

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

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

REPLY

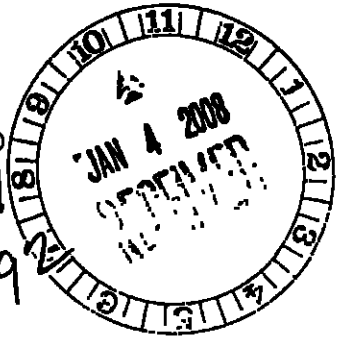
to South Plains Switching Ltd's
"Petition for Compensation"

EXHIBITS

- 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)

Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
for PYCO Industries, Inc.

John Heffner
1750 K Street, N.W., Suite 350
Washington, D.C. 20006
(202) 296-3334
for West Texas & Lubbock Railway Co.



221191
221192

221193

ENTERED
Office of Proceedings
JAN - 4 2008
Part of
Public Record

Exhibit A

BEFORE THE SURFACE TRANSPORTATION BOARD

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Declaration of Stephen Gregory

I, Stephen Gregory, Vice President of West Texas & Lubbock Railway, make this Declaration pursuant to 28 USC 1746 in support of the Reply by West Texas & Lubbock Railway Company (WTL) and PYCO Industries (PYCO) to the petition for compensation filed by South Plains Switching Ltd. Co. (SAW) in Finance Docket 35111.

1. WTL incurred numerous costs in providing alternative service for PYCO in Finance Dockets 34802 and 34889 that are the result of SAW's failure adequately to maintain its trackage. The main instance is documented in filings in those two dockets, F.D. 34802 and 34899, for example as part of PYCO's status report dated January 30, 2007. WTL incurred \$27,759.50 in costs for Martin Railroad Construction to repair SAW track (which I note caused a derailment of PYCO cars in June 2006 at approximately 50th and Southeast Drive in Lubbock) and for Southwestern

Diversified Leasing to rerail a damaged car. WTL invoiced SAW for this expense (invoice number 1317 dated July 18, 2006), but never received any response or payment. Mr. Eldon Martin furnished an expert opinion that the cause was a defective switch. WTL claims the amount of \$27,759.50 as a set-off to any amount determined owed by WTL to SAW.

2. WTL incurred labor costs of \$1,072.00 to manually spike a track switch in open and closed positions. The switch was broken beyond repair and SAW refused to replace it. Additionally, WTL sustained two derailments due to SAW's failure to maintain trackage immediately after WTL commenced operating over the lines on behalf of PYCO on November 10, 2007. The derailments cost \$9515.50 (including an estimated \$1280 for rail provided by PYCO from its inventory). WTL made emergency repairs assisted by contractor Eldon Martin representing PYCO, and it is my understanding that PYCO will summarize those expenses in a separate statement. All these costs are due to SAW's failure to maintain its trackage.

3. SAW provided no services to WTL (or PYCO) during the period of alternative rail service in Finance Dockets 34802 and 34889. Indeed, so far as WTL could tell, SAW provided no maintenance of the trackage. WTL repeatedly requested PYCO to obtain permission from the Surface Transportation Board for WTL (or some third party) to make repairs to prevent derailments. (The Board denied that permission.) In addition, SAW operated

during protocol hours assigned to WTL and from time to time harassed WTL employees in the performance of their switching duties. WTL adjusted its activities to operate at night in order to avoid conflicts with SAW. Throughout alternative service, SAW refused to participate in conference calls with BNSF to coordinate service, notwithstanding direct orders to do so by this Board. Factors such as these in general resulted in less efficient operations for WTL (and higher costs) than should have been the case. SAW's failure to cooperate serves as an additional reason why it should be denied any "profit" from alternative service. Furthermore, SAW benefited from WTL service because SAW was required to handle the traffic of most of its customers in one direction only, to the Lubbock yard of BNSF Railway. WTL handled the traffic in the opposite direction. Logically, if this Board were to award a per car fee to SAW in the nature requested by SAW, then WTL claims as a set-off the same fee for each car it hauled for SAW.

4. Through our attorney, John Heffner, we informed SAW that we were prepared to pay \$2.90 per carload for use of SAW trackage. We made this offer in an email March 13, 2006, reiterated in a letter dated February 12, 2007. The basis for this figure is set forth in detail in the PYCO status report which I have already referenced. That figure is based on the agency's methodology used in condemnation proceedings. SAW failed to pursue the matter. WTL management concluded that SAW

waived its claims in view of the small amount to which SAW was entitled and the large amount SAW owed WTL. All alternative rail service is now long over. SAW's claim for massive per car use fees amounts to a claim for lost profits. It is too late for WTL and PYCO to adjust their contractual relationships to take into account paying a massive profit to SAW for WTL's discharging SAW's common carrier obligations which the Surface Transportation Board repeatedly found SAW was not doing. Retroactive award of profit to SAW against WTL would reward SAW for failure to discharge its duties and penalize WTL for providing what amounts to a public service function in an emergency situation. This is unfair to WTL and to PYCO.

5. I also confirm that SAW represented that WTL exclusively used 12,720 feet of trackage to serve PYCO, and shared another 17,840 feet of trackage with SAW.

Pursuant to 28 USC 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.

A handwritten signature in black ink, appearing to read "Steven Gregory". The signature is written in a cursive, flowing style.

Executed on December 28, 2007.

JOHN D. HEFTNER, PLLC

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SUITE 800

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(202) 263-4180

FAX (202) 296-3939

j.heffner@verizon.net

February 12, 2007

Thomas F. McFarland, Esq.
Thomas F. McFarland, PC
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112

**RE. SAW Charges to West Texas and Lubbock
Railroad Co., Inc., for handling FYCO traffic**

Dear Tom:

I am writing on behalf of West Texas and Lubbock Railroad Co., Inc ("WTLC") in connection with the enclosed letter. That letter references SAW's attempt to collect \$75 per car from WTLC for operations that WTLC has conducted over SAW track during the period of Alternative Rail Service ordered by the Surface Transportation Board ("the Board").

As you know, there is precedent at the former Interstate Commerce Commission indicating that SAW may not be entitled to compensation. In Service Order No. 1513, dated Sept. 28, 1993, the ICC declined to require a directed service carrier [Delaware Lackawanna Railroad] to pay the "landlord" railroad [Pocono Northeast Railway] for the use of its property where Pocono Northeast had unlawfully terminated service. In making that ruling, the ICC cited Kansas City Terminal Ry. Co.-Operate-Chicago R&P, 360 I.C.C. 289 (1979) for the proposition that "the Commission's authorization of directed rail service does not require compensation to the carrier over whose lines service is directed." There the ICC said that in the usual case where the costs of providing the service exceed the revenues, no rental for the use of the property is required. However, it also said that where the directed service is profitable (as it was in that case), then rental should be paid. But it added that rent should be reduced

Exhibit B

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

Declaration of Robert Lacy

I, Robert Lacy, make this Declaration pursuant to 28 U.S.C. 1746 in support of the Reply by PYCO Industries (PYCO) and West Texas & Lubbock Railway Company (WTL) to the petition for compensation for use of facilities in alternative rail service (Finance Docket 35111) filed on behalf of South Plains Switching Ltd. Co. (SAW). I am the Senior Vice President for Marketing for PYCO; I am responsible for rail matters on behalf of PYCO; and I am personally familiar with all the matters covered herein.

1. PYCO Industries closed acquisition of the SAW lines pursuant the Decision served August 31, 2007, in Finance Docket 34890 (feeder line) on November 9, 2007. As PYCO and WTL indicated in filings in that docket and in the alternative service proceedings (Finance Dockets 34802 and 34889), SAW had failed to maintain its lines. Although PYCO and WTL inspected the lines immediately upon acquisition with representatives of

Martin Railroad Construction, WTL in efforts to provide service sustained two more costly derailments due to SAW's failure to maintain. (It is my understanding that WTL is furnishing a statement covering the additional derailment costs.) Most urgently, many switches required immediate cleaning and repair, and many rotten ties needed replacement, throughout the SAW system. PYCO retained Martin Railroad Construction to make emergency repairs. I attach hereto as Exhibit A a table showing invoices from Martin Construction to date, totaling \$48,813.98. The costs in Exhibit A were primarily labor expenses. PYCO had purchased rail, ties, and other track material for use in extending its yard tracks, and then held this material pending the outcome of the feeder line proceeding. We supplied total material to date worth \$9729.38 (original cost for us to acquire it) to Mr. Martin for the repairs covered in Exhibit A. All these repairs were needed due to SAW's failure to maintain its track. In addition, PYCO sustained \$2000 in labor and materials costs to control weeds on the trackage in 2007. The costs for all these amounts are properly a set-off against any claim by SAW against PYCO or WTL for additional compensation.

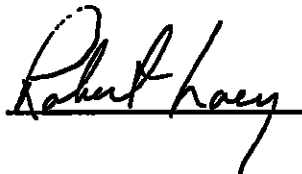
2. SAW raised the issue of compensation in approximately early March of 2006. WTL and PYCO calculated an amount of compensation based on the estimated net liquidation value of the trackage (and land) and based on SAW's statement of the amount of trackage involved. That amount was \$2.90 per carload. WTL

offered to pay this amount to SAW by email dated March 13, 2006, but SAW never responded. WTL subsequently incurred substantial costs due to SAW's failure to maintain the track and also provided substantial services to SAW (including moving SAW cars from the BNSF yard to the SAW yard) without compensation from SAW. PYCO and WTL properly assumed that SAW was waiving any compensation claim due to the set-off's WTL and PYCO could assert and due to SAW's failure to provide any services (like track maintenance). PYCO subsequently learned that SAW filed litigation against STB claiming the alternative service was illegal on the ground it did not receive compensation, which of course it never pursued. This suggests that SAW intentionally failed to make a timely claim for compensation in order to create a legal issue.

3. SAW's action, or more accurately failure to act in a timely fashion, on compensation matters is unfair to WTL and PYCO. PYCO and WTL arranged for alternative service with the understanding that any "compensation" to SAW would be limited to payment for services provided by SAW (none were provided) and to compensation for use of facilities based on condemnation principles, not on any obligation on the part of WTL to pay additional "profit" to SAW. This position was made clear early on. As we have documented in F.D. 34802 and F.D. 34889, SAW refuses to negotiate. SAW simply refused to negotiate, and coupled this with a failure to approach the Board on the issue

until after alternative service was over. SAW now wishes to upset WTL's and PYCO's expectation not just at the last minute, but in fact after the alternative service arrangements have totally expired. Retroactive adjustment of contractual expectations is extremely prejudicial to PYCO and to WTL. Either WTL or PYCO or both will be forced to incur a loss in order to provide profit to SAW. SAW should not be rewarded with profit for its own wrongdoing, not only in failing to provide adequate service in the first place (any profit from WTL's provision of adequate service should flow to WTL, not a party who failed to provide service) but also in failing to pursue compensation matters properly or timely. In any event, this Board has found the SAW lines did not have a "going concern value" in excess of "net liquidation value" in the feeder line proceeding, so any profit ordered to SAW here is a total windfall for SAW.

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

A handwritten signature in cursive script, appearing to read "Robert Haey", written over a horizontal line.

Executed on: Dec. 28, 2007.

**PYCO Industries, Inc.
PSC - Maintenance and Repairs
December 27, 2007**

November 11th – 17th:	\$7,860.00
Cleaned and repaired switches (6)	
November 18th – 24th:	\$6,250.00
Replaced ties, plates, and spikes in main yard and at ADM	
November 26th – December 3rd:	\$13,607.50
East Main switch	
Acme Lead	
Yard tracks	
ADM – Replaced relay ties	
84 Lumber switch 465	
December 4th – 10th:	\$10,296.48
Main East yard – 2 nd switch and Alley lead switch	
West Yard Switches	
East Tail to Wye switch	
December 11th – 17th:	\$10,795.00
Lead Curve to 34 th	
East Main	
Bluelink switch	
Engine track by RR office	
Total:	\$48,813.98

****All supplies were taken from PYCO's current inventory.**

Exhibit C

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Facilities in Alternative) F.D. 35111
Rail Service - West Texas &)
Lubbock Railway Co.)

Declaration of Montey Sneed

I, Montey Sneed, make this Declaration pursuant to 28 U.S.C. 1746 in support of the Reply by PYCO Industries (PYCO) and West Texas & Lubbock Railway Company (WTL) to the petition for compensation for use of facilities in alternative rail service (Finance Docket 35111) filed on behalf of South Plains Switching Ltd. Co. (SAW).

1. Based on inspection and long familiarity with the trackage at issue in Lubbock, I prepared several Declarations upon which PYCO relied for purposes of showing the "net liquidation value" (NLV) of the (former) SAW system in Lubbock in PYCO Industries, Inc. - Feeder Line Development - South Plains Switching Ltd., Finance Docket 34890. My qualifications and expertise are set forth in those Declarations. PYCO and WTL have requested me to provide my expert opinion in calculating the maximum upper bound for the NLV of the track, ties, and other track material (OTM) used by WTL to provide rail service to PYCO

during the alternative rail service periods.

2. The Surface Transportation Board authorized alternative service for PYCO by order served January 26, 2006, in Finance Docket 34802. Pursuant to the applicable order in Finance Docket 34889, alternative service automatically terminated on November 9, 2007, when PYCO closed on the acquisition of the SAW lines as provided in Finance Docket 34890. The first question is when to value the facilities involved in providing service to PYCO. In my "Third Declaration" in Finance Docket 34890 (dated September 26, 2006 and filed by PYCO on September 28, 2006, as an exhibit to its "Modification to Valuation of Assets of South Plains Switching, Ltd.", I observed that my estimate of value per ton was very close to the estimate by SAW's witness (Landreth), and to minimize conflict, I adopted his values. Based on market research, I determined that \$75/ton was the most accurate figure for the cost of removal and freight of rail and ties. I further indicated that a salvage contractor would require compensation for overseeing a job (including overhead and profit), and that this normally ranged from 15 to 50%. For my calculations, I used 15%. I determined that the waste ties (which cost at least \$2/tie to remove and properly to dispose) would overwhelm the number of reusable ties, and, favorably to SAW, assumed that ties would be a "wash" (no net value, but no net loss). In the feeder line proceeding, the Surface Transportation Board relied upon my approach for purposes of determining NLV for the track, ties and OTM. Valuations in the salvage market tend to rise or to fall

with overall demand for rail. Although there has been some fluctuation in value over the period January 26, 2006, through November 9, 2007, the values supplied in my Third Declaration and found by this Board in the feeder line proceeding continue to represent a fair and reasonable upper bound estimate for the value of the track, ties and OTM during the entire period.

3. The next question is to identify the portion of the SAW system used in supplying alternative service to PYCO. Only a small portion of the SAW system was so used: (1) alternative use involved shared use of the old Fort Worth mainline (evidently called Track 9298 by SAW) into the SAW yard, plus dedicated use of two switch tracks in the SAW yard to serve PYCO's Plant No. 1, and (2) tracks 9200 and 9298 on the east side of the BNSF mainline, and a lead to PYCO's Plant No. 2. SAW furnished a calculation of the trackage employed for alternative service in a transmission to WTL on approximately March 1, 2006 (relevant portion attached as Appendix I). That calculation is as follows:

Shared use (by SAW and by WTL):

Track 9298 (to SAW yard):	5000 feet
Track 231 lead:	960
Lead PYCO Plant 2 to 50 th St.:	6280
Track 310 through Farmers Coop:	<u>5600</u>
Total Shared Use -	17,840

As indicated in Appendix I, SAW proposed a 50/50 split of the shared trackage, although it claimed that WTL had control over the trackage "well over 50% of the available time." A 50/50

split of the trackage is a fair and reasonable split because WTL provided certain services of value to SAW. In particular, WTL picked up all cars (both SAW and PYCO) from the BNSF yard and spotted the SAW cars at the SAW yard for switching by SAW. SAW did not pay WTL for this service, although it was for the benefit of SAW, not PYCO. In addition, WTL advises that SAW operated during protocol hours assigned to WTL, with the result that in order to avoid conflict, WTL transferred operations to evenings and nights when SAW did not operate for safety reasons. Thus, even if WTL had control of dispatch more than 50% of the time, part of that time was for the benefit of SAW as much as PYCO. For valuation purposes, I conclude that a 50/50 split is a fair and reasonable approximation.

Using a 50/50 split, the shared use portion for PYCO is $\frac{1}{2}$ times 17,840 or 8,920 feet.

SAW's calculation of track used exclusively by WTL is as follows:

Assigned use for service to PYCO	
Track #5 (in SAW yard):	2400 feet
Track #1 (in SAW yard):	2100 feet
Track 9200 (east of BNSF mainline):	3900 feet
Track 9298 (east of BNSF mainline):	<u>4320 feet</u>
Total:	12,720 feet

12,720 plus 8,920 equals 21,640 feet of trackage.

4. The next matter to address is the weight of the rail and

condition of the rail and ties in the segments used for alternative service to PYCO. Based on my inspections in the past, the ties are unuseable, and the bulk of the track is 90 or 85 pound scrap. However, there is a small amount of 110 pound rail in the former mainline in the SAW yard. In addition, SAW's expert claimed that some of the 90# was relay quality, and the bulk of the rest was reroll.

In order to favor SAW in calculating NLV, I assume in my attachment that all the 110 pound relay and 90 pound reroll claimed by SAW to exist is located in the segments used by WTL to provide alternative service. However, based on personal inspection, I find that this trackage all was associated with the lead and mainline connecting the SAW yard to the BNSF mainline. This portion was shared use during the alternative service period.

Based on these assumptions, which I regard as favorable to SAW and fully consistent with the methodology used by the Board in the feeder line proceeding, I have prepared the NLV valuation set forth below:

Exclusive use trackage (12,720 feet):

Material	Weight	Grade	Tonnage	\$/ton	Total
Rail	90	Reroll	381.74	330	125,975.52
OTM	90	Scrap	76.35	245	18,705.46
Ties					<u>00.00</u>

Gross Sales: 144,680.98

Less take-up and freight for

458.09 tons at \$75/ton = -34,356.96

Less 15% salvager overhead and

profit = -16,548.60

Net liquidation value: \$93,775.41

Shared Use (17840 feet)

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

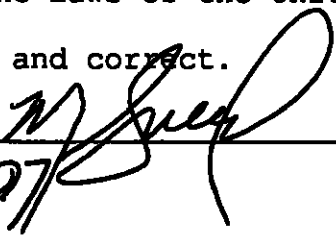
Net liquidation value: \$191,886.67

50% WTL/PYCO share: \$95,943.34

Total NLV for SAW track assets used to provide service to PYCO is thus: \$189,718.75.

5. Any compensation for SAW over and above application of cost of capital to the NLV for the land and trackage used by WTL would constitute "profit" to SAW. SAW provided no service to WTL or PYCO during the alternative rail service period and the only "cost" it incurred was the "opportunity" cost of its plant devoted to alternative service. Application of the railroad cost of capital to the NLV for land and trackage covers that cost, and many view that as a "profit" - a kind of maximum rental for regulated property subject to a common carrier obligation.

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: 12/28/07 

CHARLES H MONTANGE

ATTORNEY AT LAW

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SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX (206) 546-3739

28 September 2006
by hand

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

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

PYCO's revised valuation of SAW, due September 28

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find eleven copies of PYCO's revised valuation of SAW, due pursuant to the relevant scheduling orders on September 28, 2006. A certificate of service on counsel for parties is attached.

Thank you for your assistance.

Very truly,



Charles H. Montange
for PYCO Industries, Inc.

Encls.

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

PYCO INDUSTRIES'
MODIFICATION TO VALUATION
OF ASSETS OF
SOUTH PLAINS SWITCHING, LTD.

PYCO Industries, Inc. (PYCO) sets forth herewith revisions to its valuation of South Plains Switching, Ltd. (SAW) assets pursuant to the discovery responses which SAW provided on September 21, 2006.¹

National transportation policy requires the Board to "foster sound economic conditions in transportation." 49 U.S.C. § 10101(5). An accurate valuation of SAW assets in the context of a feeder line application is essential to achieve that goal. If SAW assets were overvalued, rail shipments would be uneconomically diverted to trucks, or rail dependent businesses would be rendered uncompetitive. In addition, the basic purpose of the feeder line statute (49 U.S.C. § 10907) to foster better conditions on inadequately served feeder lines will have been thwarted.

As we will show in our Rebuttal currently due on or about October 19, 2006, SAW indeed has sought to inflate its valuation vastly in excess of any reasonable GCV or NLV. For

¹ PYCO filed revised valuations on or about August 12, 2006, based on SAW discovery responses related solely to Alternative Two. SAW discovery responses made September 21 were far more extensive than those previously supplied PYCO.

Exhibit A

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

THIRD DECLARATION
OF MONTEY SNEED

I, Montey Sneed, make this Third Declaration pursuant to 28 USC § 1746, in support of the feeder line application filed by PYCO Industries, Inc. (PYCO), in F.D. 34890.

1. Summary. I have reviewed the discovery responses provided by South Plains Switching, Ltd. (SAW) on September 21, 2006, which incorporates SAW's filing on September 18, 2006, with respect to the net liquidation value (NLV) of track, ties, and other track material (OTM) on SAW's lines in Lubbock. On the basis of that information, I am adjusting my NLV estimates for track, ties and OTM. I will first summarize the adjustments I believe required, and then provide my revised NLV estimate for track, ties and OTM for all of the trackage owned by SAW. The spreadsheet attached as Exhibit I summarizes my calculations. I calculate that the NLV for track/ties/OTM for all of SAW is no greater than \$806,467.89.

2. Per unit salvage values. SAW did not supply an actual estimate of NLV for the track, tie and OTM which it owns. SAW did supply an actual estimate for NLV for "Alternative Two." That

estimate is set forth in Exhibit 2 to SAW's September 18 filing (Landreth Statement), at p. 22, Attachment 2. The per unit salvage values (e.g., relay rail at \$450 per net ton) used by Mr. Landreth are set forth at the bottom of said Attachment 2. All these per unit salvage values are very close to those employed by me in my original estimates. To minimize conflict, I have adopted them for my revised calculation of NLV.

3. Total trackage owned by SAW. I based my previous estimates of total track feet owned by SAW on the representations of SAW and BNSF in their contract, and in the acquisition exemption filing with the Surface Transportation Board by which SAW was authorized to acquire the tracks which it operates in Lubbock (approximately 74,384 feet). I adjusted that number for observed track retirements and track I understood SAW to be in the process of constructing, to derive a total of 78,920 feet (14.94 miles), which I assumed all owned by SAW in the absence of any discovery data from SAW. In the Landreth statement, Landreth asserts that SAW operates on 198,277 track feet and owns 133,884 track feet (SAW Sept. 18 filing, Exhibit 2, p. 4). Landreth's Attachment 1 (pp. 19-21) purports to be a summary of track on which SAW operates, dividing it into track owned by SAW and track owned by industry. SAW supplied PYCO's counsel with a plethora of track agreements and deeds on September 21, but we obviously have not had time to review that to confirm or to refute the information in Landreth's

Attachment 1. I have reviewed several deeds issued by SAW to Choo Choo Properties and others in February and April of this year (2006) which purport to convey out what appear to be substantial sections of SAW land and trackage. It is not clear that these conveyances are reflected by Landreth. However, for purposes of my revised NLV valuation, I will assume that all 133,884 which Landreth claims that SAW owns is owned by SAW.

4. Grade/weight of rail. For all track and ties covered by Landreth's "Attachment 2" referenced above, I employed his representations of weight and grade. (This rail basically is that covered by PYCO's original "Alternative Two.") SAW makes no representations concerning the remainder of its rail. Because the rail is otherwise a mix of 85 and 90 pound rail that is worn out and has not been replaced for decades, I treated it in a fashion favorable to SAW as all 90 pound re-roll quality. The effect of this treatment is to use 85 pound tonnages only for rail SAW through its witness admits is 85 pound, to incorporate all 110 pound valuations SAW asserts, to credit SAW for all re-roll SAW asserts in its discovery response, and to treat as scrap that rail which SAW admits is scrap. Similarly, this treatment is otherwise favorable to SAW in treating all remaining rail as 90 pound re-roll. Much of this is scrap and/or 85 pound.

5. Other adjustments. I continue to treat ties as a wash. Most ties are in poor condition, and once unearthed would decompose

quickly. Removal and disposal costs for ties are a minimum of \$2/tie. Based on my earlier inspection, the number of junk ties would overwhelm the ties that could be re-used, or employed for landscape such that ties are a net negative. Based on my earlier inspection, I have determined that there are at least 15,000 square feet of crossings which must be replaced/repared. Based on actual repair estimates, I conclude \$10/square foot is an average repair/replacement cost. Landreth gives \$70/ton for cost of rail/OTM removal and freight. Based on market research, \$75/ton is a more accurate figure. A salvage contractor would also require compensation for overseeing the job and some level of profit for assuming the risk of the transaction. Based on my experience, this compensation varies from 15% to 50% and usually is at least 25%. I have assumed the minimum (15%).

6. Conclusion. The attached spread sheet sets forth my calculation of the NLV for track, ties and OTM for all-SAW based on my inspection, as supplemented by SAW's discovery responses. I believe this likely overstates actual NLV due to assumptions favoring SAW which I employed in preparing the calculation. I am also concerned about sales of land and track by SAW to third parties, including Choo Choo Properties, and am continuing to examine the implications of such matters for NLV and operations generally.

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 Sept. 26, 2006

[Signature]

SAW TOTAL TRACKAGE 25.36 Miles

Material	Weight	Grade	Tonnage	\$ Per Ton	TOTAL
Rail	110	relay	49 137340	\$450 00	\$22,111 80
Rail	110	reroll	0 881300	\$330 00	\$290 83
Angle Bars	110	relay	2 235400	\$450 00	\$1,005 93
Tie Plates	110	relay	7 600000	\$450 00	\$3,420 00
Rail	90	relay	431 557600	\$450 00	\$194,200 92
Rail	90	reroll	2804 783100	\$330 00	\$925,578 42
Rail	90	scrap	64 219860	\$245 00	\$15,733 87
Angle Bars	90	relay	17 520000	\$450 00	\$7,884 00
Tie Plates	90	relay	46 810000	\$450 00	\$21,064 50
Angle Bars	90	scrap	155 280000	\$245 00	\$38,043 60
Tie Plates	90	scrap	416 467800	\$245 00	\$102,034 61
Rail	85	scrap	320 171000	\$245 00	\$78,441 90
Angle Bars	85	scrap	14 510000	\$245 00	\$3,554 95
Tie Plates	85	scrap	44 943700	\$245 00	\$11,011 21
Spikes & Bolts		scrap	15 400000	\$245 00	\$3,773 00
Ties					\$0 00
			Gross	Sales	\$1,428,149.53
Crossing removal & repair		-\$10 00 per sq ft	15,000sqft		\$150,000 00
Takeup & Freight			Total Tons	\$ Per Ton	
			4391 5171	\$75 00	\$329,363 78
			Gross	Net	\$948,785 75
		Salvagers	Profit	15 00%	\$142,317 86
			Purchase	Price	\$806,467.89

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SOUTH PLAINS SWITCHING, LTD CO ,	)	
	)	
Plaintiff,	)	
	)	
v	)	
	)	
THE SURFACE TRANSPORTATION	)	
BOARD,	)	
	)	
Defendant	)	Civil Action No 5 07-CV-047-C
	)	ECF

JUDGMENT

For the reasons stated in the Court's order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered
cause is **DISMISSED** without prejudice

Dated September 25, 2007


SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SOUTH PLAINS SWITCHING, LTD CO ,	)	
	)	
Plaintiff,	)	
	)	
v	)	
	)	
THE SURFACE TRANSPORTATION	)	
BOARD,	)	
	)	
Defendant	)	Civil Action No 5:07-CV-047-C
	)	ECF

ORDER

On this date the Court considered Defendant's Motion to Dismiss, filed May 15, 2007, the Response filed by Plaintiff on June 1, 2007; and Defendant's Reply, filed June 14, 2007. On September 13, 2007, the Court ordered the parties to advise the Court as to the status of the proceeding before the Surface Transportation Board. Defendant's Status Report was filed September 17, 2007, and Plaintiff's Status Report was filed September 20, 2007.

**I.
PROCEDURAL HISTORY**

Plaintiff, South Plains Switching, Ltd . Co ("South Plains"), filed its Original Complaint and Request for Injunctive Relief on March 22, 2007. Defendant, the Surface Transportation Board ("the STB"), filed its Motion to Dismiss on May 15, 2007. South Plains filed its Response on June 1, 2007. After filing an unopposed Motion for Leave to File a Reply, STB was granted leave to file a Reply on June 13, 2007, and the Reply was filed on June 14, 2007.

II. BACKGROUND

South Plains is a shortline or "feeder line" railroad servicing company serving customers in the southeast part of the industrial section of east Lubbock, Texas. South Plains operates and owns approximately 14 miles of track that it purchased from The Burlington Northern and Santa Fe Railway Company ("BNSF") in 1999. South Plains delivers rail cars along its tracks to and from customers located along the tracks. South Plains is the intermediary servicing company between these customers and the BNSF, which ultimately transports the rail cars along BNSF's tracks to various destinations throughout the country. One of the largest customers of South Plains is Pyco Industries, Inc. ("PYCO"), which operates two large plants for the processing of cottonseed products near South Plains' tracks. In 2005, a dispute arose between PYCO and South Plains regarding rail car services. In 2006, the STB issued several decisions relating to this dispute. In those decisions, the STB determined that West Texas & Lubbock Railway Company, Inc. ("WTL"), another rail servicing company, would be allowed to operate over South Plains' tracks in order to provide emergency alternative rail service to PYCO. Subsequently, the STB eventually entered an order allowing for temporary alternative service by WTL. At some point, PYCO filed a "feeder line" application to acquire South Plains' lines, or portions thereof, under forced sale. A second application for forced sale was filed by Keokuk Junction Railway Company, also seeking to acquire South Plains' lines.

The STB is an agency of the United States of America charged with broad authority over matters related to the economic regulatory oversight of freight railroads and the transportation they provide on the interstate rail network. Among its many responsibilities, the STB regulates

railroad rates and services, including the provision of adequate rail service. *See* 49 U.S.C. §§ 10701-10747, 10907, and 11101-11124. Under certain circumstances, the STB may address a rail service emergency and order a carrier that is not providing adequate rail service to allow another carrier to use its lines to serve the affected shippers. *Id.* at § 11123(a). Upon a proper showing, the STB may issue an emergency order providing for such emergency alternative rail service for a period not to exceed 270 days. *Id.* at § 11123(b)(1) and (c)(1). Additionally, if the STB finds that there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier, the STB may order the carrier to allow another carrier to operate over its rail lines. *Id.* at § 11102(a), 49 C.F.R. part 1147. Such temporary alternative rail service is not subject to the 270-day time restriction of an emergency alternative rail service order.

Finally, to afford a more permanent relief to shippers whose rail service has been found to be inadequate, the STB may order the incumbent carrier's line to be sold under the feeder line provisions. 49 U.S.C. § 10907, 49 C.F.R. 1151. The price of the forced sale must be no less than the "constitutional minimum value." 49 U.S.C. § 10907(b)(1). There may be competing offers to buy the rail line if multiple parties submit applications for the sale.

The STB issued orders allowing for "emergency alternative service" over South Plains' rail lines for a period that expired on October 23, 2006—the end of the statutory 270-day period. South Plains and PYCO reached an agreement that extended this emergency alternative service for an additional 30 days ending on November 22, 2006. The STB entered a "temporary alternative service" order on November 21, 2006, that allowed WTL to continue to operate over

South Plains' tracks once the emergency alternative service orders and agreed extension of those orders expired on November 22, 2006

South Plains has filed suit in this Court seeking (1) a Writ of Mandamus ordering the STB to vacate its November 21, 2006 order that allowed for temporary alternative service over South Plains' tracks, (2) an injunction that would prevent the STB from enforcing the November 21, 2006 order, (3) in the alternative, should this Court not require the November 21, 2006 order to be vacated, that this Court, by Writ of Mandamus, order the STB to act within 20 days on the competing feeder line applications for forced sale, or (4) in the alternative, that this Court, pursuant to the Administrative Procedures Act, 5 U.S.C. § 706, order the STB to act within 20 days on the competing feeder line applications for forced sale (Pl.'s Compl. 10, ¶ 33 (prayer for relief seeking the 4 listed requests))

III. STANDARD

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Menchaca v.*

Chrysler Credit Corp, 613 F.2d 507, 511 (5th Cir. 1980). In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute. *Williamson v. Tucker*, 645 F.2d 404, 413 (1981).

IV. DISCUSSION

Defendant argues that this Court lacks jurisdiction to consider South Plains' claims. South Plains asks this Court to vacate an order of the STB or instruct the STB to vacate it. In the alternative, South Plains asks this Court to order the STB to act, within 20 days of this Court's order, in related proceedings before the STB on applications for forced sale of South Plains' feeder lines located in Lubbock, Texas.

On August 31, 2007, the STB issued a decision (to become effective on September 10, 2007) on the applications for forced sale of South Plains' feeder lines. Thus, the alternative relief requested by South Plains from this Court is now moot—the STB has acted on those applications and rendered a decision. South Plains' Complaint can be dismissed on mootness grounds alone because the alternative relief sought has been rendered moot by the STB's August 31, 2007 decision.

In addition, as argued by the STB in its Motion and Reply, review of the STB's orders and decisions is not proper in this Court and must be sought in the appellate court pursuant to the Hobbs Act, 28 U.S.C. §§ 2321(a) and 2342(5). The Hobbs Act states

Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

28 U S C § 2321(a)

Chapter 158 provides in relevant part

The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of— (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title

28 U S C § 2342

The district court only has jurisdiction over STB orders in civil actions for the “payment of money or the collection of fines, penalties, and forfeitures” and when a district court has referred a question to the STB over an STB order “arising out of that referral ” 28 U S C § 1336(a) and (b) Neither of these two instances applies to the case at hand.

Moreover, prior precedence from the Fifth Circuit and other federal circuit courts of appeals have held that the Hobbs Act provides the exclusive means of jurisdictional review of the orders of agencies to which it applies *See, e g , Bywater Neighborhood Ass’n v Tricarico*, 879 F.2d 165, 167-68 (5th Cir 1980), *Baros v Texas Mexican Ry* , 400 F 3d 228, 237 (5th Cir 2005) (“courts of appeals have exclusive jurisdiction over any action to enjoin, suspend, or determine the validity of an STB order”), (see also Def ’s Mot 9-13 (listing authorities holding that a district court cannot apply the Administrative Procedures Act or the Mandamus and Venue Act where jurisdiction has been set in the courts of appeals))

**V.
CONCLUSION**

Therefore, the Court **ORDERS** that South Plains Switching, Ltd , Co 's claims against the Surface Transportation Board, be **DISMISSED** without prejudice and that each of the parties bear its own costs as to those claims

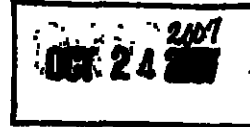
SO ORDERED

Dated September 25, 2007



SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED



CLERK U.S. DISTRICT COURT
By _____
Deputy

**IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

SOUTH PLAINS SWITCHING, LTD. CO., §

Plaintiff

v.

**THE SURFACE TRANSPORTATION
BOARD,**

Defendant

§
§
§
§
§
§
§
§
§
§

**CIVIL NO. 5:07-CV-047-C
ECF**

**NOTICE OF APPEAL OF
SOUTH PLAINS SWITCHING, LTD. CO.**

**NOW COMES, SOUTH PLAINS SWITCHING, LTD. CO., pursuant to *Fed R App P*
3, and files this, its Notice of Appeal.**

I.

The party taking this appeal is Plaintiff, SOUTH PLAINS SWITCHING, LTD. CO.

II.

**SOUTH PLAINS SWITCHING, LTD. CO., is appealing the Order of the court granting
the Defendant's Motion to Dismiss, said Order signed and entered on September 25, 2007, and the
Judgment of the court dismissing this case without prejudice also signed and entered on September
25, 2007.**

**SOUTH PLAINS SWITCHING, LTD CO., is appealing the entire Order and the entire
Judgment.**

This appeal is being taken to the Fifth Circuit Court of Appeals in New Orleans, Louisiana.

Respectfully submitted,

JAMES L. GORSUCH, P.C.

4412 74th Street, Suite B-102

Lubbock, Texas 79424

Telephone (806)771-6474

Telecopier (806)771-6476



/s/ James L. Gorsuch

By James L. Gorsuch

State Bar No 08221250

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of October, 2007, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Northern District of Texas using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys listed below.

Mr. Richard B. Roper
United States Attorney
Ms Ann C Roberts
Assistant United States Attorney
1205 Texas Avenue, Suite 700
Lubbock, Texas 79401

Ms Ellen D. Hanson
General Counsel
Ms Evelyn G Kitty
Associate General Counsel
Surface Transportation Board
395 E Street, S W
Washington, D C 20423-0001



/s/ James L. Gorsuch

James L. Gorsuch

Exhibit E

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: 312-468-9589

RE: Deraillment 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: 806/766-0484

SEND TO: PERMIAN BASIN RAILWAY
Ed Ellis, CEO
South Clinton St, Ste 300
P.O. Box 618181
Chicago, IL 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

POSTED

TO PERMIAN BASIN RAILWAYS

DATE 6/15/06

JOB NO.

JOB NAME CRANE SERVICE

JOB LOCATION LUBBOCK

TERMS

DESCRIPTION	QUANTITY	UNIT PRICE	AMOUNT
LIFT DERAILER CAR			
PERMIT			80 00
CRANE SERVICE (1st)	1	hours @ 250 ⁰⁰ /hour	625 00
CRANE SERVICE (2nd)	6	hours @ 277 ⁵⁰ /hr	1,665 00
RIGGERS	4 1/2	hours @ 50 ⁰⁰ /hour	247 50
RIGGERS (CONT.)	23 1/2	hours @ 82 ⁵⁰ /hour	1,897 50
DRIVER	2	hours @ 55 ⁰⁰ /hour	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



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
Damage to Railroad Property- Derailment at 50th & Southeast Dr. (Farmers Co-op Compress) 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			23,134.50
			4,625.00
		Total	\$27,759.50
		Payment Due	\$27,759.50

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

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.

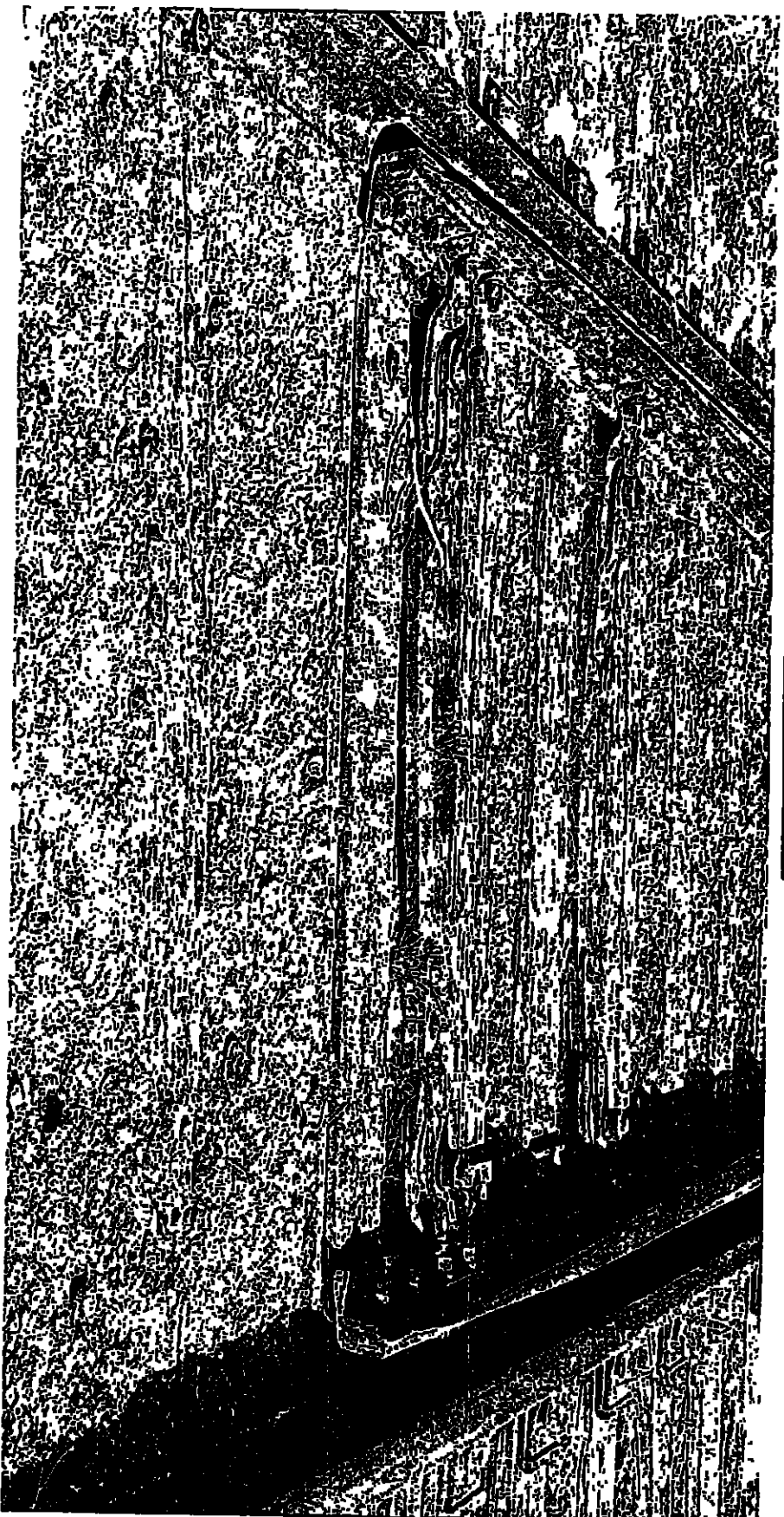
Executed on 6-30-06



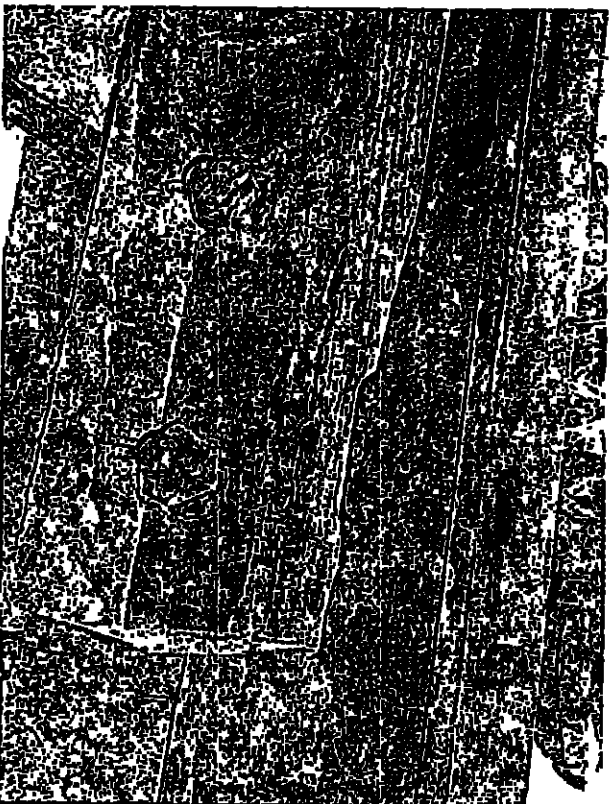
133.07 Worn or missing cotter pin

- ☐ 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

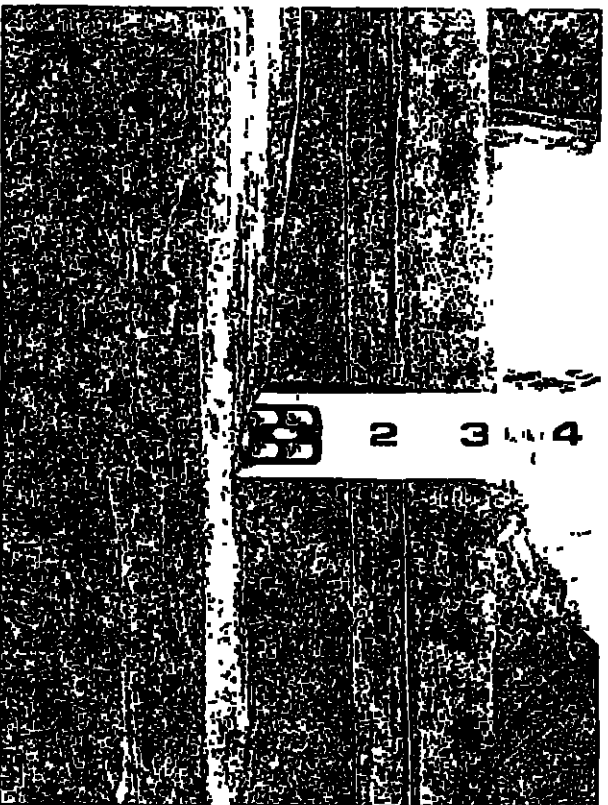
Left hand nut and bolt, #1 connector rod



Right Hand Switch Point

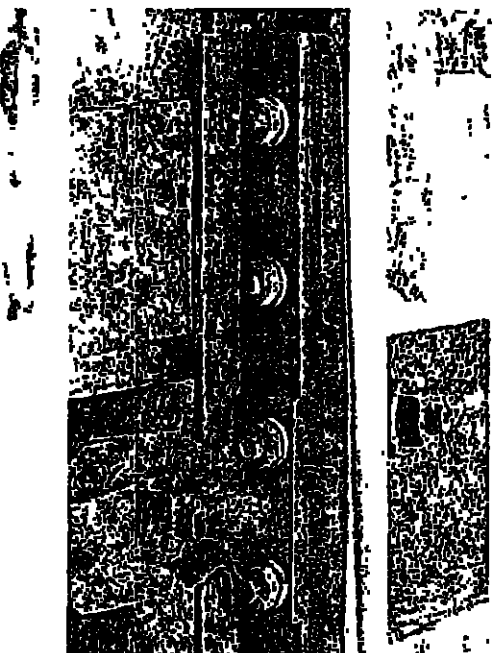


- ❑ This picture illustrated the wear and tear of the point of the switch point.
- ❑ The missing part of the point would make it difficult for the point of switch to fit properly against the stock rail.
- ❑ Point must fit securely under the lip of the rail with no type of gap in-between.



- 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.

[illegible][illegible]

- ❑ 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.

Exhibit F

SECTION 4 - COMPENSATION

ATTACHMENT A

Page 1 of 4

49 U.S.C. § 11123(b)(2), provides that railroads may establish between themselves the terms of compensation for operations and use of facilities and equipment. If the parties do not agree on the terms of compensation, the STB may establish the terms.

WTL will have use of SAW infrastructure to conduct its operations for a period of five months, or approximately 23 weeks. During this time WTL will have exclusive use of 12,720 ft of SAW infrastructure and shared use of an additional 17,840 ft. Details on tracks in feet and use are shown below:

WTL use of SAW infrastructure

Exclusive WTL use

<u>Description</u>	<u>Length</u>
Track #5 SAW yard	2,400
Track #1 SAW yard	2,100
Track 9200	3,900
Track 9298 (to the old BN bridge)	4,320
Total	12,720 ft.

Shared SAW & WTL use

<u>Description</u>	<u>Length</u>
Track 9298 SAW yard	5,000
Track 231 lead to 9200/9298	980
Track lead PYCO plant 2 to 50 th St	6,280
Track 310 through Farmers 1	5,600
Total	17,840 ft.

Even though WTL control of the shared track is well over 50% of available time, we have split use of the shared track on a 50 / 50 basis.

Summary of WTL control and use

<u>Description</u>	<u>Length</u>
Exclusive WTL use	12,720
Shared use 50%	8,920
Total	21,640 ft.

In summary WTL has use of over four miles of SAW infrastructure. Clearly this requires compensation by WTL for its use.

Exhibit B

----- Original Message -----

1 From: john heffner

To: c.montange

Cc: Ed Ellis ; Steve Gregory

Sent: Thursday, February 15, 2007 1:22 PM

Subject: Fw: wtl interchange agreement

Charles your memory is better than mine Looks like I told Tom on March 13 that compensation would be at \$2 90 per car and I didn't hear from him on this subject until he started banging away at it again in late December 2006 John

----- Original Message -----

From: john heffner

To: Tom McFarland

Cc: c.montange ; Ed Ellis ; Steve Gregory

Sent: Monday, March 13, 2006 3 50 PM

Subject: wtl interchange agreement

Tom, I wanted to give you a "heads up" that I would soon be responding in writing to the "interchange and joint use agreement" you had sent me on March 1 Rather than prepare a new agreement, I will redo your agreement with the changes "redlined " Compensation will be at \$2 90 per car This compensation is based upon the value of SAW's track and right of way and is, we believe, very favorable to SAW Liability provisions will be allocated based upon fault or upon whose employees or equipment was involved Otherwise split 50/50 All repairs required (like for track) and wrecks will be at your cost with costs for material and labor fully documented and all records available for inspection I'm sure you would do just the same if our roles were reversed John

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.⁴

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
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⁴ 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.

OTM	53.52	220.00	\$ 11,774.40
Less take up costs, freight		100/ton	(32,112.00)
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 G

CHAS MONTANGE

From: "Hale, Weldon E" <Weldon.Hale@bnsf.com>
To: "CHAS MONTANGE" <c.montange@verizon.net>
Sent: Wednesday, January 02, 2008 8:20 AM
Subject: RE: SAW claim for compensation against PYCO/WTL for alternative service

BNSF entered into a settlement agreement with SAW paying SAW \$75 per car for cars BNSF switches to Jarvis Metals in Burris, TX. BNSF sought to avoid further litigation on SAW's lost profits damages claim.

Eddie Hale
 Shortline Development
 BNSF Railway
 (817) 352-6012

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From: CHAS MONTANGE [mailto:c.montange@verizon.net]
Sent: Wednesday, December 26, 2007 2:46 PM
To: Hale, Weldon E
Subject: Fw: SAW claim for compensation against PYCO/WTL for alternative service

Hello, Eddie. I sent this message on Dec 20. PYCO tells me you may have been gone. In the hope you are now back, I am sending it again. By our calculation, we need to respond to SAW on January 2. That means I need to dispatch a response no later than Monday, Dec 31, and would appreciate hearing from you by Friday, Dec 28.

----- Original Message -----

From: CHAS MONTANGE
To: Weldon.Hale@bnsf.com
Sent: Thursday, December 20, 2007 12:50 PM
Subject: SAW claim for compensation against PYCO/WTL for alternative service

SAW has filed a petition in F.D. 35111 asserting that BNSF's agreement to pay \$75 per carload to SAW in order to serve Jarvis shows the "fair market value" of use of track.

Could you confirm my understanding that the amount BNSF agreed to pay was in settlement of some of SAW's litigation against BNSF, and that it is based on SAW's claim for lost profits?

Thanks