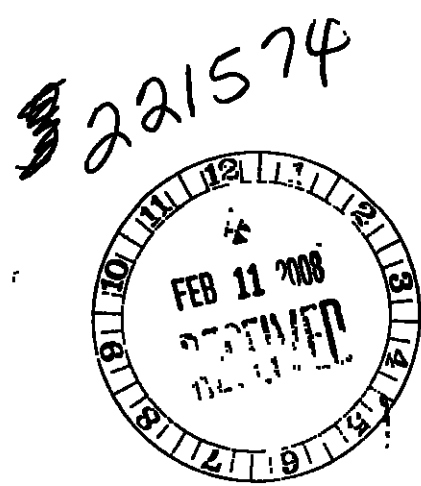


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8 February 2008
by express service

ENTERED
Office of Proceedings

FEB 11 2008

Part of
Public Record

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

Re: PYCO Industries, Inc. - Feeder Line Application -
South Plains Switching Ltd. Co., F.D. 34890

Verified Motion for Enforcement or Clarification
and Other Appropriate Relief

Expeditious Treatment Requested

Dear Madam Secretary:

Enclosed on behalf of PYCO Industries, Inc. (PYCO) please find for filing in Finance Docket 34890 (feeder line proceeding) the original and ten copies of a Verified Motion for Enforcement and other relief. On November 9, 2007, PYCO closed its purchase of all of South Plains Switching Ltd. (SAW) pursuant to this Board's order in F.D. 34890 served August 31, 2007. Commencing in January shortly after PYCO indicated that it would not voluntarily pay SAW \$75/carload as SAW demanded in another proceeding, SAW has asserted that it did not transfer to PYCO (a) switches (including Switch 310) necessary to provide service to shippers on the line, (b) property at Burris, and (c) track 21 (Acme lead) and possibly other trackage. All this trackage was included in the SAW inventory filed in this feeder line proceeding, and valued as part of the sale not just by PYCO, but by SAW and this Board as well. Moreover, SAW's counsel represented that the transfer instruments he prepared transferred all that SAW had received from BNSF. .

Reason for expeditious treatment. SAW this week filed a suit in state court seeking a Temporary Restraining Order (TRO) to block PYCO from using Switch 310, and an initial hearing has evidently been scheduled for Tuesday, February 12. While PYCO as a legal matter believes that suit is among other things an attack on this Board's jurisdiction and August 31 order, PYCO as a factual matter is certain that Switch 310 is vital to serve its

customers Attebury and Compress. In order to prevent disruption of service to those two rail shippers, PYCO requests expeditious treatment of this Motion. This Board's action will serve to clarify that state court intervention is inappropriate. Moreover, PYCO's motion is straightforward, merely seeking to enforce and to ensure that SAW conveys what it represented it owned, what all parties and this Board valued, and what PYCO paid for: all of SAW. SAW should not be permitted to continue to disrupt rail service in Lubbock through spurious after-the-fact claims and suits.

PYCO has designated Attachment V as "highly confidential" under the applicable protective order and is submitting it under seal.

By my signature below, I certify service of a copy of the motion 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)

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. --)
Feeder Line Application --) F.D. 34890
Lines of South Plains Switching, Ltd. Co.)

Expeditious Treatment Requested

Verified Motion
for
Enforcement or Clarification
and Other Appropriate Relief

On November 9, 2007, PYCO Industries, Inc. (PYCO), acquired the lines of South Plains Switching, Ltd. (SAW), pursuant to this Board's Decision served August 31, 2007, in F.D. 34890, as supplemented by a settlement agreement entered into between PYCO, SAW, and Choo Choo Properties, Inc., on September 20, 2007. PYCO commenced operations (through a contract carrier) on the former SAW lines at 12:01 AM on November 10, 2007.

Since that time, the former incumbent railroad (SAW) has taken a variety of actions to disrupt rail service by PYCO for itself and its customers. These actions are directly contrary to this Board's Decision in this proceeding served August 31, 2007.

Matters indeed have reached a point that SAW is seeking to bar PYCO from access to tracks necessary to served two customers (Attebury Grain and Farmers Compress) that supported PYCO's feeder line application in this proceeding. PYCO has no choice but to request this Board's intervention to prevent SAW not only from continuing its retaliatory vendetta against PYCO and other

rail customers in Lubbock but also from obstructing PYCO's efforts to provide rail service as contemplated in the aforementioned August 31 Decision. Because of SAW's threat to cut off PYCO's ability to serve Attebury and Compress via Track 310 and Switch 310, PYCO has little choice but to seek expeditious treatment for this motion.

While SAW has taken a number of disruptive positions (and if the future is like the past, will doubtless take more), PYCO will focus on three of SAW's recent "attacks" which appear to PYCO unequivocally in violation of this Board's August 31 Decision, as well as other Decisions:

- (1) SAW's continued claims to switches (turnouts) including especially No. 310;
- (2) SAW's continued claims to the Burris trackage; and
- (3) the Wisener family's claim to continued ownership of the Track 21 (Acme lead adjacent to PYCO's plant no. 1 and the former) SAW, now PYCO, railyard in Lubbock.

The relief sought herein is appropriate implementation of this Board's Decision served August 31, 2007 in this proceeding, and is further appropriate under 49 U.S.C. 721(b) & 11701(a), and other statutes. The relief sought is also compelled by federal rail transportation policy, and in particular 49 U.S.C. 10101(3) (safe and efficient rail transportation), (4) sound rail transportation system, (5) sound economic conditions, (7) barrier

reduction, (9) honest and efficient management, (12) prohibition of predatory practices, and (15) expeditious handling and resolution.

I. Turnouts/switches and 310

In order to reach certain of the tracks which it acquired from SAW, PYCO must use switches (turnouts) off the BNSF mainline running from the northwest in a southeasterly direction through Lubbock. This Board's August 31, 2007 order requires SAW to convey to the successful feeder line applicant (PYCO) all its rail lines. That is what PYCO understood it was obtaining in the November 9, 2007 closing. But PYCO has now learned that SAW not only is maintaining a lawsuit in state court against BNSF claiming ownership of all the mainline switches (see SAW's Third Amended Petition filed Feb. 1, 2008 against BNSF in Texas state court, Attachment X), but also that SAW has filed a suit in Texas state court contending that it never transferred its ownership interests (if any) to PYCO pursuant to this Board's orders and seeking a TRO to prevent PYCO from using a key switch, number 310 (copy appended as Attachment I). SAW's suit is a direct contradiction of this Board's August 31 Decision, and the TRO SAW seeks as to Switch 310 effectively would prevent PYCO from serving key customers.

Before discussing SAW's strange position, it is important to identify switch 310. It connects Track 310 to the BNSF mainline

a couple hundred yards below the BNSF yard and the cross switches for Track 9298 (which now belongs to PYCO). Track 310 can only be used in conjunction with the mainline via Switch 310. SAW has elsewhere acknowledged that use of Track 310 in conjunction with the BNSF mainline was "necessary" for SAW to provide reasonable rail service to two of switch customers in Lubbock, and more specifically to Attebury and Farmers Compress.¹ Use of Switch 310 and Track 310 is as "necessary" for PYCO as SAW argued to this Board that it was for itself. If PYCO is barred from use of Switch 310, it cannot reasonably serve two key rail customers, Attebury and Compress.

Attebury and Compress supported PYCO's feeder line application from the inception. As the record in F.D. 34890 shows, SAW has a history of threatening and taking retaliation against shippers like PYCO, Attebury and Compress that have been

¹ SAW explained to this Board that such operation "is necessary in order to provide SAW with reasonable access to SAW Track 310." See SAW's "Reply in Opposition to Petition for Clarification" e-filed in F.D. 33753 under cover letter dated August 3, 2007, at page 6. SAW stated that

"Track 310 is used to provide rail service to Attebury Grain Company and Farmers Compress Plant 1 [citing an attachment to a Verified Statement by Shad Wisener]. After its acquisition of trackage at Lubbock in 1999 until the beginning of alternative rail service in 2006, SAW regularly operated over the BNSF mainline between SAW Track 9298 and SAW Track 310 in order to provide service to Attebury Grain and Farmers Compress Plant 1."

Id.

critical of SAW.⁷ In this sense, it is not surprising that SAW now seeks to disrupt service on Track 310: SAW gets three (PYCO, Attebury and Compress) of its perceived "enemies" with one blow.

PYCO (through its contract provider West Texas & Lubbock Railway) has been using Switch 310 and Track 310 to serve Attebury and Compress since the November 9, 2007 closing. However, on January 14, 2008, PYCO's Lubbock counsel (Mr. McLaren) received a "cease and desist" letter dated January 11, 2008 from SAW's Lubbock counsel (Mr. Gorsuch) dealing with Switch 310. The letter asserted that SAW acquired Switch 310 from Lubbock pursuant to the 1999 sale of BNSF's Lubbock lines to SAW. The letter correctly states that PYCO has been using Switch 310 since its acquisition of SAW's assets. But then the letter asserts that the switch continues to belong to SAW, and that it "was not transferred to PYCO Industries as it was not necessary for PYCO Industries to fulfill its common carrier obligations under the STB mandate." A copy of this Letter is attached as Attachment II.

It would be extraordinary for a mainline railroad like BNSF to sell to a shortline operator switches that are part of its

⁷ SAW's retaliatory conduct in part gave rise to this Board's Decision in F.D. 34890 and related dockets placing constraints on SAW during the feeder line proceeding.

trunk line as SAW contends BNSF did.³ PYCO's Lubbock counsel accordingly immediately requested documentation of SAW's claim of ownership (none was provided), and the next day disputed SAW's claim. Even if SAW owned any interest in the mainline switches, then all that interest necessarily transferred to PYCO when PYCO acquired "All-SAW" pursuant to this Board's August 31 Decision in this proceeding. PYCO's rail counsel (the undersigned) accordingly also immediately sent SAW's rail counsel (Mr. McFarland) a communication stating that

"[a]ll property owned by SAW at the time of the feeder line order was conveyed to PYCO, with the sole exceptions being to add certain additional properties (e.g., from Choo Choo and an easement so PYCO could serve 84 Lumber). Mr. Gorsuch's claim is obviously contrary to the STB order, devoid of merit, and amounts to harassment. ... If SAW persists with this sort of claim, PYCO reserves all rights to seek relief at STB."

A copy of this email is appended as Attachment III. PYCO received no response until Tuesday, February 5. On that date, SAW's Lubbock counsel gave PYCO's Lubbock counsel a newly filed Texas lawsuit asking for a TRO barring PYCO from using Switch 310. A

³ In a footnote at page 6 of SAW's pleading referenced in footnote 1, SAW asserted that it owned switch 310 and presumably many other mainline switches by reason of BNSF's 1999 sale of Lubbock assets to SAW.

copy of this document is appended as Attachment III.

This Board required SAW to convey all its rail lines. These necessarily include switches associated with the lines to be operated. The switches to the extent owned by SAW are part of the lines. A line without switches is worthless, just as a person beheaded is dead. A "'railroad line' is not merely the service being provided, but the physical properties and interests belonging to the [rail carrier] that constitute the line." In re Boston & Maine Corp., 596 F.2d 2, 6 (1st Cir. 1979).

Gorsuch's claim in his January 11 letter to Mr. McLaren that the switch is not "necessary" for PYCO to fulfill its common carrier obligations is specious: it is directly contradicted by SAW's own statements set forth in footnote 1 to this Board indicating that access from the BNSF mainline to Track 310 (i.e., use of Switch 310) was "necessary" to provide common carrier service to Attlebury and Compress. In any event, it is not for SAW or Mr. Gorsuch to determine what is "necessary" for PYCO, and to excise everything else from the conveyance. This Board's Decision served August 31, 2007, required SAW to convey all its rail lines. All means all. This Board has indicated there is a "rebuttable presumption" that all property must be conveyed in forced sale situations (e.g., Railroad Ventures - Abandonment Exemption - Between Youngstown OH, and Darlington, PA, AB 556 (Sub-no. 2X), served Oct. 4, 2000), and here SAW admits that

Switch 310 is necessary, so it does not even begin to rebut.

Since SAW is taking the position it still owns the switches, and is attempting to bar PYCO from serving its customers on this basis, this Board should order SAW immediately to quitclaim all SAW's interests (if SAW has any interests⁴) in all switches, including but not limited to 310, to PYCO, and to desist from all further litigation on the issue.

In light of SAW's pleading in state court seeking a TRO against PYCO, PYCO requests expeditious treatment of this motion.

II. Burris Trackage

SAW included all its Burris properties in its inventory for Net Liquidation Valuation (NLV)⁵ and Going Concern Valuation (GCV)⁶ purposes. Likewise, PYCO and this Board fully included

⁴ Any interests of SAW were conveyed by Bill of Sale to PYCO at the November 9 closing. The bill of sale conveyed all track and ties. Switches are made of track and ties. SAW's claims are frivolous as well as costly and disruptive.

⁵ The Burris tracks are set forth in SAW's inventory of its assets for sale in F.D. 34890 in SAW's "Statement in Response to PYCO's Feeder Line Application to Acquire 'All-SAW'" filed September 18, 2006, at Tab II (Verified Statement of Edward Landreth), Attachment 1, page numbered 21.

For the convenience of the Board, Mr. Landreth's "Attachment 1" is attached in full in Attachment IV hereto. The Burris tracks are tracks AT 4, 7 and 12 on that page of the inventory.

⁶ SAW specifically sought inclusion of the \$75/carload fee BNSF it argued BNSF had agreed to pay SAW at Burris. See SAW's "Statement in Response," supra, at page 19. SAW's "GCV" witness, Mr. Plaistow, included that charge in several of his valuation scenarios. See id. Tab 1, Verified Statement of Plaistow at p. 9 (specifically included in "All-SAW" scenarios 1 and 3). This Board noted that SAW's scenarios included the Burris

Burris in the valuation of "All-SAW." This Board's NLV calculation included the Burris tracks. Indeed, this Board relied on PYCO's NLV estimate. August 31 Decision at 18. PYCO's estimate was based without any omissions on SAW's track inventory, as the Board indicated. Id. This Board specifically included SAW's Burris revenue streams for purposes of determining GCV of SAW.⁷

Since GCV was less than NLV, this Board set the value of SAW at NLV. PYCO subsequently entered into a settlement agreement in which it agreed to buy the SAW property for the stated sum, plus certain additional property at an additional price to ensure an ability to serve other customers.⁸ The settlement agreement does not provide for omission of any property.⁹ SAW's counsel submitted a deed to PYCO which SAW's counsel represented was based on the BNSF to SAW deed in order to encompass all properties SAW received from BNSF.¹⁰

In short, SAW, PYCO and STB valued all of SAW, including

revenue. August 31 Decision at 20 & 21. Three of PYCO's four GCV valuation scenarios included the Burris revenue. Id. at 21-22.

⁷ See STB Decision, F.D. 34890, served August 31, 2007, at 27 (specifically including \$75/carload at Burris).

⁸ A copy of this settlement agreement is set forth in Attachment V (under seal).

⁹ See id.

¹⁰ A copy of this letter and deed are set forth in Attachment VI.

SAW's Burris assets, PYCO paid for same, and understood it was getting same. BNSF was of the same impression: BNSF redirected the \$75/carload payment for Burris traffic to PYCO after PYCO acquired SAW's lines pursuant to the closing on November 9, 2007. However, SAW has purported to terminate the \$75/carload agreement pertaining to Burris on the ground that BNSF was paying the money to PYCO rather than SAW, and SAW's rail counsel has confirmed to PYCO's rail counsel that SAW indeed claims still to own Burris.¹¹ PYCO views the revenue stream from Burris as essential for economic operation of the Lubbock rail assets, whose GCV has already been determined less than their NLV. Burris revenue is vital to maintaining the switching system. See Iowa Terminal v. ICC, 853 F.2d 965, 971 (D.C. Cir. 1988) (even if property simply leased out for non-rail use in the past, it may be essential to future rail viability). SAW's position not only is contrary to STB's Decision in F.D. 34890, but also constitutes a direct contradiction to SAW's position throughout that proceeding that

¹¹ SAW purported to terminate the \$75/carload agreement by letter dated January 2, 2008, on the ground that since sale of SAW's rail assets to PYCO, BNSF had not made payments to SAW. The letter is set forth in Attachment IX. BNSF responded by letter dated January 9 (also in Attachment IX) that PYCO claimed the property. SAW's rail counsel confirmed to PYCO's rail counsel on February 6, 2008, that SAW did not convey the Burris property. This email is also in Attachment IX. The statement by SAW's rail counsel on February 6, 2008, is contrary to his representation in his letter of October 24, 2007 (Attachment VI) that the deed he prepared from SAW to PYCO included everything SAW received from BNSF.

the Burris assets and revenues were part of the "All-SAW" scenario.

In this Board's Decision served January 24, 2007, in this proceeding, this Board essentially ruled that if SAW placed a track in its inventory through the Landreth statement, then that track is presumptively part of SAW that must be included in the transfer to a feeder line applicant prepared to pay the price at that time to be set by the Board. The issue the Board addressed in its January 24 Decision arose because SAW purported to transfer property used by shipper Hanson (which like Attebury and Compress supported PYCO's feeder line application) to "Choo Choo Properties" (a SAW alter-ego), and Choo Choo (as well as SAW) purported to terminate all Hanson's rights to use the property. This Board specifically noted that SAW through Landreth had included the trackage at issue in the SAW property inventory, and "[a]s a consequence of listing that track, SAW also included Track No. 269 in its estimation of the constitutional minimum value of its rail system in the feeder line case." Slip op. p. 4 & n.10. This Board relied on this fact, among others, to void the purported sale to Choo Choo. Jan. 24 Decision, slip op. p. 6. Since SAW included the Burris tracks in its inventory, and its estimation of the constitutional minimum value of its rail system, then they are part of the property which must be transferred to PYCO.

Another recent decision by this Board is relevant. Faced with five (by now, six) years of litigation from SAW, BNSF in 2007 filed a petition for clarification concerning the incidental trackage rights claimed by SAW pursuant to SAW's original 1999 acquisition from BNSF. In this Board's decision reported as South Plains Switching Ltd. Co. - Acquisition Exemption BNSF Railway Co., F.D. 33753 (Sub-no. 1), served Feb. 5, 2008, dismissing the BNSF petition as moot, this Board stated that:

"All of SAW's rail lines and related property were sold to PYCO Industries, Inc. (PYCO) effective November 9, 2001, pursuant to the Board's order in PYCO Industries, Inc. Feeder Line Application Lines of South Plains Switching, Ltd., Co., STB Finance Docket No. 33890, et al. (STB served Aug. 31, 2001), and a settlement agreement between PYCO, SAW and a company related to SAW. In light of that recent sale of all of SAW's rail lines and related property, SAW no longer provides any rail service." (Emphasis added.)

This Board is certainly correct that PYCO (1) purchased all SAW's rail lines and related property, and (2) is not pressing any claims against BNSF. The problem is that SAW (as usual) harbors a different view considerably twisted from the rest of the world as to what it sold to PYCO. SAW baselessly claims that it can arbitrarily delete parts of what it was required to sell, and represented it was selling. SAW thus continues to press claims

with alacrity against BNSF and PYCO on its theory that it did not do what it was told to do, and told PYCO it was doing. If Franz Kafka were still alive, he could use SAW's logic to write another of those novels by which his name has come to be an adjective meaning bizarre and illogical.

This Board must issue orders appropriate to require SAW to quitclaim immediately to PYCO all its Burris assets received from BNSF in 1999, and to cease and desist from asserting any claim to the revenue stream from Burris after November 9, 2007.

III. Track 21

The Landreth inventory at p. 19 clearly includes SAW Track 21, a 780 foot long track also known as the Acme Lead which goes north directly out of the former SAW (now PYCO) yard, and indeed abuts portions of PYCO plant 1. The trackage useful for rail purposes lies between 19th and 23rd Streets, immediately north of the rail yard and PYCO's Plant No. 1 complex. As is the case for the Burris properties, it was included by SAW, PYCO, and STB in the valuation in F.D. 34890 and the price which PYCO paid to SAW thus paid SAW for it.

The trackage is extremely useful to PYCO for use in conjunction with the railyard at Plant No. 1 because no streets are crossed when railcars are switched on it, although there are a couple street crossings at the north end where Acme Brick (a former shipper) has offices. PYCO of course commenced use of the

trackage for switching and storage. SAW's alter ego Choo Choo sent a notice of trespass to PYCO claiming ownership of the property. See Attachment VII. Upon examination, PYCO learned that SAW had purported to deed the property to Choo Choo on April 28, 2006. See Attachment VIII. PYCO understands that on January 28, 2008, Acme Brick recorded a deed from Choo Choo for Choo Choo's property north of 23rd Street. PYCO seeks the property remainder of Track 21 in Choo Choo's hands: roughly 19th Street to 23^d Street.

This Board invalidated all deeds by SAW to Choo Choo after May 5, 2006 in this Board's Decision in F.D. 34890 and related dockets served August 3, 2006.

This Board also voided an April 28, 2006 deed from SAW to Choo Choo at the behest of Hanson Aggregates in this Board's Decision in F.D. 34890 served Jan. 24, 2007. One of the grounds for invalidation, as already discussed, was that SAW had included the track in question in its Landreth inventory, just as it included Track 21.

Just as the deed of same date between the same parties in respect to the Hanson trackage was invalidated in the January 24 decision, SAW's deed to Choo Choo relating to Track 21 should be voided insofar as it is still owned by the Wisener family (i.e., all of Track 21 south of 23rd Street to the rail yard). SAW (or Choo Choo) should be obligated to convey the property to PYCO

forthwith. Track 21 is useful to the operation of PYCO's rail lines in Lubbock, PYCO was using it, and PYCO may need the Track to deliver product to Acme Brick as SAW claims to have done in the past (Acme Brick was listed by SAW as a customer in the F.D. 34890 proceeding). The track was included in the Landreth inventory, it was valued in the proceeding by SAW, PYCO and this Board, PYCO paid the amount the Board prescribed for it, and PYCO actively sought to use it for rail here.

In the feeder line proceeding, PYCO sought a general invalidation of deeds out by SAW to Choo Choo,¹² at least after January 9, 2006 (the date PYCO advised SAW and the Board it intended to file a feeder line application).¹³ However, PYCO at that time did not have sufficient information to link specific lines in the Landreth inventory to deeds out by SAW to Choo Choo, and even now PYCO is unsure which properties on the Landreth inventory Choo Choo (or some other Wisener family entity) claims to own. (SAW or Choo Choo seem to be making claims on almost a

¹² See Verified Motion to Void Additional Transfers of Property Interests from South Plains Switching Ltd. to Choo Choo Properties, Inc., filed under cover letter dated Oct. 13, 2007, by PYCO in F.D. 34890. PYCO asked for specific invalidation of two deeds (not relevant here) and general invalidation of deeds to Choo Choo after January 9, 2006, because PYCO was unsure what deeds had been issued.

¹³ The Board specifically relied on this January 9, 2006 notification in issuing its January 24, 2007 Decision invalidating as SAW - Choo Choo deed. See F.D. 34890, served Jan. 24, 2007, slip op. at 3.

weekly basis.) This Board never specifically addressed PYCO's motion. However, in the Decision served August 31, 2007, the Board stated that "[a]ny pending motions not specifically discussed here have not been found meritorious and will be denied." Slip op. at 10. If that statement constitutes an obstacle to the relief that PYCO seeks in connection with Track 21, then PYCO believes it should be reconsidered as materially in error. It operates to deprive PYCO of track that the Board included in its valuation, which PYCO bought and paid for, and which PYCO used and needs for rail operations.

Conclusion

For the reasons stated, SAW (and any alter ego of SAW claiming an interest) should be required to convey all interests in switches, the Burris track and Track 21 to PYCO. This Board should also enter all other appropriate relief.

In light of SAW's threat to enjoin PYCO's use of Switch 310, which is vital to service to Attebury and Compress, PYCO requests expeditious treatment.

Respectfully submitted,


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

Counsel for PYCO Industries, Inc.

Of counsel:

Gary McLaren
Phillips & McLaren
3305-66th St., Suite 1A
Lubbock, TX 79413

Verification

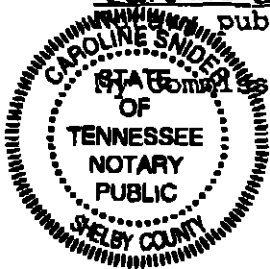
I, Robert Lacy, hereby declare and swear, that I am Senior Vice President for Marketing, PYCO Industries, that I am responsible for rail operations on behalf of PYCO, that I have read the foregoing Verified Motion, and that the facts set forth therein are true and correct to the best of my knowledge and belief.

Robert Lacy

Subscribed and sworn to before me
this 8 th day of February, 2008.

Caroline Snider

Caroline Snider
public.



My Commission expires:

MY COMMISSION EXPIRES
October 13, 2009

Attachment I

No. 2008-542,199

SOUTH PLAINS SWITCHING, LTD. CO.

v.

PYCO INDUSTRIES, INC.

IN THE 37th DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RECORD CO.
DISTRICT CLERK LUBBOCK CO.
DEPUTY

2008 FEB - 1 PM 2:13

**PLAINTIFF'S ORIGINAL PETITION AND
APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTION**

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), Plaintiffs herein, file this, their Original Petition, complaining of PYCO INDUSTRIES, INC. ("PYCO"), and would show to the court as follows:

**I.
DISCOVERY LEVEL**

SOUTH PLAINS anticipates that discovery will be conducted under Level III of the applicable Texas Rules of Civil Procedure for the reason that it is anticipated that the court will enter a Scheduling Order in this case.

**II.
PARTIES**

SOUTH PLAINS is a corporation created and existing under the laws of the state of Texas. SOUTH PLAINS is authorized to do business in the state of Texas. Its principal place of business is Lubbock, Lubbock County, Texas.

PYCO is a corporation authorized to do business in the State of Texas and may be served by and through its Registered Agent, Mr. Gail Kring, 2901 Avenue A, Lubbock, Lubbock County, Texas 79404.

SOUTH PLAINS SWITCHING, LTD. CO. v. PYCO INDUSTRIES, INC.
PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

COPY

III. JURISDICTION AND VENUE

This court has jurisdiction of this matter for the reason that the relief sought by **SOUTH PLAINS** is within the jurisdictional subject matter of this court and any damages sought herein are within the jurisdictional limits of this court.

Venue of this case is proper in Lubbock County. **PYCO'S** principal place of business is located in Lubbock County. **SOUTH PLAINS'** principal place of business is located in Lubbock County. The trespasses alleged herein occurred in Lubbock County. The acts, omissions and events giving rise to this case all occurred in Lubbock County.

IV. UNDERLYING FACTS

Trespass Over Switch

SOUTH PLAINS is the owner of a turnout/switch that is located at the junction of the main line of The Burlington Northern and Santa Fe Railway Company ("BNSF"), and Track 310. The BNSF main line runs generally from the southeast to the northwest. Track 310, which comes off the main line, runs generally in an easterly to northeasterly direction. The turnout/switch was sold to **SOUTH PLAINS** by virtue of an Asset Sale Agreement and a Bill of Sale in 1999.

SOUTH PLAINS owns the turnout/switch as of this date and has continued ownership in the turnout/switch since 1999. However, **PYCO** uses that turnout/switch to move rail cars from the BNSF main line to Track 310. **PYCO** is therefore trespassing on the turnout/switch owned by **SOUTH PLAINS** when it is using the turnout/switch to access Track 310.

The trespass is continuing and has continued from November, 2007, until the present date. **SOUTH PLAINS** anticipates that **PYCO** will continue to run its rail cars over the turnout/switch

owned by **SOUTH PLAINS** in the future.

**V.
CAUSES OF ACTION**

Trespass

The unauthorized use by **PYCO** of the turnout/switch owned by **SOUTH PLAINS** to access Track 310 is a physical invasion of the property by **PYCO**. The physical invasion has been both intentional and voluntary. **PYCO'S** trespass therefore caused injury to **SOUTH PLAINS'** right of possession.

In the alternative, **PYCO** caused another entity or aided, assisted, advised or encouraged the actual trespasser or, ratified and adopted the trespasser for its own benefit. Therefore, **PYCO** is liable as a trespasser.

**VI.
Declaratory Judgment**

SOUTH PLAINS asks the court to declare that the action of **PYCO** in moving its rail cars over the turnout/switch owned by **SOUTH PLAINS** to access Track 310, constitutes a trespass, and moves the court for a declaratory judgment holding that **PYCO** has trespassed upon the property of **SOUTH PLAINS** by using the turnout/switch to access Track 310.

**VII.
DAMAGES**

SOUTH PLAINS are entitled to recover their actual damages resulting from the trespass by **PYCO**.

**VIII.
ATTORNEY'S FEES**

Pursuant to the Declaratory Judgment Act, **SOUTH PLAINS** is entitled to recover any and

all attorney's fees that are reasonable, necessary, just, and equitable, that have been incurred in obtaining a declaratory judgment from the court that FYCO has abandoned the rail cars.

IX.

SOUTH PLAINS asks the court for a judgment against **FYCO** awarding **SOUTH PLAINS** compensation for the temporary harm set forth herein within the jurisdictional limits of this court. Moreover, the harm to **SOUTH PLAINS** will continue and become irreparable, leaving **SOUTH PLAINS** without an adequate remedy at law, unless this court enjoins **FYCO'S** trespass and interference with the property of **SOUTH PLAINS** by ordering **FYCO** to refrain from using the turnout/switch to access Track 310.

X.

PRAYER

WHEREFORE, Premises Considered, SOUTH PLAINS requests the following:

1. **SOUTH PLAINS** asks that this court immediately issue a temporary restraining order, without notice, restraining **FYCO** and **FYCO'S** agents, servants and employees and any person with notice of the order, from directly or indirectly using the turnout/switch owned by **SOUTH PLAINS** to access Track 310.
2. This court enter a temporary injunction, after notice to **FYCO**, and an evidentiary hearing, enjoining **FYCO** and **FYCO'S** agents, servants and employees and any person with notice of the order, from directly or indirectly using the turnout/switch owned by **SOUTH PLAINS** to access Track 310.
3. **SOUTH PLAINS** requests that **FYCO** be cited to appear and answer herein, and that upon final trial, the court should enter judgment as follows:
 - a. the court declare that **FYCO** has been trespassing on the switch owned by **SOUTH PLAINS** as set out above;
 - b. the court enter a Permanent Injunction enjoining **FYCO** and **FYCO'S** agents, servants, employees and persons with knowledge of the order, from directly or indirectly using the turnout/switch of **SOUTH PLAINS** as specifically set out above;

- c. the court enter judgment against FYCO awarding of SOUTH PLAINS recovery of damages, attorney's fees, costs of court, and any and other further relief to which of SOUTH PLAINS may show itself to be entitled.

Respectfully submitted,

JAMES L. GORSUCH, P.C.
4412 74th Street, Suite B-102
Lubbock, Texas 79424
Telephone: (806)771-6474
Telecopier: (806)771-6476


By: James L. Gorsuch
State Bar No. 08221250

Demand for Jury

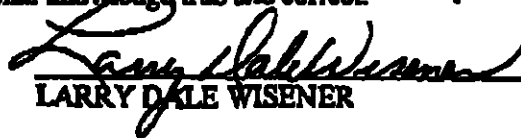
SOUTH PLAINS SWITCHING, LTD. CO., Plaintiff herein, hereby respectfully demands and trial by jury in this cause.


James L. Gorsuch

STATE OF TEXAS §
 COUNTY OF LUBBOCK §

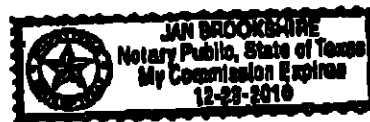
VERIFICATION

BEFORE ME, the undersigned notary public, on this day personally appeared Larry Dale Wisener, who, being by me duly sworn, deposed that he is the President of South Plains Switching, Ltd. Co., in the above styled and numbered cause, that he has read the foregoing Plaintiff's Original Petition and Application for Temporary Restraining Order and Temporary Injunction, and that the allegations contained in such Original Petition and Application for Temporary Restraining Order and Temporary Injunction are within his personal knowledge true and correct.


 LARRY DALE WISENER

SUBSCRIBED AND SWORN TO BEFORE ME, on the 31st day of January, 2008, by Larry Dale Wisener.


 Notary Public, State of Texas



Attachment II

JAMES L. GORSUCH, P.C.

Attorney at Law

4412 - 74th Street, Suite B-102
Lubbock, Texas 79424

Telephone: (806) 771-6474
Facsimile: (806) 771-6476
jgorsuch@nts-online.net

January 11, 2008

CM/RRR 7005 1820 0007 1894 3184

Mr. Gary R. McLaren
Phillips & McLaren, P.C.
3305 66th Street, Suite 1A
Lubbock, Texas 79413

NOTICE TO CEASE AND DESIST

Dear Mr. McLaren:

As you know, this firm represents South Plains Switching, Ltd. Co ("South Plains") in connection with its various transactions with The Burlington Northern and Santa Fe Railway Company ("BNSF"). By Asset Sale Agreement, dated the 3rd day of May, 1999, and by Bill of Sale executed by Mr. Douglas J. Babb, of BNSF, on May 18, 1999, South Plains became the owner of the switch located between the BNSF main line and Track 310 ("Switch 310")

The switch was conveyed by BNSF to South Plains by the Bill of Sale referred to above. Since the sale of part of the assets of South Plains to Pyco pursuant to a Surface Transportation Board proceeding, Pyco Industries has utilized Switch 310 in its operations. This switch is the property of South Plains. The use by Pyco Industries of the switch is improper, and constitutes an invasion of the rights of South Plains, the owner of the switch.

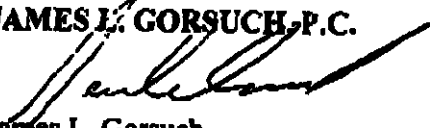
The switch was not transferred to Pyco Industries as it was not necessary for Pyco Industries to fulfill its common carrier obligations under the STB mandate.

Pyco Industries is hereby placed on notice to cease and desist its use of Switch 310 at once until arrangements can be made for the removal of the switch and/or other disposition of the switch.

We remain,

Very truly yours,

JAMES L. GORSUCH, P.C.


James L. Gorsuch

JLG:jeb

Attachment III

CHAS MONTANGE

From: "CHAS MONTANGE" <c.montange@verizon.net>
To: <mcfarland@aol.com>
Cc: "John Heffner" <j.heffner@verizon.net>, "Gary McLaren" <gmclaren@sbcglobal.net>
Sent: Tuesday, January 15, 2008 9:09 AM
Subject: Switch 310, letter from Mr. Gorsuch to Mr. McLaren dated 14 Jan

To: Tom McFarland, for SAW

Re: Letter, Mr. Gorsuch (for SAW) to Mr. McLaren (for PYCO), dated Jan. 14

On January 14, 2008, Mr. McLaren received a letter from Mr. Gorsuch demanding that PYCO cease use of switch 310 on the ground that (a) the switch had been conveyed by BNSF to SAW in 1999, and (b) the switch still belonged to SAW on the ground that (c) PYCO did not need it to fulfill common carrier obligations.

On its face, Mr. Gorsuch's claim is specious. All property owned by SAW at the time of the feeder line order was conveyed to PYCO, with the sole exceptions being to add certain additional properties (e.g., from Choo Choo and an easement so PYCO could serve 84 Lumber). Mr. Gorsuch's claim is obviously contrary to the STB order, devoid of merit, and amounts to harassment.

We reiterate: all SAW property was conveyed. Mr. Gorsuch admits this was part of SAW's property. That ends the matter. Even had SAW sought to exclude switch 310 from the conveyance by asking STB to allow SAW to continue to retain it on the ground Mr. Gorsuch asserts (i.e., that PYCO does not require it for common carrier purposes), under STB precedent, STB would have rejected such a position by SAW out of hand.

If SAW persists with this sort of claim, PYCO reserves all rights to seek relief at STB.

1/15/2008

Attachment IV

**SECOND VERIFIED STATEMENT
REGARDING
SOUTH PLAINS SWITCHING, LTD , CO
RAILROAD ASSETS**

LISTED AS

**PYCO INDUSTRIES, INC.
FEEDER LINE APPLICATION
STB FINANCE DOCKET 34890**

**TRACKAGE OWNED BY
SOUTH PLAINS SWITCHING, LTD , CO.**

STATEMENT FOR:

**SOUTH PLAINS SWITCHING, LTD , CO
C/O Thomas F McFarland, Esq
208 South LaSalle Street – Suite 1890
Chicago, IL 60604**

**INSPECTION DATE.
September 1, 2006**

**REPORT DATE:
September 5, 2006**

**REPORT BY:
LANDRETH ENGINEERING, LLC
P. O. Box 92156
Albuquerque, NM 87199**

Attachment 1

SUMMARY SOUTH PLAINS SWITCHING, LTD , CO TRACKAGE OWNED & OPERATED

West of Avenue A - Sec 7 Blk B TTRR Survey

ICC Trk No	Description	Length	Operated RR Owned	Industry Owned
7	Gilbreath (YGY)	862	862	0
22	Gilbreath (YGY)	761	342	419
25	Old Brite Trucking Site	500	500	0
?	West TX Warehouse (Underwood)	758	758	0
41	Watson Foods	1037	678	359
48	Watson Foods	740	540	200
52	Frito Lay Spur	1068	1068	0
21	Acme Brick Spur	300	300	0
Main Line Corridor		1655	1655	0
	Feet	7681	6703	978
	Miles	1 45	1 27	0 19

Main Line Corridor		5374	5374	0
34	Yard Trk 5 - TEAM 9205	3332	3332	0
20	Yard Trk 1 - TEAM 9201	3330	3330	0
49	Yard Trk 2 - TEAM 9202	2712	2712	0
50	Yard Trk 3 - TEAM 9203	2463	2463	0
46	Yard Trk 4 - TEAM 9204	2969	2969	0
SAW 1	Locomotive Pocket Track	492	492	0
9	East BN Industrial No 2 Lead	1051	1051	0
73	BN Industrial No 2 Lead	388	388	0
42	Furr's Spur	780	145	635
35	Orchard Lead	804	804	0
137	PYCO - North Side	789	142	647
21	Acme Brck	780	780	0
	Feet	25264	23982	1282
	Miles	4.78	4 54	0 24

East of BNSF /

AT 65	FWD Interchange Trk 2	1368	1368	0
19	FWD Interchange Trk 2	1094	1094	0
Main Line	TEAM No 9298	4667	4667	0
92	TEAM No 9200 FWD Siding	3949	3949	0
AT 127	CLIC No 310 - Attebury	1099	1099	0
AT 128	CLIC No 311 - Attebury	3120	255	2865
33	CLIC No 311 - Attebury	419	419	0
AT 129	CLIC No 312 - Attebury	3029	129	2900
32	CLIC No 312 - Attebury	81	81	0
AT 130	CLIC No 313 - Attebury	2936	41	2895
31	CLIC No 313 - Attebury	1,474	1,474	0
AT 127	CLIC No. 310 - Compress	1,404	705	699
37	Compress Plant 1	3,486	3486	0
38	Compress Plant 1- Stub Trk	636	636	0

100	Compress Plant 3	800	368	432	
101	Compress Plant 3	894	462	432	
102	Runaround Trk - Compress	1253	1253	0	
65	Compress Plant 3-2	6008	4820	1188	
66	Compress Plant 4	1177	777	400	
120	Compress Plant 2-4	2381	2381	0	
AT 245	Compress Plant 4	456	0	456	
AT 262	Compress Plant 4	1401	995	406	
AT 263	Compress Plant 4	984	578	406	
?	PYCO Plant 2	6000	165	6000	
		Feet	50116	31202	19079
		Miles	9 49	5 91	3 61

Orchard Lead Properties South of 34th Street North 50th Street

35	Orchard Lead	5228	5228	0	
39	Crawford - Austin Manufacturing	449	170	279	
39	H & W Co Partnership	441	209	232	
39	Crawford - Austin Manufacturing	1209	140	1069	
47	Humble Oil	278	140	138	
62	Commercial Storage & Distr	400	215	185	
64	David C Weaver Grain Company	603	144	459	
96	Tom Armstrong Warehouse	469	165	304	
?	Mayfield Van Lines	330	185	145	
60	Lead	1510	1510	0	
93	Runaround Trk	1287	1287	0	
61	GTZ, Inc	696	274	422	
63	GTZ, Inc	598	170	428	
80	Weaver Grain	1834	164	1670	
		Feet	15332	10001	5331
		Miles	2 90	1 89	1.01

FW&D Orchard Lead Properties South of 50th Street

35	Orchard Lead	2557	2557	0	
107	Lead BN Industrial No 3	5992	5992	0	
119	Wilkerson	2335	1635	700	
108	Waples - Platter	703	286	417	
109	X/over	225	225	0	
110	Payless Cashways	800	700	100	
		Feet	12612	11395	1217
		Miles	2 39	2 16	0 23

ATSF Crawford Industrial Properties

AT 259	Lead Eagle Picher	5536	5536	0
AT 260	Eagle Picher	1934	1554	380
AT 275	Eagle Picher	832	432	396
AT 294	Eagle Picher	933	0	933
AT 244	Crawford Lead	12,279	12,279	0
AT 269	Furr's Lead	5515	5515	0
AT 296	O G Floyd	2820	172	2648
AT 258	Wilkerson	440	109	331
AT 272	Wilkerson	266	158	108
AT 274	Wilkerson	656	110	546
AT 297	Magnolia Seed Company	482	112	370

AT 282	Furr's	1417	180	1237
AT 283	Furr's	628	0	628
AT 150	CLIC 0340	3146	3146	0
AT 151	ADM	6165	432	5733
AT 152	ADM	3348	0	3348
AT 153	ADM	1700	0	1700
AT 154	ADM	942	0	942
AT 155	ADM	210	0	210
AT 158	ADM	211	0	211
AT 175	ADM	185	0	185
SAW 2	MLK Unloading Trk	774	127	647
SAW 3	MLK Unloading Trk	2675	0	2675
SAW 4	MLK Unloading Trk	2840	0	2840
AT 4	Feed Lot Burns	1844	832	1012
AT 7	Jarvis Metals - Burns	1826	824	1002
AT 12	Jarvis Metals - Burns	815	622	193
		60419	32140	28275
		11 44	6 09	5 36

BN Industrial District 2

73	BN Industrial No 2 Lead	8041	8041	0
?	Noble & Cox	371	156	215
70	Service Stores	656	144	512
75	BN Industrial No 2 Lead	2215	2215	0
136	Georgia Pacific	405	135	270
118	Georgia Pacific	546	156	390
111	Ajax Grain	942	156	786
79	Ladder Land & Cattle	634	246	388
89	BN Industrial No 2 Lead	3287	3287	0
91	Texas Bag	1874	692	1182
?	McMillan & Mattox	385	185	200
121	Brokers Trust	392	157	235
106	West Texas Wholesale	464	156	308
105	Foxworth Lubbock Properties	776	155	621
104	Pan Tex Plywood	250	155	95
86	BN Industrial No 2 Lead	1655	1655	0
97	Armstrong's Supply	855	165	690
87	Lone Star Cotton	383	155	228
95	Frontier Wholesale	967	355	612
98	Roberson Warehouse	1180	257	923
76	Runaround Track	1072	1072	0
114	George Caddel	673	257	416
69	Commercial Storage	485	164	321
		28508	20116	8392
		5 39924	3 8098485	1 5894

Total Feet
Total Miles

198277	133884	64554
37 55	25.36	12 23

Landreth Engineering, LLC

9-Aug-06

Attachment V

Attachment V is submitted under seal.

Attachment VI

LAW OFFICE
THOMAS F. MCFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

October 24, 2007

By e-mail to gmclaren@sbcglobal.net

By e-mail to c.montange@verizon.net

Gary McLaren, Esq.
Phillips & McLaren
3305 66th Street, Suite 1A
Lubbock, TX 79413

Charles H. Montange, Esq.
426 NW 162nd Street
Seattle, WA 98177

Re: SAW-PYCO Closing Documents

Dear Gary and Charles:

Hereby transmitted are the following proposed closing documents for the SAW conveyance to PYCO:

1. Quitclaim Deed with legal description attached (Ex. A)
2. Bill of Sale
3. Assignment and Assumption Agreement
4. Letter re SAW conveyances to Choo Choo

The Quitclaim Deed and legal description are in the same form as BNSF's 1999 Quitclaim Deed to SAW, except that Mr. Landreth has added some boundaries for clarification. I am transmitting a copy of the BNSF Quitclaim Deed and legal description so that you can confirm the source of the SAW Deed and legal description. Use of the form of the BNSF Deed and legal description ensures that SAW conveys to PYCO that which it received from BNSF.

The Bill of Sale is also predicated on the form of the Bill of Sale from BNSF to SAW. Use of that form of Bill of Sale ensures that SAW conveys to PYCO that which it received from BNSF.

The Assignment and Assumption Agreement assigns numerous agreements, leases, licenses, etc. between SAW and third parties, including PYCO. Those agreements, etc. have not yet been listed on the attachment to the A&A Agreement.

THOMAS F. MCFARLAND

Messrs. McLaren & Montange

October 24, 2007

Page 2

The letter re SAW-Choo Choo conveyances establishes that the Choo Choo deed of the Hanson property back to SAW has been recorded, and that the other conveyances from SAW to Choo Choo were not recorded, so that the chain of title from SAW to PYCO will not be affected by those conveyances.

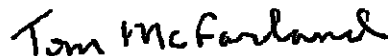
Please review these closing documents and confirm that they are acceptable.

Also, please confirm that the date of closing will be Monday, November 5. PYCO rail service would commence on that date.

I will send you evidence that taxes for 2007 on the property have been paid in full. SAW does not propose to prorate those taxes to that date of closing.

I will send you bank account references for wire transfers of sale proceeds to SAW and to South Plains Lamesa.

Very truly yours,



Thomas F. McFarland
*Attorney for South Plains
Switching, Ltd. Co.*

TMCF-HI enc-wp8.0\1264\trGMLCHM1

cc: (by e-mail, w/enc.)
Mr. & Mrs. L. Wisener
Mr. Ed Landreth
Mr. Dennis Olmstead

After Filing Return to PYCO INDUSTRIES, INC., P.O. Box 841, Lubbock, Texas 79405

QUITCLAIM DEED

THE STATE OF TEXAS §
§ **KNOW ALL MEN BY THESE PRESENTS:**
COUNTY OF LUBBOCK §

THAT SOUTH PLAINS SWITCHING, LTD. CO., a Texas Limited Liability Company, whose address is P.O. Box 64299, Lubbock, Texas 79464-4299, Grantor, for Ten Dollars (\$10.00) and other good and valuable consideration, to it duly paid, the receipt whereof is hereby acknowledged, does by these presents REMISE, RELEASE and QUITCLAIM, without any covenants of warranty whatsoever and without recourse to the Grantor, its successors and assignees, unto PYCO INDUSTRIES, INC., located at 2901 Avenue A, Lubbock, Lubbock County, Texas, 79404, Grantee, its successors and assignees, forever, all of its rights, title and interest, if any, in and to certain strips and/or parcels of land located in the County of Lubbock, Texas as described in detail in Exhibit A attached hereto.

TO HAVE AND TO HOLD the same unto Grantee, its successors and assignees, forever.

IN WITNESS WHEREOF, Grantor has caused this instrument to be signed by its
authorized representative on this the 5th day of November, 2007.

GRANTOR: SOUTH PLAINS SWITCHING, LTD. CO.

BY:

LARRY D. WISENER
President/Operating Manager

THE STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

This instrument was acknowledged before me on this the 5th day of November, 2007 by
LARRY D. WISENER, President and Operating Manager of South Plains Switching, Ltd. Co., a
Texas Limited Liability Company, on behalf of said company.

NOTARY PUBLIC, STATE OF TEXAS

Printed Name of Notary

My Commission Expires _____

EXHIBIT "A"

Being the remaining Real Estate and Improvements that constitute those certain spur tracks, industry tracks and side tracks previously designated in the records of the Burlington Northern and Santa Fe Railway Company as located in the Lubbock Subdivision (Formerly The Atchison, Topeka and Santa Fe Railway Company) and the remaining Real Estate and Improvements that constitute those certain spur tracks, industry tracks, side tracks and Main track as being a portion of the South Plains Subdivision (Formerly The Fort Worth and Denver South Plains Railway Company) all lying in Lubbock, Lubbock County, Texas.

All of said former spur tracks, industry tracks and side tracks including the former FW&D main track corridor are generally bounded by Coronado Drive and the City of Lubbock Cemetery on the North; Guava Avenue on the East; 66th Street on the South; and on the West by Ash Avenue between 66th & 58th Streets; Elm Avenue between 58th and 50th Streets; Avenue A between 50th Street and Coronado Drive.

And Also:

The remaining portion of the FW&D main track corridor lying West of Avenue A to an intersection with 26th Street, which varies in width from 50' to 10' on the north side of the centerline of the main track and varies in width from 25' to 8.5' on the south side of the centerline of the main track.

Less & Except;

The former AT&SF main track corridor is excluded from this description.

The foregoing FW&D main track is more generally described from Burlington Northern and Santa Fe Railway Records as follows:

Beginning at the intersection of the centerline of the former main track of the FW&D as originally located and constructed with the North line of Section 4, Block B of the T. T. and R. R. Survey in Lubbock County, Texas at FW&D engineering location station 6357+11.1 (Milepost 357.45) being 384.9 feet West of the NE corner of said Section 4.

Thence in a generally southwesterly, Westerly and northwesterly direction through said Survey 4 to an intersection of the centerline of the former main track of the FW&D as originally located and constructed with the North line of Section 4, Block B of the T. T. and R. R. Survey in Lubbock County, Texas at FW&D engineering location station 6401+07.8 (Milepost 358.29) being 825.24 feet East of the NW corner of said section 4.

Thence continuing in the preceding northwesterly direction across Section 3 to an intersection of the centerline of the former main track of the FW&D as originally located and constructed with the West line of Section 3, Block B of the T. T. and R. R. Survey in

Lubbock County, Texas at FW&D engineering location station 6409+77.5 (Milepost 358.44) being 274.5 feet North of the SW corner of said Section 3.

Thence continuing in the preceding northwesterly direction across Survey 5 & 7 in a northwesterly direction and finally along a curve to the left in a northerly direction within Survey 7 to an intersection of the centerline of the former main track of the FW&D as originally located and constructed to a point in the North right of way line of 26th Street at FW&D engineering location station 6484+74.4 (Milepost 359.86).

The foregoing FW&D industry tracks and spur tracks are more generally described from Burlington Northern and Santa Fe Railway Records as follows:

All remaining rights, title and interest in any and all industry and spur tracks lying in or near the railway station of Lubbock, Texas, along and contiguous to the former FW&D main line right of way between FW&D Milepost 357.4 and Milepost 359.8 as shown in the Burlington Northern and Santa Fe Railway Company records as located within the South Plains Subdivision.

And Also;

All remaining rights, title and interest in any and all industry tracks and spur tracks lying in or near the railway station of Lubbock, Texas, and shown in the Burlington Northern and Santa Fe Railway Company records as the Burlington Industrial Addition District, all additions, along with the associated tracks between the above FW&D mile post limits;

The foregoing AT&SF industry tracks and spur tracks are more generally described from Burlington Northern and Santa Fe Railway Records as follows:

All remaining rights, title and interest in the following spur tracks and industry tracks lying southeasterly of the railway station of Lubbock, Texas and North of the railway station of Burris, Texas, along and contiguous to the main track right of way between AT&SF mile post 678.0 and AT&SF milepost 679.0 as shown in the Burlington Northern and Santa Fe Railway Company Records (formerly The Atchison, Topeka and Santa Fe Railway Company) as located within the Lubbock Subdivision and generally described as follows:

Beginning at the railway station of Lubbock, Texas, at the intersection of the Burlington Northern Santa Fe Railway Company's Lubbock Subdivision Westerly right of way line and the centerline of track number ICC 244 as shown in the records of the Burlington Northern and Santa Fe, lying in Block S, Lot 1 of the G. C. & S.F. Survey, opposite AT&SF milepost 678.96, engineering station 3+74.4 track number ICC 244 chaining;

Thence in a generally westerly direction through said Block S, Lot 1 of the G. C. & S. F. Survey, Block S, Lot 2 of the C. G. & S. F. Survey, Block E, Lot 23 of the G. C. & S. F. Survey, and Block E, Lot 1 of the C. G. & S. F. Survey to engineering station 122+78.4 track number 244 station and the end of said track number 244;

And Also;

Beginning at the inception of track number ICC 297, being engineering station 95+60, track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey to engineering station 4+82, track number 297 stationing and the end of said track 297;

And Also;

Beginning at the inception of track number ICC 287, being engineering station 105+81.9, track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey to Engineering station 3+60, track number 287 stationing, and the end of said track 287;

And Also;

Beginning at the inception of track number ICC 274, being engineering station 111+71.6, track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey to engineering station 6+56, track number 274 stationing, and the end of said track 274;

And Also;

Beginning at the inception of track number ICC 258, being engineering station 116+68.4, track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey to engineering station 4+40, track number 258 stationing, and the end of said track 258;

And Also;

Beginning at the inception of track number ICC 272, being engineering station 118+89.6, track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey to engineering station 2+66, track number 272 stationing, and the end of said track 272;

And Also;

Beginning at the inception of track number ICC 296, being engineering station 48+29, track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey and Block E, Lot 2, G. C. & S. F. Survey to engineering station 28+20, track number 296 stationing, and the end of said track 296;

And Also;

Beginning at the inception of track number ICC 269, being engineering station 82+93 track number 244 stationing, lying in Block E, Lot 1, G. C. & S. F. Survey;

Thence in a generally westerly direction through Block E, Lot 1, G. C. & S. F. Survey No. 46 to engineering station 50+30 track number 269 stationing, and the end of said track 269;

And Also;

Beginning at the inception of track number ICC 282, being engineering station 38+77 track number 269 stationing, lying in G. C. & S. F. Survey No. 46;

Thence in a generally northwesterly and northerly direction through G. C. & S. F. Survey No. 46 to engineering station 14+17, track number 282 stationing, and the end of said track 282;

And Also;

Beginning at the inception of track number ICC 283, being engineering station 7+90 track number 282 stationing, lying in G. C. & S. F. Survey no.46;

Thence in a generally northerly direction through G. C. & S. F. Survey No. 46 to engineering station 6+28, track number 283 stationing, and the end of said track 283;

And Also;

Beginning at the inception of track number ICC 259, being engineering station 38+68, track number 244 stationing, lying in Lot S, Block 2, G. C. & S. F. Survey;

Thence in a generally northwesterly, northerly and westerly direction through Lot S, Block 2, G. C. & S. F. Survey and Lot 23, Block 23, G. C. & S. F. Survey to engineering station 55+36, track number 259 stationing, and the end of said track 259;

And Also;

Beginning at the inception of track number ICC 276, being engineering station 43+48, track number 259 stationing, lying in Lot S, Block 2, G. C. & S. F. Survey;

Thence in a generally northwesterly, northerly and westerly direction through Lot S, Block 2, G. C. & S. F. Survey and Lot 23, Block 23, G. C. & S. F. Survey to engineering station 12+18, track number 276 stationing, and the end of said track 276;

And Also;

Beginning at the inception of track number ICC 260, being engineering station 45+13, track number 259 stationing, lying in Lot S, Block 2, G. C. & S. F. Survey;

Thence in a generally westerly and northwesterly direction through Lot S, Block 2, G. C. & S. F. Survey and Lot 23, Block 23, G. C. & S. F. Survey to engineering station 19+34, track number 260 stationing, and the end of said track 260;

And Also;

Beginning at the inception of track number ICC 275, being engineering station 11+34, track number 260 stationing, lying in Lot 23, Block E, G. C. & S. F. Survey;

Thence in a generally northerly direction through Lot 23, Block E, G. C. & S. F. Survey to engineering station 8+32, track number 275 stationing, and the end of said track 275;

And Also;

Beginning at the inception of track number ICC 294, being engineering station 12+17, track number 260 stationing, lying in Lot 23, Block E, G. C. & S. F. Survey;

Thence in a generally northerly direction through Lot 23, Block E, G. C. & S. F. Survey to engineering station 9+33, track number 294 stationing, and the end of said track 294;

Notes:

BNSF	—	Burlington Northern and Santa Fe Railway Company
FW&D	—	Fort Worth and Denver South Plains Railway Company
AT&SF	—	The Atchison, Topeka and Santa Fe Railway Company
ICC	—	Interstate Commerce Commission — Original Track Valuation No.

10/11/07

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that SOUTH PLAINS SWITCHING, LTD. CO., a Texas limited liability corporation, whose address is P.O. Box 64299, Lubbock, Texas 79464-4299 ("Grantor"), in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration, receipt and adequacy of which is hereby acknowledged, does hereby grant, bargain, sell, and transfer to PYCO INDUSTRIES, INC., a Texas corporation ("Grantee"), the following personal property constituting Grantor's rail line in Lubbock, Texas: rail, ties, spikes, tie plates, rail anchors, bridges, culverts, signals, signal equipment, ballast, other track materials, and the metal depot at or near the Old BN Yard (excluding any and all vehicles, maintenance equipment on wheels, radios, and computer equipment), hereinafter referred to as the Property.

GRANTOR TRANSFERS SAID PROPERTY IN THE CONDITION IN WHICH IT EXISTS ("AS IS") AND EXPRESSLY DISCLAIMS, EXCEPT AS EXPRESSLY PROVIDED HEREIN, ALL WARRANTIES EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND GRANTOR SHALL NOT BE LIABLE TO GRANTEE FOR ANY CLAIM, LOSS OR DAMAGE OR EXPENSE OF ANY KIND BECAUSE OF THE CONDITION OF SAID PROPERTY, EXCEPT THAT GRANTOR WARRANTS TO GRANTEE ITS TITLE TO SAID PROPERTY

TO HAVE AND TO HOLD the same unto said Grantee its successors and assigns, forever.

IN WITNESS WHEREOF, this instrument is executed by Grantor as of the 5th
day of November, 2007.

ATTEST:

-SOUTH PLAINS SWITCHING, LTD. CO.

By: _____

By: _____

Title: _____

STATE OF TEXAS)
)
COUNTY OF LUBBOCK) SS:

On this 5th day of November, A.D., 2007, before me, the undersigned, Notary Public in and for said County, in said State, personally appeared LARRY D. WISENER, an officer of South Plains Switching, Ltd. Co., to me known to be the identical person named in and who executed the foregoing instrument, and acknowledged that he executed the same as his free and voluntary act and deed and in the capacity therein stated.

Notary Public

My Commission expires: _____

Attachment VII

JAMES L. GORSUCH, P.C.

Attorney at Law

4412 - 74th Street, Suite B-102
Lubbock, Texas 79424

Telephone: (806) 771-6474
Facsimile: (806) 771-6476
jgorsuch@mta-online.net

January 25, 2008

Via Facsimile: 785-2521

Mr. Gary R. McLaren
PHILLIPS & McLAREN, L.L.P.
3305 66th Street, Suite 1A
Lubbock, Texas 79413

Re: Notice of Choo-Choo Properties, Inc., to Pyco Industries, Inc., To Cease Trespassing
on Choo-Choo Properties, Inc.'s Rail Property

Notice to Cease Trespass

Dear Mr. McLaren:

As you know, this firm represents Choo-Choo Properties, Inc., in connection with various matters regarding its rights in the Lubbock, Texas, area. Choo-Choo Properties, Inc., became the owner, on April 28, 2006, of a strip of land located to the east of Avenue "A", between 19th Street and 23rd Street in Lubbock, Texas. The stretch of property, which includes rail, runs approximately four blocks.

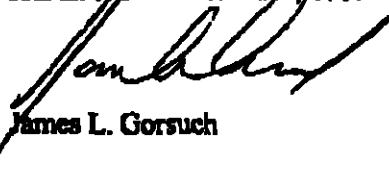
We have been advised that Pyco has improperly stored cars on this property for the past ten days. We understand that thirteen cars are now on the property. Notice is hereby given to remove said cars immediately, or, Choo-Choo Properties, Inc., will take all action necessary to protect its rights under the laws of the state of Texas.

We hope that Pyco Industries, Inc., will comply with this notice and remove the thirteen rail cars at once from the location of Choo-Choo Properties, Inc., set out above.

We remain,

Very truly yours,

JAMES L. GORSUCH, P.C.



James L. Gorsuch

JLG/jeb

January 25, 2008

Page 2

cc: Mr. Larry Wisener
CHOO-CHOO PROPERTIES, INC.
P.O. Box 64299
Lubbock, Texas 79464-4299

C O V E R
S H E E T

FAX

To: Gail Kring
Robert Lacy
744-3221

Charles Montange
206-546-3739

Re: PYCO/Railroad

Date: January 25, 2008

Pages: 3, including cover sheet

Gail, Robert and Chuck:

Please find faxed herewith a copy of letter I received from Jim Gorsuch this morning.

Gary R. McLaren

From the desk of

Gary R. McLaren
Attorney at Law
Philips & McLaren L L P
3305 66th Street, Suite 1A
Lubbock, Texas 79413

(806) 788-0809
Fax (806) 785-2521

Attachment VIII



DEED

2006054298

5 PGS

After Filing Return to: CHOO CHOO PROPERTIES, INC, P O BOX 64420, LUBBOCK, TEXAS 79464-4420

DEED NO.: 61171

QUITCLAIM DEED

**THE STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §**

KNOW ALL MEN BY THESE PRESENTS:

THAT the SOUTH PLAINS SWITCHING LTD. CO., a Texas Limited Liability Company, of the County of Lubbock, State of Texas, (hereinafter "Grantor") for and in consideration of the sum of TEN DOLLARS AND NO/100 DOLLARS (\$10.00) and other good and valuable consideration, in hand paid by the grantee herein named, the receipt and sufficiency of which is hereby acknowledged, has QUITCLAIMED, and by the presents does QUITCLAIM unto CHOO CHOO PROPERTIES, INC. of P. O. Box 64420, Lubbock, Texas 79464-4420 (hereinafter "Grantee"), all of its right, title and interest in and to the real property situated in Lubbock County, Texas, more particularly described in Exhibit "A" attached hereto and made a part hereof (hereinafter "the Property").

TO HAVE AND TO HOLD all of Grantor's right, title and interest in and to the Property and premises unto Grantee, its successors and assigns forever, so that neither Grantor nor its legal representatives or assigns shall have, claim or demand any right or title to the Property, premises or appurtenances or any part thereof.

This conveyance is made without warranty of any kind, express or implied and no covenant of warranty shall be implied from the use of any word or words herein contained, including without limitation any warranty that might arise by common law, or the warranties in Section 5.023 of the Texas Property Code (or its successor). By the acceptance of this deed,

Grantee takes the Property "AS IS". Grantor has not made and does not make any representations as to the physical condition, layout footage, expenses, zoning, operation, or any other matter affecting or related to the Property, and Grantee hereby expressly acknowledges that now such representations have been made. Grantor makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a particular purpose or otherwise except as set forth and limited herein. Any implied warranties are expressly disclaimed and excluded.

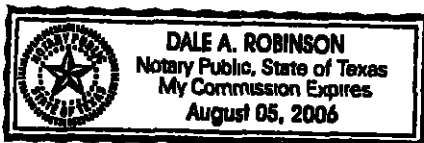
EXECUTED on this the 28th day of April, 2006.

South Plains Switching, Ltd., Co.

Delilah Wisener
By: Delilah Wisener, Owner

THE STATE OF TEXAS §
§
COUNTY OF LUBBOCK §

This instrument was acknowledged before me on this the 28th day of April, 2006 by DELILAH WISENER, Owner of South Plains Switching, Ltd. Co., a Texas Limited Liability Company, on behalf of said company.



Dale A. Robinson
NOTARY PUBLIC, STATE OF TEXAS
Dale A. Robinson
Printed Name of Notary

My Commission Expires: August 05, 2006

EXHIBIT "A".

TRACT 1:

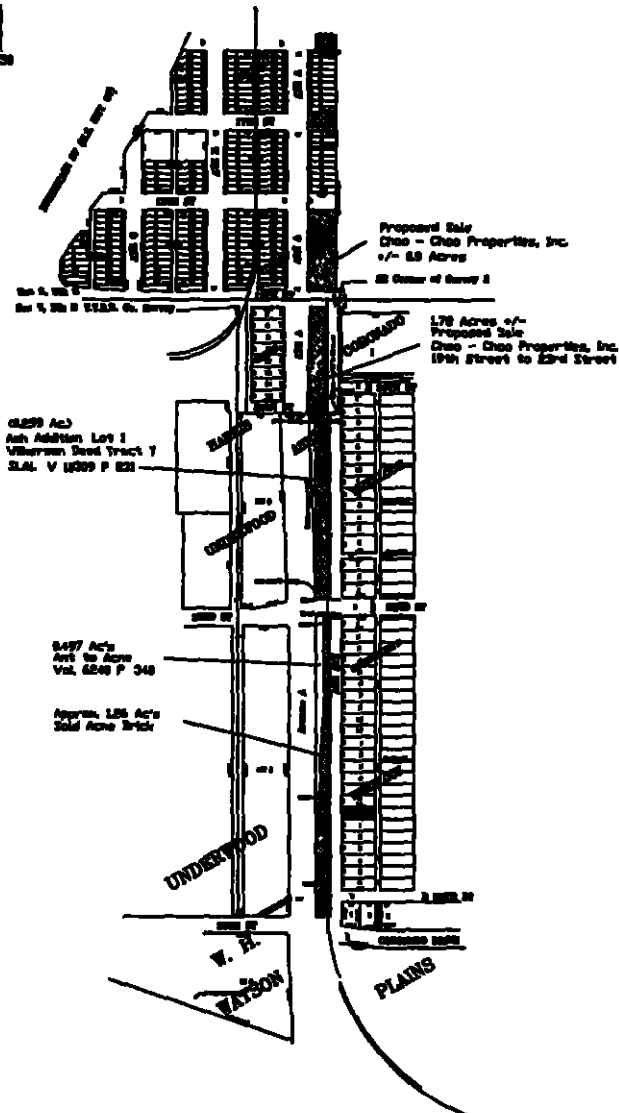
All of that portion of the South Plains Switching, Ltd., Co (SAW) property, tracks, easements, and fixtures located within the borders of the following described land as bordered by the South right of way line of 19th Street on the North, a Westerly projection of the South right of way line of 23rd Street (as shown on the Wheelock Addition) on the South, the East right of way line of Avenue A on the West excepting Lot 1 of the Ash Addition and the West line of Ash Avenue on the East all as presently located within Section 7, Block B, T.T.R.R. Co. Survey, City of Lubbock, Lubbock County, Texas.

TRACT 2:

All of the remainder of Block 238 as originally shown on the Original Town Plat for Lubbock, Texas within Block O Survey 2 in Lubbock, Lubbock County, Texas located within the borders of the following described land as Bordered by 18th Street on the North, 19th Street on the South, an Alley on the East and Avenue A on the West.



Graphic Scale



Property Conveyed to Choo - Choo Properties, Inc.

Legal Description

Tract 1

All of that portion of the SOUTH PLAINS SWITCHING, LTD. CO. (SPSW) property, lands, easements, and interests located within the borders of the following described land as bounded by the South right of way line of 16th Street on the North, a westerly projection of the South right of way line of 20th Street (as shown on the Villaview Addition) on the South, The East Right of Way line of Avenue A on the West comprising Lot 1 of the Addn Addition and the West line of Addn Addition on the East all as presently located within Section 7, Block B, T.T.SUR. CO. Survey, City of Lubbock, Lubbock County, Texas.

Tract 2

All of the Remainder of Block 238 as originally shown on the Original Town Plat for Lubbock, Texas within Block O Survey 2 in Lubbock, Lubbock County, Texas located within the borders of the following described land as Bounded by 16th Street on the North, 20th Street on the South, an Alley on the East and Avenue A on the West.

42803

Exhibit "A"
Drawing No. 61171

Sheet 1 of 1 Date 4/22/85	Choo - Choo Properties, Inc. P. O. Box 64420 Lubbock, TX 79464	South Plains Switching, Ltd., Company P. O. Box 64299 -- Lubbock, TX 79464 Phone: 806-828-4841 -- Fax: 806-828-4863	Lundbreth Engineering, LLC P. O. Box 98236 Albuquerque, NM 87199 Phone: 505-839-9823
------------------------------------	--	---	---

Attachment IX

JAMES L. GORSUCH, P.C.

Attorney at Law

4412 - 74th Street, Suite B-102
Lubbock, Texas 79424

Telephone: (806) 771-6474
Facsimile: (806) 771-6476
jgorsuch@nts-online.net

JAN 07 2008

January 2, 2008

CM/RRR 7005 0390 0000 8941 3238

and FACSIMILE:

Mr. Donald E. Herrmann

KELLY, HART & HALLMAN, P.C.

201 Main Street, Suite 2500

Fort Worth, Texas 76102

**Re: Termination of Agreement Dated September 12, 2006
South Plains Switching, Ltd. Co., and BNSF Railway Company - Burris, Texas**

NOTICE OF CANCELLATION

Dear Mr. Herrmann:

This letter will constitute a Notice of Cancellation on behalf of South Plains Switching, Ltd. Co., of the agreement dated September 12, 2006, regarding service of the Jarvis Metals facility at Burris, Texas.

As you recall, under the agreement, effective September 18, 2006, BNSF Railway Company was to pay South Plains Switching, Ltd. Co., \$75.00 per car for each car handled by BNSF on behalf of Jarvis Metals. Since the second week of November, 2007, no payment has been made by BNSF to South Plains for the handling of the cars at Burris.

BNSF has been advised that the tracks at Burris and the business at Burris were not part of the business that was sold to Pyco Industries as a result of various proceedings in front of The Surface Transportation Board. The Surface Transportation Board has acknowledged this in its Feeder Line decision which has been previously sent to you.

The agreement provides that it may be terminated by either party giving thirty days' advance notice. This letter constitutes the thirty days' advance notice of South Plains Switching, Ltd. Co., that the above referenced agreement is terminated. South Plains Switching, Ltd. Co., will consider the agreement terminated thirty days from your receipt of this letter.

January 2, 2008

Page 2

Respectfully submitted,

JAMES L. GORSUCH, P.C.



James L. Gorsuch

JLG:jcb

cc: Via Facsimile:
Mr. Larry D. Wisener
SOUTH PLAINS SWITCHING, LTD., CO.
P O. Box 64299
Lubbock, Texas 79464-4299

Via Facsimile
Mr. Thomas F. McFarland
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, #1890
Chicago, Illinois 60604-1194

KELLY HART & HALLMAN LLP

201 MAIN STREET SUITE 2600
FORT WORTH TEXAS 76102

Telephone: (817) 332-2500
Telecopy: (817) 878-9280
Writer's Direct Dial: (817) 878-3548
Email Address: donald.herrmann@khh.com

301 Congress, Suite 2000
Austin, Texas 78701
1000 Louisiana, Suite 4700
Houston, Texas 77002

January 9, 2008

VIA FAX NO. (806) 771-6476

James L. Gorsuch
James L. Gorsuch, P.C.
4412 74th Street, Suite B-102
Lubbock, Texas 79424

Re: September 12, 2006, Agreement between South Plains Switching,
Ltd. Co and BNSF Railway Company

Dear Jim:

I have received your letter noticing cancellation of the above-referenced Agreement. As you know, BNSF has received competing contentions regarding service of the Jarvis Metals facility at Burris, Texas. PYCO Industries contends that the Burris tracks and business were conveyed to it as part of the Surface Transportation Board action. South Plains Switching, of course, contends the opposite.

Except for our prior dealings with Mr. Wisner, I would suggest that the parties sit down and try to work out this dispute amicably. But, I doubt a sensible approach like that is of much interest to your client. If I'm wrong, please let me know.

In any event, your letter does not make a particular demand on BNSF. I guess my question to you is: What does South Plains Switching expect BNSF to do under these circumstances?

Very truly yours,



Donald E. Herrmann

DEH/dh
03051 0210

James L. Gorsuch
January 9, 2008
Page 2

bcc: Eddie Hale

CHAS MONTANGE

From: <mcfarland@aol.com>
To: <c.montange@verizon.net>
Cc: <delilah@nts-online.net>, <dwotrans@bresnan.net>
Sent: Wednesday, February 06, 2008 6:59 AM
Subject: Re SAW conveyance to PYCO

SAW does hold a different view, namely, that the conveyance was limited to Lubbock; Burris is distinct from Lubbock.....Tom

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

From: CHAS MONTANGE <c.montange@verizon.net>
To: mcfarland@aol.com
Sent: Tue, 5 Feb 2008 4:38 pm
Subject: SAW conveyance to PYCO

To: Tom McFarland, for SAW
From: Chas Montange, for PYCO

I note that SAW in its answer to the 2d interogs in FD 35111 references again Burris, and the Jarvis 75/carload payment

PYCO understands its deed from SAW to include all real estate, trackage and service and related rights remaining in SAW as of May 5, 2006 (plus some other interests per the settlement agreement) that BNSF conveyed to SAW. This necessarily would include all trackage and rights at Burris conveyed by BNSF to SAW, as included by SAW in the valuation for SAW in F.D. 34890. See eg Landreth statement tab 2 p 21 to SAW filing dated Sept 18, 2006 in referenced docket. Please let me know immediately if you hold (SAW holds) a different view

More new features than ever. Check out the new [AOL Mail!](#)

2/6/2008

Attachment X

SOUTH PLAINS SWITCHING, LTD. CO.

v.

BNSF RAILWAY COMPANY, f/k/a
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

IN THE 99TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED
DISTRICT CLERK
LUBBOCK CO
FEB - 1 PM 1:59
2007

**PLAINTIFF'S THIRD AMENDED ORIGINAL PETITION
AND APPLICATION FOR TEMPORARY INJUNCTION
AND PERMANENT INJUNCTION**

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), Plaintiff herein, files this, its Third Amended Original Petition and Request for Temporary Injunction and Permanent Injunction, complaining of BNSF RAILWAY COMPANY, f/k/a THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF"), Defendant herein, and would show to the court as follows:

**I.
DISCOVERY LEVEL**

SOUTH PLAINS anticipates that discovery will be conducted under Level III of the applicable Texas Rules of Civil Procedure for the reason that it is anticipated that the court will enter a Scheduling Order in this case

**II.
PARTIES**

SOUTH PLAINS is a corporation created and authorized to do business in the State of Texas. Its principal place of business is in Lubbock, Lubbock County, Texas.

BNSF is a corporation created under the laws of Delaware and authorized to do business in the State of Texas. No service of process is necessary on **BNSF** as **BNSF** has already entered an appearance in this case.

III. **JURISDICTION AND VENUE**

This court has jurisdiction of this matter for the reason that the relief sought by **SOUTH PLAINS** is within the jurisdictional subject matter of this court and any damages sought herein are within the jurisdictional limits of this court.

Venue of this action is proper in Lubbock County. **SOUTH PLAINS'** principal place of business is located in Lubbock County. The acts, omissions and events giving rise to this case all occurred in Lubbock County. The obligations of the parties under their contract were to be performed in Lubbock County.

IV. **UNDERLYING FACTS**

SOUTH PLAINS is a shortline railroad that operates over approximately thirteen miles of track in southeast Lubbock. **SOUTH PLAINS** serves customers in the southeast part of Lubbock. **SOUTH PLAINS** is responsible for obtaining rail cars by interchanging the cars from **BNSF**, taking them to the customer, and then returning the rail cars to **BNSF** after the customer is finished either loading or unloading the rail car.

SOUTH PLAINS was formed in 1999 and began operations on July 5, 1999. **BNSF** and **SOUTH PLAINS** have a contractual relationship governed by an Asset Sale Agreement.

Property and real estate conveyed by **BNSF** to **SOUTH PLAINS** in 1999 is governed by a Quitclaim Deed and a Bill of Sale.

As a part of the Asset Sale Agreement entered into between **SOUTH PLAINS** and **BNSF**, **BNSF** quitclaimed certain real estate to **SOUTH PLAINS** by virtue of a Quitclaim Deed signed on May 18, 1999, by **BNSF**. The Quitclaim Deed conveyed to **SOUTH PLAINS** all of its right, title and interest, in a parcel of land located in Lubbock County as described in detail in an attachment to the Quitclaim Deed. The property conveyed covered several miles of track in the industrial area of southwest Lubbock.

As a part of Asset Sale Agreement, **BNSF**, by Bill of Sale, conveyed to **SOUTH PLAINS** all rail, ties, spikes, tie plates, rail anchors, turnouts, bridges, culverts, signaling equipment, and other supporting structures, ballast, other track materials and supplies and the metal depot at or near the old BN yard. The conveyance of the property set forth in the Bill of Sale was a conveyance of the turnout/switches allowing access to the tracks conveyed to **SOUTH PLAINS**.

The turnout/switches conveyed as a part of the Asset Sale Agreement and Bill of Sale were the following:

1. Turnout/Switch at the west end of Track 340 ("West Turnout/Switch 340").
2. Turnout/Switch located at the east end of Track 340 ("East Turnout/Switch 340").
3. Turnout/Switch located at the east end of Track 320 ("East Turnout/Switch 320").
4. Turnout/Switch located at the west end of Track 320 ("West Turnout/Switch 320").
5. Turnout/Switch located at the west end of Track 330 (West Turnout/Switch 330).
6. Turnout/Switch at Track 310 ("Turnout/Switch 310").

On June 8, 2007, **BNSF** shut off and closed West Turnout Switch 340. This turnout/switch was conveyed by **BNSF** to **SOUTH PLAINS** by the Asset Sale Agreement and the Bill of Sale. On June 6, 2000, **BNSF** removed East Turnout/Switch 320. This turnout/switch was conveyed by

BNSF to SOUTH PLAINS by the Asset Sale Agreement and the Bill of Sale. On September 22, 2000, BNSF removed West Turnout/Switch 320. This turnout/switch had been conveyed by BNSF to SOUTH PLAINS by virtue of the Asset Sale Agreement and the Bill of Sale. On October 23, 2003, BNSF removed West Turnout/Switch 330. This turnout/switch was conveyed by BNSF to SOUTH PLAINS by virtue of the Asset Sale Agreement and the Bill of Sale. At no time before any of these turnout/switches were removed, did BNSF obtain permission from SOUTH PLAINS to remove the turnout/switches

Despite East Turnout/Switch 340 being owned by SOUTH PLAINS, since November of 2007 BNSF has used East Turnout/Switch 340 to access Track 340. This movement over the turnout/switch was not authorized by SOUTH PLAINS and is improper interference with and trespass upon the property of SOUTH PLAINS.

As a part of the Asset Sale Agreement, BNSF quitclaimed to SOUTH PLAINS three tracks located in Burris, Texas, being Tracks 4, 7 and 12. The ownership of these tracks have been the subject of previous litigation. In Tarrant County, BNSF sought a declaratory judgment that the conveyance was invalid due to a mutual mistake. The jury found and the court incorporated into its judgment, a finding that the conveyance of the tracks was not a mutual mistake. That portion of the court's judgment in Tarrant County was not appealed. Therefore, SOUTH PLAINS owns Tracks 4, 7 and 12 at Burris. In addition, pursuant to the Bill of Sale, SOUTH PLAINS owns all of the turnout/switches allowing access to said tracks.

V. **CAUSES OF ACTION**

Breach of Contract

BNSF and SOUTH PLAINS entered into an Agreement for the Sale of Certain Assets, Rights and Obligations of The Burlington Northern and Santa Fe Railway Company to South Plains Switching, Ltd. Co. ("Asset Sale Agreement"). As a part of the Asset Sale Agreement, BNSF conveyed to SOUTH PLAINS, by Bill of Sale, the turnout/switches described above. The removal of these turnout/switches was a breach by BNSF of the Asset Sale Agreement which has resulted in damages to SOUTH PLAINS.

Conversion

The removal of the turnout/switches set out above by BNSF amounted to BNSF'S wrongfully exercising dominion or control over the property of SOUTH PLAINS, to wit, the turnout/switches described above. SOUTH PLAINS has been damaged as a result of the conversion on the part of BNSF

Trespass

The unlawful detention and use of East Turnout/Switch 340 by BNSF to access Track 340, constitutes trespass on the part of BNSF, and constitutes improper interference, improper possession and trespass of and upon Turnout/Switch 340.

VI. **DECLARATORY JUDGMENT**

SOUTH PLAINS seeks a declaratory judgment from this court that it owns the turnout/switches described herein, as well as the turnout/switches on the Burris Tracks 4, 7 and 12. Under the Asset Sale Agreement, the Quitclaim Deed and the Bill of Sale, these turnout/switches were conveyed by BNSF to SOUTH PLAINS. Therefore, SOUTH PLAINS seeks a declaratory judgment from this court holding that SOUTH PLAINS is the owner of the turnout/switches in

question.

VII. **ESTOPPEL**

BNSF cannot raise the defense of limitations under the doctrine of equitable estoppel. **BNSF'S** representatives made one or more representations that the turnout/switches taken out in 2000 and 2003 would be replaced, which induced **SOUTH PLAINS** to delay filing suit on the turnout/switches until after limitations had apparently run. The fraudulent representations made by **BNSF'S** representatives were calculated to delay any action by **SOUTH PLAINS** in filing suit in connection with the turnout/switches that were removed in 2000 and 2003. The representations made by the representative of **BNSF**, combined with the refusal of **BNSF** to replace these turnout/switches, shows that **BNSF** induced **SOUTH PLAINS** to delay filing suit. **SOUTH PLAINS** detrimentally relied upon the misrepresentations of **BNSF'S** representative regarding the turnout/switches. For all of these reasons, **BNSF** should be estopped from raising the statute of limitations defense herein.

VIII. **DAMAGES**

SOUTH PLAINS is entitled to recover damages for the turnout/switches that have been converted by **BNSF**. **BNSF** is liable to **SOUTH PLAINS** for the market value of the turnout/switches, or, in the alternative, the replacement value of the turnout/switches, or, in the alternative, the actual or intrinsic value of the turnout/switches.

SOUTH PLAINS is also entitled to recover damages for the continued wrongful possession of West Turnout/Switch 340 and **BNSF'S** continued trespass on Turnout/Switch 340.

IX.
EXEMPLARY DAMAGES

BNSF was well aware that the turnout/switches set forth herein were conveyed to **SOUTH PLAINS** by virtue of the Asset Sale Agreement and the Bill of Sale. However, **BNSF** acted with malice and removed the turnout/switches in violation of the rights of **SOUTH PLAINS**. Therefore, **BNSF** is liable to **SOUTH PLAINS** for exemplary damages.

BNSF was well aware that East Turnout/Switch 340 was conveyed to **SOUTH PLAINS** by the Asset Sale Agreement and by the Bill of Sale. However, **BNSF** continues to use East Turnout/Switch 340 to access Track 340 in violation of the rights of **SOUTH PLAINS**. **BNSF** has acted with malice in continuing to use East Turnout/Switch 340 to access Track 340. Therefore, **BNSF** is liable for exemplary damages.

IX.
ATTORNEY'S FEES

SOUTH PLAINS has retained the law firm of James L. Gorsuch, P.C., to represent it in the preparation and prosecution of this lawsuit and has agreed to pay such attorney reasonable and necessary fees that are equitable and just. Accordingly, **SOUTH PLAINS** asks the court to render judgment in favor of **SOUTH PLAINS** for reasonable and necessary attorney's fees, that are equitable and just, incurred in this proceeding.

X.
APPLICATION FOR TEMPORARY INJUNCTION

BNSF'S continued improper possession and use of East Turnout/Switch 340 in question is a continuing violation of the property right of **SOUTH PLAINS** in the turnout/switch. **SOUTH PLAINS** has shown a probable right of relief in that on the final hearing, **SOUTH PLAINS** will be

able to prove that it is the owner of East Turnout/Switch 340, and that BNSF has continued improper possession, use and control of East Turnout/Switch 340. SOUTH PLAINS will suffer a probable injury unless injunctive relief is granted. BNSF will continue to move trains over the East Turnout/Switch 340 and continued improper use of BNSF of East Turnout/Switch 340 will cause the turnout/switches to deteriorate and depreciate in value. SOUTH PLAINS has no adequate remedy at law. At this point, SOUTH PLAINS cannot obtain complete, final and equitable relief in connection with the improper use by BNSF of East Turnout/Switch 340.

Therefore, this court, after hearing, should enter a Temporary Injunction, forbidding BNSF from moving trains over East Turnout/Switch 340 to access Track 340 until final order of this court.

X.
PRAYER

WHEREFORE, Premises Considered, SOUTH PLAINS requests

1. That this court, after a hearing, enter a Temporary Injunction, prohibiting BNSF from using East Turnover/Switch 340 to access Track 340.
2. That upon final hearing, SOUTH PLAINS have judgment against BNSF based on breach of contract, conversion, and under the Declaratory Judgment Act and for damages resulting from the removal of the turnout/switches as set out herein.
3. That the court enter a declaratory judgment that the turnout/switches on Tracks 4, 7 and 12 in Burris, Texas, were duly and properly conveyed by BNSF to SOUTH PLAINS and that SOUTH PLAINS is the owner of said turnout/switches.
4. That SOUTH PLAINS recover any and all damages it has sustained resulting from the actions of BNSF in removing the turnout/switches, including but not limited to, the market value of the switches, any attorney's fees, pre-judgment and post-judgment interest, and any other and further relief to which SOUTH PLAINS may show itself to be entitled.

Respectfully submitted,

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By: James L. Gorsuch

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Third Amended Original Petition has been served on opposing counsel on the 1st day of February, 2008:

CM/RRR 7006 2760 0004 4274 1952

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