service to PYCO Plant 2, except that Track 318 can be used for that purpose if it is not blocked and if complete movement to Plant 2 would not delay operations of Farmers Compress Company.

WTL's locomotives shall be tied up off SAW's tracks.

FEB-03-2006(FRI) 15:11 PYCO Industries

(FRX)7443221

P.003/003

Feb 03 06 02:09p Dallas Wisener
02-01-2006 10:48am Fire-T McFarland

8068283345 p.3
212 201 8885 T-601 P.003/003 F-893

THOMAS R McFARLAND

John D. Haffner, Esq.
February 1, 2006
Page 2

On each inbound switch from the BNSF yard, WTL shall transport cars for PYCO and for SAW's customers to SAW's yard, where the cars for SAW's customers shall be set off onto Tracks 2 and 3.

SAW shall perform its outbound switch to the BNSF yard separately and independently of WTL's outbound switch. SAW shall be able to provide its outbound switch at any time during the day, provided that the switch does not unreasonably interfere with WTL's operations.

WTL shall move empty cars located on Track Nos. 2 and 3 in SAW's yard for loading by PYCO before bringing additional empty cars of the same type from the BNSF yard for loading by PYCO.

Please sign below if this implements the agreement accurately.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for SAW

TMF:M-p80114v-mcRDM/

AGREED: WEST TEXAS & LUBBOCK RAILWAY CO., INC.

By: *[Signature]*

Title: VICE PRESIDENT

Attachment IV

6/23/06

8:44am – SAW switching, had to stop moving seed and get out of the way.

6/29/06

8:06am – SAW moving in Yard

6/30/06

8:30am – SAW in yard and heading West across Avenue A with a lumber car.

2:41pm – SAW on the BNSF mainline

7/3/06

9:30am – SAW moving in yard

7/6/06

7:30am – SAW moving East to switch customers

7/7/06

7:30am – SAW switching in yard

7/11/06

8:00am – SAW on #2 track, blocking #6 track so that we cannot do our car movement inside our plant. Car needs to be moved 200 feet so that PYCO cars can go through the switch. Hans from WTL called and asked them to move the cars and were told they would be moved at 2:00pm. The cars were moved at 2:00pm to allow WTL to switch.

Attachment V



Exhibit B

SAW Event Log

Tuesday 1/31:

In general SAW personnel shadowed WTLC operations. WTLC crews feel unsafe and threatened because of intermittent "surprise appearances", considered harassment.

0715 2 SAW units switching west of Ave A with one tank car – no headlight or ditch lights

1400 – Olmstead left Gregory message with 3 complaints: WTLC dropping one car; switching in darkness with no lantern or flashlight; derail left open. Hans response: did drop car; WTLC crew equipped with lanterns, no switching before light this morning; derail on SAW track protecting the BNSF main has no lock, WTLC opened in advance and closed behind, derail on route to 9298 has lock, Hans locked behind move. I reported this in message to Olmstead, adding even though GCOR permits dropping, we would refrain from doing so if it was a violation of a specific SAW rule. There was no return call.

1400 - Shad on ground next to locomotive no earplugs

1400 – Shad and Rodney standing on a rail

1430 Rodney riding loco across Juniper on lower step, no earplugs or safety glasses

1445 SAW train to BNSF – no flag on rear, no air test performed

1445 Observed unknown SAW employee cross 30 ft in front of moving loco to line switch against movement on track 3

1515 SAW train from BNSF – trailing unit no headlight on dim

1830 Shad observing at Plant 2; Hans asked if we could do anything for him, Shad said he was a rail buff

1915 Shad vehicle headlights pointed towards WTLC crew requiring crew to stop; Hans asked him to turn off; after Shad complained about operation after 1900, he complied, complaining we were violating FRA Hours of Service (split rest OK). At 1830 Shad said he had been taking pictures since 0700; if worked in train service this would be an hours of service violation?

2015 Shad taking flash pictures of engineer, causing distraction and a safety hazard

2040 Shad driving length of train several times, causing delay to crew account required to insure no operating hazards resulting, at cemetery

Wednesday 2/1

0700 WTLC made up BNSF interchange and left SAW property at 0900

0930 Shad and 3 other SAW employees on BNSF main line property, east end lower yard, distraction (WTLC train stalled at this point); also Shad and one other SAW employee standing between rails on SAW track with no safety glasses

1703 Rodney between the rails of track 3 with foot on north rail

1710 Shad standing in grade crossing taking pictures of WTLC train

1730 Shad and Rodney in middle of track 3, no earplugs, safety glasses, safety shoes
1745 WTLC crew discovered angle cock open on east end of track 2 after we had closed it. WTLC crew discovered when brakes would not set, causing switching delay.
1820 WTLC crew asked Shad to turn off headlights pointed at the conductor on the ground, could not see movement shoving to him, Shad refused and rolled up the car window.
1835 Shad makes obscene gesture to WTLC engineer.

Thursday 2/2

1030 WTLC advises Dennis Olmstead BNSF can take outbound interchange and deliver hot cars for SAW customers, although outside protocol window. WTLC needs SAW authority to do so.
1110 No response from Olmstead, advised McFarland in an attempt to get SAW response.
1210 BNSF advises SAW is willing to pull hot cars from BNSF yard, asks for WTLC permission which is granted
1230 BNSF advised SAW decided not to pull hot cars
1320 Shad standing in front of WTLC engine on crossing taking pictures
1330 Switch left against WTLC train by SAW engine
1757 Shad walking in and around Track 5 (assigned to WTLC in protocol) with no safety glasses
1849 Shad shines hi-beam vehicle headlights at WTLC engine and takes picture of engine and crew while engine is being tied down.
1850 Shad confronts Hans, blocks road so we have no access to our engine.

Saturday 2/4

1010 SAW employee Davidson getting on and off moving equipment, SAW track 2.
1445 Permission from Compress to use track 310, Shad on Compress property taking pictures

Monday 2/6

0700-0750 SAW switching in SAW yard
1516 WTLC left cut of cars on the yard main with angle cock closed on the east end. WTLC engine ran around cut to couple on west end, determined brakes were not functioning properly, checked and found angle cock on the east end had been opened.
1520 SAW in yard switching
1530 Davidson sitting on rail on SAW lead, east end yard.

Tuesday 2/7

0730 SAW placed Master lock on switch west end of track 3; WTLC asked to have it opened, has never been unlocked. Creates delay in spotting SAW cars.
1200 SAW employees standing next to running engine without ear plugs or safety glasses. Juniper grade crossing partially blocked for 12 minutes with no protection.
1850 Shad taking pictures of WTLC crew tying down train. He then advised Superintendent that access to the road through the yard was not permitted. When the Superintendent questioned this he was insulted.

Wednesday 2/8

0900-1000 WTLC return to SAW yard from BNSF interchange was blocked by SAW switching in SAW yard outside the protocol window.
1000 - 1040 WTLC access to Plant 2 through Compress was delayed by SAW switching in the Compress outside the protocol window.

Wednesday 2/15

0945 SAW shoved cars to yard from BNSF main. No contact with WTL; movement was outside protocol window.

Thursday 2/16

0700 Several switch positions changed in west end of SAW yard, vs. the way WTL crew left them the night before. No known SAW operations would account for this.
0915 SAW train approaching WTL train enroute to BNSF yard. Operation outside protocol window, safety would be enhanced by movement coordination.

Monday 2/20

0615-0700 SAW switching west end of yard.
0700-0900 SAW switching east end of yard, including use of track assigned to WTL. Both actions outside of protocol with no coordination.

Thursday 2/23

1515 SAW train movement potentially conflicting with WTL train movement outside protocol window.

Friday 2/14

1530 Obscene gestures directed to WTL crew by SAW employees.
1615 SAW train movement to BNSF yard outside protocol window.

Monday 2/27

SAW switching throughout the day outside protocol window.

Tuesday 2/28

SAW switching throughout the day outside protocol window.

Wednesday 3/1

SAW switching throughout the day outside protocol window.

Thursday 3/2

1000 SAW blocked access to Plant 2 via Compress with cars.

Friday 3/3

SAW switching throughout the day outside protocol window.

Monday 3/6

0645 SAW switching outside protocol window.

0745 Shad Wisener advises WTL Superintendent Grosstueck that he was not allowed in a vehicle on access road adjacent to a PYCO track. Grosstueck responded that STB orders provided authorization. Shad replied that the SAW Owner disagreed.

0825 WTL route to BNSF blocked by SAW moving PYCO car from track 5 (assigned to WTL). WTL forced to move out of the way.

1050 Shad made a list of PYCO cars in WTL train.

Tuesday 3/7

0745 SAW switching east end of yard outside protocol window.

1350 WTL and SAW were in BNSF yard interchanging at same time. After SAW departed red flags on both ends of WTL train were removed. SAW was the only other crew in the BNSF yard at the time.

Wednesday 3/8

0815 SAW switching in east end of yard outside protocol window. SAW occupied same track as WTL, causing WTL to cease operations not knowing direction or intention of SAW movement.

Thursday 3/9

0900 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Monday 3/13

0820 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Tuesday 3/14

0845 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Wednesday 3/15

0815 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Thursday 3/16

0830 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Monday 3/20

0800 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Tuesday 3/21

0810 SAW switching in east end of yard outside protocol window while WTL switching on west end.

0915 WTL moving east on yard main when SAW pulled out on same track in front of WTL. Per GCOR rule WTL stopped and the SAW train backed out of this track.

Wednesday 3/22

0730 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Friday 3/24

0700 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Monday 3/17

0700 SAW switching in east end of yard outside protocol window while WTL switching on west end.

Tuesday 3/28

0700 SAW switching in east end of yard outside protocol window while WTL switching on west end.

0900 Shad driving at high rate of speed through yard, WTL crew must be on lookout for this when on the ground.

Wednesday 3/29

0700 SAW switching in east end of yard outside protocol window while WTL switching on west end. Shad driving at high rate of speed through yard, WTL crew must be on lookout for this when on the ground

Friday 3/31

0720 SAW switching in east end of yard while WTL switching on west end.

Monday 4/3

1500 SAW switching in east end of yard.

Tuesday 4/4

0810 SAW switching in east end of yard while WTL switching on west end.

Wednesday 4/5

1445 SAW moving from BNSF to SAW yard outside protocol window

Thursday 4/6

0730 SAW switching on west end of yard, preventing WTL from switching until 0815.

Saturday 4/8

0730 SAW switching on west end of yard, preventing WTL from switching until 0800. Potentially conflicting train movements as SAW was on same track as WTL.

Monday 4/10

0745 SAW switching at east end of yard.

Tuesday 4/11

0835 SAW switching at east end of yard.

Wednesday 4/12

0930 SAW switching on west end of yard track 6, conflicting with both WTL and PYCO car mover, creating a potentially dangerous situation to both WTL and PYCO personnel. All PYCO switching was stopped until SAW was clear of west end of the yard.

Friday April 21 – SAW interchange outside protocol delayed WTLC, causing backup move in BNSF yard.

Monday May 15 – WTLC changed operating plan to have crew on duty at 1400 daily. This was to conform with BNSF advice that early evening (1800 – 2000) provided best opportunity for minimized delays in accessing their yard for interchange. Also expected to reduce potential for operating conflicts with SAW.

Monday July 10 - SAW fouled west end switch with Track 6 with cars preventing switching with Pyco trackmobile. The area was clear by 1400.

Exhibit C

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	)	
 PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34899
SOUTH PLAINS SWITCHING LTD	)	
 PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD	)	(revisions of F.D. 34844)
 PYCO INDUSTRIES, INC. v.	)	F.D. 34838
SOUTH PLAINS SWITCHING, LTD.	)	
 SOUTH PLAINS SWITCHING, LTD. --	)	
ACQUISITION EXEMPTION --	)	F.D. 33753 (Sub-no. 1)
BNSF RAILWAY COMPANY	)	

**Declaration of
Gary R. McLaren**

I, Gary R. McLaren, make this Declaration in support of PYCO Industries, Inc.'s Motion For Enforcement Of Protocol In F.D. 34802; Motion For Order Staying Retaliatory Actions By Incumbent Railroad (SAW) In F.D. 34802 and 34899; Motion To Stay Any Purported Sale Of Property To Choo Choo Properties And Certain Retaliatory Actions By Choo Choo Properties (Or Any Other Nom De Guerre Of SAW Or Larry Wisener) in F.D. 34890, 34802, and 34899; Motion to Preserve Status Quo In Complaint Proceeding (F.D. 34838); and Motion To Submit New Evidence In Support Of Petition To Revoke In F.D. 33753 (Sub-No. 1).

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. I represented PYCO on July 3, 2006, in the United States District Court, Northern District Of Texas, Lubbock Division in a hearing on an application for Preliminary Injunction.

3. I have summarized herein below portions of the testimony at said hearing of Mr. Larry Wisener, the corporate representative of Choo-Choo Properties, Inc. ("Choo-Choo"), and that of Mrs. Larry Wisener as the corporate representative of South Plains Switching, Ltd., Co. ("SAW"), and I attach hereto the entire transcript of the sworn testimony of Mr. and Mrs. Wisener at the hearing.

4. At the hearing, Mr. Wisener testified that he incorporated Choo-Choo in February or March of 2006. p. 40, line 23.

5. Larry Wisener is the only shareholder of Choo-Choo and its only officer. p. 41, lines 2-7. Mr. Wisener also testified that he is the only employee of Choo-Choo. p. 51, lines 4-5.

6. Choo-Choo purchased real property, upon which trackage made the subject of this proceeding is located, from SAW on June 12, 2006. p. 41, line 24.

7. Mr. Wisener testified that Choo-Choo purchased all of the properties from SAW for less than \$2,000. p. 44, line 17. Mrs. Wisener later testified that the purchase price of the properties sold by SAW to Choo-Choo was only \$1,800.00. p. 74, line 20.

8. A portion of the properties purchased by Choo-Choo contained the "wye track crossing" made in part the subject of STB's order of June 21, 2006.

9. At the hearing, Wisener testified that Choo-Choo had no present plans for the wye track outside the STB's protocol; however, Choo-Choo had been "talking to SAW" about putting in a locomotive inspections pit for SAW's use. p. 49, lines 5-19.

10. Mrs. Wisener testified that Choo-Choo is not an affiliate of SAW, p. 71, line 22, and that SAW made no attempt to contact the BNSF concerning SAW's sale of trackage to Choo-Choo. p. 72, line 10.

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 July 13, 2006


Gary R. McLaren

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PYCO INDUSTRIES, INC.,) NO. 5:06-CV-131-C
PLAINTIFF,)

VS.)

SOUTH PLAINS SWITCHING, LTD., CO.,)
DEFENDANT.)

LUBBOCK, TEXAS

CHOO-CHOO PROPERTIES, INC.,)
INTERVENOR-PLAINTIFF,)

VS.)

PYCO INDUSTRIES, INC.,)
INTERVENOR-DEFENDANT.)

JULY 3, 2006

HEARING ON APPLICATIONS FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE SAM R. CUMMINGS,

UNITED STATES DISTRICT JUDGE

OFFICIAL COURT REPORTER: MECHELLE DANIEL, 1205 TEXAS AVENUE,
LUBBOCK, TEXAS 79401, (806) 744-7667.

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT
PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

A P P E A R A N C E S

FOR PYCO INDUSTRIES, INC.:

PHILLIPS & McLAREN
ATTORNEYS AT LAW
3305 66TH STREET, SUITE 1A
LUBBOCK, TEXAS 79413
BY: GARY R. McLAREN

FOR SOUTH PLAINS SWITCHING, LTD., CO., and
CHOO-CHOO PROPERTIES, INC.:

JAMES L. GORSUCH
ATTORNEY AT LAW
4412 74th STREET, SUITE B-102
LUBBOCK, TEXAS 79424

* * * * *

INDEX

WITNESSES FOR PYCO INDUSTRIES, INC.:

RODNEY GAIL KRING

DIRECT EXAMINATION BY MR. McLAREN	5
CROSS-EXAMINATION BY MR. GORSUCH	25
REDIRECT EXAMINATION BY MR. McLAREN	37

LARRY DALE WISENER

DIRECT EXAMINATION BY MR. McLAREN	40
CROSS-EXAMINATION BY MR. GORSUCH	51
REDIRECT EXAMINATION BY MR. McLAREN	66

DELILAH WISENER

DIRECT EXAMINATION BY MR. McLAREN	70
CROSS-EXAMINATION BY MR. GORSUCH	77

WITNESSES FOR SOUTH PLAINS SWITCHING, LTD., CO.

NONE

WITNESSES FOR CHOO-CHOO PROPERTIES, INC.

NONE

PLAINTIFF/INTERVENOR-DEFENDANT

EXHIBITS

OFFERED ADMITTED

NO. 1		9	9
-------	-----------	---	---

DEFENDANT EXHIBITS

NONE

INTERVENOR-PLAINTIFF EXHIBITS

NO. 1		52	52
NO. 4		61	61

ARGUMENT BY MR. McLAREN	78
ARGUMENT BY MR. GORSUCH	80
COURT'S FINDINGS	84

* * * * *

1 then we lose business. And if we process high free fatty acid
2 cottonseed meal, you add a lot of fat to it that won't
3 pelletize or make blocks out of, and then we lose protein
4 business also.

5 Q. Has PYCO had to make any of its buyers of cottonseed
6 products aware of the slowdown this year?

7 A. Yes, sir.

8 MR. McLAREN: Pass the witness.

9 THE COURT: All right. You may step down. Call your
10 next witness.

11 MR. McLAREN: PYCO Industries would call the
12 corporate representative of Choo-Choo Properties, Your Honor.

13 (THE OATH IS ADMINISTERED BY THE COURT)

14 LARRY DALE WISENER,
15 PLAINTIFF'S WITNESS, TESTIFIED ON HIS OATH AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MR. McLAREN:

18 Q. State your full name for the record, please, sir.

19 A. Larry Dale Wisener, W-i-s-e-n-e-r.

20 Q. Mr. Wisener, I'm going to be asking you questions today
21 specifically about Choo-Choo Properties. Could you tell me
22 when Choo-Choo Properties was incorporated?

23 A. It was the latter part of February, March 2006.

24 Q. Of this year. And who are the officers of Choo-Choo
25 Properties?

1 A. I am.

2 Q. Are there any other officers of Choo-Choo Properties?

3 A. No.

4 Q. How many shares of stock were issued in Choo-Choo?

5 A. 100 percent to me.

6 Q. You're the sole shareholder--

7 A. That's correct.

8 Q. --of Choo-Choo Properties?

9 And what business is Choo-Choo Properties, Inc., in?
10 What do you do?

11 A. Real estate investments.

12 Q. Okay. In terms of this particular wye track that we've
13 been discussing today and that you have heard testimony of,
14 when did Choo-Choo Properties purchase the wye track from SAW?

15 A. It was in negotiations to purchase with SAW's land manager
16 since March--latter part of February or March, were in
17 negotiations to buy several properties from South Plains
18 Switching. This particular sale was completed sometime early--
19 first part of June or something, along with some other
20 properties.

21 Q. If your records indicate or the pleadings indicate that it
22 was June the 12th of this year, you would have no reason to
23 argue with that?

24 A. I wouldn't dispute it, no, sir.

25 Q. Okay. And tell me or tell the Court, if you will, what--

1 how many-- Strike that.

2 You are an owner in SAW; is that correct?

3 A. No, sir.

4 Q. You don't own any shares in SAW?

5 A. No, sir.

6 Q. Who owns the shares of SAW?

7 A. Mrs. Wisener.

8 Q. And is that your wife here in the courtroom today?

9 A. Yes, it is.

10 Q. And the two of you are married?

11 A. Yes.

12 Q. Does she own those shares as her separate property, or do
13 you know?

14 A. I have no idea how they structured it, but--I really
15 don't.

16 Q. When you go to work in the morning, do you go to work for
17 SAW or do you go to work for Choo-Choo?

18 A. I don't go to work anymore, sir.

19 Q. Have you historically had an office at SAW, Mr. Wisener?

20 A. I still have an office in Slaton, Texas, with South Plains
21 Lamesa Railroad that I am president and general manager of.

22 Q. With regard to SAW in particular, Mr. Wisener, tell the
23 Court, if you will, any relationship that you have had with
24 that entity over the course of the last ten years, either as
25 owner, employee, or what.

1 A. I was president and general manager up until my
2 resignation that I tendered sometime, I believe, in January or
3 February. I resigned my position at SAW.

4 Q. Right. You were president of SAW until February of 2006;
5 isn't that correct?

6 A. I believe that's correct.

7 Q. About the same time that negotiations began between SAW
8 and Choo-Choo Properties; isn't that correct?

9 A. Thereabouts.

10 Q. And in terms of those negotiations, who was handling the
11 negotiations on behalf of Choo-Choo Properties for the purchase
12 of the wye track?

13 A. I was.

14 Q. And in terms of the sale of the properties, who were you
15 dealing with on the other side, if you will, on the wye track
16 purchase with SAW?

17 A. Mr. Ed Landreth and Mrs. Wisener.

18 Q. Mrs. Wisener, your wife?

19 A. And Ed Landreth.

20 Q. And Ed-- I'm sorry, I can't hear you.

21 A. Landreth.

22 Q. Ed Landreth. And is Ed Landreth an employee of SAW?

23 A. No, no.

24 Q. Is he a shareholder of SAW?

25 A. No.

1 Q. Is he a--either officer or director of SAW?

2 A. No.

3 Q. Is he an independent contractor for SAW?

4 A. Yes.

5 Q. How much money did Choo-Choo Properties pay SAW for the
6 wye track made the subject of this lawsuit?

7 A. It was included with several other properties. I don't--I
8 don't know exactly what portion to attribute to the west leg of
9 the wye. It was involved with some leases that we purchased
10 and some other lots and stuff that was nonoperating properties.

11 Q. Well, how much was paid for all the properties between SAW
12 and Choo-Choo?

13 A. Somewhere around \$1500 \$2,000, I think.

14 Q. \$2,000 for all the properties?

15 A. Well, I believe it was a little less, or somewhere around
16 there.

17 Q. Could be a little less than \$2,000?

18 A. Yes, sir. I don't recall the exact amount.

19 Q. But it's your testimony today that Choo-Choo Properties
20 can't distinguish as to the exact dollar amount paid for the
21 wye track?

22 A. We paid a lump sum for several small pieces of
23 nonoperating property, correct.

24 Q. Do you still have Plaintiff's Exhibit Number 1 in front of
25 you, Mr. Wisener?

1 A. Is this the photograph, sir?

2 Q. Yes, please.

3 A. Yes.

4 Q. If I could ask you to take a look at that. Mr. Kring's
5 testimony was much as I see the photograph. The wye track
6 running towards the south, towards the bottom of the exhibit,
7 the wye track continues southward across 34th Street; is that
8 correct?

9 A. Correct.

10 Q. And in terms of what Choo-Choo purchased from SAW, how
11 much further south down the wye track does Choo-Choo Properties
12 now own?

13 A. Where the wye comes together-- Of the property south of
14 that wye track?

15 Q. Yes.

16 A. Over 34th Street?

17 Q. Yes.

18 A. We bought two lots that's located back in there, one at
19 40th and Globe and one--then I bought a track--I can't identify
20 the track that comes off of this lead track that goes back
21 toward 84 Lumber. It's approximately a mile and a half long.
22 I don't want to try to call the track number. We own two
23 partials that is across this crossing.

24 Q. Do you--does Choo-Choo Properties own the real estate
25 underneath what is shown as the wye track in Plaintiff's

1 Exhibit Number 1?

2 A. No, sir, just the west leg. We own the real estate and
3 the track on the west leg of the wye.

4 Q. And what do you--what is the west leg? I must not be
5 following you.

6 A. We also own--start at the west leg of the wye, which is
7 the state clearance points, 8 1/2-feet clearance from the east
8 leg, 8 1/2-feet clearance from the west leg to where you come
9 to that clearance point. We own that portion from there, back
10 out to Avenue A, all the way back west, including back parallel
11 to 6 Track, over the lead track and out to Avenue A. We
12 purchased all of that property.

13 Q. And does Choo-Choo Properties own the real estate beneath
14 what we've been calling the wye track crossing?

15 A. Yes.

16 Q. From that point, from the wye track crossing, moving
17 southward on the wye track--

18 A. Yes, sir.

19 Q. --how far does Choo-Choo Properties own the property
20 underneath the trackage?

21 A. Just to that point of beginning right at the vertex of the
22 wye. We start there, and we own back west to Avenue A. Then
23 we go on over 34th Street, out to Globe Avenue and 40th, and we
24 own property there and another location.

25 Q. Is it fair to say that the wye track crossing then is the

1 southernmost point of the property bought by Choo-Choo from SAW
2 on the wye track?

3 A. Several feet south of the crossing in question here today.

4 Q. A few feet south of the wye track grade crossing?

5 A. Several feet. Almost to the vertex. We own 8 1/2 feet--
6 approximately 8 1/2 feet from the vertex. That's the state
7 clearance point.

8 Q. And as far as that trackage--or I beg your pardon--that
9 real estate purchased by Choo-Choo from SAW, the wye track, to
10 the best of your knowledge as Choo-Choo Properties' witness,
11 what railroad carriers can operate over that track?

12 A. None if I don't give them any permission. It services no
13 customers.

14 Q. Are there presently--is a--at least a portion of that wye
15 track presently under the STB's jurisdiction?

16 A. Yes. Incorrectly, we believe.

17 Q. And as far as the STB's order, what are the carriers that
18 can operate on that portion of the wye track that Choo-Choo
19 Properties owns?

20 A. If I read the STB order and understand it correctly, they
21 said the WTL could and the SAW could within the hours of the
22 operating windows, I think they're referred to, or the protocol
23 that was established. But there's no need for either railroad
24 to be up on the track, because it services no one.

25 Q. Is it fair to say, Mr. Wisener, that other than SAW and

1 WTL, no other railroad carriers can presently operate across
2 that wye track because of the STB protocol?

3 A. That's correct.

4 Q. And what complaints, if any, has Choo-Choo Properties
5 received from SAW since your purchase of the wye track on June
6 the 12th?

7 A. That we was going to have to move the cars. I also-- The
8 cars that were stored on that track were under the control of
9 South Plains Lamesa, that I'm president and general manager of,
10 with a storage contract. I was notified by SAW we was going to
11 have to move the cars according to the STB order and could no
12 longer be placed up on that track.

13 Q. Other than the movement of the South Plains Lamesa
14 railroad cars, has Choo-Choo Properties received any other
15 complaints from SAW with regard to their use of the wye track?

16 A. They don't have a use for the wye track. They haven't
17 requested use of it, nor do they need the use of the west leg
18 of the wye.

19 Q. Are you saying that SAW never uses the wye track?

20 A. Not now. We don't need it--or they don't need it.

21 Q. But certainly WTL may need to use the wye track?

22 A. I don't know why. It doesn't service their order. It's
23 not one of the tracks given to them under the protocol. As
24 Mr. Kring stated, it doesn't service them.

25 Q. Well, notwithstanding the fact it may not service them,

1 SAW and WTL are still authorized to operate over that track
2 during the protocol hours. Isn't that true, Mr. Wisener?

3 A. During the protocol hours only, is--like I said, according
4 to my understanding of the protocol.

5 Q: And other than the operation of those two--the possible
6 operation of those two carriers, what other use is Choo-Choo
7 Properties making of the wye track grade crossing?

8 A. We have several things in mind.

9 Q. You have several things in mind, but today, what use is
10 Choo-Choo Properties making of the wye track--

11 A. Well, after we get this resolved, none, but Choo-Choo is
12 talking to SAW about the possibility of putting in a locomotive
13 inspection pit that is required by the FRA and leasing it to
14 South Plains Switching. This is something they do not have and
15 they are in great need of, according to the FRA, which we could
16 construct and lease back to them. This is a good area to do
17 that in because it has no other value or no other use.

18 Q. No other value and no other use, other than what you're
19 talking with SAW about this potential project; is that correct?

20 A. Well, at this time. I'm looking at several different
21 applications to apply this.

22 Q. In terms of Choo-Choo's purchase of the wye track, did
23 Choo-Choo Properties ever make any contact with the Burlington
24 Northern Santa Fe Railway Company concerning the purchase of
25 that trackage--or that real estate under the trackage?

1 A. I don't know as I'm required to.

2 Q. Well, let me reask the question. Did Choo-Choo
3 Properties, Inc.--and you're testifying on behalf of that
4 corporation. Did Choo-Choo Properties make any contact with
5 the Burlington Northern Santa Fe Railway Company about the
6 purchase of the wye track?

7 A. I'm sorry, Mr. McLaren. I don't understand your question.
8 Why would I? They don't own it. Why would I contact them
9 about purchasing it?

10 Q. Okay. What other assets does Choo-Choo own, other than
11 the properties that you purchased from SAW that closed on June
12 the 12th?

13 A. Well, we're a relatively young company. We just got
14 started. But we're looking at several real estate ventures,
15 some downstate, some in Oklahoma, and possibly some up in
16 New Mexico.

17 Q. As you testify here today, Mr. Wisener, isn't it true that
18 the only properties that Choo-Choo Properties, Inc., owns are
19 the properties that you purchased from SAW and closed on June
20 the 12th of 2006?

21 A. Oh, there were some leases and stuff we bought back in
22 March.

23 Q. What's the value of those leases?

24 A. I don't have any idea. They were non-income. There
25 wasn't annual leases, but we may turn them into such, or we may

1 dispose of them or operate them. We don't have any idea yet.

2 Q. Who are the employees of Choo-Choo Properties, Inc.? How
3 many do you have?

4 A. Just myself. We're just a small real estate investment
5 firm.

6 MR. McLAREN: Pass the witness.

7 MR. GORSUCH: Your Honor, may I approach with an
8 exhibit?

9 And, Your Honor, may I approach the witness?

10 THE COURT: Yes.

11 CROSS-EXAMINATION

12 BY MR. GORSUCH:

13 Q. Mr. Wisener, I show you what's been marked as Exhibit 1
14 and ask, sir, if you recognize that.

15 A. Yes, I do.

16 Q. And what is that, sir?

17 A. It's an agreement of sale of certain assets, rights, and
18 obligations of the Burlington Northern Santa Fe to South Plains
19 Switching, Ltd., Company.

20 Q. And what year was that signed?

21 A. 1999.

22 Q. All right, sir. I'll ask you to turn-- Is this a true
23 and correct copy of that agreement?

24 A. It appears to be. I've seen this document several times,
25 and it appears to be.

1 MR. GORSUCH: Your Honor, we would offer Intervenor's
2 Exhibit Number 1, asset sale agreement.

3 MR. McLAREN: No objection.

4 THE COURT: Admitted.

5 Q. (BY MR. GORSUCH) I'll ask you to turn to page 17 of the
6 agreement.

7 A. Yes, sir.

8 Q. Actually page 18. And there is a last sentence there
9 where it says--it talks about first--the paragraph talks about
10 first right of refusal; is that correct? That--that--

11 A. Yes.

12 Q. --section?

13 A. Yes, sir. Top of page 18, yes, sir.

14 Q. If you want to sell the entire railroad, is it fair to say
15 you've got to give BNSF a right to buy it first?

16 A. Yes, sir, paragraphs--that's exactly what it says. If we
17 want to sell the whole railroad, we have to contact BNSF and
18 notify them, and then they have first right of refusal.

19 Q. Okay. The last sentence of that section there, could you
20 read that to the Court, on page 18?

21 A. Page 18. "The foregoing"--of the first paragraph? It
22 says, "The foregoing shall not apply where the buyer wishes to
23 sell small segments of track or property compromising the rail
24 line where such sale would not hinder overall operations of
25 buyer on rail line."

- 1 Q. Okay. Does the west end of the wye serve any customers?
- 2 A. No, sir, it does not.
- 3 Q. In your view, would there be any hinderance of serving any
- 4 of the customers if that track and property were, in fact, sold
- 5 from South Plains Switching to Choo-Choo Properties?
- 6 A. No, sir.
- 7 Q. All right, sir. Let me ask you a few background
- 8 questions. How old a man are you, sir?
- 9 A. I'm fifty-nine.
- 10 Q. Where were you born and raised?
- 11 A. In Oklahoma.
- 12 Q. And you're married to Delilah Wisener?
- 13 A. Yes.
- 14 Q. How long have y'all been married?
- 15 A. 41 years.
- 16 Q. How many children?
- 17 A. Three.
- 18 Q. What are their ages?
- 19 A. Lord. I have a daughter that's thirty-eight; a son,
- 20 thirty-seven; and another daughter, thirty-five.
- 21 Q. How many grandkids?
- 22 A. Nine.
- 23 Q. All right, sir. South Plains Lamesa Railroad, when was
- 24 that formed?
- 25 A. South Plains Lamesa was formed in 1993. It was the first

1 acquisition from the Atchison, Topeka, Santa Fe at Slaton to
2 Lamesa, Texas.

3 Q. It is a short-line railroad?

4 A. Yes, sir.

5 Q. Tell the Court briefly what a short-line railroad is.

6 A. The short-line is one where the Class 1's, which is your
7 larger rail lines, when they become unprofitable and can no
8 longer be operated as such, well, they spin them off to just
9 what it says, to a short-line operator that can perform the
10 services for less money and get around a lot of the union rules
11 and hopefully make a profit and stay viable.

12 Q. Generally when you formed and bought the property for
13 South Plains Lamesa, where did that line go to?

14 A. From Slaton to Lamesa, Texas.

15 Q. All right. Was a--later, a large part of that line
16 abandoned?

17 A. In 1997, we abandoned from 5 miles out, from Milepost 5 to
18 Milepost 54.7, which was the station number at Lamesa, and
19 abandoned that portion because there was no business left on
20 the line at all.

21 Q. Does South Plains Lamesa have storage contracts?

22 A. Yes, it does.

23 Q. Who do they have storage contracts with?

24 A. Well, we've got a very lucrative, large contract with TTX
25 Corporation, and then we store for GTA--GATX, Ashland Chemical,

1 Poole Chemical, and other customers various times of the year,
2 but year round for TTX Corporation.

3 Q. The cars that we're talking about on the west end of the
4 wye track--west leg of the wye track, were they storage cars?

5 A. They were storage cars for TTX. We had several cars
6 stored on SAW tracks in Lubbock because we had run out of room
7 at Slaton, Texas, and we had several cars stored of our own
8 tracks. And due to this STB order that they got against the
9 railroad, we were required to move. We had approximately
10 60 cars we had to shuffle around, find other space to put,
11 because they took two of our storage tracks in Lubbock to give
12 to PYCO for operation with the WTL.

13 Q. What were the number of those storage tracks?

14 A. That was 9200, 9298.

15 Q. All right. Under the STB order, could West Texas Lubbock
16 operate in your--or in the yard of South Plains Switching?

17 A. They can now, yes.

18 Q. How many tracks can they use?

19 A. They've got three tracks over there. They have 5 Track,
20 the main line, and 1 Track.

21 Q. Okay. Now, after the STB order came down in June, what
22 happened to those cars that were stored on the west end of the
23 wye?

24 A. Well, we had--we called TTX and we was able to ship some
25 of them out. The other cars that were on the west leg of the

1 wye, we moved out, and I have them on the end of another
2 customer's track, Hanson Aggregates, and they're stored right
3 there for now. And when Hanson gets a train in to unload, we
4 have to move those cars, put them on another track, and then
5 move them back so as not to block other customers.

6 Q. So that's extra switching required because those cars have
7 had to be moved?

8 A. That's correct.

9 Q. All right. Is there any cars blocking the crossing that
10 we're talking about right now?

11 A. No, sir. SAW removed them all, as per the order
12 instruction.

13 Q. Since, for several years, you were general manager of SAW,
14 was there any lease agreement between SAW and PYCO regarding
15 the crossing in question? A written lease agreement?

16 A. No, sir, there was not.

17 Q. Was there any type of written easement between PYCO and
18 South Plains Switching regarding the crossing in question?

19 A. No, there was not.

20 Q. Is there a lease covering the conveyor that goes across
21 that property?

22 A. There's two leases in that area in 1991 signed by Mr. Gail
23 Kring for an underground electrical easement and an overhead
24 conveyor. I don't know why, if they did have authority from
25 the railroad to build the crossings--which, looking at the

1 railroad records, it's very customary. They have another
2 crossing back west of there that is certainly covered by a
3 lease agreement, that there wasn't one--if they did, in fact,
4 have the authority for this crossing, wasn't covered by lease,
5 because that's just common--railroaders protect themselves
6 against liability--is to have it covered under a lease.

7 Q. But for some reason, there's not a written lease here; is
8 that correct?

9 A. No, sir, there's certainly not.

10 Q. All right. Now, are you--in your work--prior work for SAW
11 or your current work, for the past years, were you out on the
12 wye track a great deal?

13 A. Yes.

14 Q. All right. Would you say that the use of that track by
15 PYCO was continuous or would it be sporadic?

16 A. It would be sporadic, and illegal at times, because one of
17 the reasons that started this lawsuit--I'd like to get in--they
18 didn't truck that seed across. Mr. Lewis Harvill and them
19 devised a way that, at night, when SAW would tie up and go
20 home, they would load this directly into gondolas with loaders
21 at night when SAW personnel weren't present. Even had these
22 cones to mark the signals, that controlled the signals on
23 34th Street to prevent them from being activated.

24 Q. And how long did this go on?

25 A. Until I found it out and I contacted Mr. Harvill and had

1 an immediate stop put to it.

2 Q. All right, sir. Now, let's just talk about them crossing
3 the deal. When you say it's sporadic, how do you say it's
4 sporadic?

5 A. Well, they just used it when they needed to move the
6 cottonseed at times. And I heard Mr. Kring's testimony that
7 they use these piles all the time. We've owned that railroad
8 since 1999, and I take exception with that. They have not.

9 Q. Okay. Have there been periods of time when there has not
10 been seed stored over there?

11 A. There has been periods of time that there's very little
12 seed stored there. And I can't say that there was not any seed
13 to be exact, but there was low crop years, like you said at the
14 car count. There's been years we didn't do 1200 cars from
15 PYCO. He said 2500. There was very little seed to go anywhere
16 during those low crop years; much less, to use that, they've
17 got seed houses. Why would they handle it twice, moving it
18 back and forth when there's a low crop year, and they've got
19 seed houses on the west side that will store any average crop,
20 usually, without even going over there?

21 Q. During these bad crop years, would you see PYCO vehicles
22 continuously going across that crossing, either one way or the
23 other?

24 A. No, sir, sure didn't.

25 Q. Okay. And would that situation be as I described it for

1 some period of time?

2 A. That's correct.

3 Q. Now, you heard Mr. Kring testify about the shop track
4 extension; is that correct?

5 A. Yes, sir.

6 Q. Were there clearance problems with that extension?

7 A. Yes, sir. SAW sold PYCO, when it purchased the railroad
8 in '99, certain properties that is shown in this photograph
9 that were covered under lease. This was the agreement with
10 PYCO that SAW had when we purchased it. We had the full
11 support of PYCO to purchase this if we would sell them those
12 leases, and that's what we did. The shop track was one of
13 these leases that was held that was transferred to PYCO in
14 2000. It was owned by the SAW prior to the original purchase.

15 Q. All right, sir. Now, when they built it, were there
16 clearance problems?

17 A. Yes, sir, there is.

18 Q. What were the clearance problems?

19 A. Well, when this track comes on past where it used to stop
20 back there, going back over their property, they are within
21 8 1/2 feet of that west leg of the wye, and that is the state
22 statute. They are encroaching over on private property with
23 the overhang of the cars, which is a clearance violation of
24 state law. And I think we tried to notify them of that, but
25 they built it any-- You can't--in other words, you can't pass

1 a car on their shop track now, and the west leg of the wye,
2 safely, and a man certainly cannot be on the side of that car.
3 And there's no postage, no signage of close clearance in that
4 area there, which it's certainly a hazard what they have done,
5 and then with no signage of anything to dictate it.

6 Q. Let's go back a little bit to the crossing in question.
7 Has PYCO ever informed South Plains Switching or Choo-Choo
8 Properties that they claimed that they owned that crossing?
9 Did they ever notify you or Mrs. Wisener of that claim?

10 A. No, they did not, and nor did they notify-- I was in the
11 current position when they tore that crossing out. This
12 photograph here don't do it justice. When they sent their rail
13 contractor out there to do their track extension, they never
14 notified the railroad that there would be workmen in that area,
15 and they undermined that roadbed there at this exact crossing
16 and dug it out and all so they could start their tie-in work
17 and all, and they severely undermined that roadbed and
18 endangered the lives of the train crew and all on that leg of
19 the wye, with no notice at all to the railroad.

20 MR. GORSUCH: Your Honor, may I approach?

21 THE COURT: Yes.

22 Q. (BY MR. GORSUCH) Mr. Wisener, I'll show you what's been
23 marked as Intervenor's Exhibit Number 4 and ask if you can
24 identify that photograph and advise the Court what it shows.

25 A. Yes. This is a photograph taken from up overhead. I

1 would assume it was a photograph that was furnished to us by
2 PYCO, because it's up overhead. It shows the crossing, and it
3 also shows where they was out right next--and undermined and
4 dug out right at the end of the ties in that section of the wye
5 track--

6 Q. Mr. Wisener, hold on. Let me--before you start talking
7 about it, does that accurately depict what the situation was
8 out there, at least at one point in the last three months?

9 A. Well, at one point. It was worse before they built that
10 shop track. That whole area was undermined and was left open
11 out there, no signage, no posting that it was an open pit
12 before they built the track and filled it back in somewhat.

13 Q. Let me ask you--let me ask you, does this accurately
14 depict what the situation was out there, at least at one point
15 during the last three months?

16 A. That's correct.

17 MR. GORSUCH: Your Honor, we would offer Intervenor's
18 Number 4.

19 MR. McLAREN: No objection.

20 THE COURT: Admitted.

21 Q. (BY MR. GORSUCH) Now, Mr. Wisener, in connection with
22 Intervenor's Number 4, can you describe on that where the
23 part--the dirt was dug out on the track owned by--at that time,
24 by South Plains Switching?

25 A. It's right there west of this crossing. You can see the

1 concrete crossing coming from the east wye track over to the
2 west wye track to go back into PYCO's facility. And you can
3 still see the dirt and stuff excavated out right at the end of
4 the crossties in that area.

5 Q. What was the problem with that?

6 A. Well, it undermined the roadbed in that area. There's no
7 stabilization, no sideways shifting or lateral movement
8 stabilization for a train going over. There's nothing to
9 support the west side of the track in that area.

10 Q. Was this done when PYCO was building their own shop track?

11 A. That's correct.

12 Q. All right. In the picture there, the track nearest to the
13 picture, is that the shop track owned by PYCO?

14 A. Yes, sir. That's their new extension, yes, sir.

15 Q. All right. And the second track in there, is that the
16 west leg of the wye we've talking about?

17 A. Yes, it is.

18 Q. And the third track going out from the top, is that the
19 east leg of the wye?

20 A. Yes, sir.

21 Q. All right, sir. Any written demand from PYCO to either
22 Choo-Choo Properties or to South Plains that PYCO owned an
23 easement going across that property?

24 A. No, sir.

25 Q. To your knowledge, were any documents ever filed with any

1 clerk's office or any government official or government
2 official agency by PYCO claiming they had an easement over
3 there?

4 A. No, sir.

5 Q. Did PYCO ever fence that property, the fence going across
6 the tracks?

7 A. No, sir.

8 Q. Did they ever post that property for--and say there was no
9 trespassing so that no one, including the trains of South
10 Plains, could go across it?

11 A. No, sir.

12 Q. All right, sir. Is it fair to say that on--at least on
13 the east leg of the wye, that the trains of South Plains have
14 gone across that crossing on almost a daily basis?

15 A. Yes, sir. Daily basis would be exactly correct. There
16 is--I believe there's seven customers south of that crossing
17 that has to be served on a daily basis, six or seven.

18 Q. All right. After the STB order came down, I believe you
19 and Mr. Kring testified those railcars were moved; is that
20 correct?

21 A. Yes, sir.

22 Q. Then there was-- Was there a posting on the property of
23 "No trespassing"?

24 A. That's correct.

25 Q. Okay. Why was that done?

1 A. So I could protect that area in there. Didn't want them
2 going over it.

3 Q. Okay. Why did you not want PYCO going over that?

4 A. Well, because the property now belonged to Choo-Choo
5 Properties. There was no easement over it, and I have no
6 liability, and it was under my--with discussion with my wife,
7 that they allege that these vehicles that they're running in
8 plant bear no tags, no insurance or anything else. There's--I
9 have the same problem, as Choo-Choo Properties, the railroad
10 should. Liability is a big cause.

11 Q. Okay. Now, where did they--when they said this about
12 their trucks had no licenses or no tags, where did they make
13 this representation?

14 A. I believe Mrs. Wisener-- I read part of the STB stuff.
15 It was in one of their filings as to why they needed this
16 crossing, and they couldn't put the trucks out on city street
17 because they didn't tag or insure their plant vehicles.

18 Q. Okay. So--

19 A. And it's supposedly supposed to be some kind of a
20 specialized equipment, they allege, that wouldn't fit on the
21 highway or something.

22 Q. So you would have--either South Plains or Choo-Choo would
23 have unlicensed, untagged vehicles going across that crossing?

24 A. That's correct.

25 Q. Now, you heard Mr. Kring's testimony regarding the

1 34th Street. They were able to get the City to give them a
2 lane out there; is that correct?

3 A. Yes, sir.

4 Q. And you've seen trucks from PYCO going from the east to
5 the west on that lane?

6 A. Yes, sir.

7 Q. How long have you seen that, sir?

8 A. I'm not over there in that area much. I seen them on two
9 or three different occasions probably within the last two or
10 three weeks. Like I said, I'm not--I'm not over there hardly
11 any anymore.

12 Q. Okay. You heard Mr. Kring testify that PYCO had no
13 problems with South Plains Switching using the east leg of the
14 wye to serve the customers; is that correct?

15 A. Yes, sir.

16 Q. Would that be important, considering your knowledge of
17 South Plains Switching and its operations, for South Plains to
18 continue to use the east leg of the crossing?

19 A. Well, it's my understanding, reading the order, that they
20 have the South Plains Switching shut down to a 4-hour-a-day
21 operation. They were successful in getting it for 20 hours.
22 There's six customers that's dependent just as much on rail on
23 the south side of that crossing as PYCO Industries is, and it
24 would severely hinder their operation if they were stopped from
25 going over that crossing. I don't see how they could service

1 all their customers and be restricted from not using that east
2 leg of the wye.

3 Q. All right, sir. You have read the STB order in this case?

4 A. Yes, sir.

5 Q. All right. Do you feel that South Plains Switching has
6 complied with that order?

7 A. Yes, I do. They removed the railcars.

8 Q. Is there anything in the order that you read that gives
9 PYCO the right to use the railroad crossing we're talking about
10 here today?

11 A. No, sir, not in my--not--I don't.

12 MR. GORSUCH: Pass the witness.

13 REDIRECT EXAMINATION

14 BY MR. McLAREN:

15 Q. Mr. Wisener, I believe you testified a minute ago that
16 PYCO's use of the wye track crossing was sporadic and illegal.
17 Do you remember that testimony?

18 A. Sure do.

19 Q. Tell me every effort that SAW has made since 1994 or '95
20 to advise PYCO that it is not to use the wye track crossing.

21 A. Well, first, I'll correct your dates. SAW didn't purchase
22 the railroad until 1999, of May.

23 Q. I'll stand corrected. Since the time that SAW purchased
24 the railroad, tell the Court every effort made by SAW to advise
25 PYCO that they can no longer use what we're calling the wye

1 track crossing.

2 A. When SAW commenced operations, PYCO was, and still is, the
3 biggest shipper on the line, and we worked very closely with
4 them. They were supposed to furnish--when I--when SAW sold
5 them their leases in 2000, covering certain properties, to
6 Mr. Martin, PYCO was supposed to have furnished SAW--we allowed
7 them to put a track mobile in the yard to facilitate their
8 workload and make it a lot easier and continue to use other
9 crossings and stuff out there that they had been using; some,
10 they hadn't been using, because I know the BNSF wouldn't allow
11 them to do it. And they were to furnish us with some liability
12 insurance. It never was forthcoming.

13 The only time I stopped them from using the wye is,
14 like I said, was when they were loading, and we did allow them,
15 on a permission basis, to do it. We never had to take the
16 crossing out for repairs. We were able to get over the
17 crossing and back to service the other customers without any
18 problem until Mr. Harvill was caught, like I said, loading
19 gondola cars directly in that area to--so they wouldn't have to
20 facilitate crossing back over. They were loading directly, and
21 he was admonished to don't be loading cars on SAW property
22 again.

23 Q. It's fair to say, isn't it, Mr. Wisener, that SAW never
24 has advised PYCO not to use the wye track grade crossing?

25 A. Yes. We advised Mr. Lewis Harvill not to be loading on

1 it, not--maybe to drive across it in a motor vehicle, but not
2 to load off of it.

3 Q. And is it also fair to say that PYCO has never interfered
4 with the use of the wye track--well, the use of the wye track--
5 SAW's use of the wye track?

6 A. Yes, they have. When they--

7 Q. How have they interfered?

8 A. When they dug this out and made it unsafe to utilize
9 and--without anything and put workmen out there up on the track
10 and up on the property without proper notification, security,
11 or anything and undermined the west leg, they--they--they
12 stopped the railroad from using--going over that west leg. And
13 I don't believe the SAW, up until my purchase, had been on that
14 west leg. They used the--there at this wye track in this--it
15 shows in this photograph. They placed those cars from the
16 south--from the west end of that, and I don't think they've had
17 an engine over that track since it's been undermined, and I
18 don't know if they have inspected to see if it's been repaired
19 and put back to where it can be adequately or safely used
20 today.

21 Q. Well, Mr. Wisener, PYCO and SAW have been locked in
22 dispute at the STB since at least December of 2005; isn't that
23 true?

24 A. I--somewhere around there.

25 Q. An alternative service order was issued by STB displacing

1 SAW as the carrier in January of 2006; is that correct?

2 A. I believe--I believe that's right. PYCO alleged they
3 didn't get serviced one day and it made them upset.

4 Q. And during that period of time, it's also true that SAW
5 has never made any complaint to the STB about the testimony
6 that you've given at length today about the undermining of this
7 particular section of track at the wye track crossing; isn't
8 that true?

9 A. I do know that the SAW, on several attempts, through
10 counsel, has tried in attempt to talk to PYCO in resolution of
11 this matter and the wye track and was refused each time, either
12 by PYCO's counsel or Mr. Kring, that they had nothing to
13 discuss with her. That, I do know. I don't know whether or
14 not she has filed, or her counsel--I'm not privy to that or
15 what they may or may not have filed with the STB.

16 Q. And the clearance problems that you've made some ado
17 today, have--has SAW ever turned that in to the STB as a
18 problem?

19 A. It's not an STB jurisdiction. It would be the State, and
20 we have reported it to the State, and I expect they will be
21 out, and to OSHA. It is a violation.

22 Q. And no agency, either state or federal, has issued any
23 order in that respect, have they, Mr. Wisener?

24 A. Well, they'll have to come out and do an inspection of it
25 first, but if it's outside the state guidelines, for safety

1 clearances, I'm sure they'll take issue with it.

2 MR. McLAREN: No further questions, Your Honor.

3 THE COURT: All right. You may step down.

4 MR. McLAREN: Your Honor, at this time, PYCO
5 Industries would call the corporate representative of SAW,
6 South Plains Switching.

7 (THE OATH IS ADMINISTERED BY THE COURT)

8 DELILAH WISENER,
9 PLAINTIFF'S WITNESS, TESTIFIED ON HER OATH AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MR. McLAREN:

12 Q. Mrs. Wisener, if you will, give your full name for the
13 Court, please.

14 A. Delilah Narcissis (spelled phonetically) Wisener.

15 Q. And how are you employed?

16 A. I own South Plains Switching, South Plains Lamesa.

17 Q. And South Plains Switching, we're calling SAW today. Is
18 that okay if I--

19 A. That's fine with me.

20 Q. --use that acronym?

21 And how long have you owned SAW?

22 A. Since 1999.

23 Q. Okay. From whom did you purchase SAW?

24 A. Burlington Northern Santa Fe.

25 Q. And the agreement between the Burlington Northern Santa Fe

1 and SAW, is that agreement--that I think is still before you as
2 SAW'S Exhibit Number 1, is it not?

3 A. Yes.

4 Q. If you could, I'd like to ask you to take a look at that
5 agreement. I'll direct your attention to page 17 of the
6 agreement, paragraph 7B. I'll give you a minute to find it.

7 A. Yes.

8 Q. This is the paragraph that Mr. Gorsuch was asking
9 questions about a few minutes ago concerning the right of first
10 refusal of the BNSF, isn't it?

11 A. Yes.

12 Q. And the first sentence of that paragraph says, "Any
13 subsequent agreement by buyer"--and buyer would be SAW; is that
14 right?

15 A. Correct.

16 Q. "--to sell any portion of the rail line, except"--in
17 parenthesis, "(except to an affiliate of buyer) must contain
18 the effective right of seller to purchase the rail line."

19 I'm going to stop at that point of the sentence and
20 ask a question about what's between the parenthesis. Is
21 Choo-Choo Properties, Inc., an affiliate of SAW?

22 A. No.

23 Q. All right. Then if you would move with me to the last
24 part of that paragraph on page 18, the last sentence, "The
25 foregoing shall not apply where buyer wishes to sell small

1 segments of track or property comprising the rail line, which
2 such sale would not hinder the overall operations of buyer on
3 the rail line." Do you find that sentence?

4 A. Yes.

5 Q. Does this sentence accurately describe SAW's sale of the
6 wye track to Choo-Choo Properties?

7 A. I would think so.

8 Q. Did SAW make any effort to contact the BNSF prior to the
9 sale of the wye trackage to Choo-Choo Properties?

10 A. No.

11 Q. Why?

12 A. SAW has sold other pieces of nonoperating property and did
13 not contact the BNSF. I visited with my attorneys. They felt
14 that it fell within this guideline.

15 Q. So it's SAW's testimony today that at least the sale of
16 this wye track--that this track is not a--the sale of the
17 subject piece of track is not a piece of track that affects the
18 overall operations of SAW?

19 A. That's correct.

20 Q. And I believe it was Mr. Wisener's testimony a few minutes
21 ago that at least as to the west part of the wye track--he has
22 a term for it, the western portion of it--that no customers are
23 served by that particular part of the wye track. Is that true?

24 A. I hesitate to say what's true, because I get turned around
25 with north, south, east, and west, but I'm willing to concede

1 that that's probably what he said.

2 Q. Okay. How many shippers are located on the wye track
3 south of PYCO's property, that amount of track that was sold to
4 Choo-Choo Properties?

5 A. I don't believe there are any.

6 Q. It's true, isn't it, Mrs. Wisener, that PYCO has not
7 blocked SAW's usage of the wye track at the wye track grade
8 crossing?

9 A. I am not on the ground over there. I--I have not heard
10 anything.

11 Q. And you're testifying today as the corporate
12 representative, the person here on behalf of SAW; is that
13 correct?

14 A. I am, and I--but I am not on the ground and--

15 Q. Well, you're not on the ground, but--

16 A. --in the daily operations--

17 Q. I'm sorry. I didn't mean to interrupt. Go ahead. I
18 interrupted you.

19 A. I said in the daily operations, I sit in an office. I am
20 not on the ground.

21 Q. Do you go to work each day for SAW?

22 A. Almost every day.

23 Q. Do people report to you?

24 A. Yes.

25 Q. And tell me again what title you occupy at SAW.

1 A. Owner.

2 Q. Okay. Any other--do you call yourself president or--

3 A. I am now serving as the operating manager.

4 Q. All right. And as operating manager, is it not your
5 responsibilities to know what's going on, as you say, out there
6 on the ground, at the various segments of track?

7 A. It could be, yes.

8 Q. Has anyone reported to you that PYCO has attempted to
9 block SAW's usage of the wye track during the protocol hours
10 that SAW has been afforded by the STB?

11 A. No one has reported that to me.

12 Q. Mr. Wisener testified earlier, on behalf of Choo-Choo
13 Properties, that he thought the sale of the wye track
14 properties was somewhere in the neighborhood of \$2500. Let me
15 ask you, do you know how much SAW was paid by Choo-Choo
16 Properties for the sale of the wye track?

17 A. I believe he said it was a little under \$2,000.

18 Q. I stand corrected, but I'll ask you the direct question,
19 how much was the purchase price?

20 A. I believe it was about 1800.

21 Q. Very good.

22 Each day that the WTL and SAW operate over the track
23 under the STB protocol, each morning, there is a telephone
24 call--

25 A. To my understanding, yes.

1 Q. --an operating telephone call.

2 You understand what I'm talking about?

3 A. (Witness nods head up and down.)

4 Q. And that has been in place since the STB issued its
5 protocol in January, has it not?

6 A. I don't know.

7 Q. Has SAW ever participated in those morning telephone calls
8 with the WTL?

9 MR. GORSUCH: Your Honor, we would object. We're
10 getting in now to STB matters that were presented up there,
11 decided up there, that deal with the operation of the railroad
12 and actually have nothing to do with the enforcement--supposed
13 enforcement of the STB order. It's totally irrelevant, doesn't
14 have anything to do with what we're here for on the enforcement
15 of this order and has nothing to do with the crossing in
16 question.

17 THE COURT: All right. Mr. McLaren?

18 MR. McLAREN: Judge, they have had testimony,
19 elicited by Mr. Gorsuch, about a number of things that don't
20 have to do with this order, one of which is a claim that there
21 is some type of safety concern.

22 THE COURT: All right, sir. I understand that, and
23 quite frankly, I don't believe that that issue is before the
24 Court. I agree with Mr. Gorsuch. I mean, here, we're talking
25 about a lawsuit to enforce an order of STB, and any ancillary

1 issues at this point I don't believe will be helpful to the
2 Court in resolving, first of all, whether or not a preliminary
3 injunction should be entered, and, second of all, whether those
4 issues would be addressed at any later point in time in this
5 court.

6 MR. McLAREN: I'll move along, Judge.

7 THE COURT: All right, sir.

8 Q. (BY MR. McLAREN) Who is the registered agent of SAW?

9 A. It would have to be me.

10 Q. You are the registered agent?

11 A. Yes.

12 Q. If the Secretary of State's website indicates that
13 Mr. Wisener is still the registered agent, why has that not
14 been changed?

15 A. We'll have to talk to Mr. Gorsuch about that. I don't
16 know.

17 Q. Are you aware of the fact that Mr. Wisener refused the
18 service of the temporary restraining order complaint just a few
19 days ago?

20 MR. GORSUCH: Again, Your Honor, object as being
21 irrelevant.

22 THE COURT: All right. I'll sustain. Let's move on.

23 Q. (BY MR. McLAREN) Let me make sure I understand,
24 Mrs. Wisener. Has SAW been able to use the wye track pursuant
25 to the protocol since June the 12th?

1 A. I cannot answer that.

2 Q. Okay. Has SAW given any or made any complaints to
3 Choo-Choo Properties about not being able to use the wye track
4 in question?

5 A. No.

6 MR. McLAREN: Pass the witness.

7 CROSS-EXAMINATION

8 BY MR. GORSUCH:

9 Q. Mrs. Wisener, very briefly. Mr. McLaren asked you about
10 customers that were at the south end of the wye and you said
11 none. Are there customers on the other side of 34th Street?

12 A. Yes.

13 Q. And they are south of 34th Street? And I'm looking south
14 to help you. They are this way from 34th Street?

15 A. Okay. I believe I explained earlier that north, south,
16 east, and west are not my long suits.

17 Q. All right. But the west--the east end of the wye is
18 needed by South Plains to serve those customers that are south
19 of--

20 A. We have customers that we have to service over that wye.

21 Q. All right. And you heard Mr. Kring testify that he has no
22 objection to South Plains using the east leg of the wye to
23 serve those customers; is that correct?

24 A. Yes.

25 Q. After you received the STB order, did you move the cars in

1 question?

2 A. I did.

3 Q. Has there been any cars blocking that crossing since that
4 time?

5 A. None.

6 Q. I asked Mr. Wisener a number of questions about any claims
7 made by PYCO as to the ownership of that crossing, whether they
8 had used it continuously and whether they had used it
9 exclusively. If I ask you those same questions, would your
10 answers be the same as your husband, Mr. Wisener?

11 A. They would be the same.

12 MR. GORSUCH: Pass the witness.

13 MR. McLAREN: No further questions, Your Honor.

14 THE COURT: All right. You may step down.

15 MR. McLAREN: Your Honor, that concludes the
16 witnesses that PYCO wishes to call.

17 THE COURT: All right, sir. Mr. Gorsuch?

18 MR. GORSUCH: Your Honor, we have no witnesses other
19 than those that have been called.

20 THE COURT: All right, sir.

21 All right. Let's take about a ten-minute recess;
22 then I'll entertain brief argument.

23 (RECESS TAKEN)

24 THE COURT: All right, Mr. McLaren.

25 MR. McLAREN: Judge, as the Court is aware, PYCO is