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29 November 2006
by express

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

Re: PYCO Industries -- Alternative Rail Service --
South Plains Switching, Ltd., F.D. 34889
and related Ex Parte 346 (Sub no. 14C)

2/8/06
2/8/05

PYCO's Opposition to SAW Petition to Terminate
e-filed on 22 November

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of PYCO's Opposition to SAW's November 22 petition to terminate alternative rail service.

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) (w/encl.)

BEFORE THE
SURFACE TRANSPORTATION BOARD



PYCO INDUSTRIES, INC. --	)	
ALTERNATIVE RAIL SERVICE --	)	F.D. 34889
SOUTH PLAINS SWITCHING LTD.	)	
RAIL GENERAL EXEMPTION AUTHORITY --	)	
MISCELLANEOUS AGRICULTURAL	)	Ex parte 346
PRODUCTS -- PYCO INDUSTRIES, INC.	)	(sub no. 14C)
PETITION FOR PARTIAL REVOCATION	)	

PYCO INDUSTRIES, INC.'s
OPPOSITION
to
SOUTH PLAINS SWITCHING, LTD's
PETITION TO TERMINATE

In a decision served November 21, 2006, this Board granted the petition of shipper PYCO Industries, Inc. (PYCO) for alternative rail service under 49 C.F.R. Part 1147 (temporary relief for service inadequacies) over lines of incumbent rail provider South Plains Switching, Ltd. (SAW).

49 C.F.R. § 1147.1(c)(1) allows the filing of a petition to terminate, but it expressly "admonishe[s]" carriers like SAW "not to file such a petition prematurely." The regulation also provides that if a petition is filed, it must contain

"a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing or is prepared to provide, adequate rail service...."

In a pleading filed the on November 22 -- one day after this Board's decision -- SAW petitioned to terminate the alternative service order.

PYCO opposes SAW's petition to terminate. The petition nowhere sets forth an explanation, let alone supporting evidence, showing that SAW is now prepared to provide PYCO with

adequate rail service. To the contrary, the SAW petition contends (p. 4) that alternative service was never justified, or, citing a recent WTL letter, is not justified because there is no longer a transportation emergency (p. 3). SAW's claims are only relevant insofar as they constitute further proof that SAW continues to be unwilling or unprepared to provide adequate rail service.

I. SUMMARY OF ARGUMENT

The issue on a petition to terminate is whether the incumbent carrier will now provide adequate rail service. SAW's petition does not contain information responsive to that issue and must be denied.

Insofar as SAW does make claims, they are both irrelevant and wrong, and even more critically, demonstrate the need for continued alternative rail service.

SAW's argument that there is no justification for alternative service in the first place (SAW petition circa p. 4) is a reflection of SAW's refusal to accept any responsibility for the service failures that led to this Board's initial alternative service order on January 26, 2006, in F.D. 34802. This Board has elsewhere explained to SAW that its continued refusal to accept any responsibility itself indicates it is not prepared to provide alternative rail service.¹ The same response applies here.

SAW's other argument, for which it submits a recent WTL

¹ Decision in F.D. 34802, served June 21, 2006, at p. 5.

letter as evidence, is that there is no longer a service emergency. SAW argues that alternative service is therefore unlawful. SAW's syllogism misfires on a whole series of grounds. Although Part 1146 (expedited relief for service emergencies) implementing 49 U.S.C. § 11123 is for emergency situations, this proceeding (F.D. 34889) is not under Part 1146. It is under Part 1147. Part 1147 deals with longer term problems, and insofar as relevant here, implements 49 U.S.C. § 11102(a). Part 1147 is not limited to emergencies. The focus in Part 1147 is on rail service inadequacy.

Second, the WTL letter does not say what SAW says it says. To be sure, WTL's letter may be read to suggest that PYCO's demand for service is expected to be lower due to the poor growing season. But PYCO in filings in F.D. 34890 has indicated that due to poor crop conditions in the past season, it will be using fewer rail cars in the coming year. The fact that PYCO's demand in 2007 is therefore expected to be less is hardly new evidence (although SAW inconsistently ignored and indeed argued against that fact in F.D. 34890²). But more important, a decrease in PYCO's overall demand from 2006 levels does not mean that PYCO is no longer entitled to alternative rail service due to SAW service inadequacy. To the contrary, PYCO remains rail dependent, faces a serious service problem

² SAW based its valuation case on a base year which anticipates peak PYCO shipping and argued against the proposition that agricultural commodity-related shipments varied with annual growing season weather conditions.

with SAW, and indeed an emergency will arise, should PYCO be denied alternative service from WTL.

WTL's counsel in his letter states that WTL was discontinuing the morning conference call it had undertaken pursuant to this Board's protocol order in F.D. 34802 (decision served Feb. 16, 2006, and this Board's order (paragraph 1b) served August 3, 2006) for a variety of reasons, including (a) SAW never participates, and (b) BNSF, PYCO and WTL have achieved a level of coordination that makes alternative rail service relatively fluid, notwithstanding SAW's passive-aggressive behavior. SAW's continued refusal to cooperate in coordinating service notwithstanding this Board's order, as again attested in the WTL letter on which SAW relies, is itself evidence that SAW is not prepared to provide adequate rail service, as this Board has previously recognized.³ Ironically, as evidence to terminate alternative rail service, SAW is thus literally relying on a letter which shows (a) that SAW is not prepared to provide adequate rail service and (b) that alternative service is working. SAW's logic needs some work.

In the end, SAW gives no basis for termination but instead contributes evidence for its continuation.

II. PRIOR HISTORY OF THIS AND RELATED PROCEEDINGS

PYCO originally petitioned for alternative rail service pursuant to Part 1146 in F. D. 34802, filed December 20, 2005. The petition (and its exhibits) set forth two episodes of

³ Decision in F.D. 34802, served Feb. 24, 2006, at p. 3.

service inadequacy. The first occurred in early 2005, and was resolved only upon intervention of STB's Office of Compliance and Enforcement (OCE). The second commenced in November 2005 after PYCO declined a demand by Mr. Larry Wisener (SAW's then-manager) to purchase some part of SAW from him for \$5.5 million without even rudimentary due diligence. Mr. Wisener advised PYCO's Robert Lacy that he intended to take a number of retaliatory actions against PYCO. True to his word, Mr. Wisener's SAW proceeded to (i) terminate PYCO's track lease for staging and storage of its cars, (ii) impose discriminatory charges, (iii) refuse to provide adequate switching, (iv) place derails so as to hamstring service, and (v) take other actions discussed in PYCO's F.D. 34802 filings.

In its decision served January 26, 2006, this Board found that PYCO had demonstrated that SAW service was inadequate and accordingly authorized alternative service pursuant to Part 1146. In response, SAW purported to discharge Mr. Wisener as its manager; SAW claimed it had a new cooperative attitude under its new owner/manager (Mr. Wisener's wife, Delilah Wisener); and SAW almost immediately⁴ petitioned to terminate alternative rail service. But at the same time, SAW's "new" management attempted to dictate some unworkable protocol terms,

⁴ This first of SAW's petitions to terminate alternative rail service was filed February 9, some thirteen days after the relevant order.

and literally hung-up⁵ when WTL and PYCO called to negotiate. This Board had to intervene to set a protocol to ameliorate congestion and to allow alternative service by order served in F.D. 34802 on Feb. 16, 2006. This Board subsequently denied SAW's petition to terminate in its decision in F.D. 34802 served February 24, 2006. This Board found that "although SAW claims it is able to provide adequate service to PYCO, its actions belie its willingness to do so." Decision served Feb. 24, 2006 at p. 4. The Board cited SAW's unwillingness to cooperate in the daily conference call among other things in support of this proposition.

SAW petitioned again for termination on March 30, 2006. The gravamen of SAW's argument was that SAW as a matter of law did not have to provide adequate rail service (or presumably any service at all) to PYCO. Certainly that argument does not bode well for PYCO if it sought reliable service from SAW. More particularly, SAW claimed that approximately 74% of PYCO's traffic consisted of commodities (cottonseed, linters and hulls) exempt from regulation under 49 C.F.R. § 1039.10, and that this traffic could not be managed separately from regulated traffic. In essence SAW reasoned that therefore all PYCO traffic should be treated as subject to SAW's whim. Next, SAW claimed that all SAW service to PYCO was over "switching" track over which

⁵ See PYCO Opposition in F.D. 34802 filed Feb. 16, 2006, Exhibit A (Verified Statement of Gail Kring, paragraph 4) and Exhibit B (Verified Statement of Robert Lacy, paragraph 2). Both Statements corroborate that SAW's new management declined negotiations and hung up.

the agency lacked jurisdiction per 49 U.S.C. § 10906. SAW reasoned that it accordingly did not have to provide any service to PYCO, much less adequate service.

The Board rejected these arguments on their merits in its Decision in F.D. 34802 served June 21, 2006, at p.4. The Board also indicated that "SAW still has not taken any responsibility for the service failures that led to the January decision in which we initially authorized alternative service." Id. at p. 5. "Until it acknowledges its past service lapses, SAW is unlikely to be able to avoid the difficulties it experienced in the past in providing service to PYCO." Id.

SAW actively sought to stymie service to PYCO by seeking to amend the service protocol to prevent WTL and PYCO from using track 9298 to stage cars for PYCO. In its June decision, this Board rejected this effort by SAW. SAW also had blocked an industrial crossing used by PYCO to transfer cottonseed to its plant and to outbound rail cars for shipment. This threatened plant operations, as well as placing the \$11 million stockpile of seed at risk of loss due to rot. This Board ordered SAW to remove the blockade. Id. at 7. We mention these two items because they demonstrate SAW's continued hostile intent to PYCO as opposed to any sense of cooperation, or any real preparedness or ability to provide adequate rail service.

The Board extended alternative service under Part 1146 for the maximum 270 days permitted under 49 U.S.C. § 11123 (emergency service) in its June decision. Id. p. 8. This

allowed continued alternative service under Part 1146 through October 23, 2006.

The Board's admonitions to SAW in the Board's June 21 decision did not result in any change of course by SAW. Instead, SAW continued to refuse to participate in conference calls, continued to ignore the service protocol, and among other things purported to transfer leases and parcels of property to an entity called Choo Choo Properties, Inc. Choo Choo is the alter ego of (i.e., owned and managed by) Larry Wisener, the man allegedly discharged from management of SAW by his wife. This transfer was a transparent attempt to evade this Board's jurisdiction. Choo Choo purported to block PYCO's use of the industrial crossing, again threatening PYCO with a multi-million dollar loss of its cottonseed stockpile. PYCO sought orders in F.D. 34802, 34889, and other pending dockets to protect itself (and others) from retaliation, to preserve the status quo, and continue to be able to operate and to receive rail service. This Board served a decision on August 3, 2006 in F.D. 34802, 34889, and other pending dockets that among other things, required SAW to participate in a morning conference call, voided all property transfers to Choo Choo after May 5, 2006, rescinded all lease terminations by SAW or Choo Choo after that date, and provided further relief.

The chief response of SAW/Choo Choo since that date has been to continue to seek to enforce lease terminations and the alleged property rights of Choo Choo in Texas state courts. SAW

has also belatedly sought reconsideration of the Board's August 3 order on the ground that the property transfer was lawful under Texas law and therefore this Board should not regulate it.⁶

SAW's course of action makes it clear that permanent relief from SAW is needed to secure adequate rail service for PYCO in Lubbock. Not surprisingly, PYCO accordingly has sought more permanent relief by (a) filing feeder line applications,⁷ (b)

⁶ SAW Response in F.D. 34890, 34889 and 34802 dated Nov. 3, 2006. PYCO replied to SAW's de facto out of time request to reopen in a pleading dated November 8, 2006.

⁷ PYCO's initial FLA was filed on May 5, 2006, in F.D. 34844. The Director dismissed this FLA as incomplete in a decision served June 2, 2006. PYCO appealed and sought to amend, and in addition filed a modified FLA. Although PYCO's appeal/request to amend was rejected, STB accepted PYCO's modified FLA as to Alternative Two in a decision served July 3, 2006 (F.D. 34890). In the July 3 decision, this Board adopted an expedited schedule to conclude the proceeding before alternative service expired in F.D. 34802 on October 23, 2006.

Pioneer Railcorp d/b/a Keokuk Junction Railway (KJRY) sought a delay (which this Board partially granted) to file a competing FLA presumably for all of SAW. However, KJRY only filed for Alternative Two, and lacked any letters of shipper support.

On August 2, PYCO submitted additional shipper statement indicating a majority viewed SAW service as inadequate. On August 4, 2006, SAW by letter indicated it was therefore re-evaluating its position on whether public convenience and necessity permitted an FLA on the entirety of SAW. In a decision served August 16 in F.D. 34890, this Board accepted PYCO's FLA as to all of SAW, and reframed its procedural schedule to permit another FLA for all SAW by KJRY. However, that schedule still looked to completion of briefing in time for a conclusion of the FLA proceeding before the October 23 expiration of alternative service. No shipper filed a comment supporting KJRY, although many including PYCO opposed KJRY, and the majority of shippers supported PYCO's FLA. KJRY represents an identical problem set to that of SAW for Lubbock shippers.

seeking revocation of SAW's original acquisition from BNSF,⁸ and (c) filing a complaint seeking equitable relief as well as damages.⁹

PYCO believes it fair to say that this Board has concentrated on the FLA proceeding (F.D. 34890) as the chief vehicle to afford long term relief to PYCO. As explained supra note 7, the Board originally envisioned a decision in the FLA proceeding before expiration of alternative service (on October 23, 2006) in F.D. 34802 (Part 1146). To accommodate SAW's request in mid-August for more time to file a responsive pleading in the FLA proceeding, this Board adopted SAW's suggestion that it toll the expiration of Part 1146 alternative service date for 30 days, with the result that alternative service would expire (by PYCO's count) on November 22, 2006.¹⁰

Realizing that Part 1146 relief might expire before this Board had completed action on long term relief, PYCO filed this proceeding (F.D. 34889) for alternative rail service under Part 1147 on July 3, 2006. Unlike Part 1146 which implements relief for service emergencies pursuant to 49 U.S.C. § 11123, relief under Part 1147 is for joint rates or routes (49 U.S.C. §

⁸ The Board denied the petition to revoke the exemption in South Plains Switching, Ltd. -- Acquisition Exemption -- BNSF, F.D. 33753 (sub-no. 1), served Sept. 15, 2006.

⁹ F.D. 34870, filed April 19, 2006.

¹⁰ Decision in F.D. 34890, 34992, 34802 served August 18, 2006, at p. 2, ordering paragraph 1. PYCO opposed the extension and reliance on "tolling." PYCO expressed concern that SAW would end up contesting any further extension of alternative service, a prediction now shown to be at least partly correct.

10705(a)) or shared use of terminal facilities (49 U.S.C. § 11102(a)). It is not predicated on an emergency at the time of issuance. It provides temporary relief for service inadequacies pending consideration of more permanent relief.

SAW did not oppose PYCO's Part 1147 petition on any substantive grounds. SAW's only reply was a short two-page letter dated August 8, 2006.¹¹ In that letter, SAW took the position that the Part 1147 petition was essentially moot, in that the Board had indicated it would issue a decision granting or rejecting PYCO's FLA before expiration of Part 1146 relief. SAW reasoned that the FLA proceeding would determine all remaining questions as to relief for PYCO: if PYCO was authorized to acquire under the FLA, it needed no relief under Part 1147, and if PYCO was not authorized to acquire under the FLA, then it should receive no relief under Part 1147.

On November 21, 2006, this Board served a decision authorizing alternative rail service pursuant to Part 1147 and 49 U.S.C. § 11102(a) (terminal facilities). The Board noted that

-- the Board had already authorized alternative service in F.D. 34802 due to two instances of substantial measurable deterioration in service (slip op. at 4 and n.6);

-- the Board had responded to retaliatory actions by SAW by issuing various orders, including property transfers to Choo

¹¹ Letter, Mr. McFarland (SAW) to Secretary Williams (STB) dated August 8, 2006.

Choo by SAW after May 5, 2006 (slip op. at 4); and

-- SAW did not oppose the Part 1147 petition on the merits (slip op. at p. 5).

The Board's order provided that alternative service under Part 1147 would continue until closing of a future authorized sale in the FLA proceeding or until grant of a petition to terminate filed by SAW. Decision in F.D. 34889 served Nov. 21, 2006, at p. 5.

III. ARGUMENT

A. SAW Is Inconsistent and Premature

SAW in its August 8 filing in this proceeding itself anticipated that alternative service would continue until the FLA proceeding was resolved. The Board in its November 21 decision in F.D. 34889 indicated (twice¹²) that it anticipated issuance of an FLA decision soon. SAW's precipitous petition to terminate seems more than a little inconsistent with its August 8 stance (and SAW's subsequent suggestion that the expiration of Part 1146 relief be tolled to accommodate procedural delays in the FLA proceeding). SAW had appeared to acquiesce in alternative service pending resolution of the FLA.

In its letter dated August 8, SAW did not oppose relief under Part 1147 on substantive grounds; SAW instead argued that an FLA decision will moot the need for Part 1147 relief. By taking this approach, SAW anticipated, indeed implicitly

¹² Decision at p. 2 and at p. 6 (discussing PYCO's request for a track inspection).

invited, the Board to ensure alternative service pending the FLA. Moreover, under STB appellate procedures, SAW essentially waives substantive arguments and objections by failing to raise them. 49 C.F.R. § 1115.3(b). It is not just inconsistent but also legally impermissible for SAW now to back-track.

When STB issued Parts 1146 and 1147, the agency reasonably expected incumbent railroads to let the ink dry on alternative service decisions before they sought to terminate such authorizations. In Part 1146 as originally proposed (the original proposal did not include a Part 1147), the agency sought to encourage a lapse of 90 days before petitions to terminate unless the incumbent railroad showed special circumstances. Although this proposed rule was not adopted, the agency's discussion of the omission indicates that carriers are nonetheless not to be precipitous, as SAW is here. See Expedited Relief for Service Inadequacies, 3 STB 968, 982 (1998) [slip opinion at p. 17]. SAW certainly fails to demonstrate anything "special" to justify axing the newborn decision one day after it appeared on the STB website.

B. SAW's Argument Is Both Irrelevant and Wrong

1. SAW misses the point. SAW's petition suffers from the insurmountable problem that it fails to address the key issue, let alone supply evidence helpful to SAW on that issue. The key issue under the regulation (49 C.F.R. § 1147.1(c)(1)) for terminating alternative service is whether SAW is now prepared to provide adequate rail service. SAW makes no showing that it

is. The record shows it is not. The petition must therefore be denied.

2. Service emergency. Although WTL's counsel makes no such statement, SAW says that a letter from WTL's counsel dated November 15 indicates that there is no longer a "transportation emergency." SAW petition at p. 3. SAW claims that Part 1147 relief is only available in emergency situations.

The existence or non-existence of an "emergency" is not indicative of whether SAW will now provide adequate service to PYCO, and is thus not relevant to what SAW must show to terminate alternative rail service per section 1147.1(c)(1). SAW must show it is now prepared to provide adequate rail service.

Ignoring the regulation, SAW cites the preamble discussion in Expedited Relief for Service Inadequacies, 3 STB 968, 982 (1998) [slip opinion at p. 17] for the proposition that Part 1147 is only available during emergencies. But the reference to emergency on which SAW relies is in the context of an immediately preceding general discussion relating primarily to Part 1146. And in any event, all that the language on which SAW relies says is that a carrier can "petition" to terminate alternative service once an emergency is over. The incumbent obviously must still show it will provide adequate service, or there will be another "emergency."

Even more to the point, elsewhere in its preamble to the final rules for Part 1146 and Part 1147, the Board made it very

clear that Part 1147 relief was not predicated on an emergency:

"The Part 1146 rules will apply to requests for expedited, short-term emergency relief under section 11123. The Part 1147 rules will apply to requests for temporary alternative service under sections 10705 or 11102, on a more fully developed record, to address serious (but not necessarily emergency) service problems." Slip op. at p. 6 (emphasis added)

The STB preamble indicates that various proceedings may be necessary to secure relief: Part 1146 for immediate but short term relief, Part 1147 for temporary but more long-lived relief, and finally something else (in PYCO's case, an FLA) for longer term relief. See id. In accordance with the preamble, PYCO properly sought relief in F.D. 34802 from a service emergency caused by SAW in the fall of 2005. PYCO similarly has properly sought temporary relief under Part 1147 from serious service problems with SAW pending final relief in other proceedings.

In any event, if no transportation emergency exists at the current time, it is solely because WTL is providing alternative service to PYCO. Although PYCO expects to ship less surplus cottonseed to California in the coming year than in the prior two years due to adverse weather conditions this past summer, this does not mean that PYCO is any less rail dependent. See Lacy Declaration attached. Moreover, it does not mean that PYCO's shipments of cottonseed oil and crush-related products, which ship by rail, will markedly change. PYCO's Part 1146

petition of December 20, 2005, was precipitated by SAW's failure to provide adequate service to move PYCO's cottonseed oil production. PYCO would quickly face a similar service emergency this year if PYCO does not receive adequate rail service.

In short, relief under Part 1147 and § 11102(a) does not rest on the demonstration of a continued or on-going transportation emergency. It rests on PYCO's prior showing of a "substantial, measurable deterioration or other demonstrated inadequacy of rail service provided by the incumbent carrier." 49 C.F.R. § 1147.1(a). As this Board found, PYCO demonstrated the inadequacy. To terminate alternative service, SAW must show that it will now provide adequate service. Id. § 1147.1(c). It has not.

SAW says that the fact that BNSF, PYCO and WTL are working together in a "fluid" fashion justifies termination of alternative service. SAW Pet at 3. The fact that alternative service is working hardly justifies its termination. The issue is whether SAW is prepared or willing to provide adequate service.

SAW continues to refuse to accept responsibility for the prior inadequacies. Instead, it is actively searching for ways to shut PYCO down through transfers to Choo Choo, purported lease terminations, and on-going civil litigation for trespass in Texas courts. As this Board has repeatedly held, SAW's conduct does not indicate an intent to provide adequate rail service. SAW's conduct continues to implement Mr. Wisener's

pledge to Mr. Lacy in November of 2005 to make PYCO's business life miserable.

In the end, all PYCO understands WTL's letter to do is indicate that WTL and BNSF have given up on getting any cooperation from SAW in the morning conference call. SAW refuses to participate despite being admonished and ordered to participate by this Board. All parties but SAW at this point can work together without a conference call. But that is not a grounds to terminate relief that is keeping rail service functional in Lubbock.

3. SAW's general claims of lack of justification. SAW did not contest the original Part 1147 petition on substantive grounds, but it now backhandedly appears to claim that the petition was unjustified from its inception. SAW Pet. at 4. This is not a grounds for termination but instead an attempt to get reconsideration, without showing either new evidence or material error. It deserves to be ignored under 49 C.F.R. § 1115.3(b). SAW could have and should have presented its case months ago, if it wanted to talk substance. In any event, SAW's claims have no merit. SAW intimates (SAW Pet. p. 4) that the only justification for alternative service were SAW's actions in connection with PYCO's trackmobile (used to switch PYCO cars) and in connection with PYCO's lease of storage track (track 9298, the lease for which SAW terminated). Many more factors were involved in the service breakdown engineered by SAW in November of 2005. However, the references to the trackmobile

and the lease to 9298 mischaracterizes both situations and to clear the record a bit, we will focus on those.

Prior to Mr. Wisener's blow-up in November 2005, PYCO operated its trackmobile on PYCO's own trackage, and between PYCO's trackage and the immediately adjacent SAW yard, to move PYCO's cars. This saved time and energy for SAW, and resulted in acceptable service for PYCO. But after Mr. Wisener's November blow-up, SAW refused to allow use of the trackmobile. This would have been acceptable had SAW then provided the necessary additional switching services for PYCO, but Mr. Wisener instructed his employees not to do so. This contributed to the serious service inadequacy faced by PYCO commencing in November 2005, because the number of cars reaching PYCO's Plant No. 1 was roughly cut in half.

Since the Board authorized WTL to provide switching services (and WTL did so), use of PYCO's trackmobile in SAW's yard was unnecessary (and not authorized by the Board). However, PYCO continued to use its trackmobile on its own property. The Board had imposed an operating protocol on SAW in F.D. 34802 assigning certain hours in the SAW yard (which is located in the middle of PYCO's Plant No. 1) to WTL/PYCO switching, and certain hours to SAW. SAW breached those hours. PYCO employees could not safely operate the trackmobile even on PYCO property during protocol hours assigned to WTL/PYCO due to instances when PYCO employees felt genuinely threatened by unexpected use of immediately adjacent trackage by SAW. This

Board in its August 3 order accordingly directed SAW not to interfere with PYCO's trackmobile, on PYCO's own property. PYCO construes this to mean that SAW is supposed to honor the protocol so that PYCO can safely use its trackmobile on its own property. Nothing in any of this suggests that alternative service is unjustified.

SAW's references to the track lease issue are similarly misplaced. Track 9298 was traditionally used to stage cars for PYCO. PYCO leased the track from SAW for that purpose. In November of 2005, SAW purported to terminate the lease and to prevent PYCO's use of the track. This would serve no purpose other than congest rail traffic in Lubbock, including in BNSF's adjacent Lubbock yard. As part of the protocol to permit service to PYCO and to control congestion, this Board essentially ordered that SAW keep clear of the relevant track. WTL and PYCO (and BNSF) have been relying on 9298 since to stage cars for PYCO. Again, nothing in this episode establishes any point helpful to SAW.

The past year has demonstrated that this Board took the right approach in Lubbock. WTL quickly worked off the congestion caused by SAW's failure to provide adequate service to PYCO.¹³ This increase in car velocity not only helps PYCO but other shippers as well, and certainly helps relieve congestion in BNSF's Lubbock yard. That WTL was able to do so

¹³ See Decision in F.D. 34802, served Feb. 24, 2006, at p. 3 (circa notes 5 to 8).

much notwithstanding the lack of cooperation from SAW is a testament to the ability of WTL management as well as evidence that SAW's efforts to blame BNSF for service inadequacies in Lubbock are misplaced. More to the point, WTL's demonstrated improvement of service since January 26, 2006, shows that service by SAW was indeed inadequate.

SAW's claims in its Petition to Terminate that it did nothing to justify relief is simply more of the same of SAW's continued refusal to accept any responsibility for its actions. Owning a railroad does not mean the owner gets to ignore service to shippers anymore than owning a gun means it does matter where one aims and fires. In neither case is ownership some kind of James Bond license to kill. Under 49 U.S.C. § 11101(a), SAW has a common carrier obligation. It cannot hide behind its supposed property rights to the point that it dishonors its common carrier obligation by providing inadequate rail service. Based on its own petition to terminate filed on November 22, SAW still does not see itself as obligated to provide adequate rail service, and indeed apparently still does not yet even understand what adequate rail service is. In SAW's worldview, the federal common carrier obligation is whatever SAW dictates. That is not the mindset for a company that can be relied upon for adequate rail service. "Until it acknowledges its past service lapses, SAW is unlikely to be able to avoid the difficulties it experienced in the past in providing service to PYCO." Decision in F.D. 34802, served June 21, 2006, at p. 4.

4. SAW's claim of to have met its obligations. At the very end of its Petition, SAW claims that it has consistently delivered every car ordered by PYCO on a timely basis, and would do so now. PYCO disagrees. SAW had PYCO on the ropes. See Declaration by Robert Lacy in Opposition to Petition to Terminate, attached. SAW's claim flies in the face of this Board's findings since January 25, 2006, in F.D. 34802, as well as this Board's findings in related cases. If SAW has evidence to support its otherwise unsupported pretenses, it should long ago have presented it.

The Board's decision in this docket served November 21, 2006, makes all required findings for authorization of alternative service under Part 1147. Those findings are supported by the record. SAW makes no showing for termination.

IV. CONCLUSION

____For the reasons stated above, and in our various oppositions to SAW's many prior petitions to terminate in F.D. 34802, PYCO opposes this latest precipitous petition by SAW to terminate alternative service under Part 1147 only a day after it was granted.

4. SAW's claim of to have met its obligations. At the very end of its Petition, SAW claims that it has consistently delivered every car ordered by PYCO on a timely basis, and would do so now. PYCO disagrees. SAW had PYCO on the ropes. See Declaration by Robert Lacy in Opposition to Petition to Terminate, attached. SAW's claim flies in the face of this Board's findings since January 25, 2006, in F.D. 34802, as well as this Board's findings in related cases. If SAW has evidence to support its otherwise unsupported pretenses, it should long ago have presented it.

The Board's decision in this docket served November 21, 2006, makes all required findings for authorization of alternative service under Part 1147. Those findings are supported by the record. SAW makes no showing for termination.

IV. CONCLUSION

For the reasons stated above, and in our various oppositions to SAW's many prior petitions to terminate in F.D. 34802, PYCO opposes this latest precipitous petition by SAW to terminate alternative service under Part 1147 only a day after it was granted. .

Respectfully submitted,



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for PYCO Industries, Inc.

Exhibit A -- Robert Lacy Declaration in Opposition

Certificate of Service

I hereby certify service of the foregoing Opposition to SAW's Petition to Terminate upon the following counsel of record by express service, next business day delivery, this 29th day of November 2006:

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

with a courtesy copy to

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

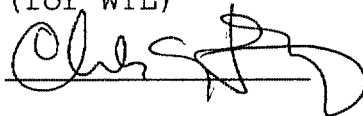


Exhibit A

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

Rebuttal Declaration of
Robert Lacy

I, Robert Lacy, make this Rebuttal Declaration in support of PYCO Industries, Inc.'s Opposition to the petition to terminate alternative rail service to PYCO pursuant to 49 C.F.R. Part 1147, as filed November 22, 2006 by incumbent rail carrier South Plains Switching, Ltd. (SAW).

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

2. As indicated in PYCO's original petition in F.D. 34802, incorporated into PYCO's petition in F.D. 34899, PYCO experienced two episodes of substantial, measurable deterioration of rail service from SAW in 2005. So far as PYCO can make out, the second episode, commencing essentially on November 17, 2005, flowed from SAW's manager's desire to retaliate against PYCO for declining to accede to his demand that we buy some portion of SAW for \$5.5 million without any due diligence. As my notes and original Declaration in F.D. 34802 indicate, on November 18, 2005, Mr. Wisener for SAW said that he was going to create conditions under

which PYCO "would have to try to figure out how to take care of ourselves." Mr. Wisener was good to his word. Faced with lack of sufficient rail service to prevent a shutdown, PYCO sought an alternative service authorization from this Board, which this Board granted. SAW continued to refuse to cooperate and took additional retaliatory actions against PYCO for seeking that relief. PYCO then sought extensions of the alternative service order, and filed various proceedings to secure long term relief, including a feeder line application. Rather than indicating any intent to cooperate, SAW took still further retaliatory actions. As my Declaration dated June 29, 2006, filed on July 3, 2006 in F.D. 34802, and my Declaration dated July 14, 2006, filed in F.D. 34802 and this proceeding on July 14 indicate, these retaliatory actions included efforts to block PYCO's access to its \$11 million seed stockpile, and termination of leases essential to PYCO's operation of its Plant No. 1. Again, only action by this Board has prevented SAW from shutting PYCO down. We have seen no sign from SAW that it is prepared to cooperate in any way to provide adequate rail service to PYCO. So far as we can tell, SAW is devoting its available ingenuity and resources to attempting to frustrate PYCO's efforts to secure adequate rail service. So far as we can tell, SAW has not deviated from the course of conduct Mr. Wisener announced to me on November 18, 2005, which was to make business life miserable for PYCO.

2. SAW says it has consistently delivered every car ordered by PYCO on a timely basis. This is not correct. To focus on the second episode of inadequate service, SAW staff informed PYCO that PYCO could have only one switch per day at PYCO's Plant No. 1. The maximum number of cars that can be switched at PYCO's Plant No. 1 at one time is 14 cars. This limited SAW to no more than 14 cars per day at Plant No. 1, during a period when we needed essentially double that number. SAW's claim is like Henry Ford's statement in 1914 that a customer could get a Model T in any color so long as it was black. SAW would switch cars for Plant No. 1, but only as long as the number was substantially less than PYCO needed. In addition to limiting the cars at Plant No. 1, SAW took a number of other actions rendering rail service difficult, inadequate, and more costly.

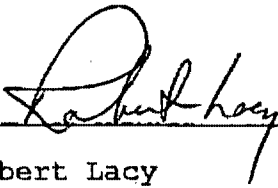
3. SAW continues to pursue retaliation rather than cooperation. As will be recalled, this Board on August 3 invalidated SAW's sale of the "wye" property to Choo Choo Properties, Inc., and rescinded certain lease terminations by Choo Choo or SAW. In the past few days, SAW's attorney has notified PYCO's Lubbock counsel that he intends to ask the Texas state court hearing Choo Choo's trespass claims based on the alleged sale of the "wye" to Choo Choo and the alleged lease terminations to enjoin PYCO from trespass notwithstanding this Board's August 3 order. He indicated he was taking this action since the Board did not issue

a feeder line decision before the Thanksgiving holiday, as had been anticipated.

4. Due to weather conditions, PYCO expects to ship less raw cottonseed to California in the coming year than in the past two years. However, PYCO's business is to produce cottonseed oil. We expect oil and related products to remain at relatively constant levels, and we are and remain dependent on adequate rail service. We expect to continue to be the largest shipper on the SAW system. WTL has demonstrated its ability to provide adequate rail service. SAW demonstrates the opposite.

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 November 28, 2006


Robert Lacy