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

Re: PYCO Industries -- Feeder Line Application --
South Plains Switching, Ltd., F.D. 34890
and related proceeding F.D. 34922

PYCO Industries -- Alternative Rail Service,
F.D. 34889 (49 CFR Part 1147 proceeding)

Request for adjustment in schedule for rebuttal
pleading in F.D. 34890 (action requested by
Tuesday, October 17); 217797

Initial comments on Pioneer/KJRY FLA
(F.D. 34992); 217800

Additional evidence supporting PYCO's
Petition for Alternative Rail Service
pursuant to 49 C.F.R. Part 1147 (F.D. 34889) 217801

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find eleven copies of PYCO's request for a schedule modification to move the due date for PYCO's rebuttal filing in F.D. 34890 to be, once again, on the same date Pioneer/KJRY must file its rebuttal in F.D. 34992. Since PYCO's rebuttal will otherwise be due on October 19, we request action by the Board on this request by October 17 so we may have time to prepare something, if necessary. This adjustment flows from the effects of the Board's schedule change in its October 5 order in this proceeding and Pioneer/KJRY's response to discovery to date.

The pleading also contains initial comments on Pioneer/KJRY's feeder line application in F.D. 34992. Under the Board's October 5 order, PYCO has until (at least) October 25 to submit final comments based on discovery from Pioneer/KJRY. PYCO does intend to file additional comments and requests that

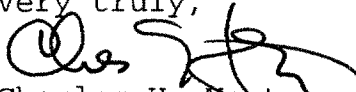
the Board not "accept" the FLA until PYCO has had an opportunity to comment.

Finally, PYCO includes additional evidence in support of its request for approval of alternative rail service in F.D. 34889 pursuant to 49 C.F.R. Part 1147 before expiration of alternative rail service in F.D. 34802 pursuant to Part 1146. The latter service authorization appears to expire on or about November 22, 2006.

Exhibit A is tendered under seal. I am supplying copies only to Messrs. McFarland and Mullins (SAW and Pioneer respectively) at this time, for the document originates with Pioneer and is from SAW. I will supply copies to other counsel when and if they supply me with copies of signed undertakings pursuant to the protective order.

Thank you for your assistance.

Very truly,



Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. counsel per certificate of service (w/encl.)
Mr. McLaren (for PYCO)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	(revision of F.D. 34844)

KEOKUK JUNCTION RAILWAY CO. --	)	
FEEDER LINE APPLICATION --	)	F.D. 34992
SOUTH PLAINS SWITCHING LTD.	)	

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

(1) PYCO INDUSTRIES, INC.'S (PYCO'S)
STATUS REPORT RELATING TO
FEEDER LINE APPLICATION
FILED ON BEHALF OF PIONEER RAILCORP
D/B/A KEOKUK JUNCTION RAILWAY CO. (PIONEER/KJRY)
(F.D. 34890 & 34992)
AND
REQUEST FOR ALTERATION OF
DUE DATE FOR PYCO'S REBUTTAL COMMENTS (F.D. 34890);

(2) INITIAL COMMENTS ON PIONEER/KJRY
FEEDER LINE APPLICATION;

and
(3) SUBMISSION OF ADDITIONAL EVIDENCE IN SUPPORT
OF PYCO'S PART 1147 PETITION FOR ALTERNATIVE RAIL SERVICE
(F.D. 34889)

I. Status Report
and Request for Simultaneous Due Dates for Rebuttal

Pursuant to the applicable procedural schedule in F.D. 34890 and F.D. 34892, comments on PYCO's revised valuation of South Plains Switching, Ltd. (SAW) are due on October 12, as are comments on Pioneer/KJRY's expanded feeder line application (FLA), except that PYCO shall have fourteen days from receipt of Pioneer/KJRY's final discovery responses to submit final

comments.¹ PYCO received what purports to be Pioneer/KJRY's "final discovery response" on October 11. PYCO's initial review of those responses indicates that notwithstanding the Board's ruling on October 5, the discovery response under cover of objections fails to make available responsive documents and materials. PYCO is evaluating what further action to take. In the meantime, the earliest that PYCO's Comments on the Pioneer/KJRY expanded FLA will be due is October 25.

Under the applicable procedure schedule, rebuttal by PYCO and Pioneer/KJRY is due seven days after the filing of final comments. Prior to the October 5 Decision, all comments on both PYCO's and Pioneer/KJRY's application were due on the same date (October 12). That meant that both applicants simultaneously filed their rebuttals seven days later (on October 19).

Under the October 5 Decision, PYCO's rebuttal remains due on October 19, but Pioneer/KJRY -- due to its failure to cooperate in discovery -- may file as late as November 1 (and perhaps even later if Pioneer/KJRY makes further tardy discovery responses). This will permit Pioneer/KJRY to convert its rebuttal filing into a sur-rebuttal of PYCO's scheduled October 19 filing. This would be unfair to PYCO. The unfairness is compounded because it in essence rewards Pioneer's failure to cooperate in making discovery. The basic procedural rules for

¹ STB Decision in F.D. 34890 and 34992 served October 5, 2006.

feeder line proceedings contemplate that the feeder line applicant have the last word. See 49 C.F.R. § 1151.2(f). Fairness requires that PYCO's "final word" go in at the same time as its adversary, Pioneer.

In addition, PYCO's experts wish to focus on review of the material that Pioneer has furnished and on preparation of responsive comments. This is not possible if our rebuttal to SAW is required on October 19. If PYCO can focus on Pioneer's discovery response, we are hopeful that we can perhaps file final comments prior to October 25, and thus foreshorten completion of briefing of the proceeding by advancing the date on which Pioneer's rebuttal will be due.

PYCO supports an expeditious resolution of this feeder line proceeding. However, allowing PYCO first to focus on Pioneer's discovery response and comments on the Pioneer/KJRY application and then to prepare and to file its rebuttal on the same day Pioneer/KJRY files its rebuttal will expedite the proceeding as well as render it more fair to PYCO. Furthermore, this alteration in the due date for PYCO's rebuttal will not result in any delays because the proceeding cannot be submitted for decision until Pioneer files its rebuttal in any event.

There is no prejudice to any party flowing from allowing simultaneous rebuttal, as was previously the situation. PYCO accordingly requests that the due date for PYCO's rebuttal be on the same date Pioneer/KJRY's rebuttal is due. This date would be seven days after PYCO files its comments on Pioneer/KJRY's

application.

II. Initial Comments on Pioneer/KJRY FLA

While PYCO reserves the right to file further comments based on Pioneer/KJRY's discovery response, PYCO does take this opportunity to respond some issues germane to the Pioneer/KJRY feeder line application which are not related to PYCO's discovery. PYCO prefaces its remarks by noting that it intends in its final comments (currently due no earlier than October 25) to contest Pioneer/KJRY's showing of financial responsibility. We accordingly request the Board not to rule on that issue until we have filed our final comments.

1. Net liquidation value. Pioneer/KJRY essentially adopts and supports PYCO's methodology and estimates for Net Liquidation Value (NLV). See Pioneer/KJRY FLA at p. 13. Pioneer/KJRY also rejects SAW's claim that the "offers" on which SAW relies for SAW's claim that NLV is \$6 million are not evidence of a \$6 million NLV at all. PYCO concurs with Pioneer's analysis of this point. We reserve the right to address it further in rebuttal.

2. Going concern value. Pioneer/KJRY argues that the preliminary Going Concern Value (GCV) calculated by PYCO's witness (Charles Banks) is too high. Pioneer/KJRY FLA at p. 15.

When PYCO originally filed Mr. Banks' estimate, we noted that it was based on a host of assumptions favorable to SAW, and that we requested discovery and an opportunity to modify our valuation after discovery. The Board granted this opportunity,

but at the behest of SAW effectively postponed the due date for SAW's response on the all-SAW alternative (i.e., SAW's lines serving shippers other than PYCO, Attebury and Compress) until September 21, 2006. The Board provided that SAW should file its revised valuation of all-SAW seven (7) days later (September 28). This, of course, is the day after Pioneer/KJRY filed their FLA. Pioneer/KJRY's criticisms of PYCO's valuation thus apply to a preliminary valuation which PYCO (and Mr. Banks) intended to modify and to refine based on discovery. Pioneer/KJRY's various criticisms of PYCO's initial GCV valuation of SAW thus were and remain premature.² In essence, and as Mr. Banks notes in his statement attached as Appendix B, Mr. Banks' revised valuations which PYCO submitted on September 28 moot Pioneer/KJRY (and their witness Brennan's) criticisms of his

² Based on Pioneer's response to PYCO's discovery to Pioneer, it appears that SAW provided Pioneer/KJRY with considerable traffic data long before SAW provided any similar information to PYCO. Indeed, based on Pioneer's discovery response to PYCO received October 9, SAW evidently sent Pioneer a bid solicitation in July including considerable traffic data never furnished PYCO, or at least never furnished in so intelligible a format. Thus SAW ensured that its invitee Pioneer had the benefit of data that PYCO did not receive until very late in the proceeding.

This corroborates statements by Mr. LaKemper (Pioneer/KJRY) to Mr. McLaren (PYCO) that SAW solicited Pioneer's involvement in this proceeding.

Pioneer marked SAW's written solicitation for a bid as "highly confidential" under the protective order. Thus, ironically, PYCO still is not privy to what SAW has been soliciting from third parties in response to PYCO's feeder line application. We are filing the SAW solicitation as received from Pioneer as Exhibit A, but under seal, in keeping with Pioneer's claim under the protective order. The traffic data as set forth in the SAW solicitation supports the proposition that 2005 is not an appropriate base year for purposes of Going Concern Value calculations.

valuation. Indeed, the Pioneer/KJRY valuation tends to corroborate the valuation derived by Mr. Banks, subject to several exceptions discussed by Mr. Banks in which Pioneer's calculations or assumptions require refinement or reflect an error.

PYCO understands Pioneer/KJRY to advocate a GCV of \$2,486,779 based on historic traffic patterns, and \$2,712,370 in the event "modest growth" is assumed, and without taking into account rehabilitation costs. Pioneer/KJRY FLA at pp. 14-15.³ This compares to an estimate slightly in excess of \$2,300,000 (prior to taking into account rehabilitation) by Mr. Banks.

As Mr. Banks notes in his statement attached in Exhibit B, the Pioneer/KJRY estimate overstates the GCV for SAW by almost \$200,000 by using a less precise "cotton adjustment factor" than is actually available (Banks at p. 6). That alone would reduce the Pioneer GCV calculation by approximately \$200,000. See id. Another downward adjustment of approximately \$633,648 would result from handling of maintenance of way and structure costs. See id. In short, proper methodology and inputs would result in

³ Based on discovery information which PYCO did receive from SAW through SAW's discovery responses on September 18 and 21, Mr. Banks calculated four separate GCV's based on different assumptions. These GCV's, not taking into account rehabilitation, ranged from \$1,131,102 (excluding Jarvis and Hanson revenues and PYCO surcharges) to \$3,032,426 (including Jarvis and Hanson revenues and PYCO surcharges). Mr. Banks favored a GCV (not taking into account rehabilitation) of \$2,300,745 (based on the assumption that Jarvis would be included in the transaction and Hanson Aggregate could be attracted back to the line by a new owner). This revised GCV is slightly below the GCV advocated by Pioneer.

Pioneer/KJRY showing a GCV less than salvage value for the SAW lines.

The other major difference in GCV valuation between Pioneer/KJRY and PYCO relates to rehabilitation. Pioneer also acknowledges that at least some crossing rehabilitation (roughly \$77,000, see id. at p. 18) is required, which presumably is a deduction from GCV.

PYCO will discuss rehabilitation in the separate section below. We will also address valuation issues more generally when we respond to all comments on rebuttal.⁴

4. Rehabilitation. Pioneer/KJRY concurs with PYCO's NLV valuation expert that the ties are scrap and the track is in worn out condition. See Pioneer/KJRY FLA at p. 13. However, Pioneer/KJRY argues that the line can nonetheless be operated without rehabilitation, except for three crossings (roughly \$77,000). Pioneer/KJRY FLA at p. 18. Pioneer/KJRY otherwise echoes SAW's claims that rehabilitation is unnecessary.

Mr. Banks in his attached Statement indicates that the problem may be semantics. Mr. Banks observes that SAW operates the line under a "deferred maintenance" program and that SAW

⁴ PYCO and Mr. Banks certainly agree with Pioneer/KJRY (see Pioneer/KJRY FLA at p. 15) that Mr. Banks' original GCV computation overstated GCV by using 2005 as the base year and by assuming that all rock was hauled at the single car rate as opposed to the unit train (27 car) rate.

PYCO and PYCO's expert, Mr. Banks, concur with Pioneer/KJRY's assessments concerning the unreliability of the Plaistow valuation. But that valuation was submitted as a response to PYCO, and we will properly deal with it in more detail in our Rebuttal filing.

maintenance costs per its own witness are trending upward. Banks at 8. In order to achieve the "normalized" maintenance levels set forth by PYCO's experts (i.e., to get the track into a condition such that all one has to do is sustain a steady state maintenance sufficient to sustain FRA Class I status), the SAW lines must be rehabilitated. Banks at p. 8. Mr. Banks shows the cost of rehabilitation as a deduction in his analysis, which here results in a negative GCV. This means that the lines are worth only their salvage value under the formula employed in 49 U.S.C. § 10907. If the necessary rehabilitation were instead shown as increased maintenance costs (as opposed to lower normalized maintenance costs), then the impact on GCV would still be to drive it below salvage value.

Pioneer/KJRY claims that this makes no sense, on the ground that no rational buyer would acquire a line with negative going concern value for continued rail operation. But Pioneer/KJRY (and its expert to the extent he indorses this view) is being unnecessarily turgid. PYCO is a captive shipper and an agricultural cooperative serving farmers in the Texas cottonbelt. It is where it is, because that is where the cotton is. It needs rail service, and the costs to relocate are so high that it is prepared to buy (subsidize) the line and rehabilitate it as a cost of doing business. As Mr. Banks says, "[t]hat is why PYCO is willing to buy a railroad it knows is not capable of generating enough cash flow to fund necessary track and structure rehabilitation." Banks at p. 9. Once one

acknowledges that PYCO is captive to the railroad, then it is clear that PYCO with great rationality is ready, willing and able to buy and rehabilitate the property.

Indeed, in the end, this very "criticism" or "argument" by Pioneer/KJRY is one of the things that most directly demonstrates why Pioneer/KJRY is unsuitable as owner for these properties. Pioneer/KJRY essentially broadcasts that it is looking to pull as much profit as it can out of this property if it acquires it, and that rehabilitation is out of the question for economic reasons (i.e., if the line is rehabilitated, Pioneer/KJRY cannot make a profit, or perhaps even cover its debt payments to acquire the line). Pioneer/KJRY basically propose, at best, continued deferred maintenance and a kind of status quo for the foreseeable future. This means the scrap ties and worn out rail will continue to deteriorate until rail service is physically impossible in Lubbock.

Postponement of rehabilitation of a rail system comprised of scrap ties and worn out rail is always possible, but any such postponement does not increase GCV, any more than postponing replacing a worn out set of brakes or tires increases the value of a used car. In the end, one has to have decent brakes and tires for successful operation of a car, and in the end one has to have something other than junk for successful operation of a railroad. Just as an informed buyer would take the status of a car's condition into account, so must STB in setting the GCV, notwithstanding Pioneer/KJRY's blandishments.

BNSF donated the Lubbock properties to SAW as an operating railroad in 1999. This kind of donation of property which has a substantial positive salvage value presumably makes sense (i.e., comports with the obligation of BNSF management to protect the interest of BNSF stockholders) only if the effective value of the property as an operating railroad was zero. In the end, this strongly corroborates PYCO's position that once deferred maintenance (i.e., rehabilitation needs) are taken into account, the true GCV for SAW's operation is exactly what BNSF received and SAW paid -- nothing. After all, SAW has not rehabilitated the line. SAW has added nothing to nothing for GCV purposes. Zero plus zero equals zero.

5. Pioneer's claimed qualifications. In its filing, Pioneer/KJRY claims that the lines if sold to Pioneer/KJRY will likely result in improved service to shippers.

So far, no shipper has provided Pioneer a letter of support for its FLA here. The majority of shippers have favored PYCO, and most of those doing so have indicated opposition to Pioneer. See shipper comments filed in F.D. 34890 on August 2, 2006, and incorporated herein.

Over Pioneer/KJRY's resistance, PYCO has sought discovery relating to Pioneer's "track record" on other properties it owns or has owned. Pursuant to our motion to compel, which the Board granted by Decision served October 5, Pioneer finally made available a response, received by PYCO on October 11. Based on preliminary review, the response omits material that is clearly

germane, such as all the litigation in which Pioneer and Pioneer subsidiaries have engaged with local communities and shipper groups across the country over the years. Under this Board's October 5 order, PYCO is required to file final comments on Pioneer/KJRY's application 14 days after receiving Pioneer's complete response to discovery. PYCO may elect to proceed on the basis of Pioneer's deficient response for a variety of reasons, but if so PYCO reserves the right to strike portions of Pioneer/KJRY's application on which Pioneer/KJRY has wrongfully failed to make discovery responses.

In all events, PYCO expects to demonstrate that there is no likelihood that service in Lubbock will improve under Pioneer/KJRY, and also that Pioneer/KJRY lacks financial responsibility for the Lubbock operations.⁵ Its own statements and such evidence it has provided to date lead to no other conclusion.

6. BNSF's right of first refusal and "chilling effects".
In its FLA, Pioneer claims a good relationship with BNSF, but then goes out of its way to oppose application of the provision in the BNSF/SAW contract that gives BNSF a right of first refusal with respect to any sale of SAW's lines, or any portions

⁵ On a somewhat related note, Pioneer in its FLA (p. 25) seems to claim that PYCO has not shown the qualifications of PYCO's rail operator, West Texas & Lubbock (WTL). This is a matter for rebuttal. Suffice it to say that both BNSF and PYCO have been pleased with WTL's competent, business-like, and professional service. In contrast to Pioneer/KJRY WTL already operates in the Lubbock area and is uniquely situated to operate more efficiently and reliably than Pioneer/KJRY in Lubbock.

thereof. Pioneer/KJRY FLA at pp. 28-31. If Pioneer/KJRY were as beloved by BNSF as Pioneer represents in its FLA, then Pioneer/KJRY presumably have nothing to fear from BNSF's right of first refusal. One wonders, then, why Pioneer devotes such an effort against BNSF.

At this point, Pioneer/KJRY's argument becomes downright laughable. Afraid to acknowledge that Pioneer/KJRY fears BNSF will employ its right of first refusal to prevent SAW from vesting the line in Pioneer/KJRY, Pioneer/KJRY conjures up the argument that BNSF's right of first refusal will have a "chilling effect" on feeder line applications. Pioneer/KJRY FLA at p. 30.

PYCO certainly is not chilled by BNSF's right of first refusal. PYCO supports that right. PYCO views BNSF's right as necessary and prudent to protect the interests of BNSF's customers (namely, the shippers in Lubbock). PYCO filed its FLA fully cognizant of the right of first refusal, and did not view it as "chilling" in the least. The right ensures that whatever entity acquires SAW's lines, that entity must satisfy BNSF that it can competently operate the lines, serve BNSF customers, and avoid congestion of the BNSF mainline and yard in Lubbock. These are important concerns not just for BNSF and its local shipper community, but for all customers served over the BNSF mainline through Lubbock.

What does have a "chilling effect" on feeder line applications is discovery that an entity like Pioneer without

any shipper support can file a "competing" feeder line application once a majority of shippers support someone else's feeder line application. The fact that a potential rascal handpicked by a retaliatory incumbent can parasitize the work of shippers to obtain adequate rail service and deprive them of the benefit of their labors certainly is about as great a disincentive to feeder line applications as can be imagined. This is especially the case when the "competing" feeder line application is a "white knight" evidently recruited by the incumbent railroad to ensure that the shippers it has been inadequately serving never obtain the relief they seek. In this sense, Pioneer/KJRY's argument about chilling effects is, to use an old cliché, the "height of hypocrisy."

BNSF is in a unique position to understand the needs of itself and its customers in Lubbock, and has every incentive to employ its right of first refusal to secure a result fully consistent with 49 U.S.C. § 10101 (national rail policy) and the purposes of 49 U.S.C. § 10907 (reinvigoration of deteriorated feeder lines). Nothing in BNSF's right of first refusal violates any policy embodied in either section 10101 or section 10907.

SAW certainly cannot claim any abuse: it is assured that it will receive the constitutional minimum value for its property as determined by the Board.

In addition, there is no conflict between application of BNSF's right of first refusal and the policies or language of 49

U.S.C. § 10907. Section 10907 does not call upon this Board to find the optimal shortline for a particular set of lines; as construed by the Board, section 10907 merely provides a mechanism to substitute one shortline for another when the incumbent provides inadequate service. BNSF's right of first refusal does not interfere with this substitution; rather, it speaks to another subject: ensuring that any new carrier will in fact provide adequate service for BNSF's customers and be compatible with BNSF's own operations. This complements section 10907, it does not conflict with it. Application of BNSF's right of first refusal is especially important in view of the fact that Pioneer/KJRY has received no support from the shipper community in Lubbock. Quite evidently, no one in Lubbock believes that Pioneer/KJRY would be an improvement over SAW in terms of providing adequate rail service. And as Pioneer/KJRY acknowledges, SAW's service has "clearly" been inadequate to meet the needs of shippers. Pioneer/KJRY FLA at p. 24.

No shipper opposes application of BNSF's right of first refusal. PYCO urges that the Board expeditiously clarify that the right will continue to apply to any transfer by SAW, including a required transfer pursuant to 49 U.S.C. § 10907.

7. Pioneer's insinuation that PYCO will abuse small shippers or its competitor. Pioneer makes the outrageous suggestion in its FLA at p. 25 that PYCO might abuse small

shippers in preference to itself, or abuse a direct competitor.⁶

PYCO has neither the intent nor the incentive to act unlawfully or to tolerate inadequate rail service to any shipper in Lubbock. PYCO is an agricultural cooperative, owned in the end by local farmers through their member cotton gins. PYCO's owners also do business with PYCO's competitor (ADM), and with other shippers on the Lubbock lines (indeed, Compress is essentially owned by the same entities that own PYCO). PYCO's owners would not tolerate discrimination. PYCO is simply the largest shipper on the line, is highly rail dependent, and is well-capitalized. PYCO is thus motivated and able to subsidize the acquisition and rehabilitation of the line, and to do so promptly, for the benefit of the entire shipper community, and for the purpose of securing adequate rail service for all shippers. PYCO intends to eliminate the climate of physical or economic blackmail, intimidation, arbitrary surcharges, service deterioration, lease cancellations, and the other misadventures that have haunted local shippers for the past six years under the incumbent. If PYCO acquires SAW's lines, PYCO in its operating agreement with WTL will ensure that WTL takes all reasonable measures to grow the business of all shippers, as WTL has done with the other lines it operates in Texas.

⁶ This kind of discrimination is legally barred (indeed, PYCO has filed a Complaint against SAW for engaging in exactly the kind of discriminatory treatment Pioneer conjures that PYCO would do). BNSF presumably will exercise its right of first refusal unless it is assured that the new owner would provide adequate rail service to all BNSF's customers in Lubbock.

PYCO filed its feeder line application to ensure that there would never be inadequate local switching service in Lubbock again. Everything we have heard from Pioneer/KJRY indicates that Pioneer/KJRY has a much different motivation.

8. Pioneer's insinuations about PYCO's financial capacity. Pioneer/KJRY suggest that PYCO has not provided proformas showing it could operate the lines for three years, or that it could cover the costs of rehabilitation. E.g., Pioneer/KJRY FLA at p.8 n3. The key is financial responsibility. PYCO in its Revised Feeder Line Application at pp. 7-9 and associated exhibits demonstrated that it had \$69 million in available funding, including \$15 million for capital expenditure requirements relating to the SAW lines. The total acquisition (\$2.3 million) and rehabilitation cost (\$4 million to \$6.6 million) would be a small fraction of PYCO's available funds.

Pioneer/KJRY cannot even come close to that kind of "financial responsibility." The KJRY showing of financial responsibility indicates KJRY will finance acquisition through a loan from Pioneer for the entire amount of the purchase price and costs of start-up, but the terms of the loan from Pioneer are not disclosed. What is disclosed is that Pioneer itself will rely on a loan for the entire amount from a bank. That loan will be secured by the track and ties embodied in the SAW system, and evidently all other assets of the Pioneer system. It will be based on a variable interest rate set monthly based

on LIBOR. The loan will be based on ten years amortization but with a balloon (all remainder due in five years). In short, Pioneer proposes a highly leveraged gamble, in which the assets of SAW are pledged to pay for the purchase, with no capital infusion from any investor. We will have more to say on this in our final comments. Again, Pioneer/KJRY should limit its arguments to matters where it is more sinned against than sinning, if there are any (which there are not). Taking PYCO to task on financial responsibility is a bit like a skunk claiming that a rose stinks, or the thirteenth chime of a clock.

III. Motion for Leave to File Additional New Evidence
Germane to Alternative Rail Service
under 49 C.F.R. Part 1147 (Finance Docket 34889)

PYCO is currently receiving service from WTL pursuant to orders of this Board in F.D. 34802, implementing 49 C.F.R. Part 1146. By statute, alternative rail service under Part 1146 is supposed to last only 270 days, and thus would expire on October 23, 2006. In order to afford SAW thirty additional days which SAW alleged was necessary to prepare its valuation case, this Board "tolled" the 270 day period for 30 days, so that the Part 1146 alternative service will now expire on or about November 22.

It now appears that final briefing will not be completed until the end of October. Indeed, PYCO only received discovery responses from Pioneer/KJRY on October 11, such that PYCO's final comments on Pioneer/KJRY's FLA are not due until October

25 at the earliest.⁷ Under this Board's October 5 Decision, Pioneer/KJRY will have seven days from PYCO's final comments to file its rebuttal. Assuming PYCO makes final comments on October 25, Pioneer/KJRY's rebuttal will not be filed until November 1. In Part I of this pleading, PYCO has requested that it be permitted to submit its rebuttal at the same time as Pioneer/KJRY.

PYCO expects to contest the financial responsibility showing of Pioneer/KJRY. In addition, this Board must address valuation issues, and BNSF's right of first refusal. It is unlikely that a decision can issue prior to November 22, much less that a property transfer to a new owner can be accomplished by that date.

SAW's opposition to PYCO's Part 1147 Petition was that the Petition would be moot, in that the pending feeder line proceeding would be concluded by the time any Part 1147 became effective. That is now clearly not going to be the case.

SAW and its alter ego Choo-Choo Properties, Inc., has recently supplied compelling new evidence justifying the need for alternative rail service under Part 1147. On September 22, 2006, Choo-Choo Properties filed an Amended Petition and Application for Temporary Restraining Order and Temporary Injunction in the 237th District Court for Lubbock County,

⁷ As noted, Pioneer/KJRY has lodged objections to certain aspects of PYCO's discovery requests and failed to make discovery responses notwithstanding this Board's October 5 Decision, and PYCO is evaluating how best to proceed.

Texas. The Amended Petition is attached as Appendix III. It alleges a trespass by PYCO on certain property known as the "we" which Choo-Choo claims to own by reason of a deed from SAW, and further demands that PYCO vacate certain property due to lease terminations by Choo-Choo. By this Board's decision dated August 2, this Board invalidated the sale of the "we" by SAW to Choo-Choo and invalidated any lease terminations by Choo-Choo or SAW. The attorney who filed the action for Choo-Choo is on the service list per the STB website. The litigation is simply another example of the kind of harassment and retaliation that PYCO has endured, continues to endure, and can expect to be compounded if PYCO again is dependent on SAW or some other incarnation of the Wisener family for rail service.⁸

But that is not all. Two days after the Choo-Choo suit, SAW filed a "Motion for Summary Judgment" (Appendix IV) against PYCO for damages. The damages were for various discriminatory and retaliatory surcharges and constructive placement fees levied by SAW against PYCO during the period between Mr. Wisener's announcement to PYCO that he was going to take retaliatory action and this Board's granting of PYCO's alternative service petition in F.D. 34802. PYCO has filed a complaint proceeding with this Board in which PYCO seeks, among other things, to put at issue all these various discriminatory

⁸ As the Board already knows, SAW allegedly was managed by Larry Wisener until PYCO obtained alternative rail service, when he ostensibly resigned in favor of his wife Delilah Wisener. Larry Wisener is the owner of Choo-Choo. Choo-Choo and SAW are effectively the same.

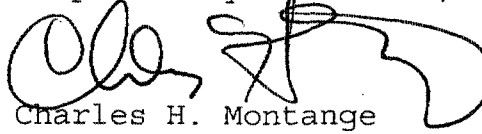
and retaliatory charges by Mr. Wisener's railroad. See F.D. 33870. The appropriate forum to litigate unlawful rates and practices is before the Board, under doctrines of exclusivity and primacy, and that is what PYCO is attempting to do. SAW's state court proceeding is again simply further evidence of harassment, and what PYCO can expect subsequent to November 22 if this Board does not authorize alternative service under Part 1147. While PYCO certainly does not admit the truth of any of the claims and arguments SAW and Choo-Choo present in their pleadings attached, PYCO does believe that the actions by SAW and Choo-Choo against PYCO in Texas state court further confirming the retaliatory intent of the Wisener family against PYCO for PYCO's temerity in seeking legal relief before this Board for inadequate rail service. They suggest that SAW can only be expected to retaliate further if it can but get its hands on PYCO again. The SAW and Choo-Choo pleadings thus constitute new evidence further establishing PYCO's entitlement to the relief PYCO has sought under 49 C.F.R. Part 1147 in F.D. 34889.

Conclusion

In accordance with the above, PYCO seeks orders (1) allowing PYCO to file its Rebuttal in F.D. 34890 on the same date Pioneer/KJRY's Rebuttal in F.D. 34992 is due and (2) including the SAW and Choo-Choo pleadings attached as Appendices C and D to be included in the record of F.D. 34889 as evidence of SAW's continued retaliatory intent against PYCO.

As to the Pioneer/KJRY valuation as embodied in the Pioneer/KJRY valuation, it corroborates PYCO's revised valuation filed September 28 in important respects, but must be adjusted downward for the reasons explained by Mr. Banks. If appropriate adjustments are made, Pioneer/KJRY also shows a GCV less than NLV for the SAW lines. PYCO reserves the right to make further comments on the Pioneer/KJRY FLA after examination of Pioneer/KJRY's discovery response, which was delivered to PYCO on October 11 (the date this pleading was finalized).

Respectfully submitted,



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Appendix A (under seal) -- SAW's solicitation packet furnished Pioneer, July 2006

Appendix B -- Banks Statement

Appendix C -- Choo-Choo amended petition in state court

Appendix D -- SAW motion for summary judgment in state court

Certificate of Service

I hereby certify service of the foregoing Appeal and Petition upon the following counsel of record by express service, next business day delivery, this 11th day of October 2006:

Thomas McFarland
208 South LaSalle Street, Suite 1890
Chicago, IL 60606-1112 (for SAW)

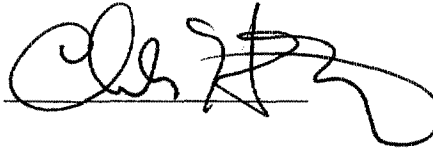
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A handwritten signature in black ink, appearing to be "Andrew Goldstein", written over a horizontal line.

Appendix B

**Before The Surface Transportation Board
STB Finance Docket No. 34890
PYCO Industries, Inc., et al. – Feeder Line Application --
Lines of South Plains Switching, Ltd. Co.**

**Verified Statement
of
Charles H. Banks**

(Based on Expanded Competing Feeder Line Application)

**Before The Surface Transportation Board
STB Finance Docket No. 34890
PYCO Industries, Inc., et al. – Feeder Line Application --
Lines of South Plains Switching, Ltd. Co.**

**Verified Statement
of
Charles H. Banks**

(Based on Expanded Competing Feeder Line Application)

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**Before The Surface Transportation Board
STB Finance Docket No. 34890
PYCO Industries, Inc., et al. – Feeder Line Application --
Lines of South Plains Switching**

**Verified Statement
of
Charles H. Banks**

(Based on Expanded Competing Feeder Line Application)

Qualifications

I am the same Charles H. Banks, a consultant and President of the firm, R.L. Banks & Associates, Inc. (RLBA) who filed a previous Verified Statement on May 3, 2006 in connection with Docket 34844, a Revised Verified Statement on August 11, 2006 and a Verified Statement (Based on Discovery) on September 28, 2006 in this proceeding. My qualifications were detailed in Exhibit A of the original statement. I appear in this proceeding on behalf of PYCO Industries, Inc. (PYCO).

Scope of Testimony

PYCO Industries, Inc., asked me to review and comment upon materials filed September 27, 2006, as part of the *Expanded Competing Feeder Line Application* by counsel and various witnesses on behalf of the Keokuk Junction Railway (KJRY), especially including the Verified Statement of William J. Brennan. Mr. Brennan's Verified Statement addresses many of the same issues which I have addressed on behalf of PYCO in my previous Verified Statements in this proceeding.

This Verified Statement is best understood as comprised of two parts. In the first part, I enumerate the points on which KJRY, in general, and Mr. Brennan, in particular, have expressed views that are similar to those I now hold, as communicated most recently in my *Verified Statement (Based on Discovery)* which was part of the September 28, 2006 filing by PYCO's counsel. I believe such commentary is appropriate and necessary due to the fact that the KJRY filing critiques elements of my going concern value derivation based on its review of my then outstanding testimony when, in fact, the parties by and large now mostly agree with each other on many key issues, thanks to adjustments I've made in my subsequently filed *Verified Statement (Based on Discovery)*, with the gap between them significantly less than between either of them and the extreme positions generally taken by counsel and witnesses working on behalf of South Plains Switching, Ltd. (SAW).

In the second part of my statement, I address the only three significant issue areas in which I believe the positions of PYCO Industries, Inc. and Keokuk Junction Railway are at significant variance with respect to the going concern valuation of SAW. Having considered the *Expanded Competing Feeder Line Application* filing in its entirety, especially including the Verified Statement of Mr. Brennan.

Similarities Between The Testimony Of Messrs. Brennan and Banks With Respect to Development of Going Concern Valuations of SAW and Their Component Pieces

As noted above, I share many of the positions advanced in the Verified Statement of Mr. Brennan with respect to a number of building blocks which comprise the foundation of his going concern valuations.

On page fifteen, Mr. Mullins echoes Mr. Brennan's characterization of recent cotton crops in Texas as "bumper crops." Although I don't believe that I used that phrase, it is obvious from my latest testimony that I agree with him completely. Therefore, I also agree with Mr. Mullins at page fifteen that Mr. Plaistow's going concern

valuation, proffered on behalf of SAW, is constructed on an "abnormally large" base. Similarly, I couldn't agree more with Mr. Brennan's statement at page five that "2005 was not a representative year for SAW" and on page six where he wrote "[I]t is, therefore, totally inappropriate to base projections of future cotton traffic on 2005 levels that are well above trend." In fact, as I discuss later, I believe the base Mr. Plaistow installed is even more abnormal than Mr. Brennan believes.

I agree with Mr. Brennan at page three, wherein he states that the discounted cash flow approaches that Mr. Plaistow and I relied upon are both valid and should yield the same results although I am disappointed that Mr. Brennan failed to comment on the absurd extent to which the going concern valuations advanced by SAW all depend upon huge terminal values. Although I have never met him, given his "vapor-ware" remark on page sixteen, I am confident that Mr. Brennan would share my skepticism about a valuation model so deliberately crafted that it had to rely so significantly on values contributed in the distant and much less certain future.

Further, I am delighted that a witness for an opposing party, Mr. Brennan, at page four, finally acknowledged what I have maintained all along, namely, that my valuation approach is "forward looking."

Beginning at page five and extending several pages thereafter, Mr. Brennan does an excellent job of undermining the credibility of Mr. Plaistow's reliance on the year 2005 traffic (and, therefore, revenue) base to develop his going concern valuations, one that parallels my critique of Mr. Plaistow's reliance beginning at page six of my latest *Verified Statement Based on Discovery*. As I did in my last Verified Statement, Mr. Brennan goes to great pains to demonstrate that the forecast index Mr. Plaistow used to discount the record 2004 and 2005 crop years were not sufficient to reflect the abnormal nature of the recent local area cotton crop years. Mr. Brennan takes Mr. Plaistow to task for relying on a national index and promotes use of a Texas state-wide data series. I agree with Mr. Brennan completely up to that point though I believe that use of an even more localized set of numbers would be more dispositive.

At page sixteen, Mr. Brennan does a nice job of exposing both the inappropriate nature of the surcharges that SAW has bandied about in this case and demonstrating that the imposition of such charges would be counterproductive insofar as they would yield less total revenue by driving away more volume than could be captured through imposition of any surcharge. I agree completely with Mr. Brennan's exposition with respect to the surcharge issue.

I also largely agree that is appropriate to use variable costs with respect to deriving going concern valuations in the subject case and I completely agree that use of same maximizes going concern value calculations. That is, in fact, one of the primary reasons that I elected to use that approach in my original Verified Statement.

At page eleven of his *Application*, Mr. Mullins characterizes the Net Liquidation Value advanced by SAW's Witness Landreth as "unreliable." I agree.

On the following page, Mr. Mullins argues that the USRP bid is "not valid." I am in complete agreement with that statement as well.

Likewise, I agree with the characterization at page thirty-one of Mr. Mullins' filing that "SAW's GCV ... severely overstate SAW's minimum constitutional value."

Differences Between the Testimony of Messrs. Brennan and Banks With Respect to Developing Going Concern Valuations of SAW and Their Component Pieces

While Mr. Brennan and I agree completely on the need to adjust 2005 SAW carloads and revenues downwards to reflect the abnormal nature of recent cotton crop years, we disagree on a remedy. Mr. Brennan employs historical state-wide data to prove that 2005 was a bumper cotton crop and in his Table A-3 applies a "Cotton Adjustment Factor" of 0.6777. The practical effect of his "Cotton Adjustment Factor" is

that Mr. Brennan reduces 2005 SAW cotton carloads by the reciprocal of 0.6777, or 33.33 percent. I do not quarrel with his approach or his calculations but I note that at page nine of his Verified Statement, Mr. Brennan regrets the absence of "more specific data on yields in the Lubbock area."

I was able to find the very sort of local area cotton crop yield data for which Mr. Brennan longed. Using Mr. Brennan's lexicon, my "Cotton Adjustment Factor" was 0.572, so I reduced SAW's 2005 cotton crop revenues by its reciprocal, 42.8 percent, as discussed at page 15 of my *Verified Statement (Based on Discovery)*. My adjustment is more severe than that reflected in Mr. Brennan's going concern valuations because the cotton crop year spike was greater in the Lubbock region than state-wide. Mr. Brennan seems to concede that fact at page six of his Verified Statement where he states that "the local yields in the Lubbock area seem, if anything, to have risen more dramatically than the state-wide averages."

In his Table A-3, Mr. Brennan applies his "Cotton Adjustment Factor" of 0.6777 to 8,033 cotton carloads handled by SAW in 2005 and concludes that 5,444 was a more representative number of SAW cotton carloads. Had Mr. Brennan used Lubbock area cotton crop data, as I did, he may have reached the same conclusion as I did that a more appropriate "Cotton Adjustment Factor" would have been 0.572. Application of that factor to the same 8,033 SAW cotton carloads in 2005 would have yielded 4,595 SAW cotton carloads in a representative year. That is a difference of 849 carloads. Assuming that the vast majority of cotton carloads do not move in blocks of 27 or more, an assumption shared by both Mr. Brennan and I, SAW would have earned \$125.60 on each of those carloads.

In his Table A-10, Mr. Brennan adopts my per cotton car URCS variable cost of \$95.97 per car. So each cotton car generates an average profit of \$29.63 (\$125.60 - \$95.97) to SAW. Multiplying \$29.63 times the 849 carload difference stemming from lower "Cotton Adjustment Factor" I derived based on Lubbock area cotton crop yield historical data results in a differential of \$25,155.87. However, as Mr. Brennan details

at page thirteen, a \$1 increase in cash flow translates into \$7.75 in going concern value in the model he is using. Applying that same 7.75 multiplier factor to Mr. Brennan's \$25,155.87 overstatement of normalized cotton revenues, because he couldn't find local area cotton crop data, results in an overstatement of both of Mr. Brennan's going concern valuations to the tune of \$194,959.

In other words, had Mr. Brennan been aware of local cotton historical crop data and used such data to better inform his "Cotton Adjustment Factor," his \$2.486 million going concern value (GCV), assuming no growth in carloads, would have been lower than the \$2.3 million going concern value I calculated in Table 5 to my *Verified Statement (Based on Discovery)* while the difference between my \$2.3 million GCV estimate and Mr. Brennan's \$2.712 million GCV would be halved.

The second area with which I disagree with Mr. Brennan is in the derivation of maintenance of way and structure costs. I have no problem using URCS to estimate the variable maintenance of way and structure costs associated with individual movements but in the case of estimating the going concern value of SAW, I believe it is inappropriate to rely solely on variable maintenance of way and structure costs. That is because, in the context of maintaining an entire railroad system, there are costs which must be incurred above and beyond which those which would vary with traffic volume. That is even more the case if the number of carloads declined, as Mr. Brennan posits.

So, what I did in my original Verified Statement was to isolate and pull out the URCS variable costs I estimated in connection with only the lower volumes I had access to at the time and substitute site specific maintenance of way and structures costs associated with the operation of an entire, albeit small, railroad. That resulted in subtracting out \$100,463 in URCS maintenance of way costs, as shown in Table 32 of my original Verified Statement and substituting in \$182,224 in site specific maintenance of way and structures costs. That difference had the affect of reducing each year's cash flow by \$81,761. Multiplying that amount by 7.75, as discussed before, would have the effect of reducing Mr. Brennan's GCV by \$633,648.

Please note, however, that the original substitution I made was based on the assumption that SAW only owned and 78,920 feet of track. If, in fact, SAW owns 133,884 feet of track and operates on 198,277 track feet, as per the SAW September 18th filing at Exhibit 2, page 4, my routine and program maintenance of way and structures costs would have been higher and the effect of the substitution would have been to lower Mr. Brennan's GCV even more.

Finally, we continue to disagree on the amount of track structure rehabilitation appropriate. To some degree, perhaps a significant degree, this is an issue of semantics. The functions performed by railroads to maintain their track are quite similar whether they are maintaining or improving (rehabilitating) the track, as discussed in my original Verified Statement. I believe all parties to this proceeding either have or would acknowledge that SAW exhibits deferred maintenance of its way and structures. The issue is the characterization and timing of remedying that deferral.

The approach my firm always takes is to determine the amount of routine day-to-day maintenance and program work necessary to keep a railroad in a steady state condition once a carrier is no longer in a deferred maintenance position and characterize that amount as "maintenance" and then to characterize the amount necessary to eliminate deferred maintenance as "rehabilitation." My firm has adopted that approach and lexicon because that is what private sector lenders want to see when they are considering making investments to acquire or improve short line railroads. My firm is the leading provider of such rail line due diligence and related services in the nation to the private sector and uses an identical approach when it is asked to provide credit review services to the Federal Railroad Administration in connection with examining Railroad Rehabilitation and Infrastructure Financing loans in the public sector.

Since my associate, Mr. Gene A. Davis, P.E. and I continue to believe that the SAW property manifests deferred maintenance of way and structures, I believe that it is

appropriate to subtract from the preliminary going concern values, noted above, amounts estimated to be necessary to rehabilitate the subject tracks to a steady-state maintenance level sufficient to sustain FRA Class 1 trackage with no deferred maintenance.

There is deferred track and structure maintenance on SAW. It was the cost of having to deal with the consequences of deferred maintenance, as manifest in higher maintenance costs, that initially caused SAW to voluntarily reduce the Class of Track from Class 1 to Excepted Track. Because it is not difficult or expensive to temporarily have a track meet Class 1 standards, SAW recycled its track from Excepted status to back to Class 1 for convenience sake and to be able to make the false claim that its new and improved Class 1 trackage did not exhibit any deferred maintenance. Of course that is not true. If it were true, SAW would never have let its track drift into Excepted status. If it were true, SAW's own witness, Mr. Plaistow, would not have put into evidence in Exhibit 36A maintenance of way costs that show the following upward trend in fighting the uphill climb in maintenance of way and structures expenses which is a consequence of failing to bite the bullet and reduce deferred maintenance on the SAW property:

2000	\$211,653
2001	\$247,058
2002	\$373,676
2003	\$382,546
2004	\$233,101
2005	\$516,678.

SAW cannot afford to maintain its trackage at the Class 1 level because the carrier does not throw of enough cash to rehab it so that its annual maintenance bill would decline to the lower, more normalized levels that have been manifest in all the Verified Statements of Mr. Davis. That is why my going concern valuations are all negative.

Unlike SAW and KJRY, PYCO does not have the luxury of walking away from the railroad property if things don't work out financially now or in three years. PYCO must continue to operate at its current sites in Lubbock if it is to avoid huge costs of relocating elsewhere. That is why PYCO is willing to buy a railroad it knows is not capable of generating enough cash flow to fund necessary track and structure rehabilitation. It is PYCO's cost of being in business. KJRY may be afraid of experiencing buyer's remorse or the "winner's curse" as Mr. Brennan characterized it; PYCO has no choice. It must buy SAW's railroad and property rights if it is to serve its former owner membership. PYCO will acquire and then rehabilitate the railroad over time, as laid out in the most recent Verified Statement filed by my colleague, Mr. Davis. Contrary to the impression created by SAW and KJRY, neither Mr. Davis nor I have ever stated or ever intended for the rehabilitation program to be undertaken in the first year. I simply showed the amount of rehabilitation as a deduct from the preliminary net present values because to do otherwise would have resulted in even larger negative going concern valuations.

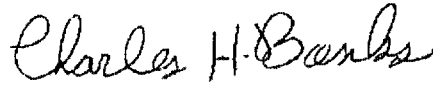
Conclusions

Despite having found a considerable amount of common ground in the *Expanded Competing Feeder Line Application*, I continue to believe that the going concern valuations I advanced in my *Verified Statement (Based on Discovery)* are the best such evidence in the case to this point because they are grounded in superior data. Further, I believe that the substitution of my evidence in just the three areas for that set forth in the Verified Statement of Mr. Brennan would result in he and KJRY reaching going concern valuations which would be approximately the same or less than those I most recently advanced in Table 5 of my *Verified Statement (Based on Discovery)*, which going concern valuation best reflects the combination of assumptions which I believe appropriate.

Under 28 USC 1746, the following language converts any statement into a verified statement, equivalent to a statement made under oath, and evidentiary in all federal agency proceedings otherwise requiring affidavits or other verification:

"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: October 11, 2006



[signature]

Appendix C

NO. 2006-535-682

CHOO-CHOO PROPERTIES, INC.

v.

PYCO INDUSTRIES, INC.

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§
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IN THE 237TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
BY *Paulina*
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DEPUTY

**PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND
APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND TEMPORARY INJUNCTION**

CHOO-CHOO PROPERTIES, INC. ("CHOO-CHOO"), Plaintiff herein, files this, its First Amended Original Petition and Request for Temporary Restraining Order and Temporary Injunction, complaining of PYCO INDUSTRIES, INC. ("PYCO"), and would show to the court as follows:

**I.
DISCOVERY LEVEL**

CHOO-CHOO anticipates that discovery will be conducted under Level III of the applicable Texas Rules of Civil Procedure for the reason that it is anticipated that the court will enter a Scheduling Order in this case.

**II.
PARTIES**

CHOO-CHOO is a corporation created and authorized to do business in the State of Texas. Its principal place of business is Lubbock, Lubbock County, Texas.

PYCO is a corporation authorized to do business in the State of Texas. No service of process is necessary at this time.

COPY

NO. 2006-535-682

CHOO-CHOO PROPERTIES, INC.

v.

PYCO INDUSTRIES, INC.

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IN THE 237TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RECORD
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2006 SEP 22 AM 11:09
Boyle Lucy

ORDER SETTING HEARING

IT APPEARING TO THE COURT that the Plaintiff, CHOO-CHOO PROPERTIES, INC., has filed an Application for Temporary Injunction, and the court, having decided that a hearing is necessary on the motion, enters the following order:

IT IS ORDERED, ADJUDGED AND DECREED that a hearing on CHOO-CHOO PROPERTIES, INC.'S Application for Temporary Injunction is hereby set for the ²⁰ day of October, 2006, at 10:00 A.m., in the 237th District Court of Lubbock County, Texas.

SIGNED this 22 day of September, 2006.

15/ Wilbur Sowden
JUDGE PRESIDING

III.
JURISDICTION AND VENUE

This court has jurisdiction in this matter for the reason that the relief sought by **CHOO-CHOO** is within the jurisdictional subject matter of this court and any damages sought herein are within the jurisdictional limits of this court.

Venue of this case is proper in Lubbock County. **PYCO'S** principal place of business is located in Lubbock County, and **CHOO-CHOO'S** principal place of business is located in Lubbock County. The acts, omissions and events giving rise to this case all occurred in Lubbock County.

IV.
UNDERLYING FACTS

CHOO-CHOO is the owner of rail property in Lubbock County, Texas. The property in question consists of two railroad tracks that form into one track known as the "wye". The "wye" track runs generally in a north/south direction and splits off into two tracks, one track generally heading northeast and the other track heading northwest. The tracks join and form a track that runs generally north/south. The property and the tracks are located generally north of 34th Street.

On both sides of the "wye" is property owned by **PYCO**. On the west end, **PYCO** has its operating plant and on the east end, **PYCO** has a storage facility.

PYCO has attempted to build a road crossing across the "wye" track generally from its west plant to the east storage facility. There is no lease or easement that covers this property and **PYCO'S** action would constitute trespass. **PYCO** has no right to trespass on the property of **CHOO-CHOO** to move vehicles and/or material from its west plant to its east storage facility.

V.

PYCO has disregarded the above facts and has in fact moved concrete into position to

concrete and prepare a road across the property and track owned by **CHOO-CHOO**. Further, **PYCO'S** vehicles have been seen crossing the property of **CHOO-CHOO** going back and forth between **PYCO'S** west plant and **PYCO'S** east storage facility from June 26, 2006, to July 7, 2006.

This court entered a Temporary Restraining Order on July 7, 2006, prohibiting **PYCO** from crossing the "wye" track. The court also set a hearing on the request for temporary injunction for July 20, 2006, on the issues involved herein.

On July 26, 2006, prior to the appointed date and time for the hearing on the temporary injunction, the parties reached a partial settlement agreement in connection with the use of the "wye" track. The parties agreed that for a period of thirty days, **PYCO** could use the road across the "wye" track to move its cottonseed from its east storage facility to its west processing facility. At the end of thirty days, under the parties' partial settlement agreement, the court was to re-enter a temporary injunction.

VI.

As a result of **PYCO'S** conduct in trespassing upon the property of **CHOO-CHOO**, without a valid lease or a valid easement, **PYCO'S** conduct is in violation of **CHOO-CHOO'S** rights. **CHOO-CHOO** has sustained harm and will continue to suffer losses unless the conduct already begun by **PYCO** is prohibited by this court. In the event that **PYCO** continues to trespass upon the property of **CHOO-CHOO**, **CHOO-CHOO** may suffer significant losses including the damage to its track, damage to its property near the track due to unsafe conditions, and other damages. There are no signalized crossing gates or signs in the area which can contribute to an unsafe condition if the truck traffic volume is heavy.

VII.

Mr. Gail Kring, President of **PYCO**, testified on Monday, July 3, 2006, in the case of United States District Court for the Northern District of Texas, Lubbock Division, styled "*Pyco Industries, Inc. v. South Plains Switching, Ltd. Co. v. Choo-Choo Properties, Inc.*", being Cause No. 5:06CV0131-C, that **PYCO** intended to continue to use the crossing by moving its trucks from one side of the crossing to the other. Mr. Kring also testified that **PYCO**, with the exception of a few truck drivers, would be completely shut down for vacation during the first two weeks of July, 2006.

VIII.

CHOO-CHOO asks the court for a judgment against **PYCO** awarding **CHOO-CHOO** compensation for the temporary harm in a sum within the jurisdictional limits of the court. Moreover, the harm to **CHOO-CHOO** will continue and become irreparable, leaving **CHOO-CHOO** without an adequate remedy at law, unless this court enjoins **PYCO'S** interference and trespass on the property of **CHOO-CHOO** by ordering **PYCO** to refrain from doing any act which would harm or trespass on the property of **CHOO-CHOO**.

IX.

On May 16, 1973, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Industrial Track Agreement No. FD8771 with the Fort Worth & Denver Railway Company. The lease contained a provision that any party could give six months' notice of termination. On May 8, 1966, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Private Track Agreement No. FD7802 with Fort Worth & Denver Railway Company. Said lease contained a thirty-day cancellation clause. On February 13, 1975, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Lease No. FD4677 with the Fort Worth & Denver Railway Company. Said lease

contained a thirty-day notice of termination clause. On October 8, 1972, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into a Contract for Pipeline Across the Right-of Way No. 8678 with the Fort Worth & Denver Railway Company. Said contract provided a sixty-day termination notice. On March 30, 1962, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Private Crossing Contract No. 6793 with the Fort Worth & Denver Railway Company. Said contract contained a ninety-day termination clause. On April 25, 1991, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Pipeline Permit No. PX91-12021 with The Burlington Northern Railway Company. Said permit contained a thirty-day cancellation clause. On January 13, 1976, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Lease No. FD4536 with the Fort Worth & Denver Railway Company. Said lease contained a thirty-day cancellation clause. On April 25, 1991, the predecessor to **PYCO**, Plains Cooperative Oil Mill, entered into Pipeline Permit No. PX91-12025 with The Burlington Northern Railway Company. Said permit contained a thirty-day cancellation clause. Each of these leases were later assumed by The Burlington Northern and Santa Fe Railway Company ("BNSF").

The real estate covered by the above referenced leases was transferred by an Asset Sale Agreement from BNSF to South Plains Switching, Ltd. Co., in May of 1999. The leases were also transferred to South Plains Switching, Ltd. Co. South Plains Switching, Ltd. Co., thereby obtained all of the rights and obligations under the agreements. On March 9, 2006, South Plains Switching, Ltd. Co., transferred those properties and the leases set out above to **CHOO-CHOO**.

Since the execution of the agreements, Plains Cooperative Oil Mill has become **PYCO**. **PYCO** has assumed all of the rights and obligations under the agreements.

On July 6, 2006, **CHOO-CHOO** sent a cancellation notice for each of the agreements set out above. The cancellation notice is attached as Exhibit "A". Despite the cancellation notice, **PYCO** has refused to vacate or move its structures and equipment from the various lease properties. **CHOO-CHOO** is entitled to full and complete possession, to the exclusion of **PYCO**, from each of the agreements as set out above except Industrial Track Agreement No. FD8771 and Private Crossing Contract No. 6793.

Despite receiving the cancellation notice on the other agreements, **PYCO** has failed and refused and still fails and refuses to vacate or remove its equipment and other property from the lease premises. **PYCO'S** failure to remove the equipment has resulted in irreparable damages to **CHOO-CHOO** for which there is no adequate remedy at law. Therefore, injunctive relief is proper.

X.

CHOO-CHOO has retained the law firm of James L. Gorsuch, P.C., to represent it in the preparation and prosecution of this lawsuit and have agreed to pay such attorney reasonable and necessary attorney's fees. Accordingly, **CHOO-CHOO** asks the court to render judgment against **PYCO** for reasonable and necessary attorney's fees incurred in this proceeding as are equitable and just.

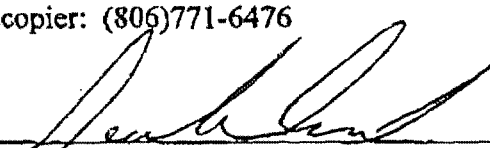
WHEREFORE, Premises Considered, CHOO-CHOO requests that:

1. This court enter a Temporary Injunction, after notice to **PYCO**, and an evidentiary hearing, enjoining **PYCO** and **PYCO'S** agents, servants, employees or any person with notice of the order, from directly or indirectly doing anything to interfere with the property rights of **CHOO-CHOO** and specifically, that **PYCO**, its agents, servants, employees an any person with notice of the order, not trespass on the property of **CHOO-CHOO** located on the "we" track between **PYCO'S** west plant and its east storage facility.

2. This court enter a Temporary Injunction, after notice to **PYCO**, and an evidentiary hearing, ordering **PYCO** and **PYCO'S** agents, servants and employees to vacate and remove any and all **PYCO** buildings, structures, equipment or other property from the leases that have been cancelled as set out above.
3. **PYCO** be cited to appear and answer to this petition and on final trial, the court should enter judgment as follows:
 - a. the court declare that **PYCO** has been trespassing on the property owned by **CHOO-CHOO** located between **PYCO'S** west plant and **PYCO'S** east storage facility;
 - b. the court enter a Permanent Injunction enjoining **PYCO** and **PYCO'S** agents, servants, employees and persons with knowledge of the order, from directly or indirectly trespassing upon the property of **CHOO-CHOO**, specifically that **PYCO**, its agents, servants, employees or any person with knowledge of the order, not trespass on **CHOO-CHOO'S** property located between **PYCO'S** west plant and **PYCO'S** east storage facility;
 - c. this court enter a Permanent Injunction enjoining **PYCO** and **PYCO'S** agents, servants, and employees from trespassing on any of the leases that have been properly cancelled herein or interfering in any way with **CHOO-CHOO'S** rights in connection with said leases.
 - d. the court enter judgment against **PYCO** awarding **CHOO-CHOO** recovery of damages, attorney's fees, costs of court, and any and other further relief to which **CHOO-CHOO** may show itself to be entitled.

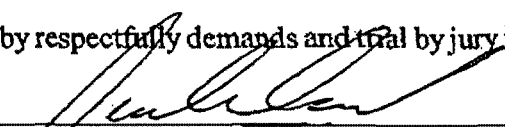
Respectfully submitted,

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

By: 
James L. Gorsuch
State Bar No. 08221250

Demand for Jury

CHOO-CHOO, Plaintiff herein, hereby respectfully demands and trial by jury in this cause.



James L. Gorsuch

10-2006 14:40 FROM: GARY McLAREN 806 788 1807

TO: 12065463739

P: 4/20

JAMES L. GORSUCH, P.C.*Attorney at Law*4412 - 74th Street, Suite B-102
Lubbock, Texas 79424Telephone: (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

EXHIBIT

tabler

"A"

SEP-27-2006 14:40 FROM:GARY McLAREN 806 788 1807

TO:12065463739

P:5/20

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.

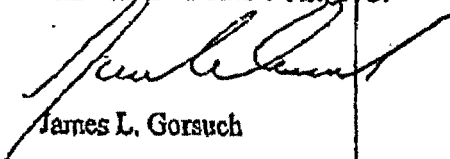
5. Private Crossing Contract No. 6793 dated March 30, 1962; Plains Cooperative Oil Mill, Inc., as original Lessee, Fort Worth and Denver Railway Company, as original Lessor; Choo-Choo Properties, Inc., is exercising its option of giving ninety (90) days' notice of termination of the Private Crossing 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

NO. 2006-534,401

SOUTH PLAINS SWITCHING, LTD. CO. §

v. §

PYCO INDUSTRIES, INC. §

IN THE 237TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

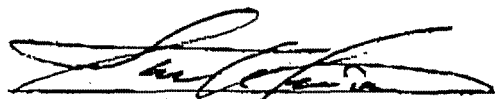
2006 SEP 26 AM 10:41

FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
DEPUTYORDER SETTING SUBMISSION

IT APPEARING TO THE COURT that the Plaintiff, SOUTH PLAINS SWITCHING, LTD. CO., has filed a Motion for Summary Judgment, and the court, having decided that a submission date is necessary on the motion, enters the following order:

IT IS ORDERED, ADJUDGED AND DECREED that the submission date for SOUTH PLAINS SWITCHING, LTD. CO.'S Motion for Summary Judgment is hereby set for the 27th day of October, 2006, in the 237th District Court of Lubbock County, Texas.

SIGNED this 26th day of September, 2006.


JUDGE PRESIDING

Appendix D

NO. 2006-534,401

SOUTH PLAINS SWITCHING, LTD. CO. § IN THE 237TH DISTRICT COURT
 v. § OF
 PYCO INDUSTRIES, INC. § LUBBOCK COUNTY, TEXAS

FILED FOR RECORD
 DISTRICT CLERK LUBBOCK CO.
 2006 SEP 26 AM 10:42
 2006 SEP 26 AM 10:42
 2006 SEP 26 AM 10:42

MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFF, SOUTH PLAINS SWITCHING, LTD. CO.

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), Plaintiff herein, files this, its Motion for Summary Judgment, pursuant to *Tex.R.Civ.P. 166(b)*, and would show to the court as follows:

I.

There is no genuine issue of material fact and SOUTH PLAINS is entitled to a judgment in its favor as a matter of law on all matters asserted herein.

II.

Basis for Motion

This motion is based upon the following:

1. The pleadings on file heretofore filed herein;
2. The Affidavit of Delilah Wisener, with attachments, attached as Exhibit "A" and incorporated herein for all purposes;
3. The Affidavit of James L. Gorsuch, attached as Exhibit "B" and incorporated herein for all purposes.

III.

Scope of the Motion

This motion covers each of the allegations set forth in Plaintiff's Original Petition, filed by

COPY

SOUTH PLAINS, on March 27, 2006. **SOUTH PLAINS** seeks a summary judgment on all of its allegations set forth herein.

IV.

Factual Background

At all relevant times herein, **PYCO INDUSTRIES, INC.** ("**PYCO**") operated a cotton mill in East Lubbock. **SOUTH PLAINS** is a shortline railroad which serves customers in the industrial area in east Lubbock. **PYCO** was one of the customers served by **SOUTH PLAINS**.

Effective May 1, 2000, with revisions made on November 1, 2001, and March 21, 2005, **SOUTH PLAINS** issued a Demurrage, Surcharge, Storage and Miscellaneous Service Program ("**Program**"). The Program went into effect for customers of **SOUTH PLAINS** including **PYCO**. A copy of the Program is attached to Delilah Wisener's Affidavit as Exhibit "1".

Under the Program, cars that were constructively placed meant cars that were held on the side or a hold track because **PYCO** did not track capacity or was unable to accept the car at their siding or team track. Cars that were constructively placed on the tracks of **SOUTH PLAINS** were subject to the demurrage charges. The Program also set demurrage charges on cars that were placed on industry siding and team tracks. These demurrage charges commenced forty-eight hours and covered charges for the next seventy-two hours, up to ten days. Charges were to be levied for cars held above fifteen calendar days. Cars that were constructively placed were subject to an additional \$150 switch charge when placed at an industry siding or team track. The Program called for a surcharge of \$20.00 per car to **PYCO**, with the new revision effective April 11, 2005.

Attached to Delilah Wisener's Affidavit as Exhibit "2" is a true, correct and accurate copy of Invoice No. 42123 sent to **PYCO**. The invoice is for cars released from constructive placement

on tracks of **SOUTH PLAINS** and switched to the Lubbock West Texas Railroad. Under the Program, cars "constructively placed" are subject to a \$150.00 switch charge when placed at an industry siding or team track. The cars were released to Lubbock West Texas Railroad and were subject to the charge. The total amount of the invoice was \$12,750.00.

Attached to Delilah Wisener's Affidavit as Exhibit "3" is a true, correct and accurate copy of Invoice No. 42121. This invoice covers cars that were constructively placed on the tracks of **SOUTH PLAINS** switched to **PYCO** at the request of **PYCO**. Under the Program, cars that are constructively placed are subject to an additional \$150.00 switch charge when placed at an industry siding or team track. **PYCO** requested these cars be placed at an industry siding or team track. The total amount of the invoice is \$17,950.00.

Attached to Delilah Wisener's Affidavit as Exhibit "4" is a true, correct and accurate copy of a surcharge set on each of the cars released as set out in the invoice. The surcharge to **PYCO**, under the program, is \$20.00 per car. The total amount of the invoice is \$2,160.00.

Attached to Delilah Wisener's Affidavit as Exhibit "5" is a true, correct and accurate copy of the demurrage invoice. The demurrage invoice was sent pursuant to the Program which shows demurrage fees for the number of days the cars sat at **PYCO**. The demurrage charges were calculated for each car subject to the Program. The total amount of the invoice is \$15,882.00.

V.

Breach of Agreement

Despite the invoices being sent and despite the invoices being based on the Program, and despite the agreement of **PYCO** to abide by the Program, **PYCO** has failed and refused and still fails and refuses to pay any amounts due under the invoices. The total sum under the four invoices

attached is \$48,742.00. By failing to pay the invoices, PYCO has breached its contract with SOUTH PLAINS. In the alternative, SOUTH PLAINS is entitled to recover \$48,742.00 from PYCO based on the theory of quantum meruit.

The breach of a contract means a failure, without legal excuse, to perform any promise that forms all or part of an agreement, the refusal to recognize the existence of an agreement or the doing of something inconsistent with its existence. *DeSantis v. Wackenhut Corp.*, 732 S.W.2d 29, 34 (Tex.App.-Houston [14th Dist.] 1987), rev'd. in part on other grounds 793 S.W.2d 670 (Tex. 1990). Whether the defendant breached the contract is a question of law for the court, not a fact question for the jury. *Bank One v. Stewart*, 967 S.W.2d 419, 432 (Tex.App.-Houston [14th Dist.] 1998, pet. denied). The court must examine the contract and determine what conduct is required of the parties and then and only then if there is a dispute concerning the failure of a party to comply with the contract, the court should submit the disputed fact issue to the jury. *Meek v. Bishop, Peterson & Sharp*, 919 S.W.2d 805, 808 (Tex.App.-Houston [14th Dist.] 1996, writ denied). A breach is material to the extent that the injured party will be deprived of a benefit it reasonably expected. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994).

The summary judgment evidence establishes that PYCO was under an obligation to pay all charges due and owing under the invoice. The failure to pay such charges on the part of PYCO amounts to a breach of the contract. The breach is material because SOUTH PLAINS has been deprived of a benefit it reasonably expected under the contract.

In the alternative, quantum meruit is an equitable theory of recovery that is intended to prevent unjust enrichment when there is an implied agreement to pay for benefits received. *In Re: Kellogg, Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005).

The elements of quantum meruit are as follows:

1. The plaintiff provided valuable services or materials;
2. The services or materials were provided for the defendant;
3. The defendant accepted the services or materials; and
4. The defendant has reasonable notice that the plaintiff expected compensation for the services and materials.

Heldensfels Brothers v. City of Corpus Christi, 832 S.W.2d 39, 31 (Tex. 1992).

A plaintiff can recover the reasonable value of services and materials. *Vic Rlty. Corp. v. Southfield Farms, Inc.*, 832 S.W.2d 610, 615 (Tex.App.—Corpus Christi 1992, no writ).

By keeping cars on the tracks owned by SOUTH PLAINS and by allowing PYCO to keep cars on its own tracks over the required period, SOUTH PLAINS was providing a service to PYCO. It was clearly expected by PYCO that SOUTH PLAINS would require payment for these services. Payment has not been forthcoming, therefore PYCO has been unjustly enriched and the doctrine of quantum meruit should provide recovery for SOUTH PLAINS against PYCO.

VI.

Attorney's Fees

SOUTH PLAINS was required to hire the undersigned attorneys to file and prosecute this case to judgment. A presentment of demand was made to PYCO. No payment of the amount has been paid by PYCO. SOUTH PLAINS has retained the undersigned attorneys to pursue this claim which is based on a breach of contract and on quantum meruit. Therefore, SOUTH PLAINS is entitled to recover reasonable and necessary attorney's fees for the trial of this case in the amount of \$2,000.00, for an appeal to the Court of Appeals \$7,500.00, and for an appeal to the Supreme Court of Texas, \$5,000.00.

WHEREFORE, Premises Considered, SOUTH PLAINS prays that the court grant this Motion for Summary Judgment, that the court enter judgment in favor of SOUTH PLAINS and against PYCO for the sum of \$48,742.00, plus reasonable and necessary attorney's fees as set out above, plus maximum pre-judgment and post-judgment interest as provided by law, and for any and other further relief to which SOUTH PLAINS may show itself to be entitled.

Respectfully submitted,

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

Original Signed By

By: James L. Gorsuch
State Bar No. 08221250

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion for Summary Judgment has been served on opposing counsel on the 26th day of September, 2006, as follows:

CM/RRR 7003 3110 0000 6378 5824

Mr. Gary R. McLaren
Phillips & McLaren
3305 66th, Suite 1-A
Lubbock, Texas 79413

Original Signed By
James L. Gorsuch

James L. Gorsuch

NO. 2006-534,401

SOUTH PLAINS SWITCHING, LTD. CO.	§	IN THE 237TH DISTRICT COURT
	§	
v.	§	OF
	§	
PYCO INDUSTRIES, INC.	§	LUBBOCK COUNTY, TEXAS

EXHIBIT "A"
AFFIDAVIT OF DELILAH WISENER

IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT OF SOUTH PLAINS SWITCHING, LTD. CO., before me, the undersigned authority, personally appeared Delilah Wisener, who, being by me first duly sworn, deposed and stated as follows:

"My name is Delilah Wisener. I am over the age of twenty-one years. I am of sound mind. I am fully capable of making this affidavit. I have never been convicted of a felony or a misdemeanor involving moral turpitude. I have personal knowledge of every statement made herein and every statement made herein is true and correct.

"I am the owner of South Plains Switching, Ltd. Co. I am familiar with the operations of South Plains Switching, Ltd. Co., and am familiar with the service to Pyco Industries, Inc., which is one of the customers of South Plains Switching, Ltd. Co.

"South Plains Switching, Ltd. Co., is a shortline railroad that serves customers in the industrial area in east Lubbock. Pyco Industries, Inc., is one of those customers served by South Plains Switching, Ltd. Co., during all relevant times concerning this lawsuit.

"Effective on May 1, 2000, with revisions made on November 1, 2001, and March 21, 2005, South Plains Switching, Ltd. Co., issued a Demurrage, Surcharge, Storage and Miscellaneous Service Program ("Program"). The Program went into effect for customers of South Plains Switching, Ltd. Co., including Pyco Industries, Inc. Attached to my affidavit as Exhibit "1" is a true, correct and accurate copy of the South Plains Switching, Ltd. Co., Demurrage, Surcharge, Storage and Miscellaneous Service Program. This Program was issued pursuant to the rights of South Plains Switching, Ltd. Co., in servicing its customers.

"Cars that were constructively placed under the Program and the cars that were held on a side track or hold track of South Plains Switching, Ltd. Co., because the customer did not have track pass or was unable to accept the car at their siding or team track. Cars that were constructively placed on the tracks of South Plains Switching, Ltd. Co., were subject to demurrage charges. The Program also set demurrage charges on cars that were placed at an industry siding or team tracks. These demurrage charges commenced after the car had been on the track or siding for forty-eight hours and covered charges for the next seventy-two hours, up to a period of ten days. Charges were to be levied for cars held above fifteen calendar days. Cars that were constructively placed were subject to a \$150.00 switch charge when placed at an industry siding or team track. The Program also set a surcharge of \$20.00 per car to Pyco with a new revision effective April 11, 2005.

"Attached as Exhibit "2" to my affidavit is a true, correct and accurate copy of Invoice No. 42123 sent to Pyco. The invoice is for cars released from constructive placement on the tracks of South Plains Switching, Ltd. Co., and switched to the Lubbock West Texas Railroad. Under the Program, cars "constructively placed" are subject to a \$150.00 switch charge when placed at an industry siding or team track. The cars were released at Lubbock West Texas Railroad and are subject to the charge. The total amount of the invoice is \$12,750.00.

"Attached as Exhibit "3" to my affidavit is a true, correct and accurate copy of Invoice No. 42121 sent to Pyco. This invoice covers cars that were constructively placed on the tracks of South Plains Switching, Ltd. Co., switched to Pyco at the request of Pyco. Under the Program, cars that are constructively placed are subject to a \$150.00 switch charge when placed at an industry siding or team track. Pyco requested these cars be placed at an industry siding or team track. The total amount of the invoice is \$17,950.00.

"Attached as Exhibit "4" to my affidavit is a true, correct and accurate copy of Surcharge Claims sent on each of the cars released as set out in the invoice. The surcharge to Pyco, under the Program, is \$20.00 per car. The total amount of the invoice is \$2,160.00.

"Attached as Exhibit "5" to my affidavit is a true, correct and accurate copy of the Demurrage Invoice. The Demurrage Invoice was sent to Pyco pursuant to the Program which establishes demurrage fees for the number of days the cars were set at Pyco. Demurrage charges were calculated under the Program. The total amount of this invoice is \$15,882.00.

"Each of the invoice above were sent to Pyco under the Program. Pyco agreed to abide by the Program and had previously made payments to South Plains Switching, Ltd. Co., under the Program. However, Pyco has failed and refused to

pay any of the amounts due under the above invoices. The total sum due under the four invoices is \$48,742.00.

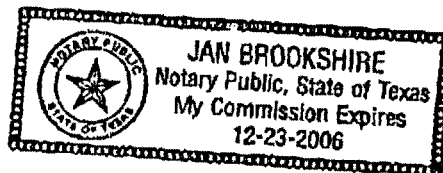
"South Plains Switching, Ltd. Co., has been required to retain the firm of James L. Gorsuch, P.C., to prosecute this action to judgment."

FURTHER AFFIANT SAYETH NOT.


DEILAH WISENER

25th SUBSCRIBED AND SWORN TO BEFORE ME, by the said Delilah Wisener on the day of September, 2006.


Notary Public, State of Texas



**SOUTH PLAINS SWITCHING, LTD
SOUTH PLAINS LAMESA RAILROAD, LTD.**

**DEMURRAGE, SURCHARGE, STORAGE AND
MISCELLANEOUS SERVICE PROGRAM**

Demurrage charges, applicability of demurrage charges, hold track program and charges, cars received empty, not loaded and sent out empty, switching between industries, surcharge, storage charges, special services, effective dates and credit policy

Effective May 1, 2000
Demurrage Program and Rates

Revision Effective November 1, 2001
Cars Received Empty, not loaded provisions
"Constructively Placed" Car Charges

REVISION
PUBLISHED March 21, 2005
Surcharges effective April 11, 2005
"Constructively Placed" Car Charges effective April 11, 2005

The following charges shall apply on all cars subject to demurrage "placed" or "constructively placed" on all lines of South Plains Switching (SAW) or South Plains Lamesa Railroad (SLAL).

"Placed" means cars actually placed at industry siding or team track.

"Constructively placed" means cars are held on a side or hold track because the industry has no track capacity or is unable to accept the car at their siding or team track.

I DEMURRAGE CHARGES:

First 48 hours placed or constructively placed at customer industry

NO CHARGE



Thereafter:

- a. Next succeeding 72 hours placed or constructively placed at an industry:
\$36.00 per 24 hour period
- b. Next succeeding period after the initial 120 hours, up to 10 calendar days following:
\$48.00 per car per 24 hour period, except that if car hire is more to SAW/SLAL than \$48.00 per car, than the actual car hire cost will be accessed
- c. For periods of time cars are held over the above 15 calendar days, \$58.00 per 24 Hour period, or fraction thereof. Where car hire cost to SAW/SLAL is higher, actual car hire cost shall apply.
- d. Cars "constructively placed" will be subject to an additional \$150.00 switch charge when "placed" at industry siding or team track. (New provision effective April 11, 2005)
- e. In the event of unit or multiple car shipments moving under connecting carrier tariffs or contracts which limit the time industries may hold equipment for loading or unloading, the payments, restrictions and conditions in those tariffs or contracts apply for cars held in excess of the allotted time.

FREE TIME

The term "24 Hour Period", "Days" and "Hours", includes all weekends, holidays and other days, except cars placed or constructively placed after 10:00 a.m. on Friday or the day before a legal holiday shall not begin to accrue time until 12:01 a.m. Monday, or 12:01 a.m. the day following the legal holiday.

NOTIFICATION

SAW/SLAL shall notify customer when cars are placed or constructively placed. Customer shall notify SAW/SLAL when cars, loaded or empty, are released.

CHARGES

Demurrage charges are assessed monthly, first day to last day of the month.

II. APPLICABILITY OF DEMURRAGE CHARGES

This demurrage program applies on all rail cars except those with an "X" in their AAR Alpha markings if those cars do not incur car hire cost to South Plains. The

program applies to all other cars, including those marked with and "X" in their AAR Alpha marking if the cars accrue car hire or mileage costs to SAW/SLAL.

III. HOLD TRACK AND PROGRAM CHARGES

SAW/SLAL strives to accommodate all customers by providing rail switching services to our customers. We do not have unlimited track space to hold equipment.

At the same time we realize that customer car supply is always under their control. At times market conditions and supply of cars results in cars being held off South Plains track. Cars being held often include those with "X" Alpha marking, which are exempt from SAW/SLAL demurrage plans.

Given our limited track storage space our hold track program allows some compensation for cars with or without "A" AAR Alpha marking, which are held for more than 7 calendar days on SAW/SLAL. The charge for this holding service is \$1.25 per car per day.

SAW/SLAL reserves the right to reject or hold any cars held longer than 7 days, or to require the customer to find other locations to store or hold such cars.

IV. CARS RECEIVED EMPTY, NOT LOADED AND SENT OUT EMPTY

SAW/SLAL receives no revenues on cars received empty, not loaded and sent out empty. Customers should attempt to avoid having this occur. In the event that cars are received empty and sent out empty and not specified by shipper to be in a hold situation as shown above, the following switching charges shall apply:

Charge to switch inbound empty car:	\$50.00 per car switched
Charge to switch outbound empty car:	\$50.00 per car switched

V. SWITCHING BETWEEN INDUSTRIES

When requested by shipper, in writing, SAW/SLAL will move a car writing the switching territory in Lubbock, Texas for a charge of \$150.00 per loaded or empty rail car.

VI. SURCHARGE

In accordance with SAW and Burlington Northern Santa Fe (BNSF) contract agreement, dated May 8, 1999, SAW asked for and received permission to implement a per car surcharge of up to \$60.00 per single car and up to \$40.00 per unit car effective May 4, 2004. (New revision effective April 11, 2005)

CHARGES

When implemented, surcharges will be assessed on a weekly basis, for all inbound and outbound revenue (loaded) cars. PYCO Industries assessment is \$20.00 per car.

VII. STORAGE PROGRAM AND CHARGES

SAW/SLAL has limited space for storage of rail cars. If space is available SAW/SLAL will store empty real cars as follows:

Charge to switch car to the storage track \$50.00 per car switched
 Charge to switch car out of the storage track \$40.00 per car switched
 Charge per 24 hour period (or fraction of day) per car held \$1.25

Switch service includes transfer to or from connecting carrier at Lubbock or Slaton, Texas. In the event customers desire to store loaded cars it is necessary to contact SAW/SLAL for availability of storage as there are restrictions on some commodities held for storage.

VIII. MISCELLANEOUS SERVICES

SAW/SLAL provides service five days a week, Monday through Friday, exclusive of Holidays. In the event switching services are requested at other times SAW/SLAL shall attempt to accommodate customers with a special switch crew. The charge for this miscellaneous service is \$500.00 per special switch crew.

IX. EFFECTIVE DATES OF THIS PROGRAM AND CREDIT POLICY

The provisions outlined above shall become effective at 12:01 a.m. on May 1, 2000 and remain in effect until such time SAW/SLAL amends any provisions or charges. A minimum of 20 days notice of any change which results in increased charges to customers shall be given by SAW/SLAL.

Billing and payments of all charges shown above is subject to SAW/SLAL credit policy.

SOUTH PLAINS CREDIT POLICY

Demurrage Accounts more than 30 days past due are subject to termination of rail service.

Surcharge Accounts are due and payable upon receipt of the invoice. Rail service will be discontinued to any customer for non-payment of this surcharge when implemented.

SOUTH PLAINS SWITCHING LTD., CO.

P. O. BOX 64299
LUBBOCK, TX 79462-4299

Invoice

Date	Invoice #
1/31/2006	42123

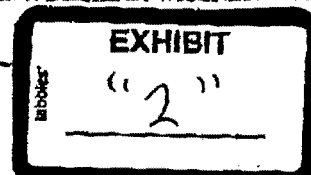
Bill To
PYCO INDUSTRIES P. O. BOX 841 LUBBOCK, TEXAS 79408

P.O. No.	Terms	Project
	Due Upon Receipt	

Quantity	Description	Rate	Amount
85	ALL CARS RELEASED FROM CONSTRUCTIVE PLACEMENT: BN 461715, 448799, HS 25386, RBOX 43732, 31398, ATSF 600601, ABOX 50003, ATSF 600706, RBOX 20277, 32910, ACFX 95775, 95712, NATX 250695, 250718, 251008, 250461, DBUX 250504, NATX 250582, 250706, 250463, 250595, GATX 54950, ACFX 95797, CRGX 8262, DBUX 250485, NATX 251013, NATX 250698, DBUX 250488, BN 587564, 585296, 587200, 585301, 587655, 585283, 587663, 585275, 585284, 587439, 585262, 587632, 585335, 587240, 587203, 587101, 587640, 587329, 587635, 585280, 585209, 587411, 585244, 587154, 587274, 587361, 587266, 587645, 587132, 587607, 587060, BNSF 541009, BN 587365, 587058, 587639, 587410, 587406, 587080, 585223, 587288, 587197, 585270, 587030, 587204, 587105, 587467, 587177, 587219, 587172, 585214, 585305, 587244, 587399, 587299, 587284, 587449, 587377	150.00	12,750.00

Should you have any questions concerning this invoice contact DELILAH WISENER at 806-828-4841.

Total \$12,750.00



SOUTH PLAINS SWITCHING LTD., CO.

P. O. BOX 64299

LUBBOCK, TX 79462-4299

Invoice

Date	Invoice #
1/30/2006	42121

Bill To
PYCO INDUSTRIES P. O. BOX 841 LUBBOCK, TEXAS 79408

P.O. No.	Terms	Project
	Due Upon Receipt	

Quantity	Description	Rate	Amount
14	JANUARY 23, 2006 PLANT 1: REQUEST 4 MTY TANKS, 6 MTY GONS, 2 MTY BOXES, 2 MTY HOPPERS (PER RICHARD) CARS PLACED: NATX 250465, 251005, DBUX 250411, ACFX 95737, BNSF 541116, BN 585330, 587396, 587366, 587245, 587473, ABOX 51245, ATSF 600670, NOKL 822028, BN 468639	150.00	2,100.00
0	JANUARY 23, 2006 PLANT 2: NOT REQUEST FOR SWITCH	150.00	0.00
12	JANUARY 24, 2006 PLANT 1: REQUEST 4 MTY TANKS, 4 MTY GONS, 2 MTY HOPPERS, 2 LOADED TANKS: REQUESTED 2 MTY HOPPERS - SAW HAD 1 MTY HOPPER ON LINE - AS PER RICHARD SAW SWITCHED IN 1 MTY HOPPER AND 1 LOADED HOPPER CARS PLACED MTY: NATX 250574, ACFX 95716, NATX 250709, 250728, BN 587533, 587631, 587180, 587211, NOKL 826582 CARS PLACED LOADED: NATX 250726, PLCX 221602, CRDX 11286	150.00	1,800.00
0	JANUARY 24, 2006 PLANT 2: NO REQUEST FOR SWITCH	150.00	0.00
10	JANUARY 25, 2006 PLANT 1: REQUEST 1 MTY TANK, 3 LOADED TANKS, 4 MTY GONS (PER RICHARD), 2 MTY BOXES CARS PLACED MTY: NATX 250730, BN 587292, 587298, 587350, 587241, ATSF 600606, RBOX 32439 CARS PLACED LOADED: ACFX 95759, 95736, 95774	150.00	1,500.00
0	JANUARY 25, 2006 PLANT 2: NO REQUEST FOR SWITCH	150.00	0.00
14	JANUARY 26, 2006 PLANT 1: REQUEST 4 MTY TANKS, 2 LOADED TANKS (PER RICHARD), 6 MTY GONS, 2 MTY BOXES CARS PLACED MTY: NATX 2503736, DBUX 250499, NATX 250714, 250710, BNSF 777278, ATSF 600622, BN 585278, 587138, 587647, 587570, 587515, 585201 CARS PLACED LOADED: DBUX 250484, PLCX 221866	150.00	2,100.00
0	JANUARY 26, 2006 PLANT 2: REQUEST 2 MTY TANKS, 12 MTY GONS NO CARS PLACED UNABLE TO CROSS IN AFTERNOON	150.00	0.00

Should you have any questions concerning this invoice contact DELILAH WISENER at 806-828-4841.

Total

EXHIBIT

tabular

3

SOUTH PLAINS SWITCHING LTD., CO.

P. O. BOX 64299
LUBBOCK, TX 79462-4299

Invoice

Date	Invoice #
1/30/2006	42121

Bill To
PYCO INDUSTRIES P. O. BOX 841 LUBBOCK, TEXAS 79408

P.O. No.	Terms	Project
	Due Upon Receipt	

Quantity	Description	Rate	Amount
10	JANUARY 27, 2006 PLANT 1: REQUEST 6 MTY GONS, 4 MTY TANKS CARS PLACED: BN 587324, 587442, 585315, 587374, 587306, 587033, DBUX 230432, NATX 250724, ACFX 95735, NATX 250975	150.00	1,500.00
14	JANUARY 27, 2006 PLANT 2: REQUEST 12 MTY GONS, 2 MTY TANKS CARS PLACED: BN 587407, 585282, 587521, 587140, 587378, 587079, 587268, 587618, 587085, 585251, 585263, 587369, NATX 250587, ACFX 95728	150.00	2,100.00
15	JANUARY 28, 2006 PLANT 1: REQUEST 12 MTY GONS (PER LES), 3 MTY HOPPERS (PER LES) CARS PLACED: BN 587296, 587672, 587532, 587694, 587628, 587469, 587118, 585228, 587114, 587212, 587223, 585221, 462326, BNSF 431599, HS 25767	150.00	2,250.00
0	JANUARY 28, 2006 PLANT 2: NO REQUEST FOR SWITCH	150.00	0.00
12	JANUARY 29, 2006 PLANT 1: REQUEST 12 MTY GONS CARS PLACED: BN 587659, BNSF 541409, BN 587351, 585316, 587360, HPJX 147588, BN 587687, 587205, HPJX 147619, 147551, BN 587530, 587623	150.00	1,800.00
12	JANUARY 29, 2006 PLANT 2: REQUEST 12 MTY GONS CAR PLACED: BN 587505, 587202, 587567, 587584, 585344, 587100, 587226, 587248, 587315, 587386, HPJX 147560, 147552	150.00	1,800.00
1	CHARGE FOR SPECIAL SWITCH CREW FOR JANUARY 28, 2006	500.00	500.00
1	CHARGE FOR SPECIAL SWITCH CREW FOR JANUARY 29, 2006	500.00	500.00

ould you have any questions concerning this invoice contact DELILAH WISENER at 806-828-4841.

Total \$17,950.00

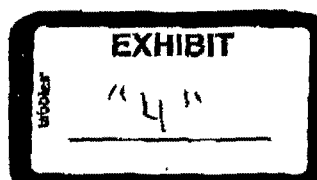
LUBBOCK, TX 79402

Date	Invoice #
1/31/2006	42122

Bill To
PYCO INDUSTRIES P. O. BOX 841 LUBBOCK, TEXAS 79408

P.O. No.	Terms	Project
	Due Upon Receipt	

Quantity	Description	Rate	Amount
24	SURCHARGE ON 17 CARS RELEASED FOR OUTBOUND AND 7 INBOUND LOADS 1/23/06 CARS RELEASED: BN 585218, 585291, 585340, 587230, 587398, 587488, HPJX 147582, 147593, DBUX 250413, NATX 250467, 251015, DBUX 250494, NATX 250976, 251012, ABOX 50036, 5298, RBOX 33499 INBOUND LOADS: NATX 250726, ACFX 95759, PLCX 221866, 221602, ACFX 95774, DBUX 250484, ACFX 95736	20.00	480.00
9	SURCHARGE ON 9 CARS RELEASED FOR OUTBOUND 1/24/06 CARS RELEASED: ACFX 95749, DBUX 250411, NATX 250966, 250991, ACFX 95760, 95757, NOKL 822028, BN 468639, ABOX 51245, ATSF 600670	20.00	180.00
13	SURCHARGE ON 12 CARS RELEASED FOR OUTBOUND AND 1 INBOUND LOAD 1/23/06 CARS RELEASED: BN 587473, 585330, 587245, 587366, 587396, BNSF 541116, NATX 251005, ACFX 95737, NATX 250728, 250465, RBOX 32857, 41192 INBOUND LOAD: NATX 250718	20.00	260.00
11	SURCHARGE ON 11 CARS RELEASED FOR OUTBOUND 1/26/06 CARS RELEASED: BN 587180, 587211, ABOX 51892, 52014, NATX 250709, ACFX 95716, NATX 250726, RBOX 20405, 39384, 32439, ATSF 600606	20.00	220.00
16	SURCHARGE ON 16 CARS RELEASED FOR OUTBOUND 1/27/06 CARS RELEASED: RBOX 31011, 34200, BN 585201, 587241, 587292, 587298, 587350, 587515, 587533, 587570, 587631, 587647, 587138, 585278, NATX 250574, 250730	20.00	320.00
35	SURCHARGE ON 35 CARS RELEASED FOR OUTBOUND 1/29/06 CARS RELEASED: BN 585251, 587079, 585263, 585282, 587085, 587140, 587268, 587369, 587378, 587618, 585315, 587033, 587306, 587374, 587442, 587521, 587324, 585221, 585228, 587114, 587118, 587212, 587223, 587296, 587469, 587532, 587628, 587672, 587694, NATX 250373, NATX 250714, DBUX 250499, HS 25767, BNSF 431599, BN 462326	20.00	700.00
Should you have any questions concerning this invoice contact DELILAH WISENER at 806-828-4841.		Total	\$2,160.00



DEMURRAGE INVOICE
For Cars Released from
01/01/06 through 01/29/06

In Account Of
PYCO INDUSTRIES
P. O. BOX 841
LUBBOCK, TEXAS 79405

Please Remit To:
South Plains Switching Co.
P. O. Box 676
Staton, Texas 79364-0676

Station: 42200 South Plains Switching

Run Date 2/1/2006
Invoice Date 2/1/2006

INVOICE NO: 0601002



DEMURRAGE AGREEMENT

SEQ	HELD FOR	CAR	CAR TYPE	PLACED DATE	PLACED TIME	RELEASED DATE	RELEASED TIME	TOTAL DAYS	CREDIT DAYS	AMOUNT DUE
1	Load	RBOX 30976	B	1/2/2006	10:30	1/6/2006	8:00	4	2	\$ 72.00
2	Load	RBOX 32988	B	1/2/2006	10:30	1/6/2006	8:00	4	2	\$ 72.00
3	Load	BN 468579	C	12/23/2005	16:30	1/4/2006	8:00	12	4	\$ 348.00
4	Load	ABOX 51083	B	12/29/2005	8:30	1/3/2006	8:00	5	2	\$ 108.00
5	Load	ATSF 621462	R	12/28/2005	13:00	1/3/2006	8:00	6	2	\$ 156.00
6	Load	RBOX 37539	B	12/29/2006	8:30	1/3/2006	8:00	5	2	\$ 108.00
7	Load	BN 467950	C	12/23/2005	16:30	1/2/2006	8:00	10	4	\$ 252.00
8	Load	BNSF 422079	C	12/23/2005	16:30	1/10/2006	8:00	18	4	\$ 676.00
9	Load	RBOX 21410	B	1/4/2006	13:30	1/10/2006	8:00	6	2	\$ 156.00
10	Load	RBOX 32907	B	1/4/2006	13:30	1/10/2006	8:00	6	2	\$ 156.00
11	Load	ABOX 51085	B	12/23/2005	16:30	1/9/2006	8:00	17	4	\$ 618.00
12	Load	ABOX 51909	B	12/27/2005	13:30	1/9/2006	8:00	13	2	\$ 502.00
13	Load	BN 445609	C	12/23/2005	16:30	1/9/2006	8:00	17	4	\$ 618.00
14	Load	RBOX 31477	B	12/27/2005	13:30	1/9/2006	8:00	13	2	\$ 502.00
15	Load	RBOX 37310	B	12/22/2005	16:30	1/9/2006	8:00	18	2	\$ 792.00
16	Load	NOKL 822028	C	1/18/2006	13:00	1/24/2006	12:35	6	2	\$ 156.00
17	Load	ATSF 600687	A	1/3/2006	12:30	1/17/2006	8:00	14	2	\$ 560.00
18	Load	BNSF 745566	A	1/3/2006	12:30	1/17/2006	8:00	14	2	\$ 560.00
19	Load	ABOX 52252	B	1/6/2006	14:30	1/13/2006	13:00	7	4	\$ 108.00
20	Load	CSXT 507786	A	1/6/2006	14:30	1/13/2006	13:00	7	4	\$ 108.00
21	Load	RBOX 31011	B	1/16/2006	17:00	1/27/2006	14:00	11	2	\$ 396.00
22	Load	RBOX 34200	B	1/16/2006	17:00	1/27/2006	14:00	11	2	\$ 396.00
23	Load	ATSF 600622	A	1/3/2006	12:30	1/27/2006	12:05	24	2	\$ 1,140.00
24	Load	BNSF 777278	A	12/30/2005	14:30	1/27/2006	12:05	28	4	\$ 1,256.00
25	Load	ABOX 51892	B	1/16/2006	17:00	1/26/2006	13:00	10	2	\$ 348.00
26	Load	ABOX 52014	B	1/16/2006	17:00	1/26/2006	13:00	10	2	\$ 348.00
27	Load	ATSF 600606	A	1/3/2006	16:30	1/26/2006	8:00	23	2	\$ 1,082.00
28	Load	RBOX 20405	B	1/16/2006	17:00	1/26/2006	8:00	10	2	\$ 348.00

EXHIBIT

" 5 "

DEMURRAGE INVOICE
For Cars Released from
01/01/06 through 01/29/06

DEMURRAGE AGREEMENT									
SEQ	HELD FOR	CAR	CAR TYPE	PLACED DATE	PLACED TIME	RELEASED DATE	RELEASED TIME	TOTAL CREDIT DAYS	AMOUNT DUE
29	Load	RBOX 32439	B	1/2/2006	14:30	1/26/2006	8:00	24	\$ 1,140.00
30	Load	RBOX 39384	B	1/13/2006	14:00	1/26/2006	8:00	13	\$ 396.00
31	Load	NOKL 826582	C	1/18/2006	13:00	1/25/2006	8:00	7	\$ 204.00
32	Load	RBOX 32857	B	1/13/2006	14:00	1/25/2006	8:00	12	\$ 348.00
33	Load	RBOX 41192	B	1/13/2006	14:00	1/25/2006	8:00	12	\$ 348.00
34	Load	ATSF 600670	A	1/2/2006	14:30	1/24/2006	12:35	22	\$ 1,024.00
35	Load	BN 468639	C	1/18/2006	13:00	1/24/2006	12:35	6	\$ 156.00
36	Load	BN 462326	C	1/25/06	14:30	1/29/2006	16:00	5	\$ 108.00
37	Load	BNSF 431599	C	1/25/06	14:30	1/29/2006	16:00	5	\$ 108.00
38	Load	HS 25767	C	1/25/06	14:30	1/29/2006	16:00	5	\$ 108.00
TOTAL LOADING						38 CARS	440	98	\$ 15,882.00

TOTAL AMOUNT DUE

\$ 15,882.00

NO. 2006-534,401

SOUTH PLAINS SWITCHING, LTD. CO.	§	IN THE 237TH DISTRICT COURT
	§	
v.	§	OF
	§	
PYCO INDUSTRIES, INC.	§	LUBBOCK COUNTY, TEXAS

EXHIBIT "B"
AFFIDAVIT OF JAMES L. GORSUCH

IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT OF SOUTH PLAINS SWITCHING, LTD. CO., before me, the undersigned authority, personally appeared James L. Gorsuch, who, being by me first duly sworn, deposed and stated as follows:

"My name is James L. Gorsuch. I am over the age of twenty-one years. I am of sound mind. I am fully capable of making this affidavit. I have personal knowledge of every statement made herein and every statement made herein is true and correct.

"This firm has been retained to represent South Plains Switching, Ltd. Co., in the collection of amounts due and owing under its Demurrage, Surcharge, Storage and Miscellaneous Service Program with Pyco Industries, Inc. The claims being made by South Plains Switching, Ltd. Co., include breach of contract and quantum meruit.

"A presentment of demand was placed upon Pyco Industries, Inc., for payment of said amounts. Pyco did not respond or make any payment under the presentment of demand.

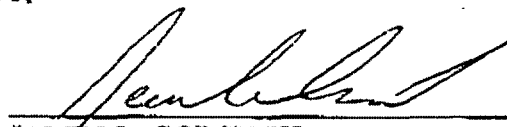
"I have been licensed to practice in Texas since November of 1978 after graduating from Texas Tech University School of Law in May of 1978. I have practiced in Lubbock County and the surrounding area since that time. My primary emphasis has been trial work with a specialty in commercial trial work. I am familiar with the fees customarily charged in this area for cases of this type. I have handled many cases of this type both from the plaintiff's side and from the defendant's side and am familiar with the fees customarily charged.

"In my opinion, a reasonable hourly rate for an attorney representing the Plaintiff in this case is \$150.00 per hour. Up to the date of the filing of this motion, I have incurred approximately 7.75 hours in representing South Plains Switching, Ltd. Co. In my opinion, each of the hours that I have spent on this case have been necessary. I am familiar with the amount of hours required to bring a case to a judgment level. In my opinion, a reasonable and necessary attorney's fees sustained by South Plains Switching, Ltd. Co., to this point would be \$2,000.00.

"I have appealed many cases both as an appellant and appellee to the Court of Appeals in Amarillo, Texas. I am familiar with the customary fees charged in this area for such an appeal and am familiar with the necessary fees that are required to appeal a case to the Court of Appeals. In my opinion, a reasonable hourly for appealing a case of this nature to the Court of Appeals in Amarillo would be \$150.00 per hour. In my opinion, the total necessary fees to appeal a case of this type to the Court of Appeals in Amarillo would be \$7,500.00.

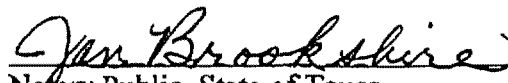
"I have filed petitions and writs of error and responded to petitions and writs of error in the Supreme Court of Texas. I am familiar with the hourly rate customarily charged for work in the Supreme Court of Texas in this area. I am familiar with the necessary hours that are required to either file a petition with the Supreme Court or to respond to a petition with the Supreme Court. In my opinion, a reasonable and necessary attorney's fees to be incurred by South Plains Switching, Ltd. Co., should this case be appealed to the Supreme Court of Texas is \$5,000.00."

FURTHER AFFIANT SAYETH NOT.



JAMES L. GORSUCH

25th SUBSCRIBED AND SWORN TO BEFORE ME, by the said James L. Gorsuch on the
day of September, 2006.



Notary Public, State of Texas

