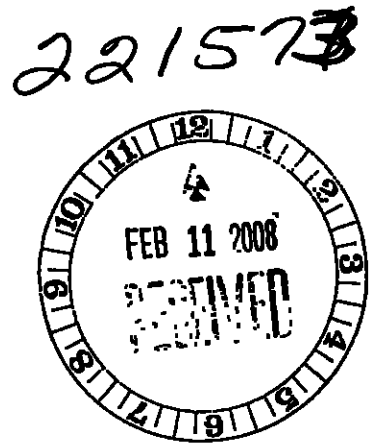


CHARLES H MONTANGE
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8 February 2008
by express service

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E St., SW
Washington, D.C. 20024

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

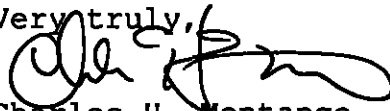
filing of opening memorandum due 2/11

Dear Madam Secretary:

Enclosed for filing please find the original and ten copies of an Opening Memorandum and appendices for filing on behalf of PYCO Industries, Inc., and West Texas & Lubbock Railway Company in the above-captioned proceeding.

By my signature below, I certify service of a copy of the foregoing upon counsel for the petitioning party (South Plains Switching), Thomas McFarland, Esq., 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112 by deposit on the above date for express (next business day) delivery.

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. Mr. McFarland (SAW) (w/encls)
Mr. Heffner (WTL) (w/encls)
Mr. McLaren (PYCO) (w/encls)

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BEFORE THE SURFACE TRANSPORTATION BOARD

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

Opening Memorandum
for West Texas & Lubbock Railway
and
PYCO Industries, Inc.

This Opening Memorandum on behalf of West Texas & Lubbock Railway (WTL) and PYCO Industries, Inc. (PYCO) is in response to this Board's Decision in this docket served January 11, 2008. WTL supplied alternative rail service to PYCO over lines of then-incumbent railroad South Plains Switching Ltd. Co. (SAW). WTL supplied alternative service to PYCO from January 26, 2006¹ until November 9, 2007,² pursuant to orders of this Board in Finance

- In PYCO Industries - Alternative Rail Service - South Plains Switching Ltd. Co., F.D. 34802, served Jan. 26, 2006, this Board initially authorized alternative rail service pursuant to 49 U.S.C. 11123 and 49 C.F.R. Part 1146, commencing 11:59 P.M. on January 26, 2006. This authority was extended to the statutory maximum (270 days), plus 30 days of "tolling" at the suggestion of SAW by orders in F.D. 34802 served February 24, 2006; June 21, 2006; and August 18, 2006. In PYCO Industries - Alternative Rail Service - South Plains Switching Ltd. Co., F.D. 34889, served November 21, 2006, this Board authorized alternative rail service pursuant to 49 U.S.C. 11102 and 49 C.F.R. Part 1147, commencing 12:00 AM on November 23, 2006. This service continued until PYCO purchased the SAW lines on November 9, 2007, pursuant to this Board's feeder line decision served August 31, 2007 in F.D. 34890.

² See PYCO Industries -- Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, served Dec. 20, 2007, at 1 ("PYCO purchased SAW's rail lines" on November 9, 2007).

Docket (F.D.) 34802 and F.D. 34889. On November 9, 2007, PYCO acquired SAW's rail lines pursuant to a decision of this Board served August 31, 2007, in F.D. 34890 (the "feeder line proceeding").

In a decision served January 11, 2008, this Board terminated F.D. 34802 and 34889, and initiated a new proceeding (F.D. 35111) regarding compensation to SAW for the WTL's use of SAW's lines to provide service to PYCO in F.D. 34802 and 34889. WTL provided alternative service to PYCO as a public service in light of SAW's creation of a service emergency in the form of inadequate rail service to its major customer (PYCO). The sole issue in F.D. 35111 is the amount of compensation (if any) that is due SAW as a result of service by WTL under F.D. 34802 and 34889.

I. LAW

This Board made clear in the preamble to its 1998 regulations adopting Parts 1146 and 1147 (the alternative service regulations underlying the proceeding here) that incumbent railroads were not entitled to compensation in the form of lost profits during the period of alternative use.³ In addition, 49 U.S.C. 11102(a), the authorizing statute relied upon by the Board for the decision in F.D. 34889, provides that in establishing

³ Expedited Relief for Service Inadequacies, STB Ex Parte 628, served Dec. 21, 1998 (promulgating Parts 1146 and 1147) ("We agree that the incumbent railroad is ... not [entitled to compensation] for lost profits for service it is not providing").

compensation, the Board shall employ "the principle controlling compensation in condemnation proceedings." The main condemnation-type proceedings in which the Board engages are "offers of financial assistance" (OFA's) under 49 U.S.C. 10904 and "feeder line applications" under 49 U.S.C. 10907. Insofar as relevant here, in both situations, the Board relies on a "net liquidation value" (NLV) approach. Under this approach the Board determines the net salvage value for the trackage, and a comparable value for real estate interests based on an "across-the-fence" valuation of parcels owned in marketable (fee) title, subject to costs of sale and other appropriate discounts. In cases involving so-called subsidy OFA's (where a shipper offers to subsidize continued service, rather than buy the line outright), the agency determines the costs to provide service plus a reasonable return on the NLV of the trackage and land. A reasonable return is the applicable cost of capital for the period in question as determined by STB in its annual proceeding for that purpose each year.

In this Board's January 11 decision in this docket at pp. 6 and 12 (citing ICC precedent in the form of Dardanelle & Russellville Railroad Co. - Trackage Rights Compensation - Arkansas Midland Railroad Company, F.D. 32625, served June 3, 1996), this Board stated that

"[o]ur predecessor, the ... ICC ..., established a formula

for determining compensation for the use of a rail line under 49 U.S.C. 11123. As it stated in Dardanelle, slip op. at 3-4, compensation should consist of three components: (1) the variable cost incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks; (2) the tenant carrier's proportionate share of the track's maintenance and operation expenses; and (3) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track."

PYCO and WTL understand the Dardanelle criteria as employed by the Board to be subject to the Board's subsequent statement in the preamble to the Part 1146 and 1147 regulations that incumbent railroads are not entitled to compensation for lost profit claims during periods of alternative service.

This Board's January 11 decision effectively requested the parties to submit evidence responsive to the Dardanelle criteria. PYCO and WTL submitted a prima facie case responsive to the Dardanelle criteria in our initial Reply to SAW's Petition. While as indicated below, we incorporate some of our submission here, we also submit a more refined analysis which includes information based on SAW's responses to PYCO discovery.

II. SUMMARY

Based on SAW's response to PYCO's discovery requests, SAW

makes no claim for variable costs, including maintenance costs. In terms of the Dardanelle criteria, only the portion involving an interest component for the alternative service carrier's use of the incumbent's lines remains relevant. Using methodology and unit values admitted by SAW, PYCO calculates the overall NLV for the property used by WTL (after taking into account portions whose use was shared) at \$221,157.04. Since SAW is not entitled to a recovery for lost profits, its compensation must be limited to the railroad cost of capital (as determined by this Board in annual proceedings) for the relevant periods times the NLV. Performing this calculation, one derives a total of \$45,116.22 as the gross amount due SAW for the entire period of alternative service.

PYCO and WTL adopt their showings and relevant supporting material from their initial Reply served January 3, 2008, at pp. 19 and 35 (\$97,610.36)⁴ and for work done for the benefit of SAW by WTL or PYCO (pp. 35-36) as set-off's to any claim for compensation by SAW. In light of these set-off's, no further compensation is due SAW, nor should any be ordered.

II. EVIDENTIARY SUBMISSION

⁴ This sum reflects costs incurred by WTL and PYCO to repair or maintain trackage that should have been repaired or maintained by SAW, but was not, and the cost incurred for derailments due to SAW's failure adequately to maintain its track.

In response to PYCO's initial discovery requests to SAW,⁵ SAW indicated it did not incur any variable costs, nor did it intend to claim compensation for maintenance.⁶ Since SAW, the proponent of a compensation award in this proceeding, is not claiming any compensation under the first two prongs of the Dardanelles criteria (variable costs and maintenance), these two prongs are not relevant in the proceeding. If SAW is making no claim for these costs, they cannot be awarded. In any event,

⁵ PYCO's initial set of discovery to SAW is attached as Appendix I.

⁶ SAW's "Response to Discovery" (responding to PYCO's first set of discovery) is attached as Appendix II. SAW admits it did not incur any variable costs due to alternative service (response to request for admission 3 and 4) other than that "SAW provided maintenance to portions of Track 9298" (see response to interrogatory 1). PYCO's interrogatory 2(b) asked for cost data concerning any actual maintenance and repair, and SAW objected that this was unduly burdensome. See SAW response to interrogatory 2(b). PYCO's counsel immediately e-mailed SAW's counsel for a more detailed response, if SAW intended to claim compensation for any maintenance. SAW's counsel responded that SAW does not so intend. Copies of these emails are set forth in Appendix III.

Track 9298 appears both east and west of the BNSF mainline through Lubbock. During the period of alternative service, both WTL and SAW used track 9298 west of the BNSF mainline to move cars between the BNSF yard and the SAW yard (location of PYCO plant no. 1). PYCO traditionally used track 9298 east of the BNSF mainline for storage of cars (PYCO had a \$1/year lease for that purpose). The alternative service protocol assigned that portion of trackage to PYCO's use. PYCO and WTL personnel saw no evidence of any maintenance of any portion of track 9298 by SAW during the alternative service period, and were SAW to assert a claim to recovery for maintenance of track 9298, PYCO and WTL would submit evidence (and indeed have submitted evidence already) to the contrary.

PYCO and WTL have already presented uncontradicted evidence⁷ that SAW provided no services for which a compensation award could be made under the first two prongs of the Dardanelle criteria. It is not appropriate to award compensation for costs (pursuant to some kind of URCS assumption or on any other basis) where the incumbent railroad did not incur costs; that would simply be an award of "profit."⁸

This leaves the remaining element of the Dardanelle criteria (compensation in the form of interest on SAW's capital investment in the trackage used by WTL to provide alternative service to PYCO). In SAW's "Response to Discovery," SAW admitted that the trackage involved in providing alternative service to PYCO was as stated in Exhibit A to Appendix I (see SAW Response to Request for Admission 8 in Appendix II). SAW also stated that it would not contest the unit values for the various grades of rail and other track material, for take-up, and for contractor overhead as found by this Board in F.D. 34890 (see Response to Request for

⁷ SAW in its response to PYCO's first set of discovery claimed to have performed some maintenance on portions of track 9298, but failed to provide any requested detail. PYCO by email requested the detail. SAW's counsel responded by email indicating SAW was not relying on this activity for purposes of compensation. See Appendix III. Based on SAW's representation of non-reliance, PYCO has not filed a motion to compel further response. In any event, as indicated in the PYCO/WTL initial reply, PYOC and WTL are aware of no instance of such maintenance, and the record in F.D. 34802, 34889, and 34890 shows that SAW took the position that SAW had no maintenance obligation.

⁸ Declaration of Charles Banks, Appendix VII, para 4.

Admission 10). In response to PYCO's interrogatory 9, SAW indicated reliance on this Board's per unit findings of NLV for track, track materials and ties, and for land valuation as employed by the Board in its decision in F.D. 34890 served August 31, 2007.

Consistent with SAW's admissions and this Board's valuations and methodology in F.D. 34890, but subject to one adjustment for trackage used only twice by WTL,⁹ PYCO calculates the NLV for trackage and land to be \$137,517.94 for the trackage (Appendix

⁹ The list of "shared track" in Appendix I Exhibit A includes track 310. Track 310 is the most direct way to reach PYCO's Plant No. 2, but it runs through Farmers Compress. Indeed, as SAW's counsel put it, "Farmers Compress has control of that track. In fact, the track runs through loading sheds inside Farmers Compress's property." Letter, Mr. McFarland to Secretary Williams, Jan. 27, 2006, at p.2, item (2). Thus the protocol allowed WTL to use Track 310 "if not blocked and if complete movement to Plant 2 would not delay operations of Farmers Compress Company." The protocol provided that Track 9298 would be "the primary means to provide service to PYCO Plant 2." Letter, McFarland to Heffner, Feb. 1, 2006, item (3) at bottom of page 1, as filed under cover letter dated February 6, 2006.

In one of the many disputes between BNSF and SAW, BNSF filed a petition for clarification in F.D. 33573 in 2007. In SAW's "Reply in Opposition to Petition for Clarification," e-filed in F.D. 33753 under cover letter dated August 3, 2007, at p. 6, SAW explained that SAW traditionally used "Track 310 ... to provide service to Attebury Grain Company and Farmers Cooperative Compress...." Given SAW's use of Track 310 to serve these customers, it is hardly surprising that it was essentially never available for use by WTL to reach PYCO. In consequence, WTL was able to use Track 310 only twice. WTL instead relied on the circuitous route involving Track 9298 east of the BNSF mainline in order to reach Plant No. 2. Since WTL in essence did not use 310 because it was blocked by SAW or SAW customers, it is not appropriate to include that track in the capital base for compensation purposes.

IV, para 9) and \$83,640 for the land (id. para 10), or \$221,157.94. Multiplying the NLV by the relevant cost of capital (10.1% from Jan. 26, 2006 per Ex Parte 558 (Sub-no. 8), served June 20, 2005, and 12.2% from September 20, 2006 per Ex Parte 558 (Sub-no. 9), served Sept. 2006), yields \$45,116.22 as the lump sum amount of "fair compensation" due SAW for use of its trackage and land. Any amount in excess of this figure would constitute profit to SAW. See id. para. 12. As already noted, when this Board adopted Parts 1146 and 1146 subsequent to Dardanelle, this Board specifically indicated that lost profit was not an element for compensation in alternative service proceedings.

PYCO and WTL incorporate their showings in their January 3, 2008 Reply as to set-off's for costs which they incurred by reason of SAW's failure to provide maintenance, and for other purposes. Those showings are set forth or referenced at pp. 19 and 34-35. The set-off's include costs for emergency repairs and re-railments totaling \$97,610.36 and an additional amount for work done for the benefit of SAW by WTL, such as pulling cars for SAW customers from the BNSF yard to the SAW yard.¹⁰ Failure to allow PYCO and WTL to claim these set-off's would amount to rewarding SAW with extra profit for failing to discharge its

¹⁰ The work performed by WTL for the benefit of SAW and its customers was substantial. According to the Second Declaration of Mr. Gregory (Appendix VIII), WTL pulled 1919 and 1916 SAW cars for customers other than PYCO during F.D. 34802 and 34889 respectively).

duties to maintain its trackage and fully serve its customers other than PYCO.¹¹

Since the amount of set-off's exceed the compensation which SAW may claim, SAW is not entitled to any additional compensation in this proceeding.

V. Comment on SAW's Case

SAW originally demanded that WTL pay it \$75/carload for all cars in F.D. 34802, and all the BNSF switching fee in F.D. 34889. The basis for the \$75 demand is a settlement in which BNSF entered to end state court litigation over alleged SAW "lost profits" at Burris involving a shipper called Jarvis Metals. WTL and PYCO, aware of STB precedent that profit was not appropriate for compensation under Parts and 1146 and 1147, offered a cost-based amount as early as March 2006,¹² but SAW refused to negotiate. SAW continues to this day reject a cost-based approach, even in the face of STB's January 11 decision indicating that the Board continued to view alleged lost profits as not recoverable.

In particular, in response to PYCO's Second Set of Discovery (attached as Appendix V), SAW in its February 5 response (see

¹¹ Accord, Banks Declaration, Appendix VII, paras 7 & 8.

¹² Examination of the basis of the original WTL/PYCO offer shows that it comported with Dardanelle based on estimated values at the time. STB's subsequent refinement of the valuation in F.D. 34890 allows for a more precise calculation now, and that is provided herewith by WTL and PYCO in Appendix IV.

Appendix VI, answer to int. 1) continues to rely exclusively on BNSF's payment of \$75/carload to SAW in order to serve the BNSF customer (Jarvis) at Burris. But this Board has already rejected SAW's reliance on the \$75/carload payment by BNSF at Burris. This Board explained in its January 11, 2008 decision, slip op. 7, that:

"there are many potential differences between BNSF's use of SAW's Burris tracks and WTL's use of SAW's Lubbock tracks. The variable costs, operating and maintenance expenses, and proportionate usage of the tracks, among other things, all may differ. Moreover, WTL and PYCO have submitted evidence that BNSF agreed to pay SAW \$75 per carload to use SAW's Burris tracks to settle a lawsuit in which SAW claimed lost profits, which, we have noted are not recoverable. Because SAW has not demonstrated that the circumstances surrounding the BNSF agreement are similar to the circumstances here, we do not regard that agreement as particularly relevant."

In response to PYCO's query for details on the \$75/carload payment (or any other payment on which SAW relies), SAW basically indicates it has no details concerning that payment beyond which it has already disclosed. Appendix VI, SAW response to interrogatory 1. In short, SAW had nothing to say in response to discovery to alter the Board's conclusion that the \$75/carload

payment was not particularly relevant.¹³

Moreover, SAW's position is internally inconsistent. SAW purports to rely on a kind of rental or profit stream to attribute value to trackage, but SAW also says in response to PYCO's discovery requests that SAW "does not contend that rental or payments that SAW received or receives for use of trackage and related right-of-way are relevant to the establishment of compensation in this proceeding." If one particular arrangement were relevant, then why not others? The reason may be that other arrangements completely undercut SAW's position. For example, SAW had previously leased track 9298 on the east side of the BNSF mainline to PYCO for \$1 per year. This is a track actually used for alternative service to PYCO, and if any "rental rate" were controlling, let alone relevant, that one would be.

The problem with SAW's compensation claim all along, and not simply in this proceeding, is that SAW seeks a monopoly profit. It has singled out something it finagled in its years of state court litigation against BNSF, and it now requests this Board to impose that arbitrary and peculiar burden on WTL (and PYCO). But this is simply SAW again attempting to play by arbitrary rules of its own, and not by the rules prescribed by the Board for the industry generally. In other words, SAW is continuing to

¹³ PYCO also understands that SAW has purported to terminate the agreement with BNSF providing for the payment.

insist on presenting its claim in a format that is completely contrary to the Dardanelle framework, with the aim of achieving a most un-Dardanelle result. Dardanelle does not work for SAW because SAW incurred no variable costs, and SAW apparently views interest on its capital investment as trivial. SAW does not want Dardanelle compensation; it wants a windfall. But incumbent railroads should not get windfalls for providing inadequate rail service, nor may they under the relevant statutes and regulations.

Respectfully submitted,


Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739
for PYCO Industries, Inc.


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

Attachments:

Verification by Mr. Gail Kring (PYCO)

Appendix I (PYCO first set of discovery to SAW)
Appendix II (SAW Response)
Appendix III (email exchange about SAW response)
Appendix IV (Sneed Second Declaration)
Appendix V (PYCO second set of discovery to SAW)
Appendix VI (SAW Response)
Appendix VII (C. Banks Declaration)
Appendix VIII (Second Gregory Declaration)

Verification by Gail Kring

I, Gail Kring, am the Chief Executive Officer of PYCO Industries, Inc. ("PYCO"), and I make the following verification of the facts upon which PYCO and West Texas & Lubbock Railway rely in the foregoing Opening Memorandum in Finance Docket 35111.

1. Based on conversations with PYCO and WTL employees, WTL used track 310 to serve PYCO only twice due to congestion by SAW or by placement of Compress cars on the tracks. Given that the track was used essentially exclusively by SAW for its customers other than PYCO, it is not appropriate for PYCO to pay compensation for it.

2. PYCO leased track 9298 from SAW for \$1/year. If SAW's claim that the BNSF payment of \$75/carload at Burris for Jarvis business is relevant is given any weight, then the fact that our lease for track actually involved in this proceeding was at a rate of \$1/year must be given controlling weight.

3. SAW provided no service to PYCO or WTL during the period of alternative service. SAW refused even to participate in conference calls ordered by the Board to coordinate service. We saw no maintenance or repair of track used to supply PYCO with service.

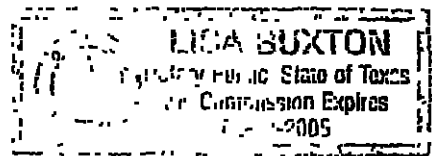
4. PYCO's bookkeeping department reviewed the arithmetic in Appendix IV and tells me it is accurate.

5. Based on review by my staff, myself, and my conversations with WTL (which is now contract rail service supplier for PYCO), the statements in the Opening Memorandum are true and correct to the best of my knowledge and belief, as are the statements in 1-4 above.

Gail Kring
Gail Kring

Sworn to and subscribed before me this
6th day of February, 2008.

Lisa Buxton
Notary public



My commission expires: February 24, 2008.

•

-

Appendix I

CHAS MONTANGE

From: "CHAS MONTANGE" <c.montange@verizon.net>
To: <mcfarland@aol.com>
Sent: Monday, January 14, 2008 1:20 PM
Attach: PYCO first set discovery to SAW Jan 14 2008 pdf
Subject: discovery, F.D. 35111

To: Tom McFarland, for SAW

copies by email, fax and express

Attached hereto in WP 5 and pdf is a set of discovery for SAW in light of STB's decision last Friday.

Should you believe that anything sought is business confidential, we of course will move for a protective order like that in FD 34890, or an extension of that one. Please let me know as soon as possible.

*I include Exhibits A+B
for the above*

1/14/2008

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Interrogatories and Document Requests
(first set)
to
South Plains Switching Ltd. Co.

These discovery requests are tendered on behalf of PYCO Industries, Inc. (PYCO) to South Plains Switching Ltd., Co. (SAW), the petitioner in this proceeding, pursuant to 49 C.F.R. 1114.27 (requests for admission); 49 C.F.R. 1114.26 (interrogatories); and 49 C.F.R. 1114.30 (document requests).

Instructions. 1. Please answer all interrogatories and document requests not less than fifteen days from service thereof, and all requests for admission will be deemed admitted unless within 15 days after service, SAW serves a written answer or objection addressed to the matter. All discovery responses should be made in accordance with the provisions of sections 1114.26-.27 and 1114.30 for interrogatories, admissions, and document requests respectively. Answers and objections should be served upon counsel for PYCO (Mr. Montange). Please make all documents available by express delivery to counsel for PYCO (Charles H. Montange, 426 NW 162d St., Seattle, WA 98177) not less than fifteen days from service of the enclosed requests. PYCO agrees to pay reasonable copying and express delivery

expenses.

2. SAW has a duty to supplement the discovery response provided herein pursuant to 49 C.F.R. 1114.29. PYCO notes that under STB's procedural schedule, both SAW and PYCO must tender their opening statements on Monday, February 11, 2008. Should any response by SAW within 15 days to the service of these discovery requests be rendered incorrect or inconsistent with SAW's opening statement, then please provide a supplemental response by no later than the following Monday, February 18, 2008.

Definitions. For purposes herein, the word "document" shall include all electronic recordings, emails, maps, charts, schematics, notes and all written materials of any sort, and shall include documents in the possession of SAW, its officers, directors, employees, agents or contractors.

"SAW" means petitioner.

"STB" means Surface Transportation Board.

"WTL" means West Texas & Lubbock Railway.

"F.D. 34802" refers to STB Finance Docket 34802.

"F.D. 34889" refers to STB Finance Docket 34889.

"Period of alternative rail service in F.D. 34802" shall mean the time from STB authorization of WTL service to PYCO in F.D. 34802 (11:59 P.M. on January 26, 2006) until the conclusion of WTL service to PYCO in F.D. 34802 (11:59 P.M. on November

November 22, 2006). "Period of alternative rail service in F.D. 34889" shall mean the time from STB authorization of WTL service to PYCO in F.D. 34889 (12:00 A.M. on November 23, 2006) until the closing of the sale of SAW assets to PYCO pursuant to the STB decision in Fin. Dkt. 34890, served August 31, 2007 (i.e., 11:59 P.M., November 9, 2007).

"Variable costs" means those costs that change with the amount of rail traffic a railroad carrier handles. "Fixed costs" means those costs that do not change with the amount of rail traffic a railroad carrier handles.

"UCRS" shall have the meaning given it by STB at page 6 of its decision in Finance Docket 35111 served January 11, 2008.

"Shared track" or "shared use track" shall mean track over which both SAW and WTL operated during the alternative rail service under F.D. 34802 and F.D. 34889.

I. Requests for Admissions

For purposes of this proceeding, PYCO requests that SAW admit the following in accordance with 49 C.F.R. 1114.27, and the foregoing instructions and definitions:

1. SAW did not expend any money, or supply any labor or material, to maintain any track used by WTL to provide rail service to PYCO during the period of alternative rail service in F.D. 34802.

2. SAW did not expend any money, or supply any labor or

material, to maintain any track used by WTL to provide rail service to PYCO during the period of alternative rail service in F.D. 34889.

3. SAW did not incur any actual additional expenses arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F.D. 34802.

4. SAW did not incur any actual additional expenses arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F.D. 34889.

5. SAW did not incur any actual variable costs arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F.D. 34802.

6. SAW did not incur any actual variable costs arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F.D. 34889.

7. The document attached as Exhibit A is a document furnished by SAW to WTL which purports to state the trackage used by WTL to furnish rail service to PYCO during the period of alternative rail service in F.D. 34802, and is genuine.

8. The trackage used by WTL to provide service to PYCO during the period of alternative rail service in F.D. 34802 and the period of alternative rail service in F.D. 34889 is as stated in the document attached as Exhibit A.

9. The document attached as Exhibit B (and dated June 12,

2006) is a document furnished by SAW to PYCO in response to an interrogatory (#5b), and is genuine.

10. For purposes of Finance Docket 35111, SAW does not contest the unit values for salvage, including valuation for each grade of rail and for other track material, for take-up, and for contractor overhead as found by STB in its Decision served August 31, 2007.

II.

Pursuant to 49 C.F.R. 1114.26 and the foregoing definitions and instructions, please answer the following interrogatories:

1. In the event any request for admission above is denied in whole or in part, or is admitted subject to a qualification or limitation, please state all grounds for denial or partial denial, or qualification or limitation, including all evidence relied upon for the denial, partial denial, qualification or limitation.

2. (a) Did SAW perform any actual maintenance or repair, or cause to be performed any actual maintenance or repair, on the track employed by WTL to furnish rail service to PYCO during (i) the period of alternative rail service in F.D. 34802, and/or (ii) the period of alternative rail service in F.D. 34889?

(b) If the answer to 2(a) is "yes," then for each item of maintenance or repair, indicate (i) the date or dates of such maintenance or repair, (ii) the approximate location, (iii) the

nature of the work performed, (iv) the identity (name and address) of the person or persons performing the maintenance or repair, (v) the identity (name and address) of the person or persons) who requested the repair, (vi) all material used in the maintenance or repair, (vii) the actual cost of the repair or maintenance, and (viii) an itemization of the actual cost showing how it was derived.

3. (a) Does SAW claim that it incurred additional expenses (other than as addressed in interrogatory 2 above) by reason of the alternative rail service WTL provided PYCO during (i) the period of alternative service in F.D. 34802 and/or (ii) the period of alternative rail service in F.D. 34889?

(b) If the answer to 3(a) is "yes," then for each item of additional expense, indicate (i) the date or dates of such expense, (ii) the approximate location(s) for which the expense was incurred, (iii) the nature of the expense, including all reasons why SAW attributes the expense to rail service provided by WTL to PYCO, (iv) the amount of the actual expense, (v) an itemization of the actual cost showing how it was derived and (vi) the name and address of any person who calculated the expense.

4. (a) Does SAW have any cost data supporting a claim, if SAW makes or may make, such a claim, for any actual variable cost incurred by reason of rail service provided by WTL to PYCO

pursuant to F.D. 34802 and/or F.D. 34889?

(b) If the answer to 4(a) is "yes," then for each item of cost data, describe it stating the nature of the cost, and the basis on which SAW claims it results from rail service provided by WTL to PYCO.

5. State all actual variable costs claimed by SAW by reason of the alternative rail service provided by WTL to PYCO pursuant to F.D. 34802 and/or F.D. 34889, and for each such cost, provide the basis on which SAW claims it was caused by service provided by WTL to PYCO.

6. If SAW does not admit Request for Admission number 8 above, state in detail the track, track material and ties, that SAW claims were used exclusively by WTL to provide service to PYCO pursuant to F.D. 34802 and F.D. 34889, and were shared between WTL and PYCO during the period of alternative rail service in F.D. 34802 and F.D. 34889.

7. Identify (name, address, telephone number, business title and company) (a) all persons having knowledge of discoverable matters, (b) all persons who provided information or answers or admissions (or denials) to this discovery request (indicating to which of the items their information was responsive), and (c) the authors of any documents furnished in the document requests if the identity of the person who prepared the document is not apparent on the face of the document.

8. Identify (name, address, telephone number, business title and company) any expert witness upon whom SAW intends to rely, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

9. (a) State length, weight, grade (reroll, relay, or scrap) and total tonnage of the rail, and the overall Net Liquidation Value of the track, other track material, ties; and (b) state the acreage and value per acre of the land for all trackage which SAW claims was used exclusively by WTL to provide rail service to PYCO during the period of alternative service pursuant to F.D. 34802 and 34889.

10. (a) State length of rail, weight, grade (reroll, relay, or scrap) and total tonnage of the rail, and the overall Net Liquidation Value of the track, other track material, ties; and (b) state the acreage and value per acre of the land , for all trackage which SAW claims it shared use with WTL during the period WTL provided alternative rail serviced to PYCO pursuant to F.D. 34802 and 34889.

11. If SAW contends that costs in respect to shared track should be distributed other than 50/50, state (a) the total car count (both for shippers served by SAW and for SAW storage customers) moving inbound over the shared track for the period of alternative rail service in F.D. 34802, other than the car count for PYCO, and (b) the total car count (both for shippers served

by SAW and for SAW car storage customers) moving outbound over the shared use track for the period of alternative rail service in F.D. 34889, other than the car count for PYCO.

12. If SAW contends that the date of movement is germane to SAW's compensation claim, then provide the data concerning inbound and outbound car counts requested in interrogatory 11 on whatever basis (daily, weekly, or monthly) it is available to SAW.

III.

Pursuant to 49 C.F.R. 1114.30, and the foregoing definitions and instructions, please supply the following documents:

1. All documents relating to any denial, partial denial, qualification, or limitation with respect to any Request for Admission above, including without limitation all documents which support or contradict the denial, partial denial, qualification or limitation.

2. For each maintenance activity or repair on or related to any trackage used by WTL to provide service to PYCO during the period of alternative rail service in F.D. 34802 and/or 34889, provide all documents (i) showing that SAW actually performed that maintenance activity or repair, (ii) the cost incurred by SAW, (iii) that the maintenance or repair was due to service provided by WTL to PCYO.

3. For each additional expense which SAW claims it incurred

by reason of WTL's providing rail service to PYCO pursuant to STB's authorizations in F.D. 34802 and F.D. 34889, provide all documents (i) showing that SAW actually incurred the expense, (ii) what the expense was for, and (iii) that the expense was due to service provided by WTL to PCYO.

4. For each actual variable cost claimed by SAW by reason of WTL's providing rail service to PYCO pursuant to STB's authorizations in F.D. 34802 and F.D. 34889, provide all documents (i) showing that SAW actually incurred the variable cost, (ii) what the variable cost was for, and (iii) that the variable cost was due to service provided by WTL to PCYO.

5. All documents relating to SAW's claim for compensation furnished by SAW to WTL or to PYCO, or by WTL or PYCO to SAW, or by SAW to STB, prior to SAW's filing its "petition" in F.D. 35111.

6. All documents relating to SAW's valuation of rail, other track material, ties, or land pursuant to interrogatories 9 and 10 above.

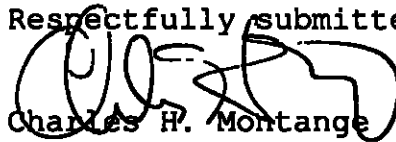
7. All documents provided to, or reviewed by, any witness for SAW, including any expert witness for SAW, in preparing any statement, table, or information for use by SAW in this proceeding.

8. All SAW records of expenses for calendar 2006 and calendar 2007 that show any variable cost incurred by SAW by

reason of the alternative service provided by WTL to PYCO pursuant to F.D. 34802 or F.D. 34889.

9. All documents (including but not limited to audit reports, tax returns, or spread sheets) prepared by an accountant or bookkeeper or other SAW employee or contractor to SAW showing any cost or expense that constitutes a variable cost relating to alternative rail service provided by WTL to PYCO pursuant to F.D. 34802 or F.D. 34889.

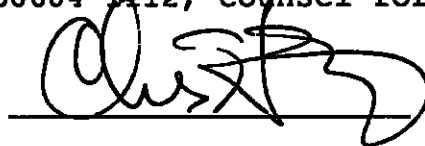
Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -2739
for PYCO Industries, Inc.

Certificate of Service

I hereby certify service by email transmission (mcfarland@aol.com), fax transmission (312-201-9695), and deposit for express delivery upon Thomas McFarland, 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112, counsel for SAW, this 14th day of January, 2008.



Discovery to SAW
(First Set)
14 Jan. 2008

Exhibit A

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	960
Track lead PYCO plant 2 to 50 th St	8,280
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.

Appendix II

BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD CO.)
-- COMPENSATION FOR USE OF) FINANCE DOCKET
FACILITIES IN ALTERNATIVE RAIL) NO. 35111
SERVICE -- WEST TEXAS AND)
LUBBOCK RAILWAY COMPANY)

RESPONSE TO DISCOVERY

SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby responds to First Set of Interrogatories and Document Requests (Discovery) submitted by PYCO Industries, Inc. (PYCO), received on January 14, 2008

SAW's responses are verified by Mr. Larry D. Wisener (verification page attached).

I. Responses To Requests For Admission

1 *SAW did not expend any money, or supply any labor or material, to maintain any track used by WTL to provide rail service to PYCO during the period of alternative rail service in F D 34802*

Response - Denied

2 *SAW did not expend any money, or supply any labor or material, to maintain any track used by WTL to provide rail service to PYCO during the period of alternative rail service in F.D. 34889.*

Response - Denied

3. *SAW did not incur any actual additional expenses arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F D 34802*

Response - Admitted

4. *SAW did not incur any actual additional expenses arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F.D. 34889*

Response - Admitted

5. *SAW did not incur any actual variable costs arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F D 34802*

Response - Denied

6. *SAW did not incur any actual variable costs arising from the rail service provided by WTL to PYCO during the period of alternative rail service in F.D. 34889.*

Response - Denied

7. *The document attached as Exhibit A is a document furnished by SAW to WTL which purports to state the trackage used by WTL to furnish rail service to PYCO during the period of alternative rail service in F D 34802, and is genuine*

Response - Admitted

8. *The trackage used by WTL to provide service to PYCO during the period of alternative rail service in F D 34802 and the period of alternative rail service in F D 34889 is as stated in the document attached as Exhibit A.*

Response - Admitted

9. *The document attached as Exhibit B (and dated June 12, 2006) is a document furnished by SAW to PYCO in response to an interrogatory (#5b), and is genuine*

Response - Admitted

10. *For purposes of Finance Docket 35111, SAW does not contest the unit values for salvage, including valuation for each grade of rail and for other track material, for take-up, and for contractor overhead as found by STB in its Decision served August 31, 2007*

Response - Admitted

II. Responses to Interrogatories

1. *In the event any request for admission above is denied in whole or in part, or is admitted subject to a qualification or limitation, please state all grounds for denial or partial denial, or qualification or limitation, including all evidence relied upon for the denial, partial denial, qualification or limitation*

Response - as to Request Nos 1, 2, 5 and 6, SAW provided maintenance of portions of Track 9298

2. *(a) Did SAW perform any actual maintenance or repair, or cause to be performed any actual maintenance or repair, on the track employed by WTL to furnish rail service to PYCO during (i) the period of alternative rail service in F D 34802, and/or (ii) the period of alternative rail service in F D 34889*

Response - (a) yes to both (i) and (ii)

(b) If the answer to 2(a) is "yes," then for each item of maintenance or repair, indicate (i) the date or dates of such maintenance or repair, (ii) the approximate location, (iii) the nature of the work performed, (iv) the identity (name and address) of the person or persons performing the maintenance or repair, (v) the identity (name and address) of the person or person who requested the repair, (vi) all material used in the maintenance or repair, (vii) the actual cost of the repair or maintenance, and (viii) an itemization of the actual cost showing how it was derived.

(b) SAW declines to respond on the ground that the interrogatory is unduly broad and preparation of a response would be unduly burdensome.

3. *(a) Does SAW claim that it incurred additional expenses (other than as addressed in interrogatory 2 above) by reason of the alternative rail service WTL provided PYCO during (i) the period of alternative rail service in F.D. 34802 and/or (ii) the period of alternative rail service in F D 34889?*

Response - (a) no

(b) If the answer to 3(a) is "yes," then for each item of additional expense, indicate (i) the date or dates of such expense, (ii) the approximate location(s) for which the expense was incurred, (iii) the nature of the expense, including all reasons why SAW attributes the expense to rail service provided by WTL to PYCO, (iv) the amount of the actual expense, (v) an itemization

of the actual cost showing how it was derived and (vi) the name and address of any person who calculated the expense.

(b) Not applicable

4 (a) *Does SAW have any cost data supporting a claim, if SAW makes or may make, such a claim, for any actual variable cost incurred by reason of rail service provided by WTL to PYCO pursuant to F D. 34802 and/or F.D. 34889?*

Response - (a) SAW will not make such a claim.

(b) *If the answer to 4(a) is "yes," then for each item of cost data, describe it stating the nature of the cost, and the basis on which SAW claims it results from rail service provided by WTL to PYCO*

Response - (b) Not applicable

5. *State all actual variable costs claimed by SAW by reason of the alternative rail service provided by WTL to PYCO pursuant to F D 34802 and/or F D 34889, and for each such costs, provide the basis on which SAW claims it was caused by service provided by WTL to PYCO*

Response - SAW will not claim any variable costs.

6 *IF SAW does not admit Request for Admission number 8 above, state in detail the track, track material and ties, that SAW claims were used exclusively by WTL to provide service to PYCO pursuant to F.D 34802 and F D 34889, and were shared between WTL and PYCO during the period of alternative rail service in F D. 34802 and F.D. 34889*

Response - Not applicable

7. *Identify (name, address, telephone number, business title and company) (a) all persons having knowledge of discoverable matters.*

Response - (a) Larry D Wisener, P O Box 64299, Lubbock, TX, (806) 828-4841,

President of SAW.

(b) *all persons who provided information or answers or admissions (or denials) to this discovery request (indicating to which of the items their information was responsive), and*

Response - (b) Larry D. Wiscner, P.O. Box 64299, Lubbock, TX, (806) 828-4841,

President of SAW

(c) the authors of any documents furnished in the document requests if the identity of the person who prepared the document is not apparent on the face of the document

Response - (c) no documents provided

8. *Identify (name, address, telephone number, business title and company) any expert witness upon whom SAW intends to rely, the subject matter on which he or she is expected to testify, and the substance of his or her testimony*

Response - Dennis W. Olmstead, Transportation Consultant, 1124 South 11th Street, Montrose, CO 81401, (970) 249-4099, the going charge for use of trackage in the area is \$75 per car

9. *(a) State length, weight, grade (reroll, relay, or scrap) and total tonnage of the rail, and the overall Net Liquidation Value of the track, other track material, ties, and (b) state the acreage and value per acre of the land for all trackage which SAW claims was used exclusively by WTL to provide rail service to PYCO during the period of alternative rail service pursuant to F.D. 34802 and 34889*

Response - (a) and (b) see net liquidation value provided in August 31, 2007 decision in feeder line case.

10. *(a) State length of rail, weight, grade (reroll, relay, or scrap) and total tonnage of the rail, and the overall Net Liquidation Value of the track, other track material, ties, and*

Response - (a) as stated in Exhibit A

(b) state the acreage and value per acre of the land, for all trackage which SAW claims it shared use with WTL during the period WTL provided alternative rail serviced to PYCO pursuant to F.D. 34802 and 34889

Response - see Response 10(a)

11. *If SAW contends that costs in respect to shared track should be distributed over than 50/50, state (a) the total car count (both for shippers served by SAW and for SAW storage customers) moving inbound over the shared track for the period of alternative rail service in*

F D. 34802, other than the car count for PYCO, and (b) the total car count (both for shippers served by SAW and for SAW car storage customers) moving outbound over the shared use track for the period of alternative rail service in F D 34889, other than the car count for PYCO.

Response - SAW declines to respond on the ground that the requested information is available to PYCO through West Texas & Lubbock Railway Company (WTLC), which received all inbound interchanges.

12. *If SAW contends that the date of movement is germane to SAW's compensation claim, then provide the data concerning inbound and outbound car counts requested in interrogatory 11 on whatever basis (daily, weekly, or monthly) it is available to SAW*

Response - SAW does not so contend

III. Responses To Requests to Produce Documents

1. *All documents relating to any denial, partial denial, qualification, or limitation with respect to any Request for Admission above, including without limitation all documents which support or contradict the denial, partial denial, qualification or limitation.*

Response - there are no such documents.

2. *For each maintenance activity or repair on or related to any trackage used by WTL to provide service to PYCO during the period of alternative rail service in F D 34802 and/or 34889, provide all documents (i) showing that SAW actually performed that maintenance activity or repair,*

Response - (i) there are no such documents.

(ii) the cost incurred by SAW, (iii) that the maintenance or repair was due to service provided by WTL to PYCO

Response - (ii) there are no such documents

(iii) that the maintenance or repair was due to service provided by WTL to PYCO

Response - (iii) there are no such documents.

3. *For each additional expense which SAW claims it incurred by reason of WTL's providing rail service to PYCO pursuant to STB's authorizations in F.D 34802 and F D 34889, provide all documents (i) showing that SAW actually incurred the expense,*

Response - (i) there are no such documents.

(ii) *what the expense was for, and*

Response - (ii) there are no such documents.

(iii) *that the expense was due to service provided by WTL to PYCO.*

Response - (iii) there are no such documents.

4 *For each actual variable cost claimed by SAW by reason of WTL's providing rail service to PYCO pursuant to STB's authorizations in F D 34802 and F D. 34889, provide all documents (i) showing that SAW actually incurred the variable cost, (ii) what the variable cost was for, and (iii) that the variable cost was due to service provided by WTL to PYCO*

Response - SAW has not claimed any such variable cost.

5 *All documents relating to SAW's claim for compensation furnished by SAW to WTL or to PYCO, or by WTL or PYCO to SAW, or by SAW to STB, prior to SAW's filing its "petition" in F D. 35111*

Response - SAW declines to respond on the ground that all such documents are already in the possession of PYCO as evidenced by PYCO's reference to such documents.

6. *All documents relating to SAW's valuation of rail, other track material, ties, or land pursuant to interrogatories 9 and 10 above*

Response - there are no such documents.

7. *All documents provided to, or reviewed by, any witness for SAW, including any expert witness for SAW, in preparing any statement table, or information for use by SAW in this proceeding*

Response - SAW declines to respond on the ground that SAW's Petition made all such documents available to PYCO

8 *All SAW records of expenses for calendar 2006 and calendar 2007 that show any variable cost incurred by SAW by reason of the alternative service provided by WTL to PYCO pursuant to F.D 34802 or F.D 34889*

Response - SAW has not claimed compensation for variable costs

9. *All documents (including but not limited to audit reports, tax returns, or spreadsheets) prepared by an accountant or bookkeeper or other SAW employee or contractor to SAW showing any cost or expense that constitutes a variable cost relating to alternative rail service provided by WTL to PYCO pursuant to F D 34802 or F D 34889*

Response - SAW has not claimed compensation for variable costs.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P O Box 64299
Lubbock, TX 79464-4299

Thomas F McFarland

THOMAS F McFARLAND
THOMAS F McFARLAND, P C
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Its Attorney

Dated: February 1, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2008, I served the foregoing document, Response to Discovery, on Charles H. Montange, Esq., 426 N.W. 162nd Street, Seattle, WA 98177, *c montange@verizon net* by e-mail and UPS overnight mail (Monday delivery).

Thomas F McFarland

Thomas F McFarland

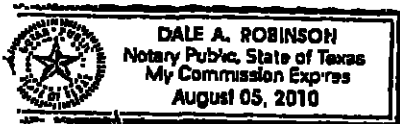
VERIFICATION

STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

LARRY D. WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.

Larry Wisener
LARRY D. WISENER

SUBSCRIBED AND SWORN TO before me on this the 28 day of January, 2008.



Dale A. Robinson
NOTARY PUBLIC

My Commission Expires: August 05, 2010

Appendix III

CHAS MONTANGE

From: <mcfarland@aol.com>
To: <c.montange@verizon.net>
Sent: Monday, February 04, 2008 7:46 AM
Subject: SAW discovery responses

Hi, Charles. The discovery responses that you refer to are not inconsistent, or at least were not meant to be. SAW did incur maintenance costs as stated, but does not intend to rely on those costs as justification for the compensation that it will claim. I hope that clears it up.

Tom

More new features than ever. Check out the new AOL Mail!

2/5/2008

CHAS MONTANGE

From: "CHAS MONTANGE" <c.montange@verizon.net>
To: <tmcfarland@ameritech.net>
Sent: Friday, February 01, 2008 2:58 PM
Subject: Re: SAW's Response to PYCO's Discovery

Hello Tom. Thank you for the response to PYCO's initial discovery request. As I read the response, SAW indicates it does not intend to claim any variable cost, which broadly would include maintenance costs. Is this correct? If SAW does intend to claim for any maintenance cost on track 9298, then I must request that you reconsider the objection to interrogatory 2(b). If SAW is not waiving a claim for costs here, then the interrogatory is highly relevant, and not overbroad. Moreover, it is not burdensome for Mr. Wisener (whom your answers indicate is the only person with knowledge) to indicate what he knows. If he has no actual cost, then he should state what he did, and give a cost estimate, and indicate approximately where (which side of the BNSF mainline at least) and approximately when. In short, if SAW intends to claim for maintenance costs on 9298, we should get a real answer to interrogatory 2(b). Since we are facing a filing deadline, I would appreciate it if you could clarify on Monday so I can determine how to proceed at STB. Thanks.

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

From: <tmcfarland@ameritech.net>
To: "Charles Montange" <c.montange@verizon.net>
Sent: Friday, February 01, 2008 8:25 AM
Subject: SAW's Response to PYCO's Discovery

> Sent by Thomas F. McFarland. Please open the attached document. It was
 > scanned and sent to you using a Xerox WorkCentre Pro.

>
 > Sent by: Guest [tmcfarland@ameritech.net]
 > Number of Images: 10
 > Attachment File Type: PDF

>
 > WorkCentre Pro Location: Chicago, IL
 > Device Name: Thomas F. McFarland, P.C.

>
 >
 > For more information on Xerox products and solutions, please visit
 > <http://www.xerox.com>

>

Appendix IV

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Second Declaration of Montey Sneed

I, Montey Sneed, make this Second Declaration pursuant to 28 U.S.C. 1746 in support of the Opening Statement 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). The purpose of this Declaration is to deliver my expert opinion on the Net Liquidation Value (NLV) of the assets then-owned by SAW used by WTL to provide alternative service to PYCO pursuant to Finance Dockets 34802 and 34889.

1. I previously prepared a Declaration in this proceeding providing an NLV for the track, ties, and other track material used by WTL to provide alternative rail service to PYCO pursuant to authority granted in Finance Dockets 34802 and 348879. In preparing that valuation, I did not personally inspect the track used, but instead assumed that it contained all the heavy rail and relay quality rail which SAW asserted in its submissions in other dockets existed throughout the SAW system. I made this assumption in order to provide an upper bound for the possible

NLV, inasmuch as I could not arrange to inspect the trackage prior to finalizing my initial Declaration.

2. At the request of PYCO, on January 28, 2008, I personally did a ground inspection of the trackage used by WTL to provide alternative rail service to PYCO in pursuant to the authority granted in Finance Dockets 34802 and 34889. Based on that personal on-the-ground inspection, I attest that there is no rail heavier than 90 pounds on the former SAW tracks used by WTL to provide alternative service to PYCO. Moreover, all switches (other than those repaired by PYCO since PYCO's acquisition of the property in November) are essentially worn out. Finally, based on interviews with WTL operating personnel (to confirm which trackage was employed for alternative service), I learned that WTL had used Track 310 only twice, due to congestion or interference by SAW. Since WTL in effect did not use Track 310, it is not appropriate to value it for compensation purposes. (Track 310 runs through the Farmers Co-op Compress, and was used by SAW to serve Compress.)

3. As I indicated in my first Declaration, SAW furnished the following information concerning use of tracks shared by both SAW and WTL:

Shared use (by SAW and by WTL):

Track 9298 (to SAW yard):	5000 feet
Track 231 lead:	960

Lead PYCO Plant 2 to 50th St.: 6280

Track 310 through Farmers Coop: 5600

Total Shared Use - 17,840

Track 310 should be deleted for the reasons stated, so the actual shared use track is 12,240 feet total. As indicated in my first Declaration, SAW originally proposed a 50/50 split. 50% of 12,240 feet is 6,120 feet. I will thus use 6,120 feet to calculate the NLV for which WTL and PYCO may be responsible for reimbursement pursuant to this Board's decisions.

4. 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): 4320 feet

Total: 12,720 feet

5. 12,720 (exclusive use) plus 6,120 (PYCO's share of the shared use trackage) equals 18,840 feet of trackage.

6. Based on my inspection, the trackage in question is all 90# or less. For ease of presentation, I will assume arguendo (and favorably to SAW) that the trackage is all 90#. Although I believe much of the trackage is scrap, I will assume arguendo (and favorably to SAW) that it is all re-roll quality. I will

only value other track materials at scrap value. I will use the same values per ton as the Board adopted in its decision valuing the trackage in Finance Docket 34890. This use is reasonable since the valuation in F.D. 34890 was based on track values during the relevant period of alternative rail service. Based on personal inspection, the ties are at best a wash (cost to dispose the rotten ties is at least as great as the value of the remaining ties for landscape or relay).

7. My calculation of NLV for the exclusive use trackage is as follows:

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

8. My calculation for PYCO's share of the shared use track is as follows:

PYCO Portion of Shared Use (6120 feet)

Rail	90	Reroll	183.59	330	60,583.25
Tie Plates	90	Scrap	19.90	245	4,875.50
Angle Bars	90	Scrap	7.44	245	1,822.80

Ties wash

Total gross sales: 67,281.44

Gross sales: 67,281.55

Less take-up and freight for

210.93 tons at \$75/ton = \$15,819.75

Less salvager overhead and

profit at 15% = 7,719.27

Net liquidation value: \$ 43,742.53

9. From the prior two paragraphs, it follows that the total NLV for SAW track assets used to provide service to PYCO is thus: 93,775.41 plus 43,742.53 = \$ 137,517.94.

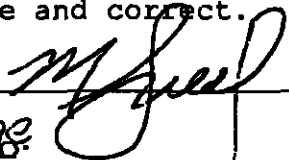
10. It is my understanding that PYCO and WTL calculated the NLV for land, using numbers employed by STB in the valuation proceeding (Fin. Dkt. 34890) to be \$83,640 for 24.6 acres. The data is set forth at p. 34 of the PYCO and WTL Reply in F.D. 35111 served Jan. 3, 2008. Based on my familiarity with the trackage, this estimate of acreage is fair and reasonable, and as noted, the value per acre is based on evidence already relied upon by STB. Adding \$137,517.94 to 83,640 equals \$221,157.94 for total NLV.

11. The railroad cost of capital was 10.1 % per STB's decision in Ex Parte 558 (Sub-no. 8), served June 20, 2005, and 12.2% per Ex Parte 558 (Sub-no. 9), served Sept. 20, 2006. During F.D. 34802, WTL used SAW track for alternative service from January 26 to November 22, 2006 or 301 days (.825 year). Of that time, 228 days (.625 year) elapsed in F.D. 34802 when the capital cost was 10.1%, and 73 days (.2 year) when it was 12.2%. The total period for F.D. 34889 service was Nov. 23, 2006 to Nov. 9, 2007, or 351 days (.962 year). The cost of capital was 12.2% throughout this period.

12. Calculating a reasonable return to SAW thus is matter of arithmetic: $\$221,157.94 \text{ times } [(.625)(.101) + (.2)(.122) + (.962)(.122) = 221,157.94 [(.063) + (.024) + (.117)] = 221,157.94 \text{ times } (.204) = \$45,116.22$. Any amount in excess of this is profit in the absence of actual costs, and it is my understanding, based on SAW's answers to PYCO's interrogatories, that SAW is claiming no variable costs. They state none. Since maintenance is the responsibility of the incumbent railroad, WTL and PYCO may be entitled to set-off's for costs they incurred by reason of SAW's failure to maintain.

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:

Feb. 3, 2008 

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Appendix V

discovery**CHAS MONTANGE**

From: "CHAS MONTANGE" <c.montange@verizon.net>
To: <mcfarland@aol.com>
Cc: "Gary McLaren" <gmclaren@sbcglobal.net>
Sent: Monday, January 21, 2008 2:20 PM
Attach: Pyco second set discovery to SAW wp, Pyco second set discovery to SAW pdf
Subject: Emailing. Pyco second set discovery to SAW

To: Tom McFarland, for SAW

Enclosed please find an email attachment with some additional discovery by PYCO to SAW

Your message is ready to be sent with the following file or link attachments:

Pyco second set discovery to SAW

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

1/21/2008

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Interrogatories and Document Requests
(second set)
to
South Plains Switching Ltd. Co.

These discovery requests are tendered on behalf of PYCO Industries, Inc. (PYCO) to South Plains Switching Ltd., Co. (SAW), the petitioner in this proceeding, pursuant to 49 C.F.R. 1114.27 (requests for admission); 49 C.F.R. 1114.26 (interrogatories); and 49 C.F.R. 1114.30 (document requests).

Instructions. 1. Please answer all interrogatories and document requests not less than fifteen days from service thereof, and all requests for admission will be deemed admitted unless within 15 days after service, SAW serves a written answer or objection addressed to the matter. All discovery responses should be made in accordance with the provisions of sections 1114.26-.27 and 1114.30 for interrogatories, admissions, and document requests respectively. Answers and objections should be served upon counsel for PYCO (Mr. Montange). Please make all documents available by express delivery to counsel for PYCO (Charles H. Montange, 426 NW 162d St., Seattle, WA 98177) not less than fifteen days from service of the enclosed requests. PYCO agrees to pay reasonable copying and express delivery

expenses.

2. SAW has a duty to supplement the discovery response provided herein pursuant to 49 C.F.R. 1114.29. PYCO notes that under STB's procedural schedule, both SAW and PYCO must tender their opening statements on Monday, February 11, 2008. Should any response by SAW within 15 days to the service of these discovery requests be rendered incorrect or inconsistent with SAW's opening statement, then please provide a supplemental response by no later than the following Monday, February 18, 2008.

Definitions. For purposes herein, the word "document" shall include all electronic recordings, emails, maps, charts, schematics, notes and all written materials of any sort, and shall include documents in the possession of SAW, its officers, directors, employees, agents or contractors.

"SAW" means petitioner.

"STB" means Surface Transportation Board.

"WTL" means West Texas & Lubbock Railway.

"F.D. 34802" refers to STB Finance Docket 34802.

"F.D. 34889" refers to STB Finance Docket 34889.

"Period of alternative rail service in F.D. 34802" shall mean the time from STB authorization of WTL service to PYCO in F.D. 34802 (11:59 P.M. on January 26, 2006) until the conclusion of WTL service to PYCO in F.D. 34802 (11:59 P.M. on November

November 22, 2006). "Period of alternative rail service in F.D. 34889" shall mean the time from STB authorization of WTL service to PYCO in F.D. 34889 (12:00 A.M. on November 23, 2006) until the closing of the sale of SAW assets to PYCO pursuant to the STB decision in Fin. Dkt. 34890, served August 31, 2007 (i.e., 11:59 P.M., November 9, 2007).

"Variable costs" means those costs that change with the amount of rail traffic a railroad carrier handles. "Fixed costs" means those costs that do not change with the amount of rail traffic a railroad carrier handles.

"URCS" shall have the meaning given it by STB at page 6 of its decision in Finance Docket 35111 served January 11, 2008.

"Shared track" or "shared use track" shall mean track over which both SAW and WTL operated during the alternative rail service under F.D. 34802 and F.D. 34889.

I.

Pursuant to 49 C.F.R. 1114.26 and the foregoing definitions and instructions, please answer the following interrogatories:

1. If SAW contends that rental or payments that SAW or any other railroad receives for trackage and related right of way is relevant to the establishment of compensation in this proceeding, then

a) list all leases or other rental or compensation agreements (collectively referred to herein as "leases") relied upon by SAW

for purposes of its claims, providing (i) the name of the lessor, (ii) the name of the lessee, (iii) the date the lease was entered, (iv) the term (monthly, yearly, etc.) of the lease, (v) the property covered by the lease (providing length of trackage, weight of rail, amount of land), (vi) the purpose of the lease (for shipments, for railcar storage, or for non-rail purposes), (vii) all other revenue received from the lessee by the lessor or an affiliated entity, (viii) the basis for the rental or compensation amount, and (ix) all lease payments made, including date and amount.

2. For each lease or other arrangement provided in response to interrogatory 2 above, indicate how and where that lease or arrangement provides evidence of any cost incurred by SAW arising due to alternative rail service provided by WTL to PYCO pursuant to F.D. 34802 or F.D. 34889.

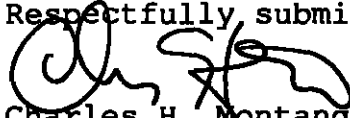
III.

Pursuant to 49 C.F.R. 1114.30, and the foregoing definitions and instructions, please supply the following documents:

1. All documents relating to, and including, any lease, rental agreement or similar compensation agreement with regard to trackage and related right of way in which SAW, Choo Choo Properties Inc. or South Plains Lamesa Railroad is lessor or is the recipient of compensation (including one-time or nominal compensation).

2. All documents describing the basis of the \$75/carload fee which SAW claims BNSF agreed to pay SAW for service to Jarvis at Burris, including but not limited to all pleadings by SAW in any court relating to that service.

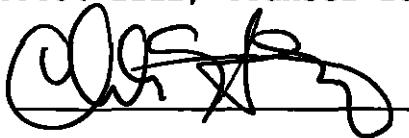
Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739
for PYCO Industries, Inc.

Certificate of Service

I hereby certify service by email transmission (mcfarland@aol.com), fax transmission (312-201-9695), and deposit for express delivery upon Thomas McFarland, 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112, counsel for SAW, this 21st day of January, 2008.



Appendix VI

BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD. CO.	)	
-- COMPENSATION FOR USE OF	)	FINANCE DOCKET
FACILITIES IN ALTERNATIVE RAIL	)	NO. 35111
SERVICE -- WEST TEXAS AND	)	
LUBBOCK RAILWAY COMPANY	)	

RESPONSE TO SECOND SET OF DISCOVERY

SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby responds to a second set of discovery received from PYCO Industries, Inc. (PYCO) on or about January 21, 2008.

Response To Interrogatories

1. *If SAW contends that rental or payments that SAW or any other railroad receives for trackage and related right of way is relevant to the establishment of compensation in this proceeding then (a) list all leases or other rental or compensation agreements (collectively referred to herein as "leases") relied upon by SAW for purposes of its claims, providing (i) the name of the lessor, (ii) the name of the lessee, (iii) the date the lease was entered, (iv) the term (monthly, yearly, etc.) of the lease, (v) the property covered by the lease (providing length of trackage, weight of rail, amount of land), (vi) the purpose of the lease (for shipments, for railcar storage, or for non-rail purposes), (vii) all other revenue received from the lessee by the lessor or an affiliated entity, (viii) the basis for the rental or compensation amount, and (ix) all lease payments made, including date and amount.*

Response - SAW does not contend that rental or payments that SAW received or receives for use of trackage and related right-of-way are relevant to the establishment of compensation in this proceeding. SAW contends that payments that BNSF Railway made to SAW for use of trackage and right-of-way at Burris, TX are relevant to the establishment of compensation in this proceeding. Details regarding BNSF's payments to SAW for such use are contained in SAW's

Petition in this proceeding, filed on December 13, 2007. SAW is not familiar with the details of any other payments for use of any other trackage and right-of-way.

2. *For each lease or other arrangement provided in response to interrogatory 2 above, indicate how and where that lease or arrangement provides evidence of any cost incurred by SAW arising due to alternative rail service provided by WTL to PYCO pursuant to F.D. 34802 or F D 34889.*

Response - Payments made by BNSF to SAW for use of SAW's trackage and right-of-way at Burris, TX provide evidence of the fair market value of use of such trackage and right-of-way in the subject territory SAW believes that such payments cover all of SAW's costs associated with such trackage and right-of-way. SAW does not understand what is meant by "how and where" such payments provide evidence of SAW's cost arising from alternative rail service.

Response to Document Requests

1. *All documents relating to, and including, any lease, rental agreement or similar compensation agreement with regard to trackage and related right of way in which SAW, Choo Choo Properties Inc or South Plains Lamesa Railroad is lessor or is the recipient of compensation (including one-time or nominal compensation).*

Response - the only such document known to SAW is the agreement between BNSF and SAW providing for payment by BNSF for use of such trackage and right-of-way at Burris, TX. A copy of that agreement was filed as part of SAW's Petition in this proceeding on December 13, 2007.

2. *All documents describing the basis of the \$75/carload fee which SAW claims BNSF agreed to pay SAW for service to Jarvis at Burris, including but not limited to all pleadings by SAW in any court relating to that service.*

Response - SAW does not know of any documents that describe the basis of the \$75-per-car payment by BNSF

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Thomas F McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Its Attorney

Dated: February 5, 2008

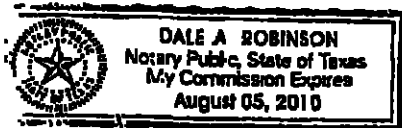
VERIFICATION

STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

LARRY D. WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.


LARRY D. WISENER

SUBSCRIBED AND SWORN TO before me on this the 28 day of January, 2008.




NOTARY PUBLIC

My Commission Expires: August 05, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2008, I served the foregoing document, Response to Second Set of Discovery, on Charles H. Montange, Esq., 426 N.W. 162nd Street, Seattle, WA 98177, *c montange@verizon.net* by e-mail and UPS overnight mail.

Thomas F. McFarland

Thomas F. McFarland

Appendix VII

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Verified Statement of
Charles H. Banks

I, Charles Banks, am a railroad economist at, and President of, R.H. Banks & Associates, a nation-wide consulting firm focusing exclusively on railroad transportation issues. After reviewing SAW's initial petition, the PYCO/West Texas & Lubbock Railway or "WTL" reply, SAW's response to PYCO's discovery and related emails between PYCO and SAW counsel, and the various exhibits to the above, I make this Verified Statement at the request of PYCO Industries, Inc., for use in the above-captioned proceeding and as an expression of my expert opinion.

1. In this Board's decision served January 11, 2008, at page 6, the Board indicated that the standard reimbursement of an incumbent railroad during a period of alternative service was designed to compensate for the following three elements: a) variable cost to the incumbent resulting from the alternative supplier's use of the incumbent's tracks; b) the alternative supplier's "proportionate share" of maintenance costs and c) an interest or rental component to compensate the incumbent for the alternative supplier's use of the incumbent's capital as manifest in the trackage used by the alternative supplier. This formulation is consistent with compensating the incumbent for any services it actually provides by reason of the alternative service provider's actions.

2. Also on page 6, this Board indicated that use of regional URCS data would be appropriate in the absence of "fully supported actual cost data." Regardless of whether the STB and the parties apply SAW-specific or the less accurate regional averages inherent in URCS, there are no theoretical, economic grounds supporting SAW's additional financial demand unless SAW incurred any actual costs as a result of the Board's decisions. PYCO and WTL submitted evidence that SAW incurred no variable or maintenance costs and, indeed, refused to perform maintenance, taking the position that was an obligation of WTL. SAW, in its discovery responses, concedes it did not incur variable costs by reason of WTL alternative service and although SAW claims to have performed some unspecified maintenance to one track (9298), it indicates no intent to rely on that for purposes of justifying compensation. (If it were to rely on said, unspecified maintenance, then, presumably, it should provide the detail PYCO sought on any maintenance SAW claimed to have performed.)

3. "Variable costs" are costs that change as service levels change (like fuel consumption). Based on the filings to date in this proceeding, SAW did not incur any variable costs due to alternative rail service provided by the alternative supplier (WTL). For example, WTL's witness (Mr. Gregory), in his statement at paragraph 3, says SAW provided no services to WTL or PYCO. Therefore, it would never be appropriate to use regional URCS data to compute an alleged variable cost where no such cost was actually incurred. That would be tantamount to awarding a "profit" to the incumbent railroad and the Board already has decided that there is no basis for such an award in this instance. From the perspective of economic theory, there can be

no justification for relying on regional URCS data to conjure up a cost that was never incurred.

4. Based on the information in the record, SAW did not perform any maintenance on the trackage used to provide alternative rail service or at least any maintenance sufficient for it to rely upon for purposes of claiming a cost. For the same reason that it is not appropriate to award imaginary variable costs to SAW when it did not incur any, it is inappropriate to award any maintenance costs to SAW when it did not perform any maintenance on the track in question or where, as here, SAW claims it is not relying on the limited maintenance it claims to have performed on unidentified portions of track 9298. Any such award would amount to awarding SAW with a "profit."

5. Based on the information in the record, the only compensation that SAW may claim appropriately is that in connection with WTL's use of its trackage. This customarily is based on Net Liquidation Value of the trackage multiplied by the owning railroad's cost of capital or a reasonable surrogate therefore. Anything in excess of that amount would amount to awarding SAW a "profit."

6. The Board has indicated that "profit" should not be awarded as part of a compensation package in alternative service scenarios. This is a sensible result in my judgment.

7. The record so far in this proceeding shows that WTL provided services to and incurred costs on behalf of SAW: in particular, WTL shuttled cars from the BNSF yard to the SAW yard not only for PYCO but also for the benefit of SAW's other customers. According to WTL, SAW did not compensate WTL for this service. SAW, otherwise, would have had to perform such work on its own and incurred costs. This in effect

means that WTL incurred additional costs that benefited SAW and its customers. Unless SAW, elsewhere, has compensated WTL for its incurrence of such costs, they are a legitimate economic offset to any claim for reimbursement on the part of SAW.

9. In addition, the record so far in this proceeding indicates that WTL, in providing alternative service, sustained a derailment due to SAW's failure to maintain its trackage. While maintenance costs may be appropriately apportioned between the parties, the cost of a derailment due to insufficiently maintained trackage is attributable to the party that should have provided maintenance. This Board, in both Finance Docket 34882 (Decision served June 21, 2006, at page 8) and 34889 (Decision served November 21, 2006, at page 6, declining to authorize independent entities to inspect/repair), indicated that SAW was responsible for providing maintenance. Thus, from an economic point of view, the cost of derailments due to poor track maintenance by SAW should be an offset to any compensation which otherwise might be due to SAW.

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.

Charles H. Banks

Executed on: February 8, 2008.

Appendix VIII

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IFM

PAGE 02/03

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Second Declaration of Stephen Gregory

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

1. According to WTL records, WTL pulled 1919 cars inbound from the BNSF yard to the SAW yard for SAW customers (other than FYCO) during the period 11:59 PM Jan. 26, 2006 to 12 AM on November 23, 2006 (Finance Docket 34802), and 1916 from November 24, 2006 to the end of November 9, 2007 (Finance Docket 34889). SAW may have had other traffic; however, this was a service WTL provided to SAW for which SAW did not compensate WTL. WTL claims compensation for it as a set-off against any compensation awarded SAW.

2. In contrast to SAW which did not provide any service to WTL or incur variable costs by reason of WTL's service to FYCO, WTL did incur variable costs (e.g., labor, fuel) to provide this service to SAW. WTL should be awarded a set off at whatever rate, if any, is set for SAW.