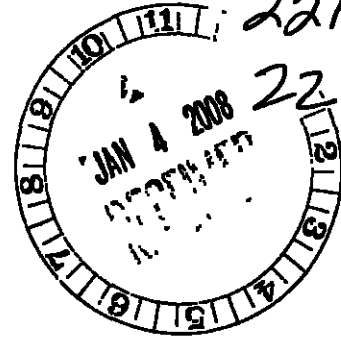


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3 January 2008

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

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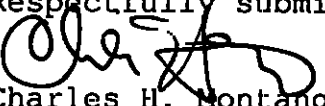
Re: South Plains Switching Ltd. Co. - Petition
Finance Docket 35111,
and related dockets F.D. 34889 and 34802

Dear Mr. Secretary:

Enclosed for filing in the three dockets above please find a Reply (and ten copies) on behalf of PYCO Industries (PYCO) and West Texas & Lubbock Railway (WTL) to the petition for compensation filed by South Plains Switching Ltd. (SAW) on or about December 13, 2007.

Thanks for your assistance in this matter.

Respectfully submitted,


Charles H. Montange
Counsel for PYCO Industries, Inc.

Encls (orig plus ten)

cc. Counsel per certificate of service (w/encls)

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. --)
Alternative Rail Service --) F.D. 34802
South Plains Switching Ltd.)

221190

PYCO Industries, Inc. --)
Alternative Rail Service --) F.D. 34889
South Plains Switching Ltd.)

221189

South Plains Switching Ltd. -)
Compensation for Use of)
Facilities in Alternative) F.D. 35111
Rail Service - West Texas &)
Lubbock Railway Co.)

221188

REPLY
to South Plains Switching Ltd's
"Petition for Compensation"

This Reply is on behalf of PYCO Industries, Inc. ("PYCO"), and West Texas & Lubbock Railway Co. (WTL) in opposition to the "Petition for Compensation" filed by South Plains Switching, Ltd. (SAW) in F.D. 35111. That "Petition" seeks a schedule for yet more filings, and relief against WTL in the amounts ranging from \$75 to \$146 per carload for alternative rail service provided by WTL to PYCO pursuant to orders in two alternative rail service proceedings now expired on their own terms.

For the reasons stated herein, SAW's Petition has no merit. Under this Board's regulations and decisions, SAW must state its case in its initial pleading, and has neither right nor reasonable expectation to file additional pleadings, and makes no showing entitling it to more filings. In any event, as shown below, all the information necessary to determine compensation

due (none is) is in the record of related proceedings, or at least available to SAW. In addition, SAW has had ample notice of the PYCO/WTL position on the matter, and should have and could have presented its entire case in its improperly filed "Petition."

Character of SAW's Petition

SAW's "Petition" is nothing more than a kind of appeal: a petition for reconsideration (out of time) administratively final decisions in two alternative service proceedings (F.D. 34802 and 34889) in which the service authorizations granted by this Board have already expired by their own terms. The SAW "Petition" belatedly requests a retroactive award of compensation to SAW in those two proceedings, after they have been completed and are otherwise moot. The petition not only should have been filed as a petition for reconsideration in those proceedings rather than in an independent docket, but also should have been filed roughly 21 months ago in F.D. 34802, and over a year ago in F.D. 34889. (Indeed, SAW could have and should have voiced its concerns as to F.D. 34889 in its initial reply to PYCO's original petition in that docket, and not as a distant afterthought as here.)

¹ As indicated herein, PYCO and WTL view this Board's Decision in PYCO Industries - Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, slip op. at p. 5 n.13 and p.9 n. 22 as indicating that the Board would address compensation issues in the alternative service proceeding dockets, not in some new proceeding.

SAW's motivation to file its "petition for compensation" in a separate docket seems clear: SAW is either abusing the Board's procedural regulations, or seeking to avoid filing fees, or both. WTL and PYCO believe that SAW's chief motivation for its unusual filing is that it is seeking to avoid compliance with the applicable requirements for reconsideration (and in particular, for reopening, as set forth in 49 C.F.R. 1115.4) of this Board's prior administratively final decisions in F.D. 34802 and F.D. 34889. Under 49 C.F.R. 1115.4, in order to obtain the relief it seeks, SAW must show, and this Board must find, material error in the prior decisions, or new evidence or changed circumstances justifying reopening F.D. 34802 and 34889. But none of these grounds for reopening exist. SAW's petition either must be rejected as a ruse to get around SAW's inability to meet the requirements of 49 C.F.R. 1115.4, or must be treated as subject to the requirements of that regulation.

Alternatively, SAW is seeking to avoid payment of requisite filing fees by mischaracterizing what it is doing. If SAW seeks compensation, then it must file two fees: \$200 (per 49 C.F.R. 1002.2(f)(61)) to file a petition for reconsideration/appeal in F.D. 34802 and \$200 more for such a pleading in F.D. 34889. But SAW's cover letter to its December 13 filing indicates it paid only one. If on the other hand, SAW intends, and the Board allows, the filing of an entirely new proceeding that is

something other than a reconsideration/appeal from F.D. 34802 and/or F.D. 34889, then that new proceeding can be only one of two other things: a complaint against WTL, or a petition for a declaratory order. The current STB filing fee for a complaint is \$17,600 [1002.2(f)(56)(111)]. The current filing fee for a petition for a declaratory order is governed by subsection 1002.2(f)(58). That subsection currently specifies a fee of \$1000 to \$1400² depending on whether it relates to a current rate or practice, and since SAW's does not, the \$1400 figure would apply.

Since SAW has failed to pay the requisite fee for a new proceeding, its petition should not be filed under a new docket and must be treated as some kind of appeal/petition for reconsideration in F.D. 34802 or F.D. 34889. If SAW wants to proceed in both, it owes another \$200.

Overview

However one characterizes SAW's de facto petition for reconsideration, SAW's claim must be rejected as unsupported by the law or the facts for, inter alia, the following additional reasons: (1) Under this Board's construction of the applicable

² When counsel inquired of the Office of Secretary concerning the basis for the fee, one suggestion made was that it was the fee for a petition for expedited or temporary relief from service inadequacies, per section 1002.2(f)(63). PYCO filed such proceedings and paid those fees. SAW is not filing such a proceeding, but instead is seeking to reopen both. The fee for that is set forth in section 1002.2(f)(61) (appeals).

statutes, SAW was supposed to negotiate compensation, and request this Board's intervention if negotiations failed to resolve the compensation issue. But SAW failed to negotiate, and subsequently intentionally failed to raise the issue of compensation in a timely fashion. SAW is now barred from pursuing the issue by reason of its failure to act in accordance with this Board's construction of the statutes, as well as by doctrines of laches and waiver. (2) SAW's basis for the compensation it seeks is contrary to the applicable statute and regulations. It thus fails to state, or at least support, its claims. In other words, even if SAW in theory were entitled to compensation, it fails to provide the information necessary for its calculation. SAW is required to provide its entire case in its petition and to bear the burden of proof there. SAW is not entitled to supplement its pleading with further information or argument at this time. (3) Any amount which SAW could possibly reasonably claim is overwhelmed by set-offs incurred by PYCO and West Texas & Lubbock Railway (WTL), PYCO's alternative service provider. That is presumably one of the key reasons SAW never raised the issue in a timely fashion in the first place.

For all these reasons, and as more fully set forth below, SAW's petition must be rejected.

I. Background

Faced with repeated episodes of rail service inadequacy by

then-incumbent rail provider South Plains Switching, Ltd. (SAW), shipper PYCO Industries ("PYCO") filed a number of proceedings, including a feeder line proceeding (F.D. 34890). Pursuant to this Board's Decision served August 31, 2007 in F.D. 34890, PYCO acquired SAW's lines on November 9, 2007. For purposes here, however, our focus is on two proceedings for interim relief filed by PYCO: F.D. 34802 and F.D. 34889.³

A. F.D. 34802 and F.D. 34899

The first proceeding (F.D. 34802) involved a petition for alternative rail service pursuant to 49 U.S.C. 11123 and 49 C.F.R. Part 1146, initially filed by PYCO in December of 2005. This Board authorized alternative rail service in F.D. 34802 in a decision served January 26, 2006. 49 U.S.C. 11123 authorizes alternative service for no more than 270 days. In a series of orders, this Board ultimately authorized service in F.D. 34802 for the entire 270 days allowed by statute. However, SAW stipulated an additional extension in order to accommodate additional filings it wished to make in other proceedings, such that alternative service under section 11123 and Part 1146 did not expire until midnight, November 22, 2007.⁴

³ We use the term "interim relief" because PYCO sought long term relief via the feeder line application in F.D. 34890.

⁴ Compare Decision in F.D. 34802, served June 21, 2006, slip op. at 8, ordering para 6 (expire Oct. 23, 2006) with Decision in F.D. 34802, served August 18, 2006, slip op. at 2, ordering para 1 (30 day extension).

For fear that the feeder line proceeding would not be concluded before the time period for alternative service under section 11123 expired, PYCO also filed a petition for alternative rail service under 49 U.S.C. 11102(a) and 49 C.F.R. Part 1147. This proceeding was docketed as F.D. 34889. This Board authorized alternative service in F.D. 34889 by decision served November 21, 2006, slip op. at p. 6, ordering para 3 (commencing 12 AM on November 23, 2006). In the referenced decision, STB provided that the alternative service authorization would automatically terminate upon a sale authorized in the feeder line proceeding (F.D. 34890). As already stated, PYCO closed such a sale with SAW on November 9, 2007. Thus alternative service expired at midnight, November 9, 2007.

B. Law and Relief Requested by SAW Relating to Compensation
in F.D. 34802 Alternative Rail Service

This Board authorized alternative rail service (as opposed to directed service) in F.D. 34802 pursuant to an emergent situation covered by 49 U.S.C. 11123. Section 11123(b)(2) provides that the rail carriers may establish between themselves the terms of compensation for operations. It also provides that "[w]hen rail carriers do not agree on the terms of compensation..., the Board may establish the terms for them."

The Board's implementing regulations for 49 U.S.C. 11123 are set forth in 49 C.F.R. Part 1146. The preamble to those

regulations makes clear (1) that this Board construes the applicable statute to require the carriers to negotiate compensation, and that the Board is authorized to set compensation "only if the parties cannot agree" and (2) that an incumbent carrier is not entitled to lost profits flowing from alternative service in Part 1146 (or any other) alternative rail service proceedings, but instead is only entitled to compensation for use of its facilities and for any services it provided. Expedited Relief for Service Inadequacies, Ex Parte No. 628, served Dec. 21, 1998, slip op. at p. 14.

SAW provided no services to WTL or PYCO during any alternative service period. More specifically, SAW failed to perform any track maintenance or weed control on trackage used to provide service to PYCO. Under the circumstances, the only compensation due to SAW would be for use of trackage.

1. SAW failure to negotiate on compensation. In early March 2006, SAW through its attorney (Mr. McFarland) tendered a request for compensation to WTL for alternative service as part

⁵ Although throughout 2006 and into the first part of 2007, SAW took the position that any entry by PYCO or WTL (other than WTL to haul cars to PYCO) was trespass, in the second half of 2007, SAW took the position that WTL was obligated to maintain the trackage. See, e.g., Letter, Wisnecr to McConville, August 6, 2007. See also Motion to Permit Inspection and Repair, dated August 6, 2007, in F.D. 34889 (and attachments thereto). SAW's claim that WTL was providing "directed service" and thus so obligated under FRA regulations is spurious. WTL provided alternative service.

of a proposed interchange agreement (never entered), but that amount was an arbitrary demand for profit. Based on SAW's representations as to the amount of its property being employed for alternative service, and based further on this Board's principles for calculating compensation in condemnation proceedings, PYCO and WTL calculated that the applicable rate of compensation would be \$2.90 per car.⁶ WTL offered this amount to SAW in an email dated March 13, 2006. See Exhibit F (email plus calculation basis). SAW's "Petition" nowhere acknowledges this offer, although SAW clearly received it, for SAW's witness (Olmstead) acknowledges that WTL offered \$2.90/carload.⁷

SAW never responded to PYCO or WTL. SAW not only stonewalled WTL and PYCO; it also stonewalled the Board. In particular, SAW never requested this Board to establish compensation terms for alternative service under 49 U.S.C. 11123. Alternative service under section 11123 expired no later than November 22, 2006 - over one year ago. SAW never followed up on

⁶ PYCO's memorandum setting out the calculation is set forth in numerous pleadings filed by PYCO in F.D. 34802, 34889, and 34890. E.g., PYCO's "Notice of Intent to Respond" e-filed in F.D. 34889 on February 20, 2007, and PYCO's "Status Report" dated January 30, 2007, in F.D. 34802, 34889, and 34890. The \$2.90/carload figure was based on SAW's "opportunity cost" (NLV trackage multiplied by reasonable return) divided by projected carloadings. As discussed *infra*, all service is now concluded, and the amount per carload (and thus number of carloadings) is no longer relevant.

⁷ Olmstead Dec. at p. 3, attached to SAW "Petition" in F.D. 35111.

negotiations for compensation, and never brought the matter to this Board's attention. SAW both failed to negotiate, and failed timely to raise the matter with this Board.

2. Set-off's during F.D. 34802 alternative service. Due to SAW's failure to maintain the track,⁸ WTL sustained a derailment while providing alternative service to PYCO under the authority granted by this Board in F.D. 34802. The total costs for re-railment (\$4,625) and repair (\$23,134.50) totaled \$27,759.50. WTL invoiced SAW for this amount on July 20, 2006.⁹ SAW did not pay. See Exhibit A (Gregory Declaration) para.2. Since the derailment arose from a breach of SAW's duty to maintain, this is a proper set-off to any amount of compensation due SAW for use of its facilities for alternative service during the F.D. 34802 period.¹⁰

⁸ Declaration of Eldon Martin executed June 30, 2006, attached as Exhibit G to PYCO "Status Report" in F.D. 34802, 34889, and 34890 dated 30 January 2007.

⁹ Exhibit C to PYCO's "Status Report" in F.D. 34802, 34889, and 34890, dated January 30, 2007.

¹⁰ WTL and PYCO sought authority for WTL or independent contractors to inspect and to repair the SAW trackage used for alternative service, but this Board repeatedly denied such authority, initially on the ground that the duty to repair rested on SAW and the Board expected SAW to discharge this duty (PYCO Industries - Alternative Rail Service - South Plains Switching Ltd., F.D. 34802, served June 21, 2006, at 8) and subsequently on the ground that the Board hoped to decide the feeder line case promptly (F.D. 34889, served Nov. 21, 2006, at 6).

B. Law and Requests for Relief Relating to Compensation
for F.D. 34889 Alternative Service

49 U.S.C. 11102(a) provides that the "rail carriers are responsible for establishing the ... compensation for use of the [terminal] facilities. However, if the rail carriers cannot agree, the Board may establish ... compensation for use of the facilities under the principle controlling compensation in condemnation proceedings. The compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another carrier under this section."

The preamble to this Board's Part 1146 and 1147 alternative service regulations makes clear that an incumbent carrier is not entitled to "profit" from alternative service. In addition, it indicates that the Board will act to establish compensation terms only upon request of one or the other of the parties.

This Board authorized alternative service to PYCO under 49 C.F.R. Part 1147 in F.D. 34889 pursuant to 49 U.S.C. 11102(a) in a decision served November 21, 2006. As the Board noted in that decision, SAW failed to oppose Part 1147 alternative service on any substantive ground. SAW in particular never raised any issue concerning compensation prior to this Board's decision authorizing alternative service per Part 1147 in the decision

served November 21, 2006.¹¹ SAW could have, and thus should have, raised the matter prior to this Board's November 21, 2006 decision.

1. SAW's tardy and improper treatment of compensation. A close examination of the record indicates that SAW at no point prior to its December 13, 2007 filing in F.D. 35111 ever requested the Board to establish terms for compensation. This clearly constitutes a waiver of any objection to alternative service in relation to any compensation claim.

SAW sent a demand for \$/5 per carload to WTL in December 2006, giving no basis for the demand. WTL responded by letter in February 2007 reminding SAW that the WTL/PYCO had provided a rationale for a much lower figure, and now also claimed set-off's. Again, SAW failed to respond. Rather than negotiate with WTL or PYCO, or to ask this Board to set compensation terms, SAW instead filed a pleading with this Board taking the position that failure to set compensation terms, or to provide security, somehow rendered the Board's action unlawful ab initio. In particular, the first time SAW raised its illegality argument in a proceeding in which PYCO was served papers was on February 15, 2007, some three months after this Board authorized Part 1147

¹ SAW sent a demand to WTL for \$/5/carload as compensation, to which WTL reiterated by letter in February 2007 that under the applicable law, the limit to which SAW could argue it was entitled was \$2.90/carload, subject to set-off's. SAW again refused to negotiate. See Exhibit A (Gregory Dec.) para 4.

alternative rail service.¹² In a pleading entitled, "Emergency Petition for Partial Modification of Operating Protocols" filed in F.D. 34889 on February 15, 2007, SAW appended a half page afterthought (SAW pleading at p. 5), in which it stated that it "hereby raises an additional ground for termination of alternative rail service in this proceeding." That ground was the alleged requirement that compensation be paid or adequately secured in advance. PYCO objected that SAW's tardy "additional ground" constituted a "reply to a reply"¹³ and moved to strike it as a violation of 49 C.F.R. 1114.13. See PYCO's "Notice of Intent to Respond" in F.D. 34889, e-filed Feb. 20, 2007, at p. 6. PYCO's motion remains pending.

SAW, however, did not pursue compensation issues at the Board. Without joining or notifying PYCO, SAW sued this Board in United States District Court to invalidate the Board's November 21, 2006, decision in F.D. 34889 evidently for failure to provide compensation.¹⁴ The District Court dismissed SAW's suit for lack

SAW implicitly admits that its first claim that alternative service in F.D. 34889 was unlawful for lack of compensation was made as an afterthought on February 15, 2007, at p. 7 of its "Petition" in F.D. 35111.

¹³ SAW filed a petition to terminate Part 1147 alternative service the day following issuance of this Board's decision authorizing it. PYCO replied, and the SAW pleading of February 15, 2007 referenced in the text insofar as it purported to buttress SAW's termination petition was simply reply to reply.

¹⁴ South Plains Switching, Ltd. Co. v. STB, USDC ND Tex CA 5:07-CV-0047-C.

of jurisdiction.¹⁵ SAW has evidently recently appealed the adverse ruling to the United States Court of Appeals for the Fifth Circuit.¹⁶ (PYCO learned of these matters after the fact.)

SAW thus appears intentionally to have avoided seeking compensation in a timely fashion in order to concoct a claim that alternative service in F.D. 34889 was void ab initio. Only when SAW's spurious claim was dismissed in U.S. District Court did SAW approach this Board to set compensation terms. Under the circumstances, SAW must be viewed as having made a kind of election of remedies: it contrived not to pursue a claim of compensation in order to pursue a facetious argument that any relief to PYCO was illegal. SAW's delay in properly pursuing compensation, SAW's failure to negotiate per the statute, SAW's failure timely to request terms from this Board, and SAW's attempted abuse of this Board's processes by running to U.S. District Court to enjoin alternative service on spurious grounds self-concocted by SAW constitute an intentional waiver of any right SAW otherwise might have had to request this Board to establish compensation terms. SAW should have sought, but did not seek, a Board order on compensation when PYCO originally petitioned for alternative service in F.D. 34889. Under the

¹⁵ Order and Judgment of dismissal in USDC ND Tex CA 5:070CV-0047-C dated Sept. 25, 2007.

¹⁶ South Plains Switching Ltd. Co. v. STB, Notice of Appeal filed Oct. 24, 2007.

circumstances, SAW may not now do so over a year later, after alternative service in F.D. 34889 has expired. SAW's current "petition" amounts to an effort to reopen F.D. 34889 well after any legitimate appeal period, not for material error or changed circumstance or new evidence, but because SAW's ruse in court did not work. That kind of gamesmanship should not be allowed.

2. Board has fulfilled its duties. PYCO notes for the record that the Board has discharged its statutory duty under 49 U.S.C. 11102(a) by publicly indicating, in the preamble to its Part 1146 and 1147 regulations, that the parties must first attempt to negotiate compensation and that the Board would not impose it in the first instance. The Board there indicated that it would establish compensation for alternative rail service upon request if negotiations between the parties failed. See Ex Parte 628, served Dec. 21, 1998, slip op at 14 (rejecting argument that the Board must set compensation upfront, on the ground that the statutes require the parties first to negotiate).

In Southern Pacific Transp. Co. v. ICC, 736 F.2d 108, 723 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985), the court of appeals considered an essentially identical situation under similar language of Revised Interstate Commerce Act section 11103(a). In the Southern Pacific case, ATSF complained that the "paid or adequately secured" requirement of the terminal facilities statute was not met where the ICC directed the parties

to negotiate compensation, since the parties failed to reach an agreement prior to commencement of the transaction. The court of appeals observed that ICC indicated that it would establish conditions of compensation if the parties were unable to agree, and stated that "[w]e hold that ... this statement ... fulfills the requirement of the term 'adequately secured' under [the predecessor statute to current 49 U.S.C. 11102(a)]."

Since this Board in its preamble to the Part 1146 and 1147 regulations has indicated it will establish conditions upon request, this "fulfills" the "paid or adequately secured" requirement of section 11102(a). If a party like SAW chooses not to negotiate compensation and also fails to ask the Board to act in a timely fashion, that constitutes a waiver of the party's right to compensation.

The court of appeals in Southern Pacific, supra, stated that ATSF's rhetoric about compensation was "more directed" at derailing the underlying relief there at issue (a merger) than at "protecting its rights." 736 F.2d at 723-24. The same can be said for SAW's arguments to date: they have clearly been directed at derailing alternative service (SAW sued STB in U.S. District Court to obtain that end), not at protecting any rights of SAW.

Moreover, this Board found PYCO financially responsible to purchase SAW in F.D. 34890 (a condemnation statute) on the same day PYCO filed its petition for alternative service in F.D.

34889. ' If PYCO had enough resources to buy at condemnation values, then it all along had enough to pay a user fee based on condemnation values. The agency's July 3, 2006 decision in F.D. 34890 determining PYCO had resources to buy SAW was tantamount to a finding of security for user fees for alternative service. In addition, PYCO paid a tariff to BNSF for all PYCO's shipments, with BNSF paying a division of that tariff to the switch provider in Lubbock (initially SAW, but then WTL during the alternative service period for PYCO shipments). Since the money for the switch costs is derived from the division, and since the division is paid out of the mainline tariff, this arrangement inherently provides adequate security for the incumbent railroad, so long as the incumbent railroad does not sleep on (or as here, attempt to manipulate use of) its rights.

All that happened was that SAW slept on its rights, gambling that by not requesting compensation terms be set, it could somehow abrogate the alternative rail service proceeding. The problem for SAW is not lack of security or compensation; it is that it contrived not to receive compensation in order to claim that relief under F.D. 34889 was illegal. It now seeks a re-do because its initial contrived legal theory did not bear it any fruit.

¹⁷ Decision in F.D. 34890, served July 3, 2006, at slip op. at 5.

3. Set-off's arising from the F.D. 34889 alternative service period. During the F.D. 34889 alternative service period, WTL, in order to provide alternative service, had to spike a switch in the SAW yard due to SAW's refusal to repair. WTL incurred \$10¹/₂ in costs as a result. Exhibit A (Gregory Dec. para. 3. In addition, PYCO incurred \$2000 in weed control costs due to SAW's failure to keep vegetation under control. Exhibit B (Lacy Dec.) para. 1." But SAW's failure to maintain its trackage resulted in even greater costs for both WTL and PYCO. Commencing November 10, 2007, PYCO (through WTL as its contract operator) had an immediate duty to provide service to numerous customers. In discharge of this duty, WTL sustained two expensive derailments due to SAW's defective track, costing \$9515.50 (inclusive of \$1280 for rail furnished by PYCO). Exhibit A, para. 2. As a result of SAW's failure to maintain its trackage, PYCO between November 11 and December 17, 2007 has expended an additional \$48,813.98 plus 9729.38 in materials to repair switches and replace ties and broken rail in an effort to patch up the tracks sufficiently to prevent further derailments pending implementation of a maintenance program. Exhibit B, para. 1. SAW is hardly in a position to contest its

¹ PYCO filed a Declaration by Mr. Lacy in F.D. 34889, concerning lack of weed control, and WTL the prior day unsuccessfully requested immediate attention by SAW to the problem. See attachments to PYCO Motion to Permit Inspection and Repair in F.D. 34889, dated August 6, 2007.

responsibility for these costs since it had its own inspector (Mr. Landreth) document "numerous violations of minimum FRA Class I track safety standards and of the Texas Clearance Law," and has already admitted that there was a need for track maintenance. See SAW "Reply to 'Motion to Permit Inspection....'" filed August 10, 2007, in F.D. 34889 at p. 4. (SAW speciously claimed, contrary to this Board's determination, that WTL was responsible to make the repairs.) Since SAW not only admits but also documents with its own witness that the failure of maintenance resulted in numerous violations of minimum requirements, PYCO and WTL are entitled to set-off's from their costs arising therefrom.

4. Total set-off's. The total set-off's claimed by WTL and PYCO due to SAW's breach of duties during the period of alternative service are as follows:

WTL: costs of three derailments - \$27,759.50 plus \$9515.50
(less 1280 for PYCO rail) - \$35,995

costs for defective switch: \$1072.

Total for WTL - \$37,061.

PYCO: Martin Rail invoices (\$48,813.98) plus materials
(\$9729.38) = \$58,543.36.

Weed control: \$2000

Total set-off's for PYCO: \$60,543.36.

Total set-off's: \$97,610.36.

C. SAW's [Mis-]Use of the Compensation Issue in F.D. 34890

In the feeder line proceeding, F.D. 34890, SAW also attempted to justify purported reversals of various of its positions on the ground that it "has been subject to an allegedly unlawful alternative rail service order in ... Finance Docket No. 34889...." See Decision in F.D. 34890, served August 31, 2007, at p. 9. This Board rejected SAW's position. This Board also noted that SAW's request to terminate alternative rail service is pending in F.D. 34889, and that the Board "will set the compensation for WTL's use of SAW's rail lines if the parties cannot agree." Id. at p. 5 n 13. PYCO and WTL believe this clearly indicates that Board anticipated that resolution of compensation issues would be in the context of a decision in F.D. 34889, upon request of a party.

However, SAW failed to negotiate compensation with WTL, much less PYCO, and never made a proper or timely request to this Board on the issue. SAW's current effort amounts to a petition to reconsider (reopen) filed out of time, on a mistaken legal theory, without supplying supportive evidence and argument.

III. ARGUMENT

A. SAW Fails to Meet Reopening Requirements

49 C.F.R. 1115.4 provides that a party such as SAW which files an untimely petition for reconsideration must in its petition demonstrate material error, or else new evidence or

changed circumstances, and request that the Board so find.

SAW makes no effort to show new evidence or changed circumstances. The relevant evidence (evidence of the condemnation value of the SAW assets used during alternative service) is neither new nor changed. SAW's petition is, if anything, predicated on some notion of material error. But this Board manifestly committed no material error. As this Board indicated in its preamble to its Part 1146 and 1147 regulations, the Board does not set compensation terms upfront, but first expects the parties to negotiate between themselves. If negotiations fail, then the Board will address the issue. This obviously requires the party seeking compensation to make a request that the Board determine compensation. It is undisputed that SAW did not make any such request in F.D. 34802 or F.D. 34889. The first time SAW filed a request was December 13, 2007, and then in a different docket (F.D. 35111). This filing was over a year after the conclusion of F.D. 34802, including all relief afforded therein to PYCO, and over a year after the last decision in the subsequent alternative service proceeding (F.D. 34889). There is no "material error" on the Board's part in failing to establish compensation when SAW failed timely to request this Board's intervention. See Topeka, P. & W. Rwy v. STB, 462 F.3d 734, 735 (7th Cir. 2006) (no material error when agency does not consider an issue a party does not raise).

SAW's petition accordingly must be denied for failure to show material error, changed circumstance or new evidence.

B. SAW's Petition Is Barred by Waiver and Laches

The record shows that SAW evidently elected not to pursue negotiations for compensation with WTL or PYCO at some point around March 13, 2006. SAW could have and should have sought this Board's intervention on the issue within 20 days of that date, and not sat on its rights for 21 additional months. SAW could have and thus should have sought compensation in F.D. 34889 before this Board authorized service in that docket. SAW's failure to act, coupled with its effort to use lack of compensation to vitiate the entire F.D. 34889 proceeding by claiming in U.S. District Court that relief in F.D. 34889 should be enjoined on that basis constitutes a both a failure to follow the applicable procedures for seeking compensation, and a waiver.

SAW's belated claim is also barred by the doctrine of laches. Laches applies to prevent a party like SAW from delaying its pursuit of a claim when that delay unfairly prejudices the party against whom relief is sought.¹⁹ Here SAW has delayed pursuit of a compensation claim in F.D. 34802 until over a year

¹⁹ This Board has recognized that laches may be applied to bar stale claims in the "absence of any particular statutory deadlines for filing." See Union Pacific Corp. - Control and Merger - Southern Pacific Transportation Company, F.D. 32760 (Sub-no. 42), served Feb. 28, 2006, slip op. at 4, recon. denied, decision served August 14, 2006.

after the rail service authorization in that proceeding expired. Similarly, it delayed pursuing its claim in F.D. 34889 until more than a month had lapsed from termination of that rail service authorization. SAW's "claim" would essentially confiscate all revenue on which WTL and PYCO relied for purposes of reimbursing WTL for remedying the inadequate rail service SAW had been visiting upon PYCO. While it might amuse SAW to threaten WTL with after the fact and retroactive confiscation of its revenues for assisting PYCO, the doctrine of laches clearly stands in the way. SAW's assertions come far too late for WTL and PYCO to take into account. The alternative service proceedings are now over. The agreement between WTL and PYCO for alternative service is completed. SAW is seeking to change the rules of the game long after it has been played. SAW's tardy pursuit of its rights is obviously highly prejudicial to both WTL and PYCO, and now puts them in a position where one or the other or both will incur unexpected costs. Accord Exhibit A (Gregory Dec.) at para 4; Exhibit B (Lacy Dec.) at para 3. SAW's approach is one with its tradition of seeking retaliation against perceived "enemies. It comes only after SAW's effort to get a court to invalidate alternative service (without notice to PYCO or WTL) failed. It is the epitome of the kind of abusive and manipulative claim that should be denied on grounds of laches.

C. SAW's Compensation Calculation Is
Fundamentally Flawed

SAW's calculations for compensation are totally contrived. SAW claims entitlement to \$75/carload during the period of F.D. 34802 service (January 26 - November 27, 2006) on the theory that this amount is what BNSF agreed in settlement of a court case to pay SAW so that BNSF could serve one of its customers (Jarvis) at a station called Burriss that SAW claimed it had a contractual right to serve as part of its original acquisition from BNSF. SAW claims that this BNSF agreement for use of its track at Burriss is evidence of "fair market value" of track use rights. See SAW "Petition" in F.D. 35111 at p. 8. But the Jarvis trackage does not encompass any of the trackage used for service to PYCO in F.D. 34802 or F.D. 34889. Moreover, the payment by BNSF to SAW was in settlement of litigation for alleged lost profit at that location which SAW brought against BNSF.²⁰ A "lost profits" settlement has nothing to do with track use rights. Furthermore, it has nothing to do with the net liquidation value of SAW assets (if any) involved in serving

²⁰ In a nutshell, after SAW acquired its assets from BNSF, BNSF continued to switch BNSF customer Jarvis at Burriss. SAW claimed that its purchase contract with BNSF entitled it to serve Jarvis at Burriss. In order to continue to provide service to Jarvis, BNSF in settlement of this litigation agreed to pay SAW \$75 per carload for SAW's alleged "lost profits." See W. Hale email attached (confirming the \$75 was part of a litigation settlement for alleged "lost profits").

Jarvis, and certainly not the SAW assets used to provide service to PYCO. It looks like nothing more than a payment to SAW for its local market (monopoly) power. Elsewhere SAW effectively has admitted this. As this Board explained in its decision served August 28, 2007 in the feeder line case (F.D. 34890), slip op. p. 20, SAW contended that its GCV included the capitalized value of the \$75/carload profit stream for Jarvis. This Board agreed to include that stream in GCV, implicitly acknowledging that it is profit and not some kind of "avoidable cost" or "opportunity cost." Id. at 27. But if it is profit, as SAW argued and the Board implicitly agreed, then it is not a legitimate claim by an incumbent railroad in an alternative service proceeding. Ex Parte 628, decision served Dec. 21, 1998, slip op at 14. As this Board there indicated, incumbent railroads are NOT entitled to lost profit in alternative service proceedings. Moreover, in F.D. 34890, this Board found that SAW's GCV (inclusive of Jarvis) was less than SAW's NLV. This amounts to a finding that SAW is not receiving anything close to \$75/carload profit overall. It would thus be inconsistent to impute it to the service to PYCO at issue here.²

For the whole period of alternative service under F.D. 34889

² This is especially the case since SAW purported to impose a surcharge of \$20 on PYCO traffic. When PYCO argued this was mere retaliation and discrimination, SAW claimed that it was because of its high costs to serve PYCO.

(that is, November 23, 2006 to November 9, 2007), SAW seeks the entire amount of the BNSF "division" (according to SAW, the division to which it claims entitlement varied, depending on the date, from \$142.72/car to \$146.64/car). SAW's theory for why it should get the entire division during the F.D. 34889 period is that alternative service during that period was illegal. See SAW "Petition" in F.D. 35111 at p. 7 & 10. This argument is specious for all manner of reasons, starting with the point that the alternative service was not illegal in the first place, and compounded by the fact that although SAW was obligated to negotiate compensation and to ask the Board in a timely fashion to establish compensation in the event negotiations were unsuccessful, SAW at all times failed to negotiate and certainly failed to ask the Board to establish compensation until long after both alternative service proceedings were over.

The applicable basis for determining compensation to SAW is ignored by SAW. As we have already observed, the preamble to this Board's alternative service regulations indicates that compensation for the incumbent railroad should not include profit, and is limited to compensation for services and use of facilities. As this Board has said, "[w]e 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." Expedited Relief for Service

Inadequacies, STB Ex Parte No. 238, served Dec. 21, 1998, slip op. 14. Furthermore, 49 U.S.C. 11102(a) specifically indicates that compensation for use of facilities is to be determined "under the principle controlling compensation in condemnation cases." There is no justification to apply some other basis for compensation under 49 U.S.C. 11123.

Before turning to the specific condemnation statutes this Board administers, PYCO and WTL observe that the only way to provide compensation for use of facilities that does not include "profit" is to determine the NLV for the facilities and then apply this Board's methodology for calculating the "opportunity cost" for that investment. Anything in excess of opportunity costs is clearly profit. Summarizing, the "opportunity cost" for a railroad investment is the NLV of the investment times an "adequate rate of return," which in turn is equivalent to the industry's cost of capital. See Cartersville Elevator v. ICC, 724 F.2d 668, 670-71 (8th Cir. 1984), aff'd reh. en banc 735 F.2d 1059 (8th Cir. 1984). It is a kind of fair rental value for the asset. In abandonment proceedings, this Board ordinarily declines to authorize an opposed abandonment if a railroad's revenue for a line exceeds its costs, including opportunity costs. This does not result in a "taking" and also sets an upper bound on the compensation which may be required under the alternative service statutes.

Based on frequency of cases, the most often used "condemnation" statutes administered by STB are 49 U.S.C. 10904 ("offers of financial assistance") and 49 U.S.C. 10907 ("feeder line applications"), although there are other statutes with limited compulsory sale powers, like 49 U.S.C. 10901(d) ("crossing rights"). The formula for determining compensation to the incumbent railroad in all of them is generally the same, but we will focus on 49 U.S.C. 10904 (OFA's) as the most frequently litigated and thus explained. Under section 10904, the Board determines "fair market value," which in general is defined as the minimum constitutional value. E.g., 49 C.F.R. 1152.27(h)(6) (for "OFA's"). The agency views minimum constitutional value as the greater of "net liquidation value" ("NLV") or "going concern value" ("GCV"). GCV is greater than NLV only when the railroad is generating a "profit" in excess of the railroad's "opportunity cost" (cost of capital) on its investment (NLV) in the track and ties, as well as covering all other applicable costs. Since (among other things) an incumbent railroad is not entitled to "profit" in Part 1146 and Part 1147 proceedings, GCV is essentially not relevant in alternative service situations, and we will focus on NLV. .

GCV is also irrelevant here because this Board has already found that GCV was less than NLV for these lines in the feeder line proceeding, F.D. 34890, served August 28, 2007, slip op. at

30. It follows that SAW's claim for \$75 per carload in lost profits is inconsistent with this Board's determination in F.D. 34890 that GCV is less than NLV for the SAW system. SAW's claim is simply an effort to obtain a huge "profit" from WTL's stepping into the service breach caused by SAW's failure to provide adequate service: a massive reward to SAW for failing in its obligations.

Most of the Board's condemnation authority relates to permanent takings. However, the OFA statute (49 U.S.C. 10904) provides a means in essence to "condemn" a line for up to one year to provide service to a shipper. That method, which requires the shipper to pay a subsidy, candidly seems closely on point to what the preamble to the alternative service regulations indicates STB intends in Part 1146 and 1147 proceedings. In "subsidy" OFA's under 49 U.S.C. 10904, this Board sets the "subsidy" to maintain operations at "avoidable costs" plus "a reasonable return on investment." 49 C.F.R. 1152.27(h)(5). Since SAW provided no services to WTL or PYCO during alternative service, it sustained no "avoidable costs." This means we need only address reasonable return on investment (opportunity costs). For purposes of section 10904, investment is NLV of the assets involved multiplied by a percentage sufficient to provide a "reasonable return." "Reasonable return" appears to be defined in 49 C.F.R. 1152.34(d) to be a railroad's current nominal cost

of capital (further explained in the regulation). This is essentially the railroad's "opportunity cost" for its investment, and in lieu of specific information from SAW, the "cost of capital" computed by this Board each year for the railroad industry is a reasonable and commonly used surrogate.

NLV as determined by the agency involves a real estate component and a track material component. NLV of the real estate in most cases is based on the "across the fence" appraised value of land interests to which the railroad holds marketable title, subject to appropriate discounts for matters like costs of sale. The NLV rail is based on the net salvage value of the track, ties, and other track material. See, e.g., Chicago & N.W. Transp. Co. V. United States, 678 F.2d 665 (7th Cir. 1982).

Fortunately, the Board has already performed an NLV calculation here. In PYCO Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, served August 31, 2007, this Board expressly relied upon PYCO's calculation of net salvage value of track and ties,²² and PYCO's valuation of the real estate. See id. 15-16 (PYCO calculation) & 18-19 (Board determination of NLV).

Since the evidence submitted during the feeder line proceeding on NLV is essentially contemporaneous with the

²² The Board noted that SAW did not contest PYCO's calculation of net salvage value of track and ties. Slip op. at 18.

alternative use proceedings, PYCO hereby incorporates herein its various showings,²³ on which the Board has already relied, for purposes of determining the value of the land, track and ties involved in providing alternative rail service to PYCO.

Based on this evidence, it is possible to calculate the maximum possible compensation which SAW may claim. The applicable formula is NLV (basically the numbers determined by the Board already applied to the assets used to provide alternative service) multiplied by railroad cost of capital multiplied by the time period for alternative service.

According to SAW, 2.41 miles of trackage were used exclusively to serve PYCO, and 3.38 miles of trackage was shared use (partly by WTL to serve PYCO, and partly by SAW to serve other customers). See Exhibit F (document entitled "Section 4 - Compensation", generated by SAW and supplied to WTL on or about March 1, 2006).

The maximum NLV for these assets can be determined by assigning all the heavy rail and re-roll rail claimed by SAW to exist in "Alternative Two" in the feeder line proceeding to the assets used for alternative service (the alternative service

²³ All these showings, referenced herein, are documents that are open to public inspection in the files of this Board for F.D. 34890. Under 49 C.F.R. 1114.4, PYCO understands it need not supply additional copies here. However, in order to ensure that the key evidence is of record, PYCO is attaching copies of critical documents to this pleading.

assets are a subset of the "Alternative Two" assets). The same expert who calculated the valuations on PYCO's behalf in the feeder line proceeding has performed a similar calculation for the mileage at issue so assigning the re-roll and heavy rail. In sum, making assumptions favorable to SAW, he treated all relay quality 110 pound rail and relay quality 90 pound rail claimed by SAW to be in the portion of the trackage WTL used jointly with SAW (chiefly the yard and mainline to it). He treated all the remainder as 90# re-roll quality (favorable to SAW) and otherwise used the same take-up costs, sales prices, and contractor fees that this Board found reasonable in the feeder line proceeding. In summary, he determined the ties to be a wash (reusable ties offset the costs of disposal of rotten ties) and the value of the track and other track material to be as follows:

- 2.41 miles of exclusive use:

Rail	Net tons	Price per ton
90# reroll	381.6	\$330
OTM	76.32	\$245

Less take up costs (\$75/ton) and contractor fee (15%), for a total of \$93,775.

- 3.38 miles of shared use:

Rail	110	Relay	49.137340	450	\$22,111.80
Rail	110	Reroll	0.881300	330	\$290.83
Angle Bars	110	Relay	2.235400	450	\$1005.93
Tie Plates	110	Relay	7.6	450	\$3,420.00
Rail	90	Relay	431.557	450	\$194,200.92
Rail	90	Reroll	62.44	330	\$20,606.19
Angle Bars	90	Relay	17.52	450	\$7884.00
Tie Plates	90	Relay	46.81	450	\$21064.50
Angle Bars	90	Scrap	2.49	245	\$610.05
Tie Plates	90	Scrap	6.24	245	\$1,528.80

Gross sales: \$272,723.02
 Less take-up and freight for
 626.32 tons at \$75/ton = 46,974.00
 Less salvager overhead and
 profit at 15% = 33,862.35
 Net liquidation value: \$191,886.67
 50% WIL/PYCO share: \$95,943.34

The maximum total share of NLV for SAW track assets used to provide service to PYCO is thus: \$189,718.75.

As to the land, most of the right of way in Lubbock is 30 feet in width, or less. If one assumes (generously in favor of SAW) that the right of way is 50 feet in width and entirely owned (at the time) by the incumbent railroad in fee, then there is approximately 6 acres of land per mile of track. 2.41 miles (exclusive use) thus would involve 14.46 acres, and 1.69 miles (half the shared use trackage) would involve 10.14 acres. Adding

14.46 acres to 10.14 acres equals 24.6 acres. In the feeder line proceeding, PYCO's real estate appraiser valued this land at a rate of \$4000/acre, and this Board found a 15% cost of sale. Using these numbers, the maximum total land valuation is \$98,400 less 15% or \$83,640.

The maximum possible NLV for land and rail material that SAW may claim is thus 83,640 plus 189,718.75, or \$273,358.75. The actual NLV is likely less, for the quoted figure makes all reasonable assumptions in favor of SAW, consistent with this Board's approach in the feeder line proceeding. It is a maximum upper bound for SAW's investment in assets employed to provide service to PYCO.

The railroad cost of capital during the period was 10.1 % [see Ex Parte 558 (Sub-no.8), served June 20, 2005] or 12.2 % [see Ex Parte 558 (Sub-no.9), served Sept. 20, 2006].

The total period of use for alternative service in F.D. 34802 was January 26 to November 22, 2006, or 301 days (.825 year). Of that amount, 228 days (.625 year) were during the period the most recent cost of capital determination was 10.1%, and remaining 73 days (.2 year) were after the determination was adjusted to 12.2%. The total period for alternative service in F.D. 34889 was November 23, 2006 to November 9, 2007, or 351 days (.962 year).

The most accurate calculation of the maximum amount that SAW

may claim is thus:

F.D. 34802

$[10.1\% \text{ (cost of capital)} \times .625 \text{ (portion of year)} \times \$273,358.75 \text{ (NLV)}] \text{ plus } [12.2\% \times .2 \times \$273,358.75] = \$17,255.77 + 6669.95 = \$23,926 \text{ (rounded)}.$

F.D. 34889

$12.2\% \text{ (cost of capital)} \times .962 \text{ (portion of year)} \times \$273,358.75 = \$32,082 \text{ (rounded)}$

F.D. 34802 and 34889

$\$23,926 \text{ plus } 32,082 = \$58,008.$

In sum, the maximum amount this Board could set for compensation in both proceedings is \$58,008, subject to set-off's.

As indicated in this Reply, PYCO and WTL oppose any award to SAW. If there is an award to SAW, it must be based on the methodology indicated above and can be no greater than \$58,008. In addition, it must be offset by set off's totaling \$97,610.36 claimed by WTL and PYCO herein (p. 19 supra). All these set-off's flow from SAW's failure to maintain its trackage, despite this Board's express admonition (in, e.g., F.D. 34802, served June 21, 2006, at 8) to SAW to do so.

There is another set-off issue if this Board were to adopt the "per carload" methodology of SAW. WTL hauled all SAW traffic from the BNSF yard to the SAW yard. Although PYCO and WTL disagree with SAW's arguments and evidence, if this Board were to

adopt them, then under the same arguments and evidence, WTL (and PYCO) would be entitled to a set-off in an equivalent amount for all non-PYCO SAW traffic moved by WTL. SAW did not compensate WTL for this service. See Exhibit A (Gregory Dec.) para 3 (last sentence).

SAW is not entitled to any "interest" on any compensation amount because it failed to negotiate compensation issues in good faith (it never responded to WTL's offers), it failed timely to request that this Board establish the amount of compensation, and it instead contrived to manipulate events to support its argument in U.S. District Court that alternative service must be enjoined. SAW should not be rewarded with interest, or held harmless by awarding it interest, for its own delays and gamesmanship.

III. Opposition to SAW Procedural Schedule

In its "Petition," SAW asks that this Board establish a briefing schedule under which it would make two additional filings.

When a party files a petition for reconsideration or reopening, or a petition for some other general relief, the Board's rules are set forth in 49 C.F.R. Part 1114. Under those rules, other parties may file a reply, in 20 days, and replies to those replies "are not permitted." 49 C.F.R. 1114.13.

The general rule is that when a party like SAW has, as here, control over the timing of its action (subject of course to

laches defenses), it is responsible to assemble and to present its case in its entirety in its petition; and it bears the burden of proof to sustain its claims. See Burlington Northern Abandonment Exemption - between Klickitat and Goldendale, WA, AB-6 (Sub-no. 335X), served June 8, 2005, slip op. at p. 3, citing 4 U.S.C. 556(d). "[Parties] have a responsibility to ascertain and collect prior to filing all of the necessary facts to support their petition." Id. (emphasis added).

SAW accordingly should have ascertained and collected all its facts before it filed its December 13 petition, and it should have presented its facts and arguments in their entirety. Instead, SAW has filed something asking for more bites at the apple, without any reasonable justification whatsoever. Requiring SAW to conform to the basic rules under which it must present its case in its entirety in its petition is not unfair to SAW. SAW had essentially exclusive access to the trackage until November 10, 2007. PYCO and (other than to pull cars for PYCO) WTL did not. The data germane to compensation have been as available to SAW, or more so in light of SAW's superior access to the property, in comparison to any other party in this proceeding. Moreover, SAW has long been on notice of the WTL/PYCO position since March of 2006. WTL advised SAW of it roughly twenty one (21) months ago, and it has not changed. PYCO set forth the position many times in pleadings filed with this

Board, including most recently in a Status Report filed November 20, 2007 in F.D. 34802, 34889, and 34890." A fortiori SAW could have (and therefore should have) presented its case in full, and in doing so it already had the advantage of knowing the thrust of the PYCO/WTL arguments in response. In other words, SAW not only has had ample opportunity (which it ignored) to compile its facts and evidence, and to make a compensation claim, but also it has had ample opportunity to respond to the basic arguments it knew WTL and PYCO would make in this Reply.

SAW's plea to file more pleadings not only is contrary to

²⁴ SAW has long been aware of the PYCO/WTL position on compensation. PYCO and WTL furnished SAW with NLV calculations showing that the condemnation value basis for computation and demonstrating that this would work out to about \$2.90 per carload for the projected level of use of SAW facilities in March 2006. SAW never responded. When SAW claimed for the first time on February 15, 2007, that alternative service authorized in F.D. 34889 was illegal for lack of compensation, PYCO responded with a pleading e-filed in F.D. 34889 on February 20, 2007, attaching the basis of the \$2.90 offer, noting that SAW had waived its claim by not pursuing the matter, but reiterating the offer in order to be done with the matter, subject to set-off's for costs incurred by WTL chargeable to SAW. In PYCO's most recent statement on the subject, PYCO pointed out that SAW had waived any claim in F.D. 34802, and could not claim "material error" justifying reopening that proceeding, when SAW itself was to blame for failing to raise the issue. PYCO similarly pointed out that SAW had failed timely to raise the issue in F.D. 34889. PYCO in any event provided a calculation of NLV values based on the conclusions of this Board in the feeder line proceeding. See PYCO's "Withdrawal of Petition for Reconsideration in F.D. 34890 and 34922, and Status Report in F.D. 34802 and F.D. 34889, filed November 20, 2007 in F.D. 34802, 34889, 34890 and 34922. In short, the arguments and facts upon which WTL and PYCO rely herein were well-known to SAW before it filed its aberrant and belated "Petition" at issue here.

the general obligation that a party state its entire case in its initial petition in situations like this, but also is unnecessary (since the information necessary to decide the petition is already of record). At the very least, it is premature, since PYCO and WTL had not yet replied.

Enough trees have died to service of pleadings in litigation spawned by SAW's machinations; compounding that loss with more rounds of paper serves no useful purpose.

PYCO and WTL note that SAW has filed some discovery requests against WTL. The documents sought are relate to total PYCO traffic hauled by WTL. That information is irrelevant to the calculation of compensation in the circumstances here. Compensation is based on NLV multiplied by cost of capital multiplied by the time period involved. Since the time period is now over, the compensation if awarded will be a lump sum, and not some kind of monthly fee based on the lump sum divided by the number of carloadings. Once service is over, and it is long since over here, carloadings are irrelevant.

Moreover, since SAW has no right of reply to the response PYCO or WTL make to its "Petition," the discovery is futile. Furthermore, since WTL does not have the documents called for in the discovery, and estimates it would take 14 man-days to generate, the discovery is thus unduly burdensome in any event.

SAW's effort to engage in an irrelevant discovery fishing

expedition certainly does not justify a procedural schedule and yet more pleadings by SAW.

Notwithstanding WTL and PYCO's objections, should this Board determine to set a procedural schedule, then WTL and PYCO reserve the right to discovery on whatever theories and facts SAW elects to advance in its opening statement, and further reserve the right to provide additional arguments and evidence showing that compensation for SAW is less than the maximum possible calculated herein. Moreover, WTL and PYCO reserve the right to submit additional evidence and arguments supporting set-off's and other defenses. WTL and PYCO further request 40 days from the filing of SAW's opening statement to reply, in order to have time to prepare and to obtain discovery they deem relevant, depending on SAW's claims, from SAW or third parties. Since SAW has delayed seeking relief at this agency for 21 months, the additional period for a reply sought by WTL and PYCO is not prejudicial and will not unduly delay the proceeding, if there are to be more rounds in this one. WTL and PYCO further oppose any further "reply" pleading by SAW. Replies to replies are generally not permitted. As WTL and PYCO have indicated, SAW could have and should have provided its entire case in its initial pleading. If over our objection SAW is afforded yet a second bite at the apple, then that is enough. No more replies to replies. SAW certainly has no entitlement, nor has it made any showing

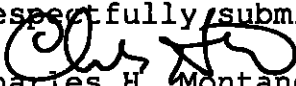
demonstrating any grounds, for yet a third bite.

Conclusion

SAW's Petition should be dismissed or denied in total. It is tantamount to an out of time petition to reopen without the requisite showings; it is barred by SAW's failure to negotiate, waiver and laches; it fails to state a legal theory on which compensation can be calculated; and indeed it fails to set forth SAW's case as required. Should this Board nonetheless award compensation, the maximum allowable, subject to set-off's, is ascertainable as indicated in this Reply, and is overshadowed by legitimate set-off's, primarily for SAW's admitted failure to maintain the trackage, despite its duty to do so.

SAW has failed to justify any need for a procedural schedule, but if one is established by this Board, then it should provide 40 days for PYCO and WTL to respond to SAW's opening statement, and (consistent with 49 C.F.R. 1104.13) should not afford SAW yet another reply to a reply.

Respectfully submitted,


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- Exhibit A - Declaration of Stephen Gregory
- Exhibit B - Declaration of Robert Lacy
- Exhibit C - Declaration of Montey Sneed (also Third Declaration of Mr. Sneed from feeder line proceeding)
- Exhibit D - Judgment and Decision in SAW v. STB, notice of appeal
- Exhibit E - Additional documents relating to first derailment [Martin fax cover sheet June 27, 2006, and invoice; invoice from Southwestern Diversified Leasing; unpaid invoice from WTL's parent (Permian Basin Railway) to SAW for the costs; Martin Declaration that derail due to defective switch]
- Exhibit F - Additional documents relating to compensation, March 06 (SAW document listing assets used for alternative service; March 13, 2006 email; March 11 calculation)
- Exhibit G - W. Hale email (Jan. 2, 2008)

Certificate of Service

I hereby certify service by deposit for express (next business day) delivery this 3d day of January 2008 upon Thomas McFarland, Esq., 708 South LaSalle St. - Suite 1890, Chicago, IL 60604-1112, counsel for SAW.

