

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*  
December 3, 2008

THOMAS F. MCFARLAND

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 34890, *PYCO Industries, Inc - Feeder Line Application - South Plains Switching, Ltd Co*

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 (1) "Notice Of Further Activity In Compensation Litigation", (2) "Motion For Leave To File Comment On Wisener Declaration"; And (3) "Litigation Status Report", for filing with the Board in the above referenced matters.

Very truly yours,

*Tom McFarland*

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

*TMcF kl enc wp8 01/199.12901efSTB*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

PYCO INDUSTRIES, INC. -- FEEDER	)	FINANCE DOCKET
LINE APPLICATION -- SOUTH PLAINS	)	NO. 34890
SWITCHING, LTD. CO.	)	
	)	
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 (1) "NOTICE OF FURTHER ACTIVITY IN COMPENSATION LITIGATION"; (2) "MOTION FOR LEAVE TO FILE COMMENT ON WISENER DECLARATION"; AND (3) "LITIGATION STATUS REPORT"**

---

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

Replicant

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 Replicant

DUE DATE: December 3, 2008

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

PYCO INDUSTRIES, INC. -- FEEDER	)	FINANCE DOCKET
LINE APPLICATION -- SOUTH PLAINS	)	NO. 34890
SWITCHING, LTD CO.	)	
	)	
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 (1) "NOTICE OF FURTHER ACTIVITY IN COMPENSATION  
LITIGATION"; (2) "MOTION FOR LEAVE TO FILE COMMENT ON  
WISENER DECLARATION"; AND (3) "LITIGATION STATUS REPORT"**

---

Pursuant to 49 C.F.R. § 1104.13(a), SOUTH PLAINS SWITCHING, LTD CO. (SAW)

hereby replies to:

- (1) Notice of Further Activity in Compensation Litigation (Notice), filed by PYCO Industries, Inc. (PYCO) on November 13, 2008; and
- (2) Litigation Status Report (Status Report), filed by PYCO on November 19, 2008

SAW is also replying in opposition to "Motion for Leave to File Comment on Wisener Declaration" (Motion), which was filed as part of the Notice. Inasmuch as Mr. Wisener's Declaration was in reply to an evidentiary filing by PYCO Witness Robert Lacy, PYCO's Motion essentially seeks leave to file a reply to a reply. SAW will treat PYCO's Motion as such.

### **PRELIMINARY STATEMENT**

The pleadings to which this reply is directed are the latest in a seemingly-endless stream of unauthorized supplemental filings by PYCO. PYCO's Status Report reaches a new low by making public, without SAW's concurrence, numerous off-the-record exchanges from counsel for SAW to counsel for PYCO made during informal settlement discussions. SAW objects in the strongest terms to that blatant violation of professional ethics. The Board is urged to admonish counsel for PYCO to respect the confidentiality of private settlement negotiations, and to refrain from further cluttering the record with pointless supplemental filings in which no relief is sought.

### **REPLY IN OPPOSITION TO MOTION FOR LEAVE TO FILE A REPLY TO A REPLY**

It is succinctly provided in 49 C.F.R. § 1104.13(c) as follows:

A reply to a reply is not permitted.

The Board sometimes permits the filing of a reply to a reply upon a showing of good cause, but PYCO's Motion does not contain any such showing. Instead, PYCO merely states the following, in cavalier fashion (Notice at 3):

. . . To the extent that PYCO requires leave to respond to these spurious allegations annexed by SAW to its 'Reply,' PYCO so requests . . .

That, of course, is in no sense a showing of good cause. In the absence of good cause, leave to reply to a reply is to be denied, i.e.:

(1) *CSX Corp -- Control -- Chessie System, Inc et al.*, 2 S.T.B. 554.557 (1997)

(Motion to strike reply to a reply granted because "this is merely an attempt to have the last word in pleading");

- (2) *Buffalo Ridge RR, Inc - Aban. Bet. Manley, MN and Brandon, SD*, 9 I C C.2d 544, 545, n.2 (1993);
- (3) *St. Louis Southwestern Ry. Co. Compensation - Trackage Rights*, 4 I.C.C. 2d 668, 673 (1987),
- (4) *Louisville & Jefferson Co. & CSX Const & Oper., Jeff., KY*, 4 I.C.C.2d 749, 750 (1988) (The rule against a reply to a reply “is designed to assure a predictable and orderly end to the filing of pleadings”);
- (5) *Louisville and Nashville R. Co. Abandonment*, 366 I.C.C. 1, 5-6 (1981); and
- (6) *Missouri Pac. R. Co - Merger - T&P and CE&I*, 360 I.C.C. 565 (1979).

Consequently, PYCO's Motion should be denied.

If PYCO's Motion is not denied, the Board should accept the following short rebuttal:

There is no credibility to PYCO's contention that its corporate subsidiary, Plansman Switching Company (PSC), is acting as an agent of PYCO. (Notice at 4) The only legitimate purpose that could be served by PSC's rail operation in place of PYCO would be to insulate PYCO from liability as operator of the rail lines. In order to insulate PYCO from liability, PSC would have to perform the rail operation independently in its own name and in its own right. If PSC were merely an agent of PYCO, PYCO would retain operational liability as a principal, directing PSC as its agent. The truth is that PSC is performing rail operations at Lubbock in its own name and in its own right in order to insulate PYCO from operational liability. Mr. Wisener's testimony is that as an independent operator of the Lubbock rail lines, PSC requires operating authority or an exemption from the Board, but PSC has neither requested nor received

such operating authority or exemption. Nothing in PYCO's Motion establishes that such operating authority or exemption is not required.

As to the duty to have maintained the facilities used during alternative rail service, PYCO's attempted distinction between a user's obligation under directed service in accordance with 49 C.F.R. § 213.5(e), compared to under an order for alternative rail service (Notice at 5), is not legally meaningful. Directed service and alternative rail service are both authorized under 49 U.S.C. § 11123. Directed service was used more often several decades ago during the Rock Island and Milwaukee Road liquidations. More recently, alternative rail service has been more in use. The Federal Railroad Administration regulation at 49 C.F.R. § 213.5(e) has not been updated to provide for alternative rail service in addition to directed rail service. However, there is no rational basis for distinguishing between those substantially similar uses of a carrier's facilities by another carrier insofar as the duty to maintain such facilities during such use. The user (WTL) has that duty, not the owner (SAW).

**REPLY TO NOTICE OF FURTHER ACTIVITY IN COMPENSATION LITIGATION**

In addition to providing notice to the Board of further activity in Texas State Court in regard to SAW's action for compensation under 49 U.S.C. § 11102(b), PYCO argues that the Texas Court does not have jurisdiction over that action because Section 11102(b) provides only for enforcement of a prior Board order for compensation, and no such Board order has been issued to date. (Notice at 4).

Inasmuch as it is for the Texas Court to determine its jurisdiction in the first instance, PYCO's argument is not properly presented to the Board. PYCO has sought leave to intervene in the Texas Court case

PYCO's argument is unsound in any event. Enforcement of a Board order for payment of compensation is specifically provided for in 49 U.S.C § 11704(c)(2). That provision would be rendered ineffectual as surplusage if Section 11102(b) were to be interpreted to provide only for enforcement of Board compensation orders. *See Pejepscot Industrial Park, Inc v Grimmel Industries*, 215 F.3d 195, 202 (1<sup>st</sup> Cir. 2000). An interpretation that renders a statutory provision as surplusage is disfavored. *Id.*, viz:

... If (49 USC) (c)(1) is interpreted only to permit a party to bring a civil action to 'enforce (a) liability' previously determined by the STB, then (49 USC) (c) (2) is surplusage. A reading that renders a statutory provision as surplusage is disfavored (citing cases) ...

The Court in that case held that a Court had jurisdiction over an action seeking compensation from a rail carrier notwithstanding the provisions of 49 U.S.C. § 10501(b) conferring exclusive authority on the Board over remedies provided for by the Interstate Commerce Act. *Id.*, at 202-205

### **REPLY TO LITIGATION STATUS REPORT**

PYCO's Status Report does not serve a valid purpose. PYCO argues that its Status Report "may be germane to further proceedings in F.D. 34890". (Status Report at 2). That potentiality is not a valid reason for hypothetical argument at this time. Moreover, as SAW has noted, PYCO has blatantly violated the confidentiality of settlement discussions in making its argument. (See Preliminary Statement, *supra*).

Contrary to the unauthorized argument that PYCO has included in its purported Status Report (at 3-7), the Board did not err by failing to resolve the issue of ownership of the switches along BNSF's main line at Lubbock and Burris, TX. Interpretation of the contract by which

BNSF conveyed property to SAW in 1999 is obviously an issue for a Texas State Court, not for the Board. The Board correctly so determined.

If the Texas Court determines that those switches were conveyed to SAW, the Board would have authority, upon SAW's petition to reopen the compensation phase of the feeder line proceeding, to determine whether or not SAW was compensated for the value of those switches and, if not, the amount of additional compensation that is required to be paid for that value

By the same token, SAW will argue in a United States Court of Appeals that the Board erred in requiring SAW to convey trackage at Burnis, TX to PYCO, and that SAW was mistakenly compensated because that trackage was mistakenly included in SAW's inventory of Lubbock property. If SAW were to prevail in that argument, the compensation phase of the feeder line proceeding would have to be reopened to require repayment of the compensation that SAW received for that trackage.

Clearly, however, argument about all of those matters must await determination by the Texas State Court and the United States Court of Appeals. PYCO is improperly arguing those issues at this time

SAW points out, however, that PYCO did not compensate SAW for the former SAW office building in Lubbock that is now being used and occupied by PYCO. Reopening of the compensation phase of the feeder line proceeding should also include compensation to SAW for conveyance of that building.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, (1) PYCO's Motion for Leave to File a Reply to a Reply should be denied; and (2) counsel for PYCO should be admonished (a) to respect the confidentiality of private negotiations; and (b) to refrain from further cluttering the record with pointless supplemental filings that do not seek relief from the Board.

Respectfully submitted,

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

Replicant

*Thomas F McFarland*

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

Attorney for Replicant

DUE DATE: December 3, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2008, I served the foregoing document, Reply To (1) "Notice of Further Activity In Compensation Litigation"; (2) "Motion For Leave To File Comment On Wisener Declaration"; and (3) "Litigation Status Report", by e-mail and first-class, U S. mail, postage prepaid, on the following

Charles H. Montange, Esq  
426 N.W 162<sup>nd</sup> Street  
Seattle, WA 98177  
*c.montange@verizon.net*

Gary McLaren, Esq.  
Phillips & McLaren  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, TX 79413  
*gmclaren@sbcglobal.net*

John D Heffner, Esq.  
John D Heffner, PLLC  
1920 N Street, N.W , Suite 800  
Washington, DC 20036  
*j.heffner@verizon.net*

*Thomas F. McFarland*

---

Thomas F McFarland