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10 October 2008  
by express service



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

223769

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

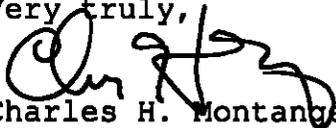
filing of notice and motion for leave

Dear Madam Secretary:

Enclosed on behalf of PYCO Industries, Inc., for filing please find the original and ten copies of a Notice and Motion for Leave. The notice is to apprise this Board (a) that South Plains Switching Ltd. Co. in September 2008 filed a state court proceeding over the same matters at issue in this proceeding; (2) that PYCO has continued to incur costs by reason of SAW's failure to maintain its trackage during the period of alternative service at issue in this compensation proceeding; and (3) that PYCO's costs so attributable now total more than \$662,000. The amount of set-off's already exceeded the maximum amount of compensation that could be calculated for SAW, further confirming SAW is entitled to no additional compensation.

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)

ENTERED  
Office of Procurement

OCT 15 2008

Part of  
Public Record

223769

BEFORE THE SURFACE TRANSPORTATION BOARD

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



Notice of Activity relating to  
to South Plains Switching Ltd's  
"Petition for Compensation"  
and  
Motion for Leave to Supplement

ENTERED  
Office of Proceedings  
OCT 15 2008  
Part of  
Public Record

This Notice is on behalf of PYCO Industries, Inc. ("PYCO") and is to apprise this Board of two matters that have arisen in connection with this proceeding.

1. South Plains Switching, Ltd. Co. (SAW) originally indicated that it "accept[ed]" \$45,112.32 as "full compensation for all periods of alternative service." See Letter, T. McFarland (SAW) to A. Quinlan (STB), dated August 12, 2008, filed in this proceeding, citing SAW Reply of Feb. 25, 2008. As this Board knows, SAW purported to withdraw this concession by its letter of August 12, 2008. PYCO is now apprised that SAW in September 2008 filed an action in Texas state court (attached as Exhibit A) against West Texas & Lubbock Railway Co. (WTL) for compensation for alternative service.

STB's jurisdiction over this matter is, in the words of 49 U.S.C. 10501(b), "exclusive." SAW's action in initiating a state court proceeding over a matter within this Board's exclusive jurisdiction, and which this Board is actively considering, is

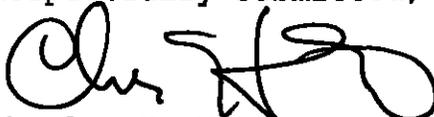
inexplicable.

2. Pursuant to this Board's Decision served August 31, 2007, in Finance Docket 34890 (feeder line proceeding), PYCO acquired all of SAW on November 9, 2007. Although PYCO and WTL objected on a variety of grounds, this Board subsequently instituted this proceeding (Finance Docket 35111) to determine whether SAW was entitled to additional compensation for use of its facilities by WTL to provide alternative service to PYCO. As already noted, SAW conceded that, under this Board's precedent, the maximum amount to which SAW was entitled was \$45,112.12, without taking into consideration set-off's. PYCO and WTL in fact claimed set-off's for costs and track repairs they incurred by reason of SAW's failure to maintain the trackage. Robert Lacy, PYCO's Senior Vice President, reports that since acquiring SAW in November 2007, PYCO has expended \$662,784 to repair the system. See Exhibit B. Mr. Lacy states that inspectors from the Federal Railroad Administration (FRA) have requested additional repairs to bring the track into compliance with FRA standards. Thus, PYCO will be incurring additional expenses by reason of SAW's failure to maintain its trackage during the period of alternative service preceding PYCO's November 2007 acquisition of SAW. All such amounts are legitimate set-off's to any claim by SAW for "compensation." SAW had a duty to maintain its track; any compensation for use of that track should be reduced by an

amount equal to the costs and repair expenses subsequently incurred by PYCO and WTL by reason of SAW's failure to discharge its duty. SAW should not be compensated for failure to discharge its duty to maintain its track.

3. To the extent a motion for leave to supplement the record is required for this filing, PYCO so moves. The SAW lawsuit was not served until September 29, 2008, upon WTL, and PYCO's actual cost to fix the SAW system resulting from SAW's failure to maintain it obviously cannot be determined until PYCO incurs the costs. The information presented herein is thus in fact "new" in the sense of arising after the original reply period.

Respectfully submitted,



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

Exhibit A - SAW v. WTL, Lubbock District Ct. No. 2008-544,741,  
evidently filed on Sept. 18, 2008  
Exhibit B - Declaration of Robert Lacy

#### Certificate of Service

I hereby certify service by deposit for express (next business day) delivery this 10th day of October 2008 upon Thomas McFarland, Esq., 208 South LaSalle St. - Suite 1890, Chicago, IL 60604-1112, counsel for SAW, and John Heffner, 1750 K Street, N.W., Suite 250, Washington, D.C. 20006, counsel for WTL.

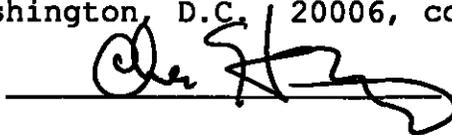


Exhibit A

NO. 2008-544, 741 +L-

FILED FOR RECORD IN  
DISTRICT CLERK LUBBOCK CO. TEXAS  
2008 SEP 18 PM 4:11:00  
Bourbon County

SOUTH PLAINS SWITCHING, LTD. CO. § IN THE 99 DISTRICT COURT  
v. § OF  
WEST TEXAS AND LUBBOCK §  
RAILWAY COMPANY, INC. § LUBBOCK COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

SOUTH PLAINS SWITCHING, LTD. CO. ("SOUTH PLAINS"), Plaintiff herein, files this, its Original Petition, complaining of WEST TEXAS AND LUBBOCK RAILWAY COMPANY, INC. ("WTL"), Defendant herein, and for cause of action would show to the court as follows:

**I.  
DISCOVERY LEVEL**

SOUTH PLAINS anticipates that discovery will be conducted under Level III of the Texas Rules of Civil Procedure for 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 with its principal place of business located in Lubbock, Lubbock County, Texas.

WTL is a Texas railroad and may be served by and through its President, Mr. E. E. Ellis, 118 South Clinton Street, Suite 400, Chicago, Illinois 60661-5772, by Certified Mail, Return Receipt Requested.

**III.  
JURISDICTION AND VENUE**

This court has jurisdiction for the reasons that the allegations set forth herein are within the

**ORIGINAL**

jurisdictional ambit of this court and the amount of damages sought are above the minimal jurisdictional limits of this court.

Venue is proper in Lubbock County for the reason that Lubbock County is the county in which all or a substantial part of the events or omissions giving rise to this claim occurred.

#### **IV. BACKGROUND FACTS**

**SOUTH PLAINS** began operations in July of 1999 as a shortline railroad. **SOUTH PLAINS** acquired approximately fourteen miles of rail track previously owned by The Burlington Northern and Santa Fe Railway Company ("BNSF"), to operate a shortline railroad and serve customers in the east Lubbock area. The rail line had previously been owned by BNSF and the customers had previously been served by BNSF. One of the largest customers served by **SOUTH PLAINS** was Pyco Industries, Inc. ("PYCO"), which owns and operates a large cotton mill in the east Lubbock area.

In 2005, PYCO asserted various complaints about the quality of service rendered by **SOUTH PLAINS**. Informal proceedings were commenced with The Surface Transportation Board ("STB"), the United States government agency that regulates some aspects of rail traffic. In late 2005, a formal proceeding was initiated by PYCO for temporary alternative rail service. Federal law provides that if a rail customer can show a substantial decrease in the quantity or quality of service over a particular period of time, it can petition the STB to allow another carrier to service that customer for a temporary period.

PYCO filed a Request for Interim Alternative Rail Service with the STB on December 20, 2005. PYCO sought an order from the STB allowing an alternative rail carrier, WTL, to service PYCO due to "emergency" conditions. Allegedly there was a large cotton crop that year and PYCO

had contracted for the delivery of a large amount of cottonseed to a third party in California.

By Order of January 26, 2006, the STB granted PYCO's Request for Emergency Alternative Rail Service and allowed WTL to operate over SOUTH PLAINS' tracks and facilities and to serve PYCO. The initial Order allowed Emergency Rail Service for a period of 30 days. On February 24, 2006, the STB extended the Emergency Alternative Rail Service PYCO's Request for a Continuation of Emergency Alternative Rail Service was granted for a period of 120 days. This Order allowed WTL to provide service to PYCO on the rail lines and facilities of SOUTH PLAINS for a period of 120 days. The 120 days was due to expire on June 25, 2006. By Order of June 21, 2006, the STB granted PYCO's Request for Emergency Alternative Rail Service to run the statutory maximum of 270 days. The STB's Order for Emergency Alternative Rail Service was to expire on October 23, 2006. SOUTH PLAINS and PYCO agreed that the period for Emergency Alternative Rail Service could be extended for 30 days until November 22, 2006.

On November 21, 2006, the STB entered an Order for Temporary Alternative Rail Service. In this Order, the STB did not set any date on which the alternative rail service would terminate. The STB based its decision under 49 U.S.C. § 11102(a) which allows temporary alternative rail service if the STB determines there has been a substantial measurable deterioration or other demonstrated inadequacy in the rail service provided by an incumbent carrier. In this case the incumbent carrier was SOUTH PLAINS.

This statute specifically provides that if the STB requires that terminal facilities and mainline tracks be used by an alternative rail carrier, the parties are to agree to establish conditions and compensation for the use of the facilities or if the parties cannot agree, the STB may establish conditions and compensation for the use of the facilities under the principles controlling

compensation in condemnation proceedings. The compensation, under the statute, shall be paid or adequately secured before a rail carrier may begin the use of the facilities of another rail carrier under that section.

The STB, in entering its Order Granting Temporary Alternative Rail Service, did not speak to or issue any Orders regarding payment of compensation or establishing security for compensation to **SOUTH PLAINS**. Therefore, WTL began using the rail lines and facilities of **SOUTH PLAINS** without any compensation being paid or being adequately secured before commencing their operations. The STB's failure to address this issue was in direct contradiction of the statutory requirements.

PYCO and Keokuk Junction Railway Company filed Feeder Line Applications requesting the STB enter an Order directing **SOUTH PLAINS** to sell the majority of its rail line and assets to either one of the railroads. On August 31, 2007, the STB issued a decision in the Feeder Line cases. The decision (1) granted the Applications of both PYCO and Keokuk; (2) provided that **SOUTH PLAINS** should select which company to sell the lines to; and (3) determined the constitutional minimum value and set the terms of the required sale. The parties entered into negotiation and eventually most of the assets of **SOUTH PLAINS** were sold to PYCO

**SOUTH PLAINS** filed for compensation from the STB on December 12, 2007, asking the STB to compensate **SOUTH PLAINS** for PYCO's use of its rail lines during the temporary alternative rail service. The STB, as of the date of the filing of this petition, has not made any ruling on the compensation request of **SOUTH PLAINS**.

V.

**CAUSE OF ACTION**

In any instance in which the STB orders temporary alternative service, another carrier such as WTL here, is allowed to use the terminal facilities of SOUTH PLAINS. SOUTH PLAINS is therefore entitled to recover damages from the other carrier for injuries sustained as a result of compliance with the STB's Order, or for compensation for the use of its facilities, or both, as appropriate, in a civil action, if SOUTH PLAINS is not satisfied with the conditions for the use of the facilities or if the amount of compensation has not been paid promptly.

SOUTH PLAINS has not been paid any compensation for the use of its terminal facilities since the Order for Temporary Alternative Service was issued by the STB. Further, the amount of compensation due to SOUTH PLAINS has not been paid promptly. The Order for Temporary Alternative Service was issued on November 21, 2006, approximately 23 months prior to the filing of this petition. By any measure, compensation has not been paid promptly to SOUTH PLAINS.

VI.

**DAMAGES**

In a civil action, SOUTH PLAINS is entitled to recover compensation for the use of its facilities by WTL, pursuant to the STB's action, including but not limited to all compensation due and owing for the use by WTL of its terminal facilities during the temporary alternative service time period.

In a civil action, SOUTH PLAINS is entitled to recover damages it sustained from the use of its facilities by WTL pursuant to the STB's action, including but not limited to constructive placement charges and surcharge. SOUTH PLAINS alleges it has sustained damages above the minimal jurisdictional limits of the court, due to its compliance with the STB Order and the use of

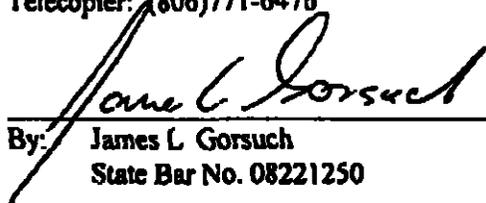
its terminal facilities and tracks by WTL.

**WHEREFORE, Premises Considered, SOUTH PLAINS prays that WTL be cited to answer herein, and that upon final hearing, SOUTH PLAINS have judgment against WTL as follows:**

1. Compensation to be paid by WTL for the use of SOUTH PLAINS' terminal facilities during the period of temporary service.
2. Damages for injuries sustained by SOUTH PLAINS due to the use by WTL of SOUTH PLAINS' terminal facilities.
3. Maximum pre-judgment and post-judgment interest as provided by law.
4. Any and other further relief to which SOUTH PLAINS may show itself to be entitled.

Respectfully submitted,

**JAMES L. GORSUCH, P.C.**  
4412 74<sup>th</sup> 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 Trial**

**SOUTH PLAINS hereby requests a jury trial in the above styled and referenced case and tenders the appropriate jury fee to the District Clerk's office upon the filing of this petition.**

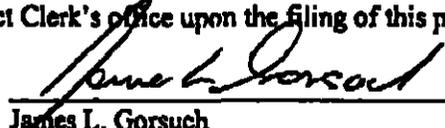
  
James L. Gorsuch

Exhibit B

BEFORE THE SURFACE TRANSPORTATION BOARD

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

Supplemental Declaration of Robert Lacy

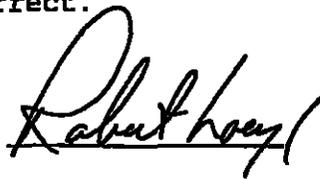
I, Robert Lacy, make this Supplemental Declaration pursuant to 28 U.S.C. 1746 to update the calculation of costs to PYCO Industries, Inc., flowing from the failure of South Plains Switching, Ltd., Co. to maintain its trackage during the period of alternative service by West Texas & Lubbock Railway Company (WTL) to PYCO under Finance Dockets 34802 and 34889. I am the Senior Vice President for Marketing for PYCO; I am responsible for rail matters on behalf of PYCO; and I am personally familiar with all the matters covered herein.

1. PYCO initially contracted with WTL to operate the lines of SAW which PYCO acquired from SAW on November 9, 2007, pursuant to this Board's Decision in Finance Docket 34890. PYCO subsequently organized a division, named Plainsman Switching, to handle all such operations, and this division now provides all common carrier services to rail customers. Because PYCO is now handling all rail operations directly, I have become intimately familiar with the costs to repair the SAW system.

2. Since acquisition of all of SAW on November 9, 2007, and through October 9, 2008, PYCO has expended \$662,784 to repair

the SAW system. As indicated in prior filings by PYCO and WTL, during the period of alternative service (and the pendency of the feeder line proceeding), SAW allowed the lines to deteriorate. In order to avoid citations from the Federal Railroad Administration (FRA), PYCO upon acquisition of the lines on November 9, 2007, immediately had to engage in a substantial repair program. FRA inspectors have requested additional repairs beyond those already completed. The substantial costs PYCO has incurred to date are a direct result of SAW's failure to maintain its lines.

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

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

Executed on: 10-10-08.