

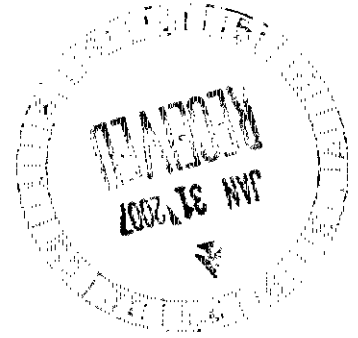
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JAN 31 2007

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Public Record

30 January 2007
by express



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

Re: PYCO Industries -- Feeder Line Development --
South Plains Switching, Ltd., F.D. 34890; 218544

related PYCO alternative service proceedings
F.D. 34802 (Part 1146) and 34889 (Part 1147);
218546 218545
and Hanson Aggregates -- Alternative Service --
South Plains Switching, Ltd., F.D. 34985 218547

PYCO Status Report

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of a Status Report on behalf of PYCO Industries Concerning Track 9200. This Status Report is precipitated by a footnote statement by the Board in a decision served January 24 in F.D. 34890. In that footnote, the Board indicated it would address a request for affirmative relief as to Track 9200 by Mrs. Wisener (South Plains Switching, or SAW) in a subsequent decision. PYCO was not aware that Mrs. Wisener's request, which was evidently made in a letter attached as an exhibit to a letter by SAW opposing relief sought by Hanson Aggregates, was being treated by the Board as a request for relief as to Track 9200. Since PYCO's rail dependent operations require continued use of Track 9200, PYCO wishes to be heard on that subject. PYCO accordingly tenders the enclosed Status Report.

Mrs. Wisener's letter appears to raise other issues in addition to Track 9200. As a precaution lest these other matters now also be on the table in the form presented by Mrs. Wisener, PYCO will likewise address them in this status report. Because these matters involve PYCO's alternative service dockets F.D. 34802 (Part 1146) and F.D. 34889 (Part 1147), PYCO requests that the Status Report be treated as filed in those

dockets as well.

Similarly, since the matters raised by Mrs. Wisener were in connection with SAW's resistance to relief sought by Hanson Aggregates, PYCO requests that the enclosed status report also be treated as filed in Hanson's alternative service proceeding, F.D. 34985.

PYCO also requests that it be permitted party status in F.D. 34985 so as to receive service of pleadings in that proceedings. Clearly statements by SAW ostensibly to resist Hanson have implications for PYCO, as indicated in the enclosed pleading as to Track 9200.

PYCO supports alternative service by West Texas & Lubbock (WTL) for Hanson Aggregates. Hanson submitted evidence of abuse by SAW in the form of a verified letter dated August 1, 2006, filed in F.D. 34890 by PYCO on or about August 2, 2006. SAW's lease termination against Hanson is now a second abusive episode. Based on PYCO's experience with SAW, SAW will continue to seek every opportunity to retaliate against, and to provide inadequate service for, Hanson. Alternative service is clearly appropriate, and WTL is ready, willing and able to provide that 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. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	

Status Report
by Pyco Industries
Concerning Track 9200

In the hope of expediting a resolution of the feeder line proceeding, PYCO has sought to avoid additional filings with the Board in F.D. 34890. However, this Board issued a Decision in this docket on January 24, 2007, bearing on a request for relief by Hanson Aggregates ("Hanson") from a purported lease termination by South Plains Switching, Ltd. (SAW) or its alter ego Choo Choo Properties. In that Decision at p. 5 n.11, this Board states that it intends to rule on a SAW request for "certain affirmative relief concerning a different track (9200)." This statement raises concerns in which PYCO has a very definite and active interest.

I. Mrs. Wisener's Dec. 27 Letter

Upon review of SAW's pleadings, PYCO notes that SAW attached as Exhibit E to its December 27, 2006, letter opposing certain relief sought by Hanson a letter by Mrs. Wisener (the alleged president of SAW) dated December 26, 2006 to the Director of the Board's Office of Compliance (Mr. Clemens) concerning Track 9200. PYCO was not aware that this letter, or this letter in combination with SAW's December 27 letter to the Board, would be treated by the Board as a request by SAW for

"certain affirmative relief" as to that track.¹ Since it evidently is being so treated, PYCO makes this status report, and if it be regarded as a reply in opposition, PYCO seeks leave to file this reply.

A. Track 9200

Tracks 9200 and 9298 (which parallel each other) have traditionally been used for staging cars for PYCO. One is currently employed as a through track to reach PYCO's Plant No. 2. The other traditionally has been used for storing cars being switched for PYCO. SAW's termination of PYCO's lease of one of the tracks (9298) for such staging was one of SAW's actions contributing to inadequate rail service which precipitated PYCO's petition for alternative rail service (F.D. 34802), and this subsequent feeder line application, as well as other related cases, in the first place. At the inception of alternative service for PYCO, SAW emptied 9200/9298 of all PYCO cars (moving same to the SAW yard). This resulted in congestion of the SAW yard such that PYCO's alternative service provider, West Texas & Lubbock (WTL), could not serve PYCO's plant no. 1,² and PYCO understands that it also resulted in congestion of the

¹ PYCO was served with Mrs. Wisener's letter as an exhibit to SAW's opposition dated December 27, 2006, to Hanson's request for relief from the SAW/Choo Choo lease termination. To counsel's knowledge, PYCO has received no other document from SAW which could be construed as a request for relief as to Track 9200.

² E.g., PYCO Industries' Opposition to Incumbent Rail Carrier's Petition to Terminate Alternative Rail Service at p.8 (and evidence cited) served Feb. 16, 2006 (faxed) in F.D. 34802 (Part 1146 proceeding).

BNSF yard in south Lubbock as well. This Board responded with a protocol order requiring SAW to keep 9200 and 9298 free of cars so WTL could serve PYCO. Decision served Feb. 16, 2006, at p. 4, ordering paragraph 1(c). As of the date of this pleading, tracks 9200 and 9298 remain in use for staging cars, and for movement of cars, for PYCO's rail dependent operations. In seeking to alter this arrangement, SAW is seeking to create another service breakdown.

To PYCO's knowledge after due inquiry, Tracks 9200 and 9298 have never been used for service to Hanson. Indeed, both are on the other side of the BNSF mainline from Hanson's property and the track Hanson leased from SAW to serve that property. Based on inquiry and observation, neither 9200 nor 9298 have been used for transload of aggregates for any customer in recent history.³ Mrs. Wisener's request for affirmative relief as to Track 9200 is simply another effort by SAW to disrupt service to PYCO and possibly to congest the adjacent BNSF railyard by blowing up the long-established status quo. Mrs. Wisener's request has no merit.

If SAW in fact cannot readily manage to provide service to Hanson (or any other shipper) without use of Track 9200, then

³ According to former BNSF employees, the City of Lubbock requested BNSF's predecessor not to use 9200/9298 for things like rock transload because the track is directly south of a major cemetery where Buddy Holly is buried, and the dust and noise from the transload operations at that location were disrupting funerals as well as upsetting visitors to Mr. Holly's gravesite. BNSF's predecessor accordingly did not so use the track, nor has any successor carrier to date.

this "fact" lends yet more support to Hanson's petition for alternative rail service from WTL (the Hanson petition is docketed as F.D. 34985). WTL has informed PYCO that WTL is ready, willing and able to provide service to Hanson as well as PYCO, and can do so for Hanson without use of Track 9200. PYCO supports alternative service by WTL for Hanson.

B. Other Matters in the Dec. 27 Letter

The Wisener letter (Exhibit E to the SAW December 27 pleading) states a request for "just compensation" for alternative rail service (evidently \$75.00 per car from WTL), and also mentions SAW claims against PYCO for alleged surcharges and "constructive placement" fees. On the basis of SAW's pleadings served on PYCO to date, PYCO had not understood these matters to be requests for relief by SAW either. However, if this Board views Mrs. Wisener's statements as requests for relief on which this Board intends to act, then PYCO is opposed to all Mrs. Wisener's "positions" on these issues.

1. Part 1146/1147 "compensation," if it is now an issue.

As to "just compensation" from WTL (or PYCO) for use of SAW tracks for alternative service, SAW through its attorney Mr. McFarland raised this issue with WTL and PYCO approximately one year ago. At that time, counsel for PYCO sent the March 11, 2006 memorandum attached as Exhibit A to counsel for WTL. PYCO is informed that WTL forwarded this information to SAW. Neither PYCO nor WTL heard anything further from SAW on this subject, and PYCO at least inferred from this that SAW conceded that any

compensation to which it was entitled was irrelevant and trivial in comparison to the claims against SAW itself.

Certainly under this Board's precedent, and for the reasons set forth in Exhibit A, SAW has no claim to any "profit" from the alternative service being provided by WTL. Obviously an incumbent carrier providing service so inadequate that alternative service is ordered should not profit by reason of its own dereliction. This precludes anything close to the \$75.00 per carload compensation Mrs. Wisener demands for SAW in her letter.

If this Board intends to treat Mrs. Wisener's letter as a formal request for compensation from WTL, then PYCO wishes to be notified and afforded an opportunity to be heard. If this is PYCO's only opportunity to be heard, then any compensation should be no greater than the amount set forth in Exhibit A, for the reasons stated in Exhibit A. But Exhibit A itself is only a starting point. Since Exhibit A was prepared, WTL has incurred substantial derailment and repair expenses due to SAW's "deferred maintenance" (effectively no maintenance approach) to running its lines.⁴ In addition, WTL has also provided

⁴ PYCO filed a verified statement by Eldon Martin as Exhibit G to its petition in F.D. 34889, filed on or about June 30, 2006, in which Mr. Martin (whose firm constructs and repairs track) stated that a WTL derailment on SAW track was the result of failure by SAW properly to maintain a switch, and that the invoice for track repair alone was \$23,134.81. PYCO hereby incorporates herein Mr. Martin's Verified Statement referenced above (and attaches it as Exhibit G). A copy of Mr. Martin's invoice is attached as Exhibit B as is an invoice (for \$4625) by another company for a crane to lift the derailed car. PYCO understands that WTL submitted a bill for all these expenses to

considerable services to SAW without compensation from SAW.⁵ These amounts are legitimate claims against SAW, and certainly legitimate set-off's to any claim by SAW against WTL or PYCO, for track usage under Parts 1146 or 1147.

The set-off to which WTL and PYCO are entitled for derailment repairs (over \$27,000⁶) alone exceeds any compensation which SAW could reasonably claim for use of its track for alternative service due to SAW's inadequacies.

2. Wisener efforts discriminate against PYCO. As to Mrs. Wisener's "positions" on recovery of money from PYCO for surcharges and "constructive placement" fees, these charges are unlawful under the ICC Termination Act. PYCO has contended and still contends that the surcharges were, among other things, unlawful and discriminatory under the Act, and that the constructive placement charges were, among other things, contrived and unreasonable practices arising due to SAW's inadequate service (e.g., failure to make switches in a timely and adequate fashion). PYCO's Complaint against SAW before this Board (F.D. 34870) filed on or about April 19, 2006,⁷ contests the surcharge, the constructive placement fees, and various other SAW actions, inactions and practices curtailing service to SAW (see Exhibit C), but that SAW declined payment.

⁵ The service includes movement of SAW traffic between the SAW and BNSF yards.

⁶ See Exhibits B and H.

⁷ Some of the STB pleadings inadvertently caption the Complaint as F.D. 34838.

PYCO. SAW's discriminatory surcharge and misplaced placement fees are part and parcel of SAW's continued efforts to degrade service to PYCO, and to retaliate against PYCO for, among other things, seeking relief from this Board.

SAW moved to dismiss PYCO's Complaint last May, PYCO opposed, and the matter remains pending before the Board. PYCO hereby incorporates its Complaint and other filings in F.D. 34870 into this memorandum as further response in opposition to Mrs. Wisener's letter insofar as it asserts a claim to surcharge and constructive placement fees against PYCO.

II. SAW's Continued Attacks on PYCO

A. SAW's "Unreasonable Practices"

As PYCO has previously indicated to the Board,⁸ SAW nonetheless has sued PYCO in Texas state court to collect its illegal surcharge and its illegal "constructive placement" fee. These are not "ordinary" non-payment claims such as might go before a trial court. Instead, they are all claims by SAW for compensation for practices that are illegal under one or more provisions of the ICC Termination Act. The construction and enforcement of that Act is committed to the exclusive jurisdiction of STB. See 49 U.S.C. § 10501(b). The matters involved in SAW's state court suit therefore should be exclusively before this Board. PYCO accordingly has asserted in state court the defense of exclusive jurisdiction, and in light

⁸ E.g., PYCO's "Status Report" and "Initial Comments" in F.D. 34890, 34922, and 34889, filed on or about October 11, at pp. 18-19, and Appendices C and D thereto.

of PYCO's Complaint, at least primary jurisdiction of this Board. Although PYCO has not identified the state trial court letter in STB's e-library under "filings," PYCO nonetheless understands that the state court has sent a letter to STB inquiring concerning these matters. (PYCO surmises that STB perhaps is treating the letter merely as "correspondence.") Neither SAW nor Choo Choo should continue to be allowed to harass PYCO in state court over matters which not only are within the jurisdiction of this agency, but also are pending before this agency in one or more proceedings.

B. Sales by SAW to Choo Choo

PYCO reiterates that SAW (allegedly run by Mrs. Wisener) through Choo Choo (run by Mr. Wisener) continues to claim in Texas state court proceedings that the Wiseners have lawfully terminated PYCO's utility leases and crossing rights. In particular, the Wiseners claim SAW sold or transferred portions of the "wye" and the utility leases and licenses to Choo Choo. Choo Choo has purported to terminate all those rights and has sued PYCO for trespass. See note 8 supra. When SAW/Choo Choo first began this ruse, this Board responded with its Decision served August 3, 2006, in F.D. 34890 (and other dockets) invalidated deeds by SAW to Choo Choo after May 5. At that time, neither PYCO nor the Board knew the date of the alleged transfer (PYCO had filed discovery requests against SAW but SAW had not responded). SAW/Choo Choo subsequently claimed that their unrecorded deed/transfers are not covered by this Board's

order because the deeds and transfers pre-date May 5. As a result, SAW and Choo Choo assert in state court that they can sue PYCO for trespass and continue their effort to shut PYCO down notwithstanding this Board's order.

SAW and Choo Choo tried the identical ploy in connection with Hanson. When Hanson sought relief from SAW's termination of its lease, SAW and Choo Choo defended based on an unrecorded transfer allegedly pre-dating May 5. This Board rejected that position in this Board's decision served January 24, 2007 in this docket.

Unfortunately, the Texas state court continues to entertain SAW/Choo Choo's efforts to shut PYCO down based on SAW's alleged pre-May 5 transfer of property interests in the "wye" to Choo Choo. This Board should clarify that the Wiseners cannot retaliate against PYCO with impunity by the devise of an alleged pre-May 5 transfer to Choo Choo anymore than they can retaliate against Hanson on that basis.

As PYCO has previously indicated,⁹ all deeds from SAW to Choo Choo (or any other third party) post-dating the inception of F.D. 34802 on December 20, 2005 should be voided in connection with this feeder line proceeding. In all events, PYCO notified SAW in a pleading filed on or about January 9, 2006, that it intended to file a feeder line application once the alternative service issue was worked out. See Decision in

⁹ PYCO's Verified Motion to Void Additional Transfers of Property Interests to Choo Choo..., filed in F.D. 34890, 34889 and 34802 on or about Oct. 14, 2006.

this docket served Jan. 24, 2007, p. 6 n.12. All deeds out by SAW after January 9, 2006, should be voided. A feeder line application cannot be prepared overnight due to the very extensive informational requirements which must be met. An incumbent railroad such as SAW should not be allowed to thwart potential applicants by engaging in piecemeal sales of its system while a prospective applicant compiles the information needed to file an application, especially in this case where the incumbent railroad (and the public) were notified in a publicly available pleading that a feeder line application would be forthcoming. A contrary result would undermine the statute as a means for viable relief.¹⁰

There are other reasons to shut down the SAW to Choo Choo gambit. Stimulated by this Board's statement in its January 24 decision that Track 269 (leased by Hanson and allegedly sold by SAW to Choo Choo pre-May 5) was in fact included by SAW in the valuation of property which SAW claims to own, PYCO re-examined SAW's representations in the feeder line proceeding concerning the "wye" track that SAW claims to have sold Choo Choo pre-May 5, and which Choo Choo and SAW in Texas state

¹⁰ The alleged deed from SAW to Choo Choo of Track 269 was unrecorded, as was the deed from SAW to Choo Choo bearing on the "wye." Although PYCO in its discovery requests to SAW sought disclosure of all deeds by SAW to third parties, SAW did not produce the alleged Track 269 deed. This raises numerous questions, including whether SAW at some point will generate yet more undisclosed unrecorded deeds of uncertain date.

court now claim belongs to Choo Choo.¹¹ It turns out that SAW through its engineering consultant (Landreth) appears to have treated the entire "we" not only as owned by SAW but also as needed for rail purposes to serve either PYCO or other shippers.¹² Mr. Landreth argued that PYCO's interest in the "west leg" of the "we" (he terms it a "license agreement") allegedly did not cover an addition to an existing PYCO track that required use of that segment, and that the remaining leg of the "we" was essential to serve other customers. But this amounts to an acknowledgement that both sides of the "we" are essential to serve customers (either PYCO or others). SAW has no business alienating track necessary to serve its customers without an abandonment authorization or an authorization to transfer the property to another common carrier. Given the implications of the testimony by SAW's expert that the entire "we" is needed for shippers, the sale to Choo Choo should be voided regardless of the feeder line proceeding.

In any event, Choo Choo is owned by Larry Wisener and is an alter ego of SAW. Its use by the Wiseners is simply a ploy to undercut the jurisdiction of this Board, to retaliate against PYCO for seeking relief before this Board, and to render

¹¹ See Choo Choo Properties v. PYCO, 237th District Court, Lubbock County, TX No. 2006-535-682 (pending). The other litigation involving matters before STB is South Plains Switching v. PYCO, 237th Dist. Ct. No. 2006-534-401 (pending).

¹² See Second Ver. Statement of Landreth at pp. 10-11, Ex. 2 to SAW "Statement in Response to PYCO's Feeder Line Application to Acquire 'All SAW'," filed on or about Sept. 28, 2006, in F.D. 34890.

nugatory the feeder line remedy.

In sum, just as this Board determined the alleged pre-May 5 sale by SAW to Choo Choo of Track 269 was ineffective and void, so must this Board determine as to all other purported pre-May 5 sales by SAW to Choo Choo, and especially the purported pre-May 5 sale to Choo Choo relating to the "wye."

SAW's hostile treatment of Hanson Aggregates raises more general issues. According to discovery data, Hanson in recent years has been SAW's largest customer in Lubbock after PYCO. Due to SAW's prior misconduct, Hanson indicated in a letter dated August 1 (filed in this proceeding on or about August 2, 2006) that based on its experience, SAW service was inadequate and unreliable, that Hanson had been threatened with retaliation by SAW for siding with PYCO, and that Hanson would not bid (or thus ship) again in the Lubbock market so long as SAW provided the local switch.¹³

In light of this Board's subsequent decision accepting PYCO's feeder line application for all of SAW,¹⁴ and in light of the Board's original indications that it would decide the feeder line matter before expiration of PYCO's Part 1146 alternative

¹³ Compilation of Shipper Comments in F.D. 34890, due August 2, 2006, Exhibit B (shipper comments, including Hanson letter dated August 1, 2006).

¹⁴ STB Decision in F.D. 34890 (and 34922), served August 16, 2006.

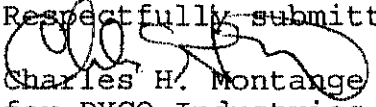
service order (October 23, 2006),¹⁵ Hanson bid another project requiring service in Lubbock. Hanson was successful with its bid, but unfortunately a result in the feeder line proceeding result has been delayed.

As Hanson's August 1 comments foresaw, SAW has now created further trouble, in effect refusing service. Hanson responded by requesting relief in F.D. 34890 (the feeder line proceeding), and by filing a Part 1146 alternative use proceeding (F.D. 34985). This Board's January 24 decision granted Hanson's request under F.D. 34890; the Board has not yet ruled in F.D. 34985. But the broader point from all this is as follows: SAW's conduct in respect to Hanson is tantamount not only to another failure by SAW adequately to discharge its common carrier obligation, but also to an effort by SAW to substantially erode any going concern value of the rail system in Lubbock for any feeder line applicant. By purportedly terminating Hanson's lease, SAW at the very least is acting to drive away its system's second largest customer. This necessarily serves to make the SAW system less economic for any successful feeder line applicant. But even more deviously, SAW may be attempting to divert that business to another Wisener-

¹⁵ Id. p. 4 (last sentence). See also STB decision in F.D. 34890, et al., served August 3, 2006, at p. 9 (procedural schedule intended to allow consummation of a feeder line sale prior to Oct. 23, 2006).

owned line in nearby Slaton, Texas.¹⁶ In other words, SAW's actions after close of briefing in the feeder line docket (F.D. 34890) may be designed not just to destroy SAW's going concern value, but to divert value over to other Wisener properties. If this ploy is successful, then it may require the feeder line proceeding to be reopened for further consideration on valuation matters.

The sooner SAW is removed from a position of being able to do what it is doing in Lubbock, the better.

Respectfully submitted,

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for PYCO Industries, Inc.

Exhibit A --- Memo, Montange to Heffner, March 11, 2006 (maximum compensation for use of tracks for alternative service)

Exhibit B --- Martin Construction Co. invoice; Southwestern Diversified Leasing invoice 4912

Exhibit C --- Permian Basin Railway Co. (WTL) invoice 1317 to SAW

Exhibit G --- Eldon Martin Verified Statement from F.D. 34889

¹⁶ Counsel for Hanson has informed counsel for PYCO that the Wiseners, who own another railroad (South Plains Lamesa) in Slaton, evidently have approached Hanson's customer to switch Hanson's rock deliveries for that customer from Lubbock to Slaton.

Certificate of Service

I hereby certify service of the foregoing upon the following counsel of record by express service, next business day delivery, this 30th day of January 2007:

Thomas McFarland
208 South LaSalle Street, Suite 1890
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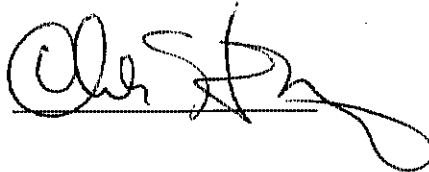
A handwritten signature in black ink, appearing to read "Chris Sippel", written over a horizontal line.

Exhibit A

11 March 2006

Memorandum to John Heffner, Esq.
counsel for West Texas and Lubbock

Re: reimbursement for services and facilities furnished
by SAW in connection with WTL alternative rail
service to PYCO

From: Chas. Montange,
counsel for PYCO Industries

Summary

Based on the methodology indicated in the preamble to STB's Part 1146 regulations, SAW is entitled to compensation for facilities or services provided in connection with alternative rail service, but not for lost profits. The only facility or service provided by SAW to WTL for alternative service to PYCO Industries is certain trackage. In order to avoid controversy but without admission, we have made the following conservative assumptions (i.e., favoring SAW): that the rail is 90# reroll, that the ties are a wash, that SAW owns the fee in the underlying property, and that SAW owns an average of 6 acres per track mile (i.e., a 50 foot right of way for each track mile). We have further assumed a 10.1% rate of return (STB's most recent cost of capital calculation for railroads), and 7000 PYCO carloadings per year. Under these assumptions, SAW would be entitled to \$2.90/carload. All other demands by SAW are simply veiled attempts to obtain profit from the alternative rail service.

Reservation

In making the computations herein, PYCO has employed a series of assumptions favoring SAW. PYCO reserves the right to recalculate all values herein based on information which may be developed in subsequent research or discovery.

Discussion

Thank you for the opportunity to review Mr. McFarland's proposed compensation for SAW during the period of alternative service. Mr. McFarland's methodology appears designed to score as high a level of profit for SAW as possible. STB rejected this approach. The preamble to the relevant regulations make it clear that compensation is to be based on costs incurred by the incumbent carrier, including return on investment with respect to facilities used to provide alternative rail service. Mr. McFarland's approach is clearly not based on such methodology.

The relevant preamble statement concerning compensation is as follows:

Various parties address the need for the incumbent carrier to be fairly compensated if it is required to provide services and/or facilities to the alternative carrier. NITL et al. argue that any payment to the incumbent carrier should be limited to costs incurred by the incumbent, including a return on investment, and not include compensation for lost profits. They suggest that fair compensation can be developed from our railroad cost accounting system, known as URCS. We agree that the incumbent railroad is entitled to fair compensation for whatever services and facilities it provides, but not for lost profits for service it is not providing. Because the type of access to an incumbent carrier's facilities and the services the incumbent will be required to provide to an alternative carrier will vary widely, depending on the service inadequacy and the relief that is fashioned, we will not attempt to prescribe in the abstract a compensation formula applicable to all situations. Rather, where appropriate we will be guided by established precedent, taking into account the circumstances of the particular case.

It is PYCO's understanding that WTL receives no services from SAW (indeed, we understand that WTL provides services to SAW). That being the case, the only compensation required is that for SAW facilities employed by WTL to serve PYCO.

Fortunately, Mr. McFarland identifies the facilities which SAW claims are provided to WTL. In order to move the alternative service compensation issue along (but without admitting that Mr. McFarland's statements are accurate for any other purpose), we will assume arguendo that they are correct here. There are two possible costs for SAW associated with those facilities: (a) maintenance and (b) return on investment.

As to maintenance, it is our understanding that SAW employs a deferred maintenance program, replacing ties and fixing switches only when broken. It is our understanding that WTL is paying SAW the full cost of all repairs necessary when a tie or switch breaks during use by WTL. It seems to us that adequately reimburses SAW for maintenance under SAW's deferred maintenance program.

Return on investment is straightforward to calculate. SAW, of course, paid nothing for the property: it was transferred to SAW by BNSF for no consideration. Although one could argue that the true investment, we will assume arguendo (solely for purposes here) that SAW nonetheless is entitled to a

return on the current value of the assets donated to SAW by BNSF.

According to Mr. McFarland, WTL is using the following facilities of SAW: 2.41 miles of track, exclusively, and 1.69 miles of track, shared 50/50 between SAW and WTL. As indicated, we will assume arguendo for alternative service compensation purposes only that Mr. McFarland's representations are correct.¹

SAW's track is comprised of 90 pound and 85 pound rail. We are advised by former SF employees that the track was worn out before SAW purchased it, and that SAW only repairs track on a deferred maintenance (i.e., when broken) bases. Most of the track is in the dirt, essentially no longer balances, and the ties are essentially a wash (so many are scrap that they offset any value associated with ties that might be useful for some economic purpose). We will nonetheless assume arguendo that all the track is 90 pound and in good enough shape to be marketable as reroll quality. The following tables compute the relevant track/tie/other track material values:

2.41 miles which SAW says are used exclusively by WTL

	Net Tons	Price/ton	Total
90# reroll	381.6	285.00	\$108,756
OTM	76.32	220.00	\$ 16,790
Less take up costs, freight		100/ton	(45,792)
Net sale price in the ground:			\$ 79,754.40

1.69 miles which SAW says are shared 50/50:

90# reroll	267.60	285.00	\$ 76,266.00
OTM	53.52	220.00	\$ 11,774.40
Less take up costs, freight		100/ton	(32,112.00)

¹ We do not believe Mr. McFarland's representations are correct. For example, it is our understanding that BNSF retains certain rights to use tracks 9200 and/or 9298. Thus to say these tracks are exclusively in use by WTL to provide service to PYCO is incorrect.

Net sale price in the ground:

\$ 55,928.40

PYCO currently anticipates approximately 7000 carloadings in 2006. The most recent cost of capital computed by STB is 10.1%/ The formula for computing a return on the current value of the rail assets donated to SAW as used to provide alternative service to BNSF is as follows:

$(\text{NLV exclusive assets})(10.1\%)/7000 +$
 $1/2 (\text{NLV shared assets})(10.1\%)/7000$

or

$79,754.40 (.101) \text{ divided by } 7000 = \1.15 plus
 $1/2 (55,928.40) (.101) \text{ divided by } 7000 = \0.40

For a total of \$1.55/car for the track, ties, and OTM.

In addition, SAW holds interests in land under some of its track and tie. If we assume arguendo each right of way involved here is 50 feet wide, this totals approximately 6 acres per mile. Some of this right of way is likely easement. The NLV of easement property is zero. Assuming arguendo (only for purposes here) that SAW owns all the underlying rights of way involved here in fee, we would have

$2.41 \times 6 = 14.46$ acres exclusive use
and

$1.69 \times 6 = 10.14$ acres for shared use. On a 50/50 basis, this would be the same as 5.07 acres for use to provide service to PYCO. The total acreage for purposes of an NLV calculation is thus 19.53 acres.

While we have not attempted to calculate an appraisal, the upper bounds are indicated by the asking price of comparable property being offered through Westmark Realty for property at Elm and 56th. That price is \$200,000 for 42 acres, or \$4800/acre. $19.53 \text{ acres multiplied by } 4800 = \$93,744.00$. Multiplying this amount by 10.1% (STB's most recent cost of capital for railroads) yields \$9468.14, and dividing this by 7000 results in a per car charge of \$1.35.

The maximum return on investment to which SAW may be entitled is thus \$1.55/carload on track, ties and OTM, and \$1.35/carload on land, or \$2.90/carload total.

PYCO can think of no other service provided by SAW, nor cost of SAW in connection with the alternative rail service being provided by WTL. If WTL is providing services to SAW that are not reimbursed by BNSF, then WTL would appear entitled to an offset for those services.

Exhibit B

MARTIN RAILROAD CONSTRUCTION
1401 INLER

LUBBOCK, TX 79416

(806) 784-0846 OFFICE

(806) 784-0868 FAX

FAX COVER SHEET

DATE: June 27, 2008

NUMBER OF PAGES (INCL COVER SHEET): 2

TO: ED ELLIS - PERMIAN BASIN RAILWAYS, WTL
ATTN: ED ELLIS
FAX: 312-488-9589

RE: Derailment Invoice for WTL of PYCO cars on Larry Wisener track at Farmers Coop
Compress located at 50th & Southeast Drive, Lubbock Tx

Mr. Ellis,

Martin Construction responded to the urgency of the situation with the derailment of your client's (PYCO) train cars on Larry Wisener's (South Plains Switching) track at Farmers Coop Compress. I related to your agent before any work was done and it was agreed that full payment of invoice is to be made to Martin Construction upon completion of work no later than 10 days after receipt of invoice. I appreciate your respect and confidence in us and our company.

Thank you,


Eldon Martin, Martin Construction

MARTIN RAILROAD CONSTRUCTION
1401 INLER (FM 179)
LUBBOCK, TX 79416
EIN # 75-2087288
PHONE: 806/784-0846
FAX: 806/784-0868

**INVOICE 61406-DRL
DERAILMENT REPAIR
50TH & SOUTHEAST DR**

SERVICE FOR: PERMIAN BASIN RAILWAY
WEST TEXAS & LUBBOCK RR
821 WEST BROADWAY
BROWNFIELD, TX 79316

CC: PYCO INDUSTRIES, INC.
ATTN: LES HOWELL
PO BOX 841
LUBBOCK, TX 79408-0841
PHONE: 806/744-2357 FAX: 806/766-0464

SEND TO: PERMIAN BASIN RAILWAY
Ed Ellis, CEO
South Clinton St, Ste 300
P.O. Box 618181
Chicago, Ill 60661
PH 312-466-0900 ext 13
FAX 312-466-9589

Salesperson: Eldon Martin		Date: 6/26/2006	
Invoice number: 61406-DRL		Service number: 62306-DRL	
Cost: AS PER AGREEMENT			
	DERAILMENT AT 50TH & SOUTHEAST DR. (FARMERS COOP COMPRESS)		
QUANTITY	DESCRIPTION OF WORK PERFORMED	RATE	AMOUNT
	SCOPE OF WORK: DERAILMENT REPAIR		
	Haul Equipment & Material to location		
	Rerail cars		
	Clean debris from site		
	Remove damaged track (rails, ties, plates, switch ties, switch hardware....)		
	Repair defective switch points		
	Replace defective or damaged: ties, switch ties, rail, HB bolt		
	Clean and adjust switches in work area		
	Install ballast		
	Raise, line, level & tamp track in work area		
	Dress and shouldered track and switches in work area		
	LABOR, MATERIAL & EQUIPMENT FOR ABOVE SCOPE		
476	MAN HOURS	\$22.50	\$10,710.00
89	HOURS 4WD BACKHOE	\$45.00	\$4,005.00
8	DAYS INDUSTRIAL AIR COMPRESSOR	\$250.00	\$2,000.00
21.5	HOURS INDUSTRIAL PORTABLE WELDER & TORCH	\$65.00	\$1,397.50
8	DAYS SPECIALTY TOOLS	\$350.00	\$2,800.00
424	MILES HAULING	\$2.00	\$848.00
25	NET TONS BALLAST	\$12.00	\$300.00
10	90# RELAY TIE PLATES	\$3.00	\$30.00
1	HEAD BLOCK SWITCH BOLT	\$50.00	\$50.00
9	NEW SWITCH TIES VARIOUS LENGTHS	\$66.00	\$594.00
10	RELAY SWITCH TIES	\$40.00	\$400.00
	TOTAL COST ABOVE SCOPE OF WORK		\$23,134.50
MARTIN CONSTRUCTION CHARGES 1.5% PER MONTH ON UNPAID BALANCE			
PAYMENT DUE UPON RECEIPT OF INVOICE			
WTL FURNISHED: 2 Kegs spikes, 1 keg bolts, 40 relay ties, 9 new switch ties, 3 - 90# 33' rail			



**SOUTHWESTERN
DIVERSIFIED LEASING**

P.O. Box 339
101 East 24th Street
PLAINVIEW, TEXAS 79072

(806) 296-7444

Invoice

4912

PAID
6/21/06

TO PERMIAN BASIN RAILWAYS

DATE 6/15/06 JOB NO. _____

JOB NAME CRANE SERVICE

JOB LOCATION LUBBOCK

TERMS

DESCRIPTION	PRICE	AMOUNT
LIFT DERAILED CAR		
PERMIT		80 00
CRANE OPER. 2 1/2 hours @ 250 ⁰⁰ /hour		625 00
CRANE OPER. (O.T.) 6 hours @ 277 ⁵⁰ /hr		1,665 00
RIGGERS 4 1/2 hours @ 55 ⁰⁰ /hour		247 50
RIGGERS (O.T.) 23 hours @ 82 ⁵⁰ /hour		1,897 50
DRIVETIME 2 hours @ 55 ⁰⁰ /hr		110 00
		\$4,625 00
PAST DUE ACCOUNTS WILL BE CHARGED AT 1 1/2% PER MONTH (18% PER YEAR OR THE MAXIMUM ALLOWED BY LAW WHICH- EVER IS GREATER).		

Thank You

Exhibit C



Permian Basin Railway Company, Inc.
P.O. Box 618181
Chicago, IL 60661

Invoice

Date	Invoice #
7/18/2006	1317

Bill To
South Plains Switching, Ltd. Co. P.O. Box 64299 Lubbock, TX 79464 Attn: Ms. Delilah Wisener

*Invoice sent to
SAW - 7/20/06.*

		Terms	FEIN
Description	Qty	Rate	Amount
Damage to Railroad Property- Derailment at 50th & Southeast Dr. (Farmers Co-op Compress)		23,134.50	23,134.50
Derailment repair work done by Martin Railroad Construction, Lubbock Texas, 6/14-6/15/06			
Crane service provided by Southwestern Diversified Leasing for derailed car		4,625.00	4,625.00
		Total	\$27,759.50
		Payment Due	\$27,759.50

Phone #	Fax #
312-466-0900	312-466-9589

Exhibit G

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. -- Alternative Rail Service
-- South Plains Switching, Ltd.

F.D. 34889

I, Eldon Martin, make this Declaration, pursuant to 28 U.S.C. § 1746, for use in the alternative service proceeding captioned above and in related proceedings before the Surface Transportation Board.

1. I am the president of Martin Railroad Construction, 9325 W. 19th, Lubbock, TX. My company constructs railroad track and repairs railroad track. I have had 33 years experience in the industry and am well familiar with Federal Railroad Administration requirements regarding track construction, repair, maintenance and inspection, including inspection and maintenance of switches. That is fact is my area of expertise.

2. On June 14, West Texas and Lubbock Railroad (WTL) experienced a derailment on trackage owned by South Plains Switching, Ltd. on the west side of the BNSF mainline in the area of Farmers Cooperative Compress (roughly 50th and Southeast Drive). After inspecting the site of the derailment, I concluded that it was the result of a defective, poorly maintained switch. In determining causation, one is looking for an explanation of how the wheel flanges picked the switch. I examined the wheel flanges and found no defects which would enhance the chance of derailment. However, there were a number of problems with the switch

immediately obvious on examination. The problems indicate a failure by the owner of the railroad properly to inspect and to repair switches. At the request of WTL, which must operate over the switch to provide service for PYCO Industries, my company repaired this switch and an adjacent defective SAW switch, and in addition assisted in re-railing the cars.

3. In my opinion, the derailment more specifically resulted from failure by South Plains Switching Ltd. to maintain the switch consistently with Federal Railroad Administration Track Safety Standards Compliance Manual, United States Department of Transportation, Office of Safety Assurance and Compliance, January 1, 2002, section 213.135 (switches), pp. 5.105-5.110. In particular, the following defect codes are relevant:

-- Defect code 135.11: unusually chipped or worn switch point, p. 5.110.

-- Defect code 135.03: improper fit between switch and stock rail, p. 5.110.

-- Defect code 133.06: loose, worn, or missing switch rod bolts, p. 5.104.

-- Defect code 133.07: worn or missing cotter pins, p. 5.104.

In addition, there is a recommendation at p. 5.109 that all bolts, nuts, cotter pins and other fasteners be in place, in good condition and properly tightened. This was not the case at the point of derailment.

4. I attach below some explanations and photographs illustrating the problem.

5. Martin Railroad Construction has submitted an invoice to WTL for \$23,134.50 for re-railing and switch repairs.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

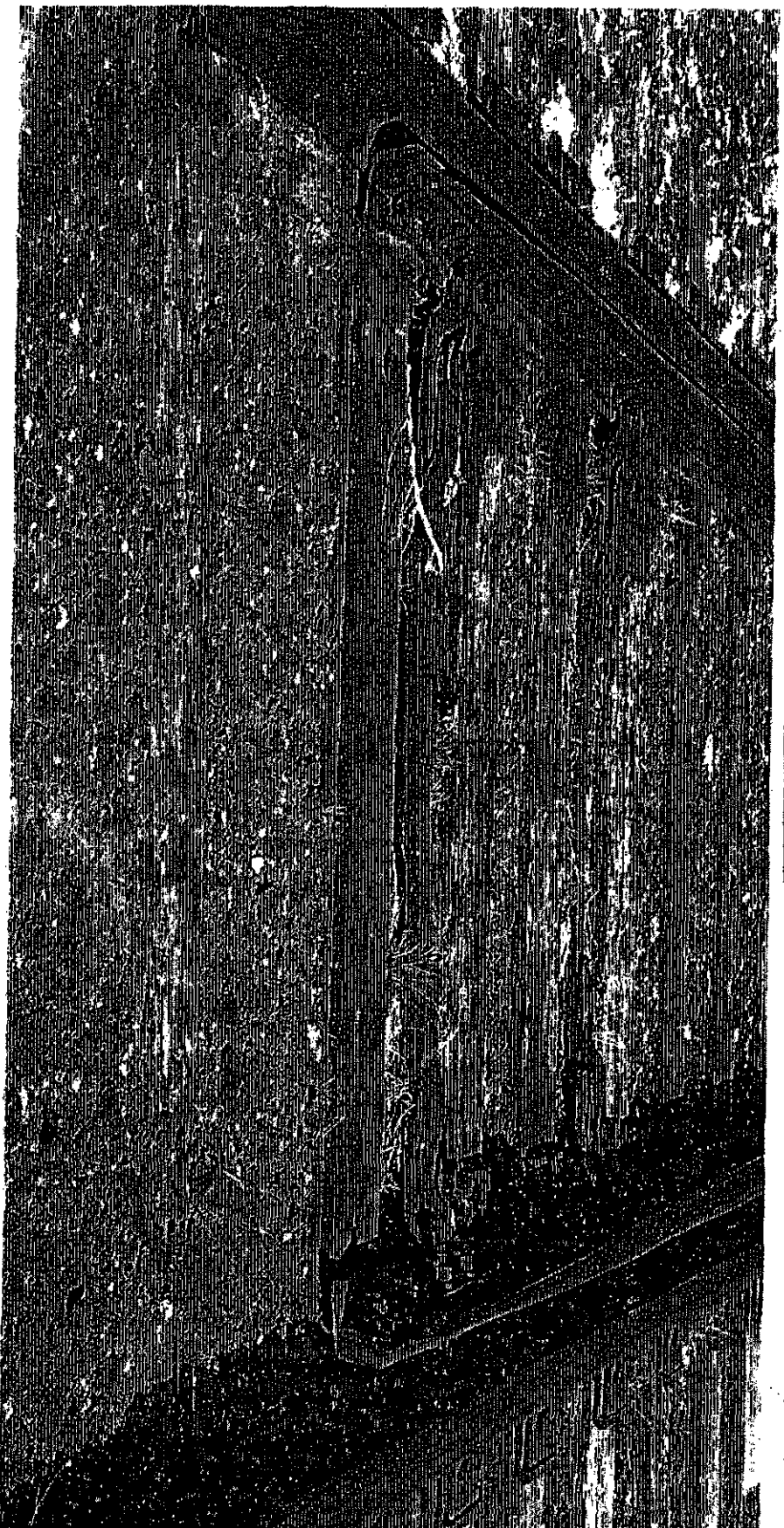
Executed on 6-30-06

Eldon Martin

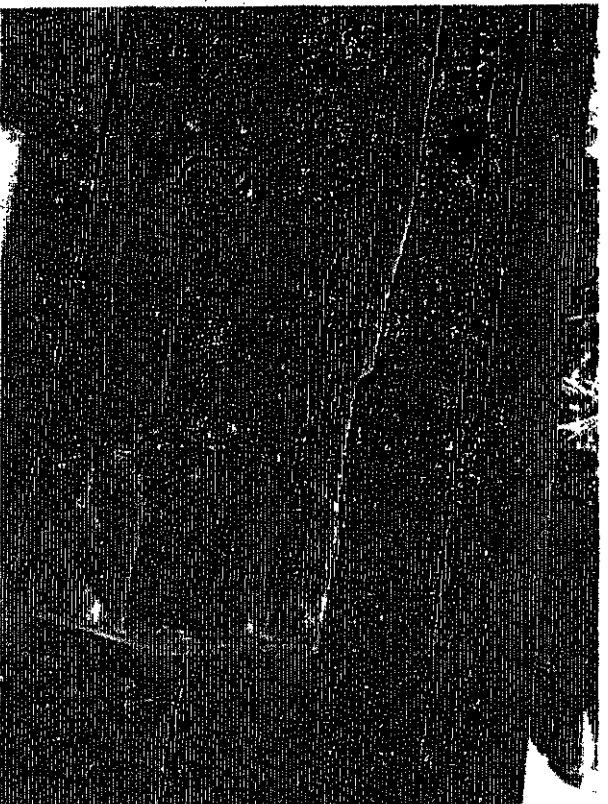
133.07 Worn or missing cotter pin

- ❑ Next picture will show the defect 133.07 and 133.06.
- ❑ If you notice the nut on the switch bolt is almost off.
- ❑ The nut should be screwed down to the jaw clip, with a cotter key, to prevent the nut from screwing off

Left hand nut and bolt, #1
connector rod

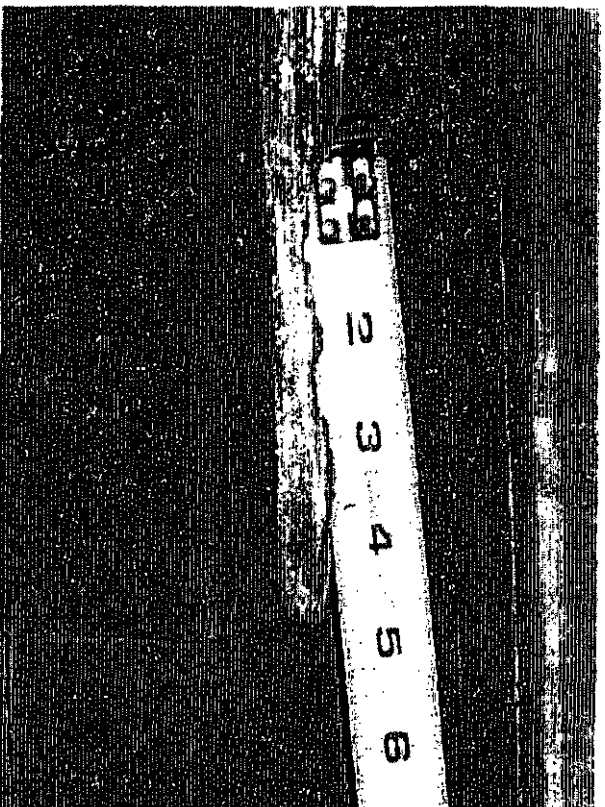


Right Hand Switch Point



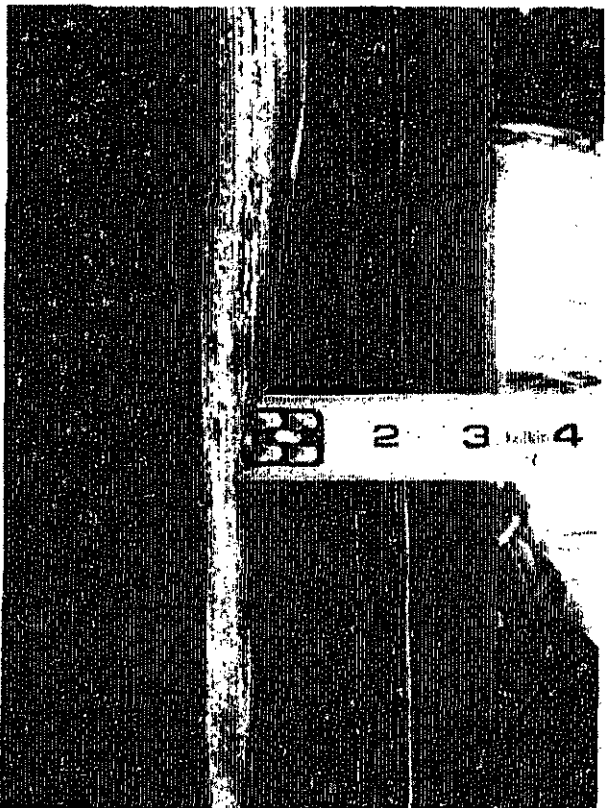
- ☐ This picture illustrated the wear and tear of the point of the switch point.
- ☐ The missing part of the point would make it difficult for the point of switch to fit properly against the stock rail.
- ☐ Point must fit securely under the lip of the rail with no type of gap in-between.

Measurement R.H. switch point

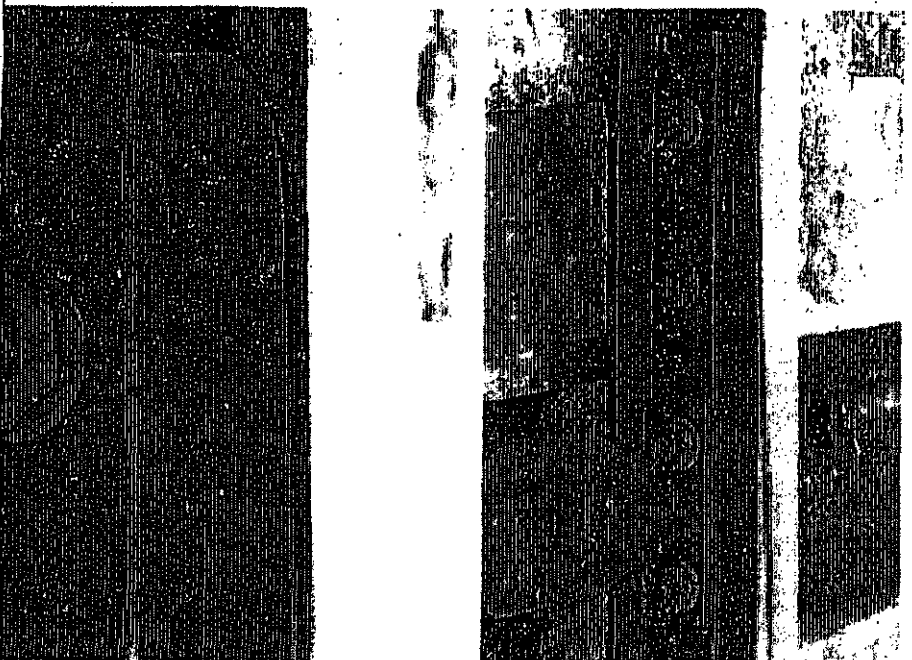


- This picture illustrates 4" back from the end of point all the way down to the base of switch point.

-
- ❑ Show 2" loss of point in height that could as well prevent a proper fit from point to stock rail.



Ex: Switch points



- Here is two examples of the way a switch point should look and fit against the rail. If you notice on picture 2 the point of the switch fits securely against the rail and underneath the lip of the rail. These points were not involved in the derailment itself, just used as an example to give a visual of a properly maintained switch point.

1. The first step in the process of developing a new product is to identify a market need. This involves conducting market research to determine what consumers want and need. Once a market need is identified, the next step is to develop a concept for a product that meets this need. This concept should be based on the market research and should take into account the needs and preferences of the target market. The concept should also be feasible in terms of technology and resources. Once a concept has been developed, the next step is to create a prototype of the product. This prototype should be used to test the concept and to gather feedback from potential customers. Finally, once the concept has been tested and refined, the product can be developed and launched into the market.

- ☐ Martin Railroad
Construction total=\$23,134.50. Which includes re-railing, hauling of all the materials and etc.
- ☐ Upon the request of the West Texas and Lubbock Railway, we dispatched a crew to assist the situation and make the repairs needed to put track back in service.
- ☐ WTLRC has been invoiced

- Martin Railroad Construction total= \$23,134.50. Which includes re-railing, hauling of all the materials and etc.
- Upon the request of the West Texas and Lubbock Railway, we dispatched a crew to assist the situation and make the repairs needed to put track back in service.
- WTLRC has been invoiced and are responsible for payment.

Certificate of Service

I hereby certify service of the foregoing upon the following counsel of record by express service, next business day delivery, this 30th day of January 2007:

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

William Sippel, Esq.
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2832 (for US Rail Partners)

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

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

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

Andrew Goldstein, Esq.
McCarthy, Sweeney & Harkaway
2175 K Street, N.W., Suite 600
Washington, D.C. 20037

Michael Hyer, Esq.
Vice President and General Counsel
Hanson Aggregates
8505 Freeport Pkwy, Suite 138
Irving, TX 75063