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November 4, 2008

By e-filing

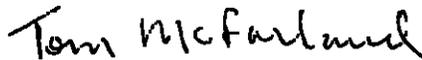
Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S W., Suite 1149
Washington, DC 20024

Re: Finance Docket No. 35111, *South Plains Switching, Ltd. Co. -- Compensation For Use Of Facilities In Alternative Rail Service -- West Texas and Lubbock Railway Company*

Dear Ms. Quinlan:

Hereby transmitted is a Reply to "Notice Of Activity" And Motion For Leave To Supplement for filing with the Board in the above referenced matter.

Very truly yours,



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

TMcf: kl enc wp8 011199:efstb8

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY TO "NOTICE OF ACTIVITY" AND
MOTION FOR LEAVE TO SUPPLEMENT

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

Petitioner

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

Attorney for Petitioner

DUE DATE. November 4, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**REPLY TO “NOTICE OF ACTIVITY” AND
MOTION FOR LEAVE TO SUPPLEMENT**

Pursuant to 49 C.F.R. § 1104.13(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies to a pleading entitled “Notice of Activity relating to South Plains Switching Ltd’s ‘Petition for Compensation’ and Motion for Leave to Supplement” filed by PYCO Industries, Inc (PYCO) on October 15, 2008 (referred to as “Notice” and “Motion”, respectively).

This Reply includes a Reply Declaration of Mr. Larry Wisener, President of SAW, marked Appendix 1, that identifies a patently false statement in the sworn declaration of Mr. Robert Lacy of PYCO

I. REPLY TO NOTICE

The activity that is the subject of the Notice is an action filed by SAW on September 18, 2008 against West Texas and Lubbock Railway Company, Inc. (WTL) in the 99th District Court of Lubbock County, Texas, No. 2008-544,741 In that action, SAW seeks (1) compensation from WTL for use of SAW’s terminal facilities pursuant to temporary rail service under 49 U S C. § 11102(a); (2) damages for injuries sustained by SAW due to such use, and (3) maximum pre-judgment and post-judgment interest. (See Exhibit A attached to the Notice)

PYCO states that it finds SAW's action in that respect "inexplicable" in light of the Board's exclusive jurisdiction over remedies provided in Part A of 49 USC, Subtitle IV (*see* 49 U.S.C. § 10501[b][1]). However, SAW's action is not at all inexplicable in light of the provisions of 49 U.S.C. § 11102(b), *i.e.* (emphasis added):

A rail carrier whose terminal facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier for injuries sustained as the result of compliance with the requirement or for compensation for the use, or both as appropriate, in a civil action, if it is not satisfied with the conditions for use of the facilities or if the amount of the compensation is not paid promptly.

SAW is not satisfied with the conditions for use of the facilities in that compensation was not paid nor adequately secured within a reasonable time after such use, as required by 49 U.S.C. § 11102(a), and the amount of compensation has not been paid promptly, in that there has been no award of compensation as of the approximate first anniversary date of the end of use of SAW's facilities (end of use was November 8, 2007). In that circumstance, 49 U.S.C. § 11102(b) explicitly provides for the filing of a "civil action". That is what SAW has done. 49 U.S.C. § 10501(b) does not displace Federal Court jurisdiction where a statute explicitly provides for such Court jurisdiction.

II. REPLY TO MOTION

PYCO's Motion seeks to supplement the record with additional testimony of PYCO Senior Vice President Robert Lacy to the effect that since PYCO's acquisition of SAW in November 2007, through October 9, 2008, PYCO has spent \$662,784 to repair "the SAW system". (*See* Exhibit B attached to the Motion). PYCO argues that those costs are a legitimate

set-off to SAW's claim for compensation for use of its facilities in alternative rail service.

(Motion at 2).

PYCO's Motion should be summarily denied. There is no legal support in PYCO's Motion for PYCO's contention that compensation for use of facilities in alternative rail service can or should be offset by an amount spent for repair of such facilities, or by any other amount. There is no factual support in that Motion that PYCO spent \$662,784 or any other amount on repair of trackage. However, even if there had been any such legal or factual support, such repairs admittedly encompassed the entire SAW system, not the lesser facilities of SAW that were used to provide alternative rail service. Even if it were proper legally to offset such compensation by amounts spent for repair of trackage, the only amount that arguably could be offset would be an amount to repair the facilities used to provide alternative rail service. It cannot be determined from the Motion how much of the amount claimed, if any, was spent on repair of facilities used to provide alternative rail service. No amount could be offset against compensation for use of facilities in alternative rail service without that essential information.

Even if it could be determined how much PYCO has spent on repair of facilities used to provide alternative rail service, an overriding reason why it is not legally permissible to offset such amount against compensation for use of such facilities is that it was PYCO's obligation to maintain such facilities in good repair during the 21½-month period of alternative rail service, not SAW's obligation. That is specifically provided in 49 C.F.R. § 213.5(e), viz :

A common carrier by railroad which is directed by the Surface Transportation Board to provide service over the track of another railroad under 49 U.S.C. 11123 is considered the owner of that track for the purposes of the application of this part during the period the directed service order remains in effect.

It is clear from 49 C F R. § 213 5(a) that it is the owner of trackage who has the obligation to maintain such trackage in good repair. By virtue of 49 C.F.R. § 213.5(e), therefore, inasmuch as PYCO was considered to be the owner, PYCO had the obligation to maintain the facilities and trackage used to provide alternative rail service in good repair. It follows that it would not be legally permissible for PYCO to offset an amount for repair of such facilities against compensation for use of such facilities when PYCO, not SAW, was responsible for the need for any such repairs.

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for the reasons stated, the Board should:

- (1) take notice that 49 U.S.C. § 11102(b) provides for the filing of a civil action where a rail carrier is not satisfied with the conditions for use of its facilities in temporary service under § 11102(a), or if the amount of compensation for such use is not paid promptly, and
- (2) deny PYCO's Motion for Leave to Supplement the record with Mr. Lacy's additional verified statement.

Respectfully submitted,

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

Petitioner

Thomas F. McFarland

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Attorney for Petitioner

DATE FILED. November 4, 2008

REPLY DECLARATION OF LARRY WISENER

My name is Larry Wisener. I am President of South Plains Switching, Ltd. Co. (SAW). I have previously provided verified statements or declarations in this proceeding and in related proceedings. This Reply Declaration is directed at a portion of the Supplemental Declaration of Robert Lacy that is attached to a "Notice of Activity relating to South Plains Switching Ltd.'s 'Petition for Compensation' and Motion for Leave to Supplement," filed by PYCO Industries, Inc. (PYCO) on October 15, 2008.

In Paragraph 1 on page 1 of the Supplemental Declaration, Mr. Lacy stated the following:

... 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 . . .

That statement is designed to make it appear that PYCO is providing the rail services that it acquired under the feeder statute by means of a division of the PYCO corporation named Plainsman Switching.

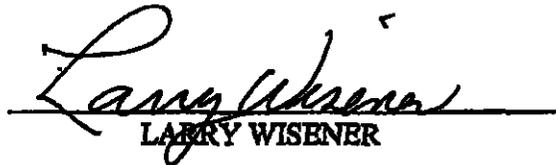
That statement is not true. Since April 23, 2008, those rail services have been performed by a separate corporation formed by PYCO, i.e., Plainsman Switching Company, Inc. (Plainsman). Attached to this Declaration as Appendix LW-1 is a copy of the Certificate of Formation of Plainsman Switching Company, Inc. as filed in the Office of the Secretary of State of Texas on April 23, 2008. Article Six of that Certificate states that Plainsman is wholly owned by PYCO. Article Three of that Certificate states that Plainsman was formed to maintain and operate a terminal belt line railway within the boundaries of Lubbock, Texas.

I have been advised by counsel that an entity that proposes to operate a rail line as a common carrier in interstate commerce is required to obtain authority from the Surface

Transportation Board (STB) to so operate, or to obtain an exemption from the statute that requires such authority. Counsel also advises that there has been no filing by Plainsman at the STB for such authority or an exemption in the six months since Plainsman was formed.

Mr. Lacy should be admonished for falsely stating under penalty of perjury that Plainsman is a division of PYCO. PYCO and Plainsman should be admonished for Plainsman's lengthy unauthorized operations of rail lines in Lubbock.

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.


LARRY WISENER

Signed on October 29, 2008

FILED
In the Office of the
Secretary of State of Texas

APR 23 2008

Corporations Section

**CERTIFICATE OF FORMATION
OF
PLAINSMAN SWITCHING COMPANY, INC.**

The undersigned, acting as the sole organizer of a for profit corporation under the Texas Business Organizations Code, does hereby adopt the following Certificate of Formation for **PLAINSMAN SWITCHING COMPANY, INC.** (the "Company"):

ARTICLE ONE

The name of the Company is **PLAINSMAN SWITCHING COMPANY, INC.**, a Texas for profit corporation.

ARTICLE TWO

The period of duration of the Company is perpetual, or until the earlier dissolution of the Company in accordance with the provisions of its regulations.

ARTICLE THREE

The purpose for which the Company is organized is to maintain and operate within the boundaries of the City of Lubbock, Texas, a terminal belt line railway consistent with, and pursuant to, Section 2.006 Permissible Purpose of For Profit Corporation Related to Railroads, Texas Business Organizations Code, said rail rights of way and railroad tracks not to be owned by the Company, and to engage in any other lawful act, activity or business that now or hereafter may be necessary, incidental, proper, or advisable to accomplish the foregoing purposes.

ARTICLE FOUR

The principal place of business of the Company in the State of Texas is 3204 Juniper Avenue, Lubbock, Lubbock County, Texas 79404.

ARTICLE FIVE

The name of the initial registered agent of the Company in the State of Texas is Gary R. McLaren, and the registered address of such initial registered agent is 3303 66th Street, Suite 1A, Lubbock, Lubbock County, Texas 79413.

ARTICLE SIX

This corporation is a close corporation. One hundred percent (100%) of all shares of Company shall be owned solely and exclusively by PYCO Industries, Inc.

ARTICLE SEVEN

Company may issue a total of 1,000 shares of common stock without par value or no par value. No additional shares or classes of shares may be issued in the Company.

ARTICLE EIGHT

Until the first annual meeting of shareholders or until successors are elected and qualified, the initial board of directors shall consist of the following:

<u>Name</u>	<u>Address</u>
Gail Kring	2901 Avenue A, Lubbock, Lubbock County, Texas 79404

ARTICLE NINE

The name and address of each organizer is as follows:

<u>Name</u>	<u>Address</u>
Gail Kring	2901 Avenue A, Lubbock, Lubbock County, Texas 79404

1st IN WITNESS WHEREOF, these ^{Certificate of Formation} ~~Articles of Organization~~ have been executed on this the 1st day of April, 2008, by the undersigned.

ORGANIZER:

Gail Kring
Gail Kring

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2008, I served the foregoing document, Reply To "Notice Of Activity" And Motion For Leave To Supplement, by e-mail & first-class, U.S. mail, postage prepaid, on the following:

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Thomas F. McFarland

Thomas F. McFarland