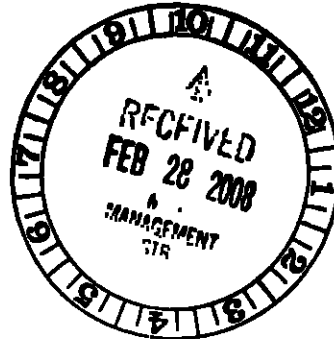


CHARLES H MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
(206) 546-1936
FAX (206) 546-3739

221703

27 February 2008
by express service



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

Supplement (Update on Recent Developments)
Relating to

PYCO's Verified Motion for Enforcement
and Other Appropriate Relief

ENTERED
Office of Proceedings

FEB 25 2008

Part of
Public Record

Dear Madam Secretary:

On February 11, 2008, PYCO Industries, Inc. (PYCO) filed a Verified Motion for Enforcement and other relief in this proceeding seeking a Board order requiring South Plains Switching Ltd. (SAW) to surrender all claims to switches, Burris trackage, and the Acme Lead, pursuant to this Board's order in F.D. 34890 served August 31, 2007, and to SAW's own representations to this Board and to PYCO. PYCO sought expeditious treatment. SAW's initial response was in the form of a February 14 letter stating that it was "relinquishing" claims that PYCO could not use Switch 310, so that expeditious treatment was not necessary.

Since February 11, 2008, there have been additional developments relevant to PYCO's motion for enforcement. In particular, although SAW has nonsuited (voluntarily dismissed without prejudice to refile) its state court claim of trespass and for a temporary restraining order barring PYCO from use of switch 310, SAW has amended its pleadings in pending litigation against BNSF to assert ownership, trespass, and damage claims against BNSF for use of a host of switches (including

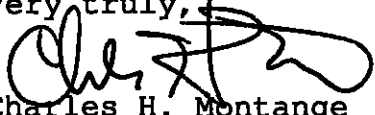
specifically 310) and Burris properties by BNSF or PYCO.

PYCO has invested heavily in buying all of SAW, and - as shown in the Verification attached to this supplementation - continues to invest heavily in repairs. SAW's spurious claims not to have conveyed what SAW told the Board it owned, which this Board ordered SAW to convey, and which SAW's counsel told PYCO its deed and bill and sale in fact conveyed, are imposing unreasonable costs and uncertainties on PYCO and the shippers of Lubbock. In light of SAW's recent maneuvers against BNSF, SAW's justification for claiming expeditious treatment is unnecessary here is false or at least misleading.

If a motion is needed for this supplementation, PYCO hereby makes same in the interest of an accurate record, and to protect rail shippers in Lubbock.

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.)

Supplemental Memorandum Concerning Recent-Developments
in connection with PYCO's Motion for
Enforcement or Clarification
and Other Appropriate Relief

On February 11, 2008, PYCO Industries, Inc. (PYCO) filed a motion for enforcement or clarification of this Board's decision served August 31, 2007, in this proceeding ordering sale and transfer of all assets of South Plains Switching, Ltd. (SAW) pursuant to terms and conditions set by the Board. This Supplemental Memorandum is to apprise the Board of some recent events which are germane to PYCO's motion in respect to Switch No. 310, related switches, and the "Burris trackage." In addition, this Memorandum serves to clarify certain representations made by SAW concerning the "Acme lead" in this proceeding.

I. Background.

In this Board's Decision served August 31, 2007, this Board ordered conveyance of all SAW's rail assets. SAW enumerated those assets in an inventory it filed in this proceeding.¹ Pursuant to a this Board's Decision and a settlement agreement,

¹ A copy of that inventory (a report by SAW witness Landreth), dated Sept. 5, 2006, is included as Attachment IV to PYCO's motion filed on February 11.

PYCO acquired all those assets, plus certain additional assets identified in the settlement agreement. SAW's attorney represented that the deed and bill of sale prepared by SAW conveyed all that SAW received from BNSF, and PYCO accepted the deed and bill of sale on that basis.

Unfortunately, since closing on November 9, 2007, SAW has pursued a course of conduct in violation of the August 31, 2007 Decision. PYCO's February 11, 2008 motion raised three specific instances for which PYCO requested enforcement or clarification of its August 31 Decision in order to address SAW's actions. In particular, PYCO sought an order from this Board clarifying that

- (1) SAW must surrender all claims to switches (turnouts) including especially No. 310;
- (2) SAW must surrender all claims to the Burris trackage; and
- (3) SAW and alter egos of SAW must surrender all claims 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.

In light of a state court lawsuit filed by SAW against PYCO alleging trespass and seeking injunctive relief concerning switch 310, PYCO sought expeditious treatment for its motion. By letter dated February 14, 2008, and filed with this Board, SAW stated that it was "relinquishing its claim that PYCO cannot use switch 310," or seek to block PYCO's use of the switch, and that expeditious treatment was therefore not necessary.

For the reasons stated herein, SAW's claims continue to be misleading.

II. Recent developments in connection with Switch 310
and Burris

PYCO filed an answer to the Texas state court lawsuit in which SAW sought to enjoin PYCO's use of Switch 310 on or about February 12. PYCO attached its motion for relief in this proceeding. On February 19, 2008, SAW's Lubbock counsel advised PYCO that on February 15, SAW filed a "nonsuit" in Texas state court, basically dismissing its action against PYCO concerning Switch 310. However, the nonsuit is without prejudice to SAW's re-filing it at any time. A copy of the nonsuit is attached as Exhibit A.

Notwithstanding the nonsuit, SAW continues to claim Switch 310. On February 22, 2007, SAW filed a "Plaintiff's Fourth Amended Original Petition" in SAW v. BNSF, 99th Dist. Cot. Lubbock County, TX, NO. 2007-539-788.² A copy of this pleading is attached as Exhibit B. In that "Amended Petition," SAW clearly asserts continued ownership of a host of switches which, to the extent owned by SAW, this Board's August 31 Decision required be conveyed to PYCO.³ The Amended Petition at page 4

² PYCO's Lubbock counsel received a copy of this SAW pleading on February 25 from BNSF's Texas counsel.

³ BNSF also furnished PYCO with an affidavit by Larry D. Wisener dated February 22, 2008, filed in one of SAW's numerous state court cases against BNSF which maintains that SAW only sold

specifically claims that SAW continues to own Switch 310, and alleges that use of the switch by PYCO (or its contract carrier WTL) is "not authorized." The SAW pleading at page 5 alleges trespass for use of switches 340, 310, 9298, 355, 352 and the Burris switch. The SAW pleading at page 6 seeks a declaration that SAW continues to own switch 310, and a number of other switches (320, 330, 340, 355, and the switches at Burris, see page 4 of "Amended Petition"). At page 7 SAW seeks damages, including exemplary damages, for use of all these switches.

This Board's August 31, 2007, decision in this feeder line proceeding required transfer of all SAW assets to PYCO. This has to include any interest of SAW in switches to and from the BNSF mainline, for neither PYCO nor any other carrier can provide common carrier rail service in Lubbock without use of switches. In addition, PYCO accepted a deed and bill of sale which SAW expressly represented conveyed all that SAW received from BNSF.⁴

to PYCO "much" of its trackage and real estate, and appears to claim ownership of all switches (310, 320, 330, 340, 9298, Burris) similar to the claims in SAW's "Amended Petition." Mr. Wisener complains about continued use of the switches, complains about BNSF's management of them, and complains about lack of compensation. The point is that SAW was required to convey, and represented it was conveying, all of SAW. If it did not convey all of SAW, as Mr. Wisener now claims, then SAW must be ordered to issue another quitclaim relinquishing all its interests, and a another bill of sale so doing as well.

⁴ A written representation signed by SAW's counsel, Mr. McFarland, stating that the deed and bill of sale from SAW to PYCO "ensures that SAW conveys to PYCO that which it received from BNSF," is included as Attachment VI to PYCO's motion in this

This obviously includes any interests in switches; otherwise the various leads cannot be operated. Moreover, it obviously includes the Burris trackage; SAW included that trackage in its inventory and in its estimate of Going Concern Value, as did the Board. PYCO paid for all of this.

In dismissing as moot a BNSF motion for clarification in South Plains Switching Ltd. Co. - Acquisition Exemption - BNSF Railway Co., F.D. 33753 (Sub-no. 1), served Feb. 5, 2008, this Board stated that "[a]ll of SAW's rail lines and related property were sold to PYCO Industries, Inc. (PYCO) effective November 9, 2007...." PYCO agrees with the Board. But now SAW is arbitrarily deleting switches, the Acme lead, and Burris trackage from all of SAW.

PYCO suffers no delusion that SAW will leave PYCO alone in connection with the switches, should SAW's continued and apparently never-ending pursuit of BNSF in Texas state court bear any fruit. In short, although SAW claimed to this Board on February 14 that it was "relinquishing its claim" that PYCO could not use Switch 310, SAW in fact is doing nothing of the sort. It

proceeding. According to Merriam Webster's Collegiate Dictionary, 10th Ed., page 386, "ensure" means "to make sure, certain or safe: guarantee." In other words, SAW guaranteed PYCO that the language conveyed "that which [SAW] received from BNSF." All SAW's claims to switches, trackage at Burris, and the Acme lead unquestionably flow from what SAW received from BNSF. See, e.g., "Amended Petition" at 2 (stating that SAW's interests derive from a 1999 BNSF deed and bill of sale). PYCO relied upon SAW's guarantee. Lacy Verification, attached.

is still asserting ownership, and SAW's representation to this Board on February 14 is thus either false or severely misleading: where SAW asserts ownership, claims of trespass and for damages inevitably follow, and on February 22 they did, in the form of another "Amended Petition" in state court in Texas.

Perhaps SAW will now say it intends to tolerate PYCO use of switches, but the "Amended Petition" makes clear that this is only so long as it extracts a monopolist's toll from either PYCO or BNSF. Neither PYCO nor BNSF should pay anything to SAW for use of a switch which is intrinsic to use of all of SAW. SAW is required to convey all of SAW, not pretend to do so, then claim to have held some back, and then play some kind of "gotya" in state court. This is not a matter of contract interpretation; it is a matter of enforcing this Board's orders. This Board ordered conveyance of all-SAW. SAW's attorney said his documents did that. See note 4 and source cited. This Board dismissed a BNSF motion for clarification as moot in another proceeding [F.D. 33753 (sub. no. 1)] because everyone (other than SAW) understands SAW had to convey everything it claimed to PYCO. If SAW now claims otherwise, it should be ordered to relinquish all claims now. In short, this Board was right in its February 5, 2008 in F.D. 33753 (Sub-no. 1): all of SAW was acquired by PYCO. SAW's spurious suits and claims against PYCO and BNSF are completely contrary to the Decisions of this Board.

PYCO wishes to restore rail service in Lubbock,⁵ not engage in costly and vexatious litigation by SAW in state court predicated on SAW's trumped up claims based on violations by SAW of this Board's Decisions and of SAW's representations on file with this Board. This Board should enforce its Decisions, and also hold SAW to its representations, by requiring SAW to surrender its spurious claims, which - as we have shown - SAW continues to make, notwithstanding SAW's claims to the contrary in its letter to this Board on February 14.

In particular, in order to protect the integrity of its own processes; and in order to bring a halt to SAW's predations [49 U.S.C. 10101(12)], encourage honest and efficient management of rail service [49 U.S.C. 10101(5)], encourage the development and continuation of a sound rail system [49 U.S.C., 10101(4)], and provide for an expeditious and effective resolution of this feeder line proceeding [49 U.S.C. 10101(15)], this Board should order SAW immediately to furnish a quitclaim deed and bill of sale surrendering all its claims to any switches to PYCO, surrendering all of its claims to Burris trackage to PYCO, and surrendering all its claims to any other property it owned in

⁵ SAW did not maintain its lines since 1999. PYCO continues to expend in excess of \$10,000 per week to make urgent repairs in order to serve customers. PYCO's limited resources are much better spend fixing the worn-out trackage so rail service may continue than in litigating with SAW over whether SAW conveyed the assets it was ordered to convey, and represented it was conveying. Lacy Verification, attached.

Lubbock that derives from a deed or bill of sale from BNSF.

III. Four Days before this Board's August 31 Decision,
SAW Told the Board it Owned the Acme Lead and the Lead
Was Necessary for Rail Purposes

SAW now asserts that it sold the Acme lead (Track 21 on the Landreth inventory) to SAW alter ego Choo Choo Properties by deed dated April 28, 2006. However, SAW stated the opposite four (4) days before this Board's August 31, 2007 decision.

As PYCO and West Texas and Lubbock Railway Company (WTL, PYCO's alternative service provider) repeatedly complained in the two alternative service dockets (F.D. 34802 and 34889), SAW failed to provide adequate maintenance to its lines used for alternative service purposes. As a result, WTL had to spike a switch in the SAW yard in order to continue to switch cars for PYCO. That in fact was the switch to the Acme lead (track 21 on the Landreth inventory of SAW assets) out of the SAW yard.

On August 27, 2007, SAW responded by filing a "petition under 49 U.S.C. 11102(a) to reopen a switch" in this docket (F.D. 34890). At page 3 of that petition, SAW stated that

"[t]he Acme switch provides access to trackage owned by SAW that is used to provide rail service to Acme Brick Company and for the general railroad purposes of SAW. WTLR's action of spiking the Acme switch substantially impairs the ability of SAW to handle its own business."

SAW demanded that PYCO restore the switch forthwith.

As verified by Robert Lacy at the end of this Memorandum, PYCO expended approximately \$8000 to fix the worn out switch to the Acme lead subsequent to closing. See Lacy Verification, attached. Since the lead is directly off the rail yard, it is extremely useful for switching purposes. Because the 2007 growing season was favorable, rail demand in Lubbock is heavy this season, and PYCO has need of the lead. However, almost immediately upon PYCO's effort to use the restored switch and lead, SAW's attorneys represented that SAW had been sold to Choo Choo Properties, and on behalf of Choo Choo demanded that PYCO vacate the premises.

It is deeply ironic that SAW says it deeded the property to Choo Choo on April 28, 2006, when it subsequently not only included the lead in its feeder line asset inventory (the Landreth material, dated Sept. 4, 2006, and already filed as Attachment IV to PYCO's motion), but also claimed ownership of the lead by pleading filed August 27, 2007, only four days before this Board's August 31 Decision. In addition, SAW asked the Board to require WTL to restore the switch on the ground that it was essential to SAW's general railroad purposes and to serve a customer. The case for ordering Choo Choo immediately to convey all its interests in the lead to PYCO is at least as strong as in the Decision served in this docket (F.D. 34890) on Jan. 24, 2007 (dealing with SAW/Choo Choo machinations in connection with

property used by shipper Hanson Aggregates).

IV. Conclusion

SAW's February 14 claim that it is not pursuing PYCO so there is no need for expeditious relief is deeply misleading. As shown, SAW effectively continues to assert all its claims, including all its claims as to Switch 310.

PYCO wishes to spend its limited resources fixing these run-down lines and operating a credible railroad as opposed to litigating with SAW over whether it can get away with violating this Board's August 31 Decision. PYCO needs all-SAW; that was what was supposed to be conveyed; that is what PYCO told was being conveyed; and that is what PYCO paid for. Those assets are used and useful for the provision of rail services by PYCO. Indeed, SAW has elsewhere asserted or at least admitted that all the assets in question here are essential for those purposes. PYCO requests appropriate orders to end SAW's spurious attempts to hamstring PYCO, either directly or through SAW's continued badgering of BNSF, with respect to assets used, useful, and necessary for rail purposes, which were in SAW's inventory, and which PYCO paid for.

A Board order requiring SAW and Choo Choo to relinquish all their interests to switches, the Acme lead, and Burris by quitclaim deed and bill of sale to PYCO, is and remains an excellent way to accomplish these ends.

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

Atts:

Verification by Robert Lacy (Sr. V.P., PYCO)

Exhibit A - SAW nonsuit, Feb. 15

Exhibit B - SAW "Amended Petition," Feb. 22

Verification.

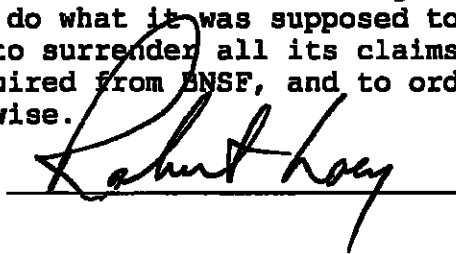
I, Robert Lacy, hereby declare and swear, that I am Senior Vice President for Marketing, PYCO Industries, that I am responsible for rail operations on behalf of PYCO, that I have read the foregoing Verified Motion, and that the facts set forth therein are true and correct to the best of my knowledge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

I also specifically declare and swear the following to the best of my knowledge and information:

- PYCO accepted the SAW deed and bill of sale in reliance on the written representation by SAW's counsel "ensur[ing]" that the deed and bill of sale conveyed all that SAW received from BNSF.

- Since PYCO acquired the SAW lines on November 9, 2007, PYCO has expended in excess of \$10,000 per week in labor and materials to repair those lines in order to provide service to customers without derailments. SAW, by failing to provide maintenance, had allowed the lines to deteriorate to the point the switches were worn out and the tracks unsafe. PYCO wished to use the Acme lead, which SAW said it still owned in its filing on August 27, 2007, for general railroad purposes, and to serve potential customers. We accordingly repaired the switch, which was in the former SAW yard, at a cost which, counting rail and ties we stockpiled, I estimate to be \$8000. We would be using the Acme lead today but for threats by SAW doing business as Choo Choo Properties that our use would be a trespass.

- PYCO wishes to repair these tracks so they are once again operational. We have limited resources which we wish to expend on fixing the lines in Lubbock, and not on continued litigation over claims by SAW that it did not do what it was supposed to do. We request the Board to order SAW to surrender all its claims to the property it claims to have acquired from BNSF, and to order SAW alter egos like Choo Choo likewise.



Subscribed and sworn to before me
this 27th day of February, 2008.



Notary public.



My commission expires: 2-24-2012.

Certificate of Service

I hereby certify service on February 27, 2008, by deposit for express next business day) delivery to Thomas McFarland, 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112 (for SAW and Choo Choo).

A handwritten signature in black ink, appearing to be "C. S. K.", is written over a horizontal line.

Exhibit A

Feb 19 2008 16:44

JAMES L GORSUCH PC

8067716476

P. 2

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

February 19, 2008

Via Facsimile: 785-2521

Mr. Gary R. McLaren

PHILLIPS & McLAREN, L.L.P.

3305 66th Street, Suite 1A

Lubbock, Texas 79413

Re: No. 2008-542,199; South Plains Switching, Ltd. Co. v. Pyco Industries, Inc.; In the
237th District Court of Lubbock County, Texas

Dear Gary:

Attached to this facsimile is a copy of a Plaintiff's Motion for Non-Suit Without Prejudice as well as an Order of Non-Suit Without Prejudice. As you can see, the motion was filed on February 15, 2008, and the order was granted the same day.

We remain,

Very truly yours,

JAMES L. GORSUCH, P.C.



James L. Gorsuch

JLG:jeb

Attachments

Feb 19 2008 16:44 JAMES L GORSUCH, PC

8067716478

P. 3

NO. 2008-542,192

SOUTH PLAINS SWITCHING, LTD. CO.

v.

PYCO INDUSTRIES, INC.

§
§
§
§
§

IN THE 237TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
BY *[Signature]*
2008 FEB 15 PM 1:17
CLERK

PLAINTIFF'S MOTION FOR NON-SUIT
WITHOUT PREJUDICE

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), files this, its Motion for Non-Suit, and would move the court to enter an order of non-suit in connection with the above styled and referenced case.

I.

SOUTH PLAINS, as Plaintiff, on February 1, 2008, filed Plaintiff's Original Petition and Application for Temporary Restraining Order and Temporary Injunction. The court did not ever enter a Temporary Restraining Order or a Temporary Injunction.

Defendant, PYCO INDUSTRIES, INC. ("PYCO"), filed its Original Answer, Affirmative Defenses and Plea of Abatement on February 12, 2008. In the Prayer of its pleading, PYCO prays that the Plaintiff take nothing and that the Defendant recover its costs herein expended.

II.

SOUTH PLAINS would show to the court that it desires to non-suit this case without prejudice for refile and asks the court to enter an order of non-suit without prejudice for refile.

WHEREFORE, Premises Considered, SOUTH PLAINS moves that the court enter an order of non-suit, non-suiting its cause of action against PYCO in this case.

COPY

Feb 19 2008 16:45

JAMES L GORSUCH PC

8067716476

p. 4

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

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion for Non-Suit Without Prejudice has been served on Defendant's counsel on the 15th day of February, 2008:

Via Facsimile: 785-2521
Mr. Gary R. McLaren
Phillips & McLaren
3305 66th, Suite 1-A
Lubbock, Texas 79413


James L. Gorsuch

Feb 19 2008 16:45

JAMES L GORSUCH PC

8067716476

P. 5

NO. 2008-542.199

SOUTH PLAINS SWITCHING, LTD. CO.

v.

PYCO INDUSTRIES, INC.

§
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IN THE 237TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
BY *[Signature]*
2008 FEB 15 PM 1:37
CLERK

ORDER OF NON-SUIT
WITHOUT PREJUDICE

ON THIS DAY CAME ON TO BE CONSIDERED the Motion for Non-Suit filed by Plaintiff, SOUTH PLAINS SWITCHING, LTD. CO., and the court, having considered the same, is of the opinion that the same should be granted. The court finds that the Motion for Non-Suit was filed prior to the time that this case was submitted to the jury and prior to the time of any discovery occurring in the case. This court has entered no injunctive relief in this case to date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Non-Suit of Plaintiff, SOUTH PLAINS SWITCHING, LTD. CO., be and is hereby granted, and all of the claims asserted herein by SOUTH PLAINS SWITCHING, LTD. CO., are hereby non-suited, without prejudice for refiling.

SIGNED this 5 day of February, 2008.

[Signature]

JUDGE PRESIDING

COPY

Exhibit B

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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** served customers in the southeast part of Lubbock. **SOUTH PLAINS** was 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 parcels 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 located 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 located at Track 310 ("Turnout/Switch 310").
7. Turnout/Switch at Track 9298 ("Turnout/Switch 9298")
8. Turnout/Switch at Track 355 at Burris ("Turnout/Switch 355").
9. Turnout/Switch at Track 352 at Burris ("Turnout/Switch 352").
10. Turnout/Switch to Tracks 7 and 12 at Burris ("Burris Switch").

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

or about June 6, 2000, BNSF removed East Turnout/Switch 320. This turnout/switch was conveyed by BNSF to SOUTH PLAINS by the Assets Sale Agreement and the Bill of Sale. On or about 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. In October of 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, Turnout/Switch 355 and the Burris Turnout/Switch to access Jarvis Metals. These movements over the turnout/switches were not authorized by SOUTH PLAINS and is improper interference with and trespass upon the property of SOUTH PLAINS.

Despite Turnout/Switch 310 being owned by SOUTH PLAINS since November of 2007, Pyco Industries and/or Lubbock West Texas Railroad has used the turnout/switch to access Track 310. This movement over the turnout/switch was not authorized by 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 has 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 all of the

turnout/switches allowing access to said tracks including Turnout/Switch 355, Turnout/Switch 352 and the Burris Turnout/Switch.

**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 the turnout/switches, West 340, West 320, East 320 and West 330, was a breach by BNSF of the Asset Sale Agreement which has resulted in damages to SOUTH PLAINS.

Conversion

The removal of Turnout/Switches West 340, West 320, East 320 and West 330 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 the turnout/switches still in place constitutes trespass on the part of BNSF, and constitutes improper interference, improper possession and trespass of and upon Turnout/Switches East 340, 310, 9298, 355, 352 and the Burris Turnout/Switch.

The unlawful use by BNSF to service Jarvis Metals, over Track 4, 7 and 12, and the turnout/switches covering said tracks, constitutes improper trespass on the part of BNSF, and

constitutes improper interference upon the property owned by **SOUTH PLAINS**.

VI.
DECLARATORY JUDGMENT

SOUTH PLAINS seeks a declaratory judgment from this court that it owns the turnout/switches described herein. 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 each of the turnout/switches that are still in place

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 Turnout/Switches 9298, East 340, 310, 355 and 352 were conveyed to **SOUTH PLAINS** by the Asset Sale Agreement and by the Bill of Sale. However, **BNSF** continues to use these turnout/switches in violation of the rights of **SOUTH PLAINS**. **BNSF** has acted with malice in continuing to use these turnout/switches. Therefore, **BNSF** is liable for exemplary damages.

X.
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.

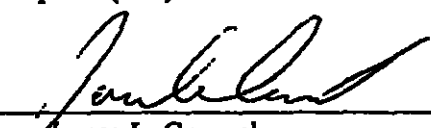
XI.
PRAYER

WHEREFORE, Premises Considered, SOUTH PLAINS requests:

1. 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.
2. 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 turnout/switches, the replacement value of the turnout/switches or in the alternative, the actual intrinsic value of the turnout/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
State Bar No. 08221250

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Fourth Amended Original Petition has been served on opposing counsel on the 22nd day of February, 2008:

CM/RRR 7006 2760 0004 4274 2058

Mr. Donald E. Herrmann

KELLY, HART & HALLMAN, P.C.

201 Main Street, Suite 2500

Fort Worth, Texas 76102

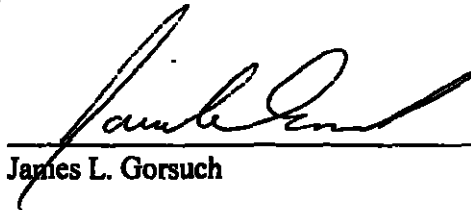
CM/RRR 7006 2760 0004 4274 2041

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