

ENTERED  
Office of Proceedings

JUL 31 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

28 July 2006  
by Express

217166  
217 169  
217165  
217168  
217169



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

Re: PYCO Industries, Inc. -- Feeder Line Application  
-- South Plains Switching, F.D. 34890; also  
tendered for Finance Dockets 34802, 34889, 34870,  
and 33753 (Sub-no. 1)

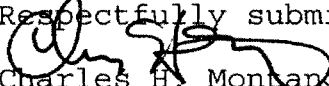
Update on Motion and Opposition to a Reply to a  
Reply

Dear Secretary Williams:

On behalf of PYCO Industries, I enclose for filing the  
original and ten copies of a statement updating the Board  
concerning certain facts pertaining to a crossing, but  
reiterating the urgent need for relief from purported lease  
terminations by Larry Wisener d/b/a Choo Choo Properties  
pursuant to an unlawful sale of property to Mr. Wisener by  
incumbent rail provider South Plains Switching, Ltd.

The pleading also opposes a reply to a reply filed by  
Keokuk Junction Railway (KJRY).

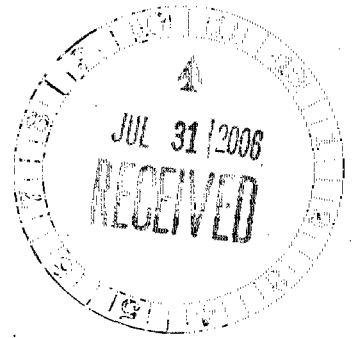
The pleading is supported by a Declaration by PYCO's  
Lubbock counsel.

Respectfully submitted,  
  
Charles H. Montange  
for PYCO Industries, INC.

Encls.

cc. Counsel (per certificate of service) (w/encl.)  
Mr. McLaren (w/encl.)

BEFORE THE  
SURFACE TRANSPORTATION BOARD



|                                     |       |                          |
|-------------------------------------|-------|--------------------------|
| PYCO INDUSTRIES, INC. --            | )     |                          |
| ALTERNATIVE RAIL SERVICE --         | )     | F.D. 34802               |
| SOUTH PLAINS SWITCHING LTD.         | )     | 217166                   |
| <br>PYCO INDUSTRIES, INC. --        | <br>) |                          |
| ALTERNATIVE RAIL SERVICE --         | )     | F.D. 34889               |
| SOUTH PLAINS SWITCHING LTD.         | )     | 217167                   |
| <br>PYCO INDUSTRIES, INC. --        | <br>) |                          |
| FEEDER LINE DEVELOPMENT --          | )     | F.D. 34890 217165        |
| SOUTH PLAINS SWITCHING LTD.         | )     | (revision of F.D. 34844) |
| <br>PYCO INDUSTRIES, INC. v.        | <br>) |                          |
| SOUTH PLAINS SWITCHING, LTD.        | )     | F.D. 34870 217168        |
| <br>SOUTH PLAINS SWITCHING, LTD. -- | <br>) |                          |
| ACQUISITION EXEMPTION --            | )     | F.D. 33753 (Sub-no. 1)   |
| BNSF RAILWAY COMPANY                | )     | 217169                   |

STATEMENT BY PYCO INDUSTRIES CONCERNING CROSSING  
and  
OPPOSITION BY PYCO TO KJRY REPLY TO REPLY

I. Statement Concerning Crossing

PYCO Industries, Inc. (PYCO) filed a "Motion for Enforcement of Protocol..." and for other relief in the above dockets on July 15, 2006, requesting relief by August 4, 2006. The motion was precipitated by a purported sale by incumbent rail provider South Plains Switching, Ltd. (SAW) of certain railroad property to Larry Wisener d/b/a/ Choo Choo Properties, Inc. ("Choo Choo"). Neither SAW nor Choo Choo obtained an STB authorization for the purported sale, and thus the sale is in violation of 49 U.S.C. § 10901. In all events, it is a ruse to allow Mr. Wisener and SAW to retaliate against PYCO for invoking this Board's jurisdiction, as well as a ruse to evade this

Board's jurisdiction, in the above-captioned proceedings. In addition to the broad assault on PYCO's crossing installations, PYCO also observed that SAW (via its Choo Choo incarnation) had obtained a temporary restraining order in Texas state court barring PYCO from use of PYCO's long-established industrial crossing over what formerly was SAW's "wye" track. Choo Choo claimed it now owned the track and that PYCO was trespassing. This jeopardized PYCO's outdoor cottonseed stockpile.

In a letter e-mailed on July 21, counsel for SAW and Choo Choo claim that SAW and PYCO reached a settlement concerning PYCO's use of a crossing over the "wye" track. PYCO confirms that a partial settlement was reached between Choo Choo and PYCO affording PYCO 30 days to move its remaining seed on the industrial crossing. The settlement was without admission of any liability on the part of PYCO. See Gary R. McLaren Declaration, attached hereto, ¶6. By the time of the partial settlement, PYCO had already lost over \$250,000 due to Mr. Wisener's obstruction of the crossing. In order to avoid loss of the remainder of its stockpile to rot, PYCO was compelled to enter into the settlement. PYCO expects to be able to move all the seed over the 30 day period. However, this does not resolve PYCO's claim of access, nor does it in any way mean that SAW's unlawful sale of property to Choo Choo is now somehow lawful. McLaren Dec. ¶6. Indeed, PYCO reserves the right to seek damages from SAW, Choo Choo, and Mr. Wisener for the blocked crossing.

Moreover, the partial settlement does not affect Choo Choo's purported termination of the numerous other critical crossing rights as set forth in Choo Choo's July 6 letter to PYCO (Attachment II to Exhibit A to the Motion for Enforcement). These terminations begin to become effective on August 5. If Larry Wisener in fact blockades or cuts off these crossing rights, as he did with the industrial crossing on the "wye," this "will result in hamstringing PYCO's operations." McLaren Dec. ¶7. Since the initial terminations become effective August 5, Mr. McLaren indicates that PYCO needs relief from the unlawful sale by SAW and the retaliatory actions taken by Mr. Wisener through SAW, Choo Choo, or whatever facade under which he chooses to operate by August 4. McLaren Dec. ¶ 7.

Finally, SAW continues to fail to maintain its trackage. PYCO learned during the course of PYCO's entry and inspection on July 24 that SAW operates its entire system as "excepted" track. FRA inspection of such track will not protect PYCO or WTL from track failures and derailments. SAW's failure to maintain its track continues "to interfere[] with PYCO's alternative service provider, and unreasonably burdens PYCO's alternative service." McLaren Dec. ¶ 8.

## II. Impermissible KJRY Reply to Reply

The original due date for competing feeder line applications was July 18, 2006. On that date, Keokuk Junction Railway Company (KJRY) filed a request for an extension of time to file a competing feeder line application for all the SAW

lines. SAW quickly (July 19) e-filed a letter supporting KJRY's request. PYCO opposed in a pleading filed July 20.

If a party seeks an extension of a deadline, it is supposed to file a request ten days in advance of the deadline. 49 C.F.R. § 1104.7(a). KJRY did not comply with this requirement, or even make a stab at compliance. Nonetheless, STB on July 21 authorized an extension until August 4 for KJRY to file a competing feeder line application. This in turn has resulted in SAW's requesting a delay until August 18 to file a response.

On July 21, KJRY e-filed a reply to PYCO's July 20 Reply. Replies to replies are impermissible, so the KJRY to the extent not moot (due to the Board's July 21 decision) must be disregarded. 49 C.F.R. § 1104.13(c). In KJRY's impermissible July 21 reply to a reply, KJRY stated that it now also proposes to file a feeder line application as to Alternative Two lines, and not just all SAW lines. This is an out of time extension of the extension it already requested out of time, and is yet another violation of 49 C.F.R. § 1104.7(a). In any event, no shipper which would be served under PYCO's Alternative Two (i.e., Attebury, Compress or PYCO) supports a KJRY filing on Alternative Two. In candor, Pioneer's actions appear to PYCO to have cavalierly disregarded PYCO's interests and to have misrepresented the actions and statements of Pioneer's counsel (Mr. LaKemper) to PYCO's Lubbock counsel,<sup>1</sup> with the result that

---

<sup>1</sup> Mr. LaKemper, the general counsel of KJRY's parent, Pioneer Railcorp, called PYCO's Lubbock counsel (Gary McLaren) on July 18, 2006. In the attached Declaration, Mr. McLaren

Pioneer has managed already to alienate the largest customer it would purport to serve, whether Pioneer is interested in all of SAW, or in only Alternative Two, or in whatever else Mr. Wisener and SAW contrive to involve KJRY.<sup>2</sup> This is hardly surprising. One would expect SAW to invite into a feeder line proceeding only companies interested in serving SAW's interests in obfuscation, retaliation, and delay much more than in meeting the needs and serving the interests of SAW's shippers.

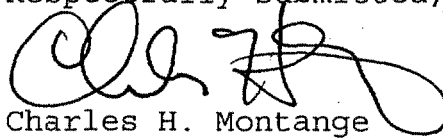
PYCO again emphasizes that SAW invited Pioneer into this proceeding for purposes of delay and for purposes of exposing PYCO to further opportunities for SAW retaliation. PYCO's alternative service order expires on October 23. PYCO fears degraded rail service by SAW on that date, which will be at the inception of the yearly cotton rush. The rolling delays sought by SAW and its allies at Pioneer are part and parcel of SAW's strategy to implement Larry Wisener's threat and apparent promise last November to make life miserable for PYCO Industries. Unfortunately, the costs continue to mount.

---

confirms that he understood LaKemper to tell him that Pioneer was interested in SAW's lines at the instigation of SAW. Mr. LaKemper indicated to Mr. McLaren that SAW's dealings with US Rail Partners had fallen through. McLaren Dec. ¶ 4. Mr. LaKemper in fact never mentioned KJRY. After at first indicating he wished to send PYCO information, he subsequently called back to say that Pioneer was filing "papers" in the proceeding. Id.

<sup>2</sup> McLaren Declaration ¶ 5.

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

Attachment (McLaren Declaration)

Certificate of Service

By my signature below, I certify service upon the following by express (next business day) delivery by placing same with an appropriate service on July 28, 2006:

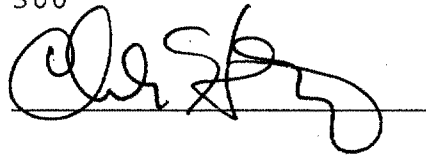
Thomas McFarland, Esq. (for SAW)  
208 South LaSalle Street -- Suite 1890  
Chicago, IL 60604-1112

William Sippel, Esq. (for USRP)  
Fletcher & Sippel  
29 North Wacker Drive, Suite 920  
Chicago, IL 60606-2875

Adrian Steel, Esq. (for BNSF)  
Mayer Brown Rowe & Maw  
1909 K Street, N.W.  
Washington, D.C. 20006-1101

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

William A. Mullins, Esq. (for KJRY)  
Baker & Miller  
2401 Pennsylvania Ave. NW, Suite 300  
Washington, D.C. 20037

A handwritten signature in black ink, appearing to read 'W. Mullins', is written over a horizontal line.

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. 34889             |
| SOUTH PLAINS SWITCHING LTD.     | ) |                        |
|                                 |   |                        |
| PYCO INDUSTRIES, INC. --        | ) |                        |
| FEEDER LINE DEVELOPMENT --      | ) | F.D. 34890             |
| SOUTH PLAINS SWITCHING LTD.     | ) |                        |
|                                 |   |                        |
| PYCO INDUSTRIES, INC. v.        | ) | F.D. 34870             |
| 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 response to (a) the Verified Statement of Daniel A. LaKemper filed in F.D. 34890 on or about July 21, 2006, and (b) in response to statements filed in the same docket by attorneys for Choo Choo Properties (Messrs. Gorsuch and McFarland) concerning a temporary agreement allowing PYCO 30 days continued use of its industrial crossing over the "we" track south of SAW's yard.

1. I am an attorney licensed to practice law in the State of Texas and have long served as legal counsel for PYCO Industries, Inc. (PYCO). I also serve as legal counsel for Farmers Cooperative Compress, another large agricultural cooperative owned by the same

farmers who own PYCO.

2. The purpose of this Declaration is two-fold. First, I wish to make clear for the record that Mr. LaKemper, general counsel of Pioneer Railcorp, gave me to understand that Pioneer was interested in the lines of South Plains Switching, Ltd. (SAW) at the instigation of SAW. Second, I wish to update the Board concerning a partial settlement reached between PYCO, SAW, and Larry Wisener's Choo Choo Properties to permit PYCO to move the remainder of its seed stockpile across alleged Choo Choo property for processing. In doing so, I wish to emphasize the continued need for prompt relief against SAW's sale of portions of its rail properties to Choo Choo, because Choo Choo (Mr. Wisener) has used that purported sale as a basis to terminate, beginning August 5, a whole series of leases and licenses critical to continued PYCO operations.

I. KJRY Interest only Due to SAW

3. I have reviewed the July 21, 2006 letter filing by Keokuk Junction Railway (KJRY), an affiliate of Pioneer, and Mr. LaKemper. That letter and filing purport to take umbrage with PYCO's earlier filing objecting to KJRY's request for an extension of time. I wish to verify for the record that all PYCO's characterizations relating to KJRY are correct.

4. Mr. LaKemper called me twice on July 18, 2006, always identifying himself as General Counsel for Pioneer, never

mentioning KJRY. He told me very clearly he was calling me at SAW's behest. I told him I thought SAW was dealing with US Rail Partners which claimed to have an exclusive. He said that he believed that deal had fallen through. He asked what we knew of Pioneer and I said nothing. He then gave me a brief overview, and asked if he could send information. He did not indicate that Pioneer intended to file anything, let alone a request for any delay or a feeder line application. Consistent with PYCO's open door policy, I said he could share with PYCO what he wished. In his second call later in the day, Mr. LaKemper told me that Pioneer had hired a lawyer and would be filing some "papers." LaKemper provided no detail but said the "papers" should not be construed as adversarial. LaKemper did not mention KJRY, nor discuss a feeder line application.

5. Upon review of the papers filed by Pioneer/KJRY, PYCO was stunned not so much at their blatantly adversarial nature, but at how little thought and contact with reality they exhibited. For example, Pioneer/KJRY claimed that PYCO was cherry-picking in Alternative Two. That is hardly the case. PYCO would prefer to acquire all SAW lines; Alternative Two is a last ditch effort to acquire lines essential to permit reasonable service to PYCO, Attebury and Compress, and this Board has already rejected the notion that PYCO is cherry-picking. Pioneer/KJRY claimed PYCO would sustain no prejudice from delay. PYCO is facing daily

economic retaliation from SAW, including eminent termination of rights to essential facilities for continued operation and rail shipment. Pioneer/KJRY thus far has shown a reckless disregard for the interests of shippers on the SAW lines. I am authorized to state that, based on PYCO's research to date concerning Pioneer Railcorp following Mr. LaKemper's call to me, PYCO has no interest in doing business with Pioneer or its subsidiaries, nor does Compress.

## II. Recent Developments

6. SAW claims to have sold the "we" or portions thereof south of the SAW yard to Larry Wisener d/b/a Choo Choo Properties, Inc. PYCO uses an industrial crossing over the "we" to move cottonseed from an outdoor stockpile into its Plant No. 1 for processing. When SAW previously blocked the crossing with rail cars, this Board ordered the blockage removed. SAW obviously transferred the "we" property to Mr. Wisener's Choo Choo in an effort to evade this Board's jurisdiction. This maneuver was successful in that Wisener obtained a TRO from state court barring PYCO from "trespassing" on Choo Choo's property. PYCO was faced with eminent spoilage of its remaining stockpile. In order to access the stockpile, PYCO and Choo Choo entered into a temporary settlement, with neither side admitting any liability, allowing PYCO to use the industrial crossing for 30 days. PYCO expects to transfer all remaining seed in that time. Mr. Wisener's attorneys

(Messrs. Gorsuch and McFarland) failed to indicate that PYCO did not, and does not, admit that Choo Choo, Wisener, or SAW have acted lawfully in blocking the crossing. PYCO's position is, and remains, that any sale by SAW to Choo Choo was, among other things, a contrivance to thwart this Board's jurisdiction and unlawfully to retaliate against PYCO.

7. SAW's retaliation against PYCO was not limited to the crossing over the "wee." As PYCO indicated in its Motion for Enforcement, et al., dated July 14, 2006, filed in F.D. 34802, 34889, 34890 and 34870 on July 15, Choo Choo Properties purported to terminate various other PYCO crossing rights for conveyors, utilities, and pipelines in a letter dated July 6, 2006 (Attachment II to Exhibit A of Motion). As we indicated (and as the July 6 letter indicates), most of these terminations become effective in 30 days, that is by August 5. The agreements Mr. Wisener is now purporting to terminate cover electrical lines, pipelines, crossings, and other critical infrastructure that PYCO requires for continued operation. There is no railroad need for any of these terminations. They will result in hamstringing PYCO's operations. PYCO reiterates its request that this Board take jurisdiction over the purported sale of SAW property to Choo Choo and prevent these terminations from becoming effective. Action is needed by August 4, 2006.

8. SAW continues to perform no maintenance on its tracks.

PYCO has already indicated that this has resulted in a costly derailment by PYCO's alternative provider West Texas & Lubbock (WTL). PYCO remains concerned that the trackage continues to deteriorate. Pursuant to this Board's entry authorization, PYCO conducted an inspection of SAW's trackage commencing July 24, 2006 in Lubbock. As it happened, a Federal Railroad Administration inspector was present pursuant to PYCO's request on the same date. He informed PYCO that all the SAW trackage was "excepted" track. On "excepted" track, there are no requirements other than a de minimis gauge requirement. The inspector stated that there is little that FRA can do with respect to "excepted" track. Under the circumstances, SAW's failure to maintain its track interferes with PYCO's alternative service provider, and unreasonably burdens PYCO's alternative service.

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 forgoing is true and correct.

Executed on: 7/28/06

  
Gary R. McLaren