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Part of  
Public Record

8 January 2006



Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

Re: PYCO Industries, Inc. -- Alternative Rail  
Service -- South Plains Switching, F.D. 34802

PYCO's Reply to January 6 SAW Petition

Dear Mr. Williams:

Tendered herewith by facsimile transmission for filing please find the Reply by PYCO Industries to a letter petition under 49 CFR 1117.1 filed by incumbent railroad South Plains Switching on Friday, January 6. PYCO received the SAW filing after hours by facsimile transmission. PYCO management nonetheless considered the matters set forth in the January 6 filing over the weekend, as manifest in the Supplemental Verified Statement of PYCO's CEO (Mr. Kring) supplied with the Reply. Because PYCO seeks urgent relief, because an alternative rail service petition is expedited, because the January 6 pleading filed by SAW is not allowed under the rules as a sur-reply, because the SAW document is deficient under the rules as a Part 1117 petition, and because it is deficient and misleading for a number of reasons, PYCO desires that the Board have immediate access to this Reply. The January 6 SAW letter should be stricken, and PYCO reiterates its request for an order authorizing alternative rail service.

PYCO will arrange for filing of an original and ten copies on Monday, and for delivery of the original signature pages by January 11, express services permitting.

A certificate of service is annexed to the Reply.

Respectfully submitted,

Charles H. Montange  
for PYCO Industries, Inc.

Encl.

cc. Thomas McFarland (for SAW) (w/encl.)  
John Heffner (for WTL) (w/encl.)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34802  
SOUTH PLAINS SWITCHING LTD. )

PETITIONER PYCO INDUSTRIES'  
REPLY to SAW's PART 1117 PETITION

Incumbent railroad South Plains Switching (SAW) on January 6, 2006, electronically filed a letter in this proceeding, ostensibly as a "Petition for Relief Not Otherwise Covered" pursuant to 49 C.F.R. Part 1117. Letter from Thomas McFarland [for South Plains Switching (SAW)] to Vernon Williams [Secretary of the Surface Transportation Board (STB)] dated January 6, 2006, along with an accompanying Verification by Larry Wisener, president of SAW, dated January 5, 2006, one day before the letter.<sup>1</sup>

PYCO Industries, Inc., the petitioner for alternative rail service in this docket, hereby replies in opposition to SAW's alleged "Petition." SAW's Petition should be dismissed as improper on a number of bases.

1. Failure to comply with Part 1117. Under 49 C.F.R. § 1117.1, a party seeking relief not otherwise covered must state the grounds on which the Board's jurisdiction is based, make a short plain statement of its claim showing it is entitled to

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<sup>1</sup> The documents in question were evidently transmitted to the Board electronically. PYCO became aware of them after the Board had closed for the week.

relief, and then make a demand for relief.

SAW's petition complies with none of these requirements. The January 6 "petition" does not state the basis of the Board's jurisdiction; it does not request any relief, and it does not establish a basis for any relief if some request for relief is set out in it. The SAW petition begins by stating that it is "intended to provide a basis for agreement between SAW and PYCO in resolution of the dispute in this proceeding." This sounds like an initial settlement offer on which to commence negotiations, not a request for relief.

But since the settlement offer is published to the STB, presumably SAW intends it not so much as a settlement offer but as a thinly disguised attempt to influence STB's decision-making process on PYCO's pending alternative service petition. That SAW's intent is to influence this Board's decision-making is confirmed by three considerations:

First, as made clear in the attached Supplemental Verified Statement by Mr. Gail Kring, SAW has made no settlement offer to PYCO, and the first PYCO was aware of Mr. Wisener's purported new position set forth in the January 6 letter was when PYCO management received it about 7 PM Friday night in Lubbock from PYCO's legal counsel in the STB proceeding. If SAW wished to discuss a settlement, it knows the telephone number of PYCO's counsel and can initiate a discussion without filing papers at STB.

Second, neither SAW nor its counsel have thus far followed up on the letter, notwithstanding the urgency of the matter.

Third, the entire second page of the "petition" basically contains reply material responding to PYCO's Rebuttal filed on 3 January.

In short, the January 6 "petition" filed by SAW does not follow

the required format for a Part 1117 petition, but instead is nothing more than a purported sur-reply to PYCO's rebuttal. In that sur-reply, SAW purports to set forth a seeming plethora of personnel and equipment to meet rail service needs on its Lubbock lines, as well as a new-found willingness to supply a second switch to PYCO under various vague limitations and conditions.

But this Board's rules governing procedures in alternative rail service proceedings allow the parties only the following pleadings: PYCO's petition, the incumbent railroad's (SAW's) reply, and PYCO's rebuttal. 49 C.F.R. § 1146.1(b)(1)-(3). Both the reply and the rebuttal must be filed on an expedited basis. Id. § 1146.1(b)(2)-(3) (replies within 5 business days, rebuttals within 3 business days). No other pleadings are specified. In such situations, the Board's generally applicable prohibition on replies to replies requires that the alleged "petition" of SAW dated January 6 be stricken. Alternative rail service petitions are supposed to address major inadequacies on a prompt basis. Allowing sur-replies as SAW has attempted here simply muddy the record, prolong the proceeding, and exacerbate the problem the alternative rail service petition is intended to address.

2. Negotiation of settlement through filing Part 1117 petitions in alternative rail proceedings is abusive. If it is SAW's intent to open settlement discussions (as it seems to claim in the second sentence of its January 6 letter), doing so

by making offers to PYCO through pleadings filed at STB is a cumbersome and inefficient way of doing so. Settlement discussions generally take place off the record, in meetings or in telephone conferences in which attorneys and/or their principals discuss problems and seek solutions in real time. Making settlement offers in letters filed with STB smacks of posturing and illicit attempts to garner favor or influence.

This Board must view what is going on here in the context of SAW's tactics last spring, and what SAW again commenced on November 17. Focussing on November events, on or about November 17, 2005, SAW through Mr. Wisener told PYCO that from that date forward, PYCO must "take care of [itself]" for purposes of rail transportation services. SAW set derails to prevent PYCO from interchanging cars, and essentially cut service to PYCO by more than half, refusing to provide more than a switch per day. From that day until this, PYCO has received inadequate rail service, with the result that it is accumulating inventory, losing sales, and incurring increased costs. The fact that Mr. Wisener now offers to loosen up one of the many choke holds he is applying to PYCO is not a settlement offer; it is an effort to get away with choking PYCO in the other ways he does not offer to ameliorate, and to retain the ability to throttle PYCO with a modified grip if the referee (STB) will just look the other way.

If any further proof of service inadequacy and indeed bad faith on the part of SAW management is required, this Board need only note the Verified Statement of Edwin Ellis, attached as

Appendix II to PYCO's Rebuttal. That Statement indicates that the standard of conduct in the short line rail industry for the discharge of common carrier obligations is markedly different from the tactics and actions of, and blockages and inadequacies created by, Mr. Wisener and SAW.

SAW has no excuse for the derails it placed (any legitimate safety issue could and should have been dealt with in other ways, see Ellis Ver. Statement, PYCO Rebuttal, App. II). If SAW's latest representation of its equipment and personnel is accurate, then SAW has no excuse for telling PYCO it would get one switch a day, or putting any conditions on additional switching now. PYCO ships over 6000 carloads per year, and the normal tariff (let alone SAW's discriminatory surcharge against PYCO) should more than compensate rail carriers for so large a volume at a major center like Lubbock.

In any event, if SAW wanted to show any kind of change of heart or good faith, it would have moved its derails, or provided additional switching, no later than the day after it received PYCO's petition for alternative rail service. That at least would have shown that SAW realized its bluffs were called. SAW's continued failure to provide service despite PYCO's petition instead indicates that, incredibly, SAW is still angling to provide as little service as possible. In short, Mr. Wisener still appears to be intent on keeping with its commitment to PYCO in November to make PYCO "take care of itself," and to make PYCO's costs go up, for failure to write a

\$5.5 million check for Mr. Wisener's railroad.

Under current rates of production and given the post-November 17 service inadequacy engineered by SAW, PYCO will run out of storage space for rail dependent product (cottonseed oil) on January 24. See Kring Verified Statement in PYCO Rebuttal, paragraph 11; Supplemental Kring Verified Statement paragraph 5, attached hereto. Under the circumstances, PYCO does not have time to play games with SAW; PYCO cannot "negotiate" by jockeying for position through the filings with the Board of letters and pleadings, ploys and counteroffers, none of which are called for or permitted under STB procedures. If SAW wishes to negotiate, then it should do so in the customary fashion, and not through tardy and playful posturing at STB.

3. SAW's negotiating position in any event is defective. SAW asserts on page 2 in its improper Part 1117 "petition" that it has adequate equipment and personnel to serve PYCO. SAW claims it has five locomotives, five engineers, and three trainmen. If so, then SAW should have had no problem operating more than one train per day, and should readily be able to provide switches to PYCO, before, on and after November 17, 2005. But PYCO has never seen more than one crew serving its facility, and SAW's settlement offer on page 1 of its petition seems to be predicated on the availability of only one crew or engine on any kind of regular basis. If SAW has all the equipment and personnel it now suddenly claims, then SAW's refusal to provide service to PYCO on 17 November underscores

and corroborates an all the more inexcusable and outrageous prolonged failure on the part of SAW to discharge its common carrier obligation. SAW's January 6 letter petition proves rather than excuses inadequate rail service.

SAW's page 2 statements also highlight the flawed nature of its page 1 settlement offer. SAW seems to predicate its offer on page 1 on the availability of only one switch engine and one crew (it does not explain why the other four engines and engineers it claims on page 2 to have available are not available to provide switching). In the first sentence of the bottom paragraph on page 1, SAW offers to provide a second switch on request, if the one crew it wishes to make available for service to Lubbock shippers can perform the second switch during the 12 hour work day, but then SAW explains there are many reasons that crew may not have time. Since Mr. Wisener indicated to PYCO for the past several years that his sole crew lacked time to provide an additional switch, the only reasonable expectation is that Mr. Wisener's crew will not have time, or will not have time on a reliable basis.

SAW in the second sentence of its "offer" paragraph then indicates it will nonetheless supply a second switch, regardless of whether one crew or two crews are required for the purpose, provided PYCO fills at least 24 cars each day. Since SAW will not deliver to PYCO more than 12 cars at a time and since after November 17 SAW will not allow PYCO to do its own interchange, SAW will never have to honor this "commitment" to

provide a second switch if it simply fails to supply PYCO with 24 empty cars to fill each day. This corresponds to what Mr. Wisener has been doing (in addition to not switching out full cars, his railroad has not been delivering empties). This is the kind of tactics which characterize Mr. Wisener. It means that the alleged commitments in SAW's January 6 offer are so full of loopholes or conditions as to be meaningless. SAW can honor or dishonor the kind of commitment it is offering at will. Under these circumstances, PYCO will continue at SAW's mercy for enough cars timely provided in order to "allow" a second switch, much less a second switch under the "normal" tariff (which is really itself abnormal, in that SAW is discriminating against PYCO by billing PYCO a \$20 carload surcharge on every car).

But more important, PYCO's need exceeds 24 cars per day at Plant No. 1. PYCO now has a huge inventory in storage that must be worked off due to SAW's unlawful and inexcusable failure to provide adequate service after November 17. PYCO needs adequate rail service, and this means an ability to interchange with its rail provider so it can move empties in and fulls out, and in any event as many switches a day as are necessary to serve its needs, Monday to Friday. Given PYCO's now huge inventory, PYCO would welcome weekend switches as well. SAW's vague settlement offer of up to two switches of 12 cars each if SAW supplies the empties is not adequate service for PYCO, and SAW's failure to provide service after 17 November has exacerbated that inadequacy.

PYCO's proposed alternative service provider, West Texas and Lubbock, was prepared to begin switching Pyco on Saturday, 7 January. WTL was prepared, and remains prepared, to provide such service, including multiple switches, continuously, seven days per week, for at least 30 days not only to take care of PYCO's on-going needs but also to work off the inventory in storage due to SAW's failure to provide service, all without additional tariff.

PYCO is a large, rail dependent shipper. It cannot conduct business operations without reliable rail transportation. When faced with a service inadequacy, STB staff informed PYCO management that PYCO's remedy is an alternative rail service petition. PYCO has twice prepared such a petition, once in the spring of 2005 when SAW arbitrarily disrupted rail service, and again this December in response to SAW's drastic curtailment of service on November 17. PYCO did not file the petition the first time because intervention by STB staff seemed to result in SAW understanding its obligation to provide service. But that clearly was proved incorrect on November 17. What was proved on that date is that SAW is unreliable; this very unreliability in the end proves all that needs to be proved concerning the inadequacy of SAW's rail service. The service is inadequate. If SAW has the equipment and personnel, then the inadequacy is in SAW's management. It does not matter what the reason is; PYCO is entitled to adequate rail service.

The preparation and filing of alternative service petitions

is expensive, and requires making difficult arrangements with an alternative rail provider. PYCO has now made such arrangements twice. It grows more difficult and costly each time, and PYCO has no reason to expect that it will be able to secure an alternative rail supplier, much less any cooperation from the line haul railroad (BNSF) serving Lubbock, should the instant petition fail. If the instant petition fails, what then protects PYCO from yet another SAW service inadequacy precipitated by some event real or imagined which occasions yet another tantrum from Mr. Wisener?

Mr. Wisener has fostered a reputation for retaliating against individuals and companies which he feels have not done his bidding or have somehow irritated him or got in his way. PYCO cannot continue to put its business at risk to such a rail provider. The settlement offer by SAW embodied in the January 6 letter by SAW's counsel has too many holes. It offers no assurance of adequate rail service at all. It does not offer a means by which PYCO can interchange its cars, obtain adequate switches, or meet its rail needs.

4. SAW's January 6 "Petition" is internally defective. The SAW Petition is internally flawed and defective as a pleading. Its substantive portion is a letter dated January 6, 2006, and apparently it was prepared and circulated late on January 6. Yet Mr. Wisener's verification attached to the letter is dated January 5. It is not clear to PYCO how Mr. Wisener can verify a document a day before it is prepared,

finalized or submitted. This again suggests that the January 6 "petition" is a ruse tendered to influence or at least to prolong the alternative rail service proceeding, rather than a legitimate pleading. The January 6 letter should be stricken from the record and otherwise dismissed as internally flawed and defective.

5. Purchase of SAW. In the penultimate paragraph on page 2 of its January 6 "petition," SAW says it wants the Board to be aware that West Texas and Lubbock (WTL) has twice sought to purchase SAW, but that SAW would not agree to be sold. SAW then asserts that WTL "is attempting to use the Board for an acquisition that it was not able to negotiate on an arm's length basis." PYCO has no idea where these remarks are coming from, or what place they have in this proceeding. First, PYCO understood that SAW has several times solicited offers for itself in 2005. Indeed, PYCO's refusal to pay SAW \$5.5 million for undisclosed assets evidently so angered Mr. Wisener that he directed his railroad on or about November 17 to provide inadequate service to PYCO. PYCO does not know whether WTL had any discussions with Mr. Wisener over the purchase of SAW, but whether WTL did or did not has nothing to do with PYCO's petition. PYCO initiated this proceeding, and PYCO persuaded WTL to enter the fray. Since this was PYCO's second request for assistance to WTL, the persuasion was neither easy nor cheap. Certainly PYCO had to do more than Henry V when he rallied his men at Honfleur with the words (according to Shakespeare) "once

more unto the breach, dear friends, once more". Henry V, Act III, Scene i, line 1. One does not easily recruit alternative rail service assistance in Lubbock, Texas, but that difficulty in recruiting is not because the existing rail service is adequate.

The only certain conclusion in respect to PYCO's petition for alternative rail service and WTL is that if PYCO's petition is granted, WTL will provide adequate rail service to PYCO and PYCO can then continue to operate. To be sure, the only long term solution for SAW's repeated rail service inadequacies may be a feeder line application (49 U.S.C. § 10907) for all or a portion of SAW's facilities, but that will be undertaken by PYCO and other shippers on SAW's line once this Board takes the action necessary so PYCO can stay in business, and so other shippers are freed from the fear of retaliation and retribution by SAW for joining in requests for relief designed to ensure permanent adequate rail service in Lubbock.

#### Conclusion

SAW's January 6 petition under 49 C.F.R. § 1117.1 must be denied for failure to comply with this Board's rules and otherwise stricken from the record of this proceeding.

#### Verification

The facts stated in this Reply are verified in the Supplemental Verified Statement of Gail Kring, CEO and Manager of PYCO, attached hereto. PYCO hereby incorporates that statement herein.

Respectfully submitted,



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for PYCO Industries, Inc.

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Certificate of Service

I certify service of this Reply and Supplemental Verified Statement by fax transmission no later than 9 January 2006 upon Thomas McFarland (312-201-9695, counsel for SAW) and John Heffner (202-296-3939, counsel for WTL), with US Mail confirmation, on the same date, at their addresses of record.



BEFORE THE  
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
ALTERNATIVE RAIL SERVICE -- ) F.D. 34802  
SOUTH PLAINS SWITCHING LTD. )

SUPPLEMENTAL VERIFIED STATEMENT  
of  
GAIL KRING

I, Gail Kring, Chief Executive Officer and General Manager of PYCO Industries, Inc., make this verified statement in connection with the Letter dated January 6, 2006, filed ostensibly pursuant to 49 C.F.R. 1117.1 by South Plains Switching (SAW), the incumbent rail carrier in this alternative rail service proceeding.

1. The letter states that it is intended to serve as a basis of agreement between SAW and PYCO. To me, this sounds like a settlement offer. SAW has made no settlement offers to PYCO prior to the January 6, 2006, letter, and has not followed up that letter by any attempt to contact us. The fact that SAW filed it with the Surface Transportation Board, thus making it public, as well as SAW's course of dealings with us, make me believe that the letter is just an effort to influence the proceeding, and not a bona fide attempt at settlement.

2. Since November 17, 2005, Mr. Wisener has directed his railroad to curtail service to PYCO, and he has made no effort to restore service, even after we filed our alternative rail service petition. The fact that he claims in his settlement offer letter to have the personnel and equipment to restore at

least some of the service PYCO formerly received does not come as a surprise, but it also certainly does not show that SAW is providing adequate rail service. What it does show, if it is allowed in the record as evidence, is that SAW's rail service inadequacies flow from a deficient management at SAW. That management is unreliable and unable to manage SAW such that the railroad will discharge its common carrier obligation to provide adequate rail service, even to the major shipper on its line.

3. As a settlement offer, SAW's proposal is inadequate. SAW does not offer to work with PYCO so PYCO can resume interchanging cars. As a result, PYCO will continue to be dependent on SAW for all switching. SAW does not commit to using both the shop and scale sidings. The result, as SAW seems to acknowledge, is that SAW will deliver or pick up a maximum of 12 cars at a time. SAW conditions its offer to provide a second switch on availability of its crew and engine (although it appears to claim it has five engines and locomotives, it seems to be able to operate only one engine at a time), and PYCO's ability to furnish 24 full cars a day. Since PYCO can only supply 24 full cars if SAW provides that many empties, and since SAW does not commit to provide that many empties, SAW's offer looks more like a trick than an offer. In any event, given the inventory build up due to SAW's failure to provide service since November 17, PYCO needs considerably more than 24 cars per day.

4. West Texas and Lubbock (WTL) was ready to provide service to PYCO commencing Saturday, January 7, and to continue

multiple switching, on a seven day per week basis, for the next 30 days, as needed by PYCO. WTL can meet PYCO's need for adequate rail service.

5. Unless this Board acts soon, PYCO will run out of storage around January 24. Unless rail service is restored, PYCO faces a combination of curtailment of production, very expensive leasing of scarce storage space (we produce, among other things, cottonseed oil which requires tanks), or some combination thereof. Lack of adequate rail service is placing an enormous investment at risk. This Board's staff indicated that an alternative service petition was the only remedy available should Mr. Wisener's railroad engage in such a failure of service. Such petitions are not easy to prepare, because they require the identification of an alternative rail supplier. PYCO is doubtful it can continue coming back to that well should this Board wish to entertain Mr. Wisener's latest vague "settlement" proposal. PYCO needs adequate rail service. PYCO respectfully requests that this Board act promptly so to provide.

6. I have also read the foregoing Reply to SAW's Part 1117 Petition, and wish this verified statement to be understood to incorporate all facts asserted in that Reply.

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

Executed on 1-08-06.

Neil King  
President

CHARLES H. MONTANGE

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8 January 2006

To: Hon. Vernon Williams, Secretary, STB      202-565-9002  
      for filing by fax

Thomas McFarland (for incumbent RR SAW)      312-201-9695

John Heffner (for alternative WTL)            202-296-3939

Mel Clemens (Director, OCE, STB)            202-565-9011

cc. Gary McLaren (of counsel for PYCO)        806-785-2521

From: Charles H. Montange, for PYCO Industries

Total pages: 18 plus cover page