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ORIGINAL

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BEFORE THE
SURFACE TRANSPORTATION BOARD

215814

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



PYCO INDUSTRIES' OPPOSITION
TO INCUMBENT RAIL CARRIER'S
PETITION TO TERMINATE ALTERNATIVE RAIL SERVICE
and
REQUEST FOR CONTINUATION OF ALTERNATIVE SERVICE ORDER

Shipper PYCO Industries, Inc. ("PYCO") opposes the petition to terminate alternative rail service filed on 9 February by incumbent rail carrier South Plains Switching, LLC ("SAW"), and requests that SAW's petition be rejected. Consistent therewith, PYCO requests that the alternative service order, which expires by its terms on or about February 25, should be continued for the maximum period allowed by the statute for extensions.

SUMMARY

First, PYCO is receiving adequate rail service from its alternative service provider, West Texas & Lubbock Railway Company (WTL). WTL has worked off PYCO's backlog. PYCO's Senior Vice President calculates that PYCO has shipped more than twice as many cars during the first 17 days of service with WTL than during the prior 17 days of service under SAW.¹ BNSF Railway (BNSF), the mainline carrier, informs PYCO that since WTL began providing service, BNSF has been able to fill out 70 unit trains in 3 days rather than 5.² This significant

¹ Robert Lacy Verified Statement, Exhibit B, para 3.

² Gail Kring Verified Statement, Exhibit A, para 8.

increase in velocity both confirms improved switching service, and also represents multiple benefits to both PYCO, BNSF, BNSF's other shippers, and the public. Cars can be used more efficiently, storage needs are less, congestion is reduced, and more product can be moved to market. PYCO appreciates the assistance of this Board in issuing the alternative service order, and in WTL in so ably resolving the congestion and meeting PYCO's rail service needs.

Second, there is no indication that SAW is able or willing to provide adequate rail service. SAW spends 2/3 to 3/4 of its petition discussing events in early or mid-2005, and essentially seeks to have this Board reconsider its January 26 order authorizing alternative rail service. SAW devotes little or no attention to anything that it has done to put itself in a position reliably to provide adequate service since January 26. In fact, the only evidence to which SAW points for that purpose (and this only at page 12 of its petition) is that Mrs. Wisener accepted her husband's resignation as manager of SAW in response to the this Board's alternative service order. Other than that, SAW's policies and approaches, including all the things SAW does which contribute to inadequate service to PYCO, remain the same. Indeed, the bulk of SAW's pleading amounts to defense of, or excuses for, its prior positions.

PYCO requests this Board to deny SAW's petition for termination of alternative rail service, and requests that this Board extend the alternative rail service authorization for the

maximum allowable period of time.

LEGAL BACKGROUND

At the request of PYCO, this Board issued an alternative service order in this proceeding on January 26, 2006. The order expires on its terms on or about February 25. However, there is a presumption that the conditions warranting the alternative rail service continue [49 C.F.R. § 1146.1(c)], and this Board admonished incumbent rail carriers such as SAW not to file premature petitions to terminate alternative rail service in the cited regulation. The preamble to the final regulation makes clear that the Board did not intend an incumbent carrier's petition to terminate to be used to rehash the original inquiry concerning whether alternative service was appropriate. Expedited Relief for Service Inadequacies, EP 628, served Dec. 21, 1998, at p. 9.

The alternative service at issue in this proceeding is provided pursuant to 49 U.S.C. § 11123. Under 49 U.S.C. § 11123(c)(1), alternative rail service may continue for 240 days after the initial 30 day period, should the Board conclude, as PYCO believes it must, that the conditions which precipitated the order continue to exist as respects the incumbent rail provider.

ARGUMENT

Presumably the key issue on a petition to terminate an alternative service order is whether anything has changed since the order was issued that shows that the incumbent carrier is

now able to provide adequate rail service. The only thing that SAW points to in this regard is the resignation of Mr. Wisener as the manager of SAW. We will focus on this issue and then comment on other matters raised by SAW.

I. Assuming Arguendo that a Leopard Can Change Its Spots,
There Is No Evidence of Such a Change Here

The principal service failure which precipitated PYCO's alternative service petition was inadequate rail service, amounting to a partial embargo, of SAW's plant no. 1, commencing on or about November 18, 2005, when Mr. Wisener (who at least until January 26, 2006 was SAW's management) announced that PYCO had "to try to figure out how to take care of [itself]."³ The Wiseners' SAW proceeded to terminate PYCO's lease to track 9298 for storage and staging of cars for Plant 2, limited PYCO to one switch per day at plant no. 2, placed derails to limit that switch to no more than 12 cars, and imposed other restrictions threatening PYCO's continued operations. SAW has not denied Mr. Wisener's actions and statements, and the policies implemented by Mr. Wisener on or about November 17 have not been materially altered by SAW to this day.

SAW essentially admits that Mr. Wisener was/is a problem: SAW claims that Mrs. Wisener (the record owner of SAW) accepted Mr. Wisener's resignation on January 26, after this Board issued the alternative serviced order.⁴ SAW intimates that Mrs.

³ See PYCO Pet. for Alt. Rail Service, served 19 Dec., 2005, Exhibit C (Lacy Verified Statement), Exhibit 4, log of events for November 18, 2005.

⁴ See SAW Petition at 11.

Wisener is new management (at least as to PYCO), and that Mrs. Wisener has been seeking to improve relations with PYCO to the point of seeking a meeting with PYCO management.⁵ SAW asserts that PYCO has not met with her, and she may seek a meeting with PYCO's board of directors. SAW requests this Board to find that "actions taken by Mrs. Wisener reflect a sincere commitment to provide adequate rail service to PYCO, and that Mr. Kring's failure to respond is not in furtherance of adequate rail service to his company." SAW Pet at 11.

There is an old saying (derived from Jeremiah 13:23) to the effect that a leopard cannot change its spots. The saying means that things cannot change their innate nature.

To the best of PYCO's knowledge, SAW has always been owned by Mrs. Wisener either in its entirety, or constructively for herself, her husband Larry, and possibly one or more children. In addition to being family owned, it is also family managed. Until January 26, management was headed by Mr. Wisener. Now Mrs. Wisener claims that role. However, there is no evidence that this Board's January 26 order, which precipitated Mr. Wisener's alleged resignation, has actually resulted in any substantive at SAW. Certainly the Wisener family remains intact, and PYCO has photographs of Mr. Wisener out directing work on SAW trackage post-January 26.⁶ PYCO is also informed that Mr. Wisener continues in direct touch with at least some

⁵ SAW Petition at 11.

⁶ Verified Statement of Robert Lacy, Exhibit B, para 6.

... BUSINESS LIKE SAW tends
to be like the proverbial leopard, an entity that cannot readily
change its spots -- its innate nature.

PYCO is prepared, however, to assume arguendo that the
leopard here can change its spots; that is, that reform of SAW
is possible. The problem is that there is absolutely no
evidence of any new attitude on the part of SAW here.

To the contrary, SAW has been unwilling meaningfully to
cooperate in the alternative service order issued January 26.
Indeed, SAW or its employees have engaged in a host of actions
which have created obstacles, well beyond the ordinary start-up
problems, for PYCO's alternative service provider, West Texas &
Lubbock (WTL). It is to WTL's credit that it has managed so
ably to surmount SAW-induced hurdles and to provide adequate
rail service to PYCO, to the point that after some two weeks
service, PYCO's back log is under control. But the fact that
PYCO is finally receiving adequate rail service is hardly
grounds to terminate alternative rail service; the adequate
service is the result of WTL's efforts, which have been
herculean to surmount SAW's problem-causing failure to
cooperate.

PYCO will underscore some highlights of SAW's post-
January 26 conduct; further details are set forth in the
verified statement of WTL's Stephen Gregory, attached hereto as

7 Id.

other Lubbock shippers.7

Exhibit C.

This Board issued its alternative service order on January 26. WTL prepared to commence service on Monday, January 30. On the evening of January 29, or the morning of January 30, SAW emptied Tracks 9200 and 9298 (which previously had been used to store and stage cars for PYCO) and relocated all PYCO-bound cars to the SAW yard, congesting it, rendering service impossible on that day for PYCO's plant no. 1. See V.S. of Gail Kring, Exhibit A, para 3.

SAW personnel engaged in numerous instances of harassment of WTL employees, as reflected in the log maintained by WTL during its first week of alternative service. See V.S. of Stephen Gregory Exhibit C, and log attached thereto.

SAW initially refused to discuss an operating protocol, causing PYCO to file a motion with this Board for imposition of a protocol. When it became clear that the Board expected the parties to negotiate a protocol, SAW through its attorney submitted a proposed protocol to WTL. PYCO's two top executives (Messrs. Kring and Lacy), as well as PYCO's attorneys, listened in on a sequence of conference calls, which PYCO understood were to discuss and to negotiate SAW's proposal. There was essentially no negotiation. In the conference call in which Mrs. Wisener participated (our records indicated 2 February), Mrs. Wisener insisted that the protocol as initially drafted by her attorney be accepted, instructed her attorney in essence to see that it was, indicated that SAW otherwise would

impose something worse, and gave WTL a deadline of Friday Noon. She then hung up.

WTL signed the protocol in compliance with Mrs. Wisener's ultimatum. However, at the very same time this was occurring, the protocol was breaking down, because BNSF was exercising its rights to operate over track designated in the protocol to serve PYCO's Plant No. 2, because of SAW-related congestion. In addition (and contrary to the assumptions behind the SAW protocol), BNSF indicated that it preferred switches in south Lubbock in the evening, rather than during the morning or afternoon, due to rail traffic generally on BNSF's mainline. Certainly BNSF advocated flexibility to allow switches after 6 PM and until midnight. Finally, SAW refused to consider allowing PYCO's cars to be stored or staged from tracks 9200 and 9298, the emptying of which by SAW on January 29/30 had precipitated congestion and traffic problems in the first place. See Kring V.S., Exhibit A, para 4-5; Lacy V.S., Exhibit B, para 2. See also Stephen Gregory V.S., Exhibit C, at pp. 8-9.

Because of this abusive situation, PYCO was sufficiently concerned to file comments with this Board raising issues with the protocol dictated by Mrs. Wisener. The events at issue are basically incorporated in that pleading, filed on February 8.

BNSF also suggested morning conference calls to work out traffic issues for the day. Although WTL agreed to participate, SAW did not. PYCO understands that WTL has subsequently worked with BNSF each morning to achieve smooth

operations, but that SAW continues to refuse to participate. Robert Lacy V.S., Exhibit B, para 7; Stephen Gregory V.S., Exhibit C (discussion under "February 7").

SAW from time to time flagged track, and placed equipment adjacent to track, necessary to operate over to provide service to PYCO plant 2. SAW from time to time has violated the protocol it dictated to WTL in a way that impeded service not just to PYCO but also sometimes to SAW's own customers as well. E.g., Stephen Gregory V.S., Exhibit C [discussion under "February 2," "February 7," and "February 8")].

On or about February 2, at roughly the same time she was hanging up on WTL and PYCO in a telephone conference, Mrs. Wisener evidently instructed her Lubbock attorney to ask Mr. McLaren (PYCO's Lubbock counsel) for a meeting with Mr. Kring (PYCO's general manager) to discuss rail operations.⁸ PYCO initially understood SAW to be requesting a meeting relating to the service protocol. Mr. Kring felt that service protocol issues should be handled by WTL and the attorneys, and advised SAW to get in touch with them if it wished to discuss the service protocol. However, Mr. Kring also recognized that it was desirable to keep a line of communication open to SAW for non-operational matters, and instructed his Lubbock counsel to inform SAW's counsel that they should forward any such proposals in writing. Mr. Kring believed that would be an efficient and

⁸ Kring V.S., Exhibit A, para 7.

productive approach.⁹ (Also, it is one that comports with Texas Bar standards for communications between parties in matters under litigation.) A copy of that letter is attached to Mr. Kring's verified statement. To date, PYCO has received no reply, other than to see the whole episode used as a "set-up" to make it appear that PYCO or Mr. Kring is somehow "bad" in SAW's petition to terminate alternative rail service. Rather than demonstrate that PYCO is not forthcoming, which SAW seems to imply, the episode demonstrates that SAW is more interested in scoring points than in providing adequate rail service to PYCO.¹⁰ The "new" SAW of Mrs. Wisener looks like the same "old" SAW of Mr. Wisener.

Indeed, PYCO understands SAW's position to be exactly the same as it was on November 18, when Mr. Wisener announced that PYCO would have to "take care of [itself]" and that SAW was going to make business costly for PYCO. SAW continues to

⁹ As PYCO indicated last December in its Petition for Alternative Rail Service, PYCO executives have become experienced with SAW requesting telephone conferences, making demands, and then hanging up, or requesting meetings, making demands, and then showing PYCO the door. See, e.g., PYCO Pet. for Alt. Rail Service, served Dec. 19, 2005, Exhibit C (Lacy V.S.) paras 12-15. Mrs. Wisener had just completed another hang-up episode (see Gail Kring V.S., Exhibit A, paras 4-5) when her Lubbock attorney requested a meeting with Mr. Kring. Mr. Kring can hardly be faulted for believing it more productive and efficient for SAW to forward a written proposal if SAW truly wished to have a substantive discussion.

¹⁰ Moreover, SAW filed so hasty a petition to terminate alternative rail service, and its alleged desire for a meeting was so recently communicated to PYCO, that SAW's lawyer and the Wiseners may not have been aware of PYCO's response when they took their shots at Mr. Kring in the petition.

refuse to allow PYCO use of track 9298 for car storage and staging, and hung up on PYCO and WTL rather than engaged in discussion of the issue. SAW refuses to allow PYCO's service provider to provide switching services in the evening when access across BNSF's mainline is more readily available. SAW continues to hedge, maneuver, and try to set up cheap shots.

A leopard cannot change its spots simply by claiming that the spots are changed. Its innate nature must change. SAW's actions in Lubbock since January 26 are exactly of the same nature that precipitated PYCO's alternative rail service petition in the first place: SAW is forcing PYCO in every way possible to "take care of itself"; SAW is giving the word "cooperation" only lip service; SAW has harassed and impeded alternative rail service. If SAW had changed with the alleged resignation of Larry Wisener, then it would be participating in conference calls, not dictating terms and hanging up. SAW employees would not be harassing and insulting WTL workers. SAW would not be violating its own dictated protocol, congesting its own yard, obstructing track it knows is needed to serve PYCO's plant no. 2, and depriving PYCO of use of track 9298 for staging cars. SAW would not be trying to "set-up" PYCO management with ambiguous requests for more meetings while at the same time hanging up on PYCO in conference calls, evidently in order for SAW to manufacture pleading points for its petition to get rid of alternative service. SAW would not be continuing to argue, as it does in its petition to end alternative service,

that the problems encountered by PYCO are due to BNSF,¹¹ or because PYCO does not have enough track of its own,¹² or because PYCO is somehow lying.¹³

If SAW actually believes all the claims it makes in its Petition to this Board, then PYCO is simply telling this Board (and PYCO) that "adequate" rail service is exactly the inadequate service provided at the time of Larry Wisener's declamation to PYCO on or about November 18. But if that is SAW's view, then Mrs. Wisener really has no wish for discussions with PYCO. Instead, if SAW's petition is any indication, Mrs. Wisener simply wants to tell PYCO to submit the conditions that Larry Wisener was dictating on November 18.

Seen in this light, SAW's petition to terminate service in effect is simply a call for reconsideration of the alternative service order. Rehashing whether alternative service is appropriate in the first place is not what a termination petition is supposed to be about. Expedited Relief for Service Inadequacies, EP 628, served Dec. 21, 1998, at p. 9. Other than its claim that its replacement of Larry Wisener with Delilah Wisener, SAW provides no evidence that it is now prepared, much less is able, to provide adequate rail service. The advent of Mrs. Wisener has not produced any change in SAW's unwillingness or inability to provide (or cooperate in

11 SAW Pet. at 12.

12 SAW Pet. at 12.

13 SAW Pet. at 2-9.

providing) adequate rail service to PYCO. SAW still hangs up, refuses to negotiate, and so far has insisted on continued application of the conditions imposed by Larry Wisener on or about November 18.

Rather than posture, SAW at the very least must make a bona fide proposal to work with PYCO to meet PYCO's needs and demonstrate that it can be relied upon to do so.¹⁴ Its approach and indeed its pleading, including Delilah Wisener's statement, demonstrate exactly the opposite.

II. PLANT NO. 1 ISSUES

As PYCO indicated, the bulk of SAW's petition appears to be in the nature of a petition for reconsideration seeking to rehash whether this Board's January 26 order was appropriate. As to Plant No. 1, the gravamen of SAW's claim seems to be that service difficulties there are "unquestionably" due to PYCO's failure to construct more railroad track for itself,¹⁵ or are the result of "obstructive tactics on the part of BNSF."¹⁶

¹⁴ SAW in its petition (pp. 13-14) "clarifies" that it will now supply a second switch to Plant No. 1 if it can do so in its crew's normal 12 hour day, or if PYCO releases 24 cars. SAW in the past has indicated its crew cannot provide a second switch in a 12 hour day, and PYCO's car supply is dependent on whether it gets the cars from SAW in the first place. Since SAW has rendered it extremely difficult for PYCO to store adequate cars, since SAW now refuses to store cars, and since SAW's practices tend to cause congestion, it is not clear that SAW's offer amounts to anything but a charade. If SAW means it to be taken seriously, it should make it in a letter to PYCO, commit to supplying adequate cars, and not attempt to posture before this Board in a pleading seeking to revoke alternative rail service for PYCO.

¹⁵ SAW Pet. at 12, citing Delilah Wisener V.S. at 6.

¹⁶ SAW Pet. at 12, citing Wisener V.S. at 2-7.

SAW claims that PYCO's track construction is "belated acknowledgement" that its in-plant capacity is "grossly inadequate."¹⁷ This is nonsense. PYCO's plant no. 1 basically surrounds the western half of SAW's yard. PYCO has considerable private track at plant no. 1 as well, as indicated in the map attached as Exhibit D. The problem of congestion arises only when SAW refuses to provide adequate switching (as it did commencing in November), terminates PYCO's lease track 9298 (November) and refuses use for storage (January 30), and places derails so as to encumber PYCO's ability to use PYCO's own equipment (a trackmobile) to move cars around PYCO's plant no. 1. PYCO's plant no. 1 was sited to allow ample and efficient rail service, but unfortunately this requires the cooperation of the railroad providing switching services.

Because SAW indicated PYCO must "take care of [itself]" on November 18, PYCO is expanding its own track, with plans to create its own yard so it need not depend on SAW's yard for anything other than through traffic. This is not an acknowledgement that SAW has inadequate track under its control to provide storage; it is an acknowledgement that SAW refuses to provide adequate rail service and PYCO must expend substantial resources to "take care of [itself]." See Gail Kring V.S., Exhibit A, para 8. BNSF has informed PYCO that WTL's switching has allowed BNSF to assemble a 70 car unit train in 3 days as opposed to 5, a marked improvement in car velocity which means

¹⁷ SAW Pet. at 11-12.

less congestion and less need for car storage. Id. This supports the conclusion that the alleged need for more car storage is a function of inadequate switching by SAW, not inadequate investment in track by PYCO.

SAW in its Petition and Delilah Wisener in her verified statement claim that the service problems faced at PYCO's plant no. 1 were attributable to obstruction by BNSF. If one examines Mrs. Wisener's statement at pages 2-7, one sees that almost all instances of obstruction relate to last winter and spring, and seem to involve removal of switches that might be of use to provide service to PYCO's plant no. 2, not plant no. 1. The "evidence" about BNSF obstruction is irrelevant to plant no. 1, and not a cause of any problems at plant no. 2. Moreover, BNSF has rejected SAW's claims.¹⁸ SAW's finger-pointing at BNSF is

¹⁸ SAW complains of lack of a mainline switch to track 320. According to BNSF, this switch was removed at the time of sale to SAW in May 1999. SAW waited until 2005 to raise the issue, which tardy quibbling makes the issue suspect in the first instance.

BNSF tells PYCO that SAW never obtained any rights to travel on BNSF's mainline for purposes of switching customers off of the mainline at track 320. According to BNSF, the acquisition exemption decision authorizing SAW's acquisition (F.D. 33753) errs in stating that SAW will acquire approximately 3 miles of incidental trackage rights over BNSF's mainline between track 9298 and BNSF's south yard in Lubbock. In fact, the distance is much less, and according to BNSF, the sales agreement makes this clear. BNSF states that Mrs. Wisener's claims to the contrary at p. 5 of her verified statement are wrong. BNSF notes that under the sales agreement and amendments thereto, SAW has at least two means of serving PYCO plant no. 2 other than track 320, and this was not a problem prior to the summer of 2005.

BNSF states that it is correct that BNSF placed a lock on the switch leading from its lower yard to track 231 in November 2004. However, this lock was removed in April 2005, and had nothing to do with the service problems encountered by PYCO.

simply a smokescreen, whether stated by SAW while under Mr. Wisener's management prior to January 26 or by SAW under Mrs. Wisener's management subsequent to January 26.

To be sure, SAW must cross the BNSF mainline, and for elementary safety reasons that requires permission by BNSF. There will necessarily be delays from time to time. But the way to address that problem is not to point fingers at BNSF; instead it is to agree to operate (or to allow operations) between 6 PM and midnight as BNSF has suggested when the mainline is congested.

BNSF offered to undertake an early morning conference call to work out service issues with SAW and WTL each day. WTL accepted and is participating; SAW did not accept and is not participating. SAW apparently still is not interested in cooperation and negotiation; it is interested in meetings and calls only when an opportunity to dictate terms and then hang-up is presented, or when a meeting is thought to be useful for pleading purposes.

III. Plant No. 2 Issues

A. General

SAW devotes most of its effort in its reconsideration argument to discussion about Plant No. 2. SAW's first claim is that PYCO shut down operations at Plant No. 2 for five days to fumigate seeds, and that this five day hiatus in demand for cars

BNSF states that it at no time has blocked SAW's access to PYCO. BNSF notes that PYCO is a customer of BNSF, and that BNSF gains nothing from impeding service to PYCO.

proves that there never was a service problem.¹⁹

PYCO's Plant No. 2 processes cottonseed, and cottonseed must be fumigated. If rail cars are delivered on a regular basis, then the plant does not have to be completely shutdown for fumigation. However, if rail cars are supplied irregularly, then the Plant has to be closed. In the case of the five-day shutdown referenced by SAW, the shutdown was a direct result of SAW's not supplying cars on a regular basis such that the seed could not be loaded out fast enough. This demonstrates inadequate service to Plant No. 2 by SAW; not the opposite. See Gail Kring V.S., Exhibit A, para 9.

SAW says that it made all boxcar deliveries requested by PYCO for Plant No. 2 in January while the alternative use petition was pending. While this may be true, SAW admits that it missed deliveries before January.

The fact that SAW managed to make the boxcar deliveries in January begs the question why it failed earlier. Actually, it illustrates PYCO's basic point that SAW management cannot be counted on to provide adequate rail service to Plant No. 2. Instead, they apparently turn it on only when PYCO places a petition on file with the STB. PYCO believes SAW is currently hoarding boxcars needed by PYCO, forcing PYCO to reorder from WTL and BNSF.²⁰

SAW claims it only missed one day's switch in November to

¹⁹ SAW Pet. at 4.

²⁰ Robert Lacy V.S., Exhibit B, para 3.

plant no. 2 due to a locomotive failure. The locomotive failure evidently excused a prolonged Thanksgiving holiday for SAW. SAW failed to provide service, despite critical need at plant no. 2, for six consecutive days, inclusive of a weekend. See PYCO Pet. Alt. Service, served Dec. 19, 2005, Exhibit C (Lacy V.S.) at para 18.

B. SAW's Request to Bifurcate Service

SAW urges that alternative rail service be terminated for Plant No. 2, even if it continues for Plant No. 1.²¹ PYCO opposes bifurcated service. Robert Lacy V.S., Exhibit B, at para 4. Because all cars are billed to PYCO with no classification as to plant, BNSF could not separate them if it wanted to do so. BNSF has indicated that it will deliver cars to only one railroad, currently WTL. It would simply result in more delay for WTL to switch out cars for SAW to deliver to Plant No. 2, and more delay for PYCO cars to be assembled by BNSF for 70 car unit trains.

Mr. Kring observes in his verified statement that BNSF indicates that WTL service has cut the time for BNSF to assemble 70 car unit trains from 5 days under SAW to only 3 days. This is a substantial improvement in velocity, reducing the number of cars needed by PYCO, and allowing BNSF to put cars to work for other customers. It opens up opportunities for PYCO to move more product, and to reduce car storage requirements. This velocity improvement will be destroyed unless WTL is permitted

²¹ SAW Reply at p. 10.

to continue to serve both PYCO facilities.

SAW has yet to demonstrate an ability to cooperate with BNSF, WTL or PYCO in Lubbock under the alternative service order. Its management hangs up rather than negotiates, and its personnel violate the protocols their management dictates to the disadvantage not only of PYCO but also of SAW's other customers. This is hardly a scenario in which SAW should be permitted to resume service to Plant No. 2. One railroad should be responsible for PYCO: one point of contact, one point of planning, one point of problem resolution. The last thing PYCO wishes at this time is SAW pointing its finger at WTL as well as BNSF as an excuse for delayed, inadequate, or interrupted service.

IV. ALTERNATIVE SERVICE BY WTL MUST BE CONTINUED

Until SAW demonstrates that it is prepared to cooperate rather than blame other railroads, or PYCO, or anything or anyone but itself, the alternative service order should remain in place.

PYCO is currently receiving adequate service from its alternative rail service provider, WTL. Notwithstanding the myriad problems arising from SAW's failure to cooperate,²² and notwithstanding SAW's refusal to allow WTL to provide evening service, WTL has managed to work off PYCO's backlog of rail traffic. WTL has advanced several ideas to improve rail service still further, and has taken or suggested numerous ideas to

²² See Stephen Gregory V.S., Exhibit C.

improve PYCO's car supply.

PYCO management is pleased with the rail service it is receiving from WTL, and it is our understanding that BNSF views WTL as performing adequately as well, and attributes a substantial velocity attribute to WTL, which benefits both PYCO and BNSF.²³ PYCO's Mr. Lacy states that actual carloadings by PYCO have more than doubled during the first 17 days of service by WTL over the preceding 17 days under SAW. Robert Lacy V.S., Exhibit 3, at para 3. At considerable cost, and notwithstanding harassment and obstacles created by SAW, PYCO has finally received adequate rail service. PYCO is in its most rail dependent season, and continued adequate rail service -- not simply a couple weeks of it -- is vital.²⁴ In order to ensure continued adequate rail service to PYCO, whose 2005 carloadings in Lubbock approximated 7000 total, and to PYCO's customers and to the public, this Board should extend the alternative service order for the maximum allowable time.

SAW makes a variety of safety and other allegations against alternative service provider WTL. WTL's Stephen Gregory responds to those allegations in his Verified Statement attached as Exhibit C. From PYCO's point of view, WTL is far more sinned against than sinning in respect to SAW, and BNSF states to us that it views WTL's performance as adequate. Any actual deficiencies on the part of WTL operations are either a function

²³ Gail Kring V.S., Exhibit A, para. 10.

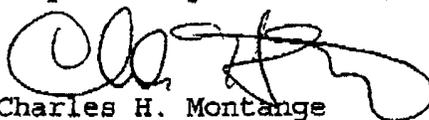
²⁴ E.g., Robert Lacy V.S., Exhibit B, para 8.

of a natural learning curve or lack of cooperation or knowledge of SAW, and those deficiencies are vastly outweighed by WTL's ability to double service to PYCO despite harassment from, and obstacles created by, SAW. Mr. Gregory's Verified Statement and the log attached thereto also chronicles some of the SAW-related or SAW-instigated problems.

CONCLUSION

For the reasons stated in this Opposition and in the attached statements, this Board should extend rather than terminate the alternative service order.

Respectfully submitted,



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Exhibit A -- V.S. Gail Kring
Exhibit B -- V.S. Robert Lacy
Exhibit C -- V.S. Stephen Gregory (WTL)
Exhibit D -- map

Certificate of Service

The undersigned hereby certifies service of the foregoing (a) by fax transmission to Thomas McFarland, counsel for SAW, at 312-201-9695, and (b) by placing a copy with Federal Express addressed to Mr. McFarland at 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112, on February 16, 2006. The undersigned also certifies service of the foregoing on John Heffner, counsel for WTL, by fax transmission at 202-296-3939 on the same date.

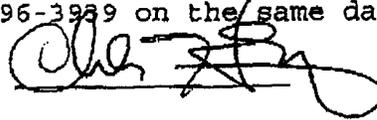
A handwritten signature in black ink, appearing to be "John Heffner", written over a horizontal line.

Exhibit A

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

Verified Statement of
Gail Kring

I, Gail Kring, make this verified statement in response to the Petition to Terminate Alternative Rail Service filed by South Plains Switching ("SAW") in this proceeding, and in support of continuation of the alternative rail service provided by West Texas & Lubbock Railroad ("WTL") which PYCO Industries, Inc. ("PYCO") has been receiving commencing on 30 January.

1. I am the Chief Executive Officer and General Manager of PYCO Industries, Inc., and have been employed by PYCO for 39 years.

2. On or about November 17, 2005, Mr. Larry Wisener of SAW informed PYCO that PYCO would have to take care of itself in terms of rail service. He restricted service to PYCO's plant no. 1 to one switch per day, terminated PYCO's lease to track 9298 (traditionally used for storage and staging of cars for PYCO, particularly for PYCO's plant 2), caused derails to be placed on SAW trackage that impeded movement of cars by PYCO at its Plant No. 1, and took a variety of other steps to ensure inadequate service to PYCO.

3. On January 26, this Board granted PYCO's petition for alternative rail service by WTL. Since SAW had refused to discuss

PYCO's proposals to negotiate an operating protocol to allow WTL to commence service immediately upon this Board's order, WTL was unable to commence service immediately. Arrangements were made for service to commence on January 30. At some point during the evening of January 29 and the morning of January 30, SAW removed all PYCO cars from track 9298 and moved them into SAW's yard, congesting it, rendering service difficult to impossible on January 30. This proved a harbinger of further SAW obstructions to alternative rail service, as discussed in WTL's verified statement.

4. Along with other representatives of PYCO, I listened into two conference calls with SAW concerning efforts to work out a service protocol during the week of January 30. In the second call, Mrs. Delilah Wisener participated. Actually, her participation was relatively brief. She came on the telephone, insisted that the protocol prepared by her attorney (Mr. McFarland) be accepted, declined to negotiate, indicated that she would impose worse terms should it not be signed, issued an ultimatum for signature by noon the next day, and hung up.

5. PYCO did not regard the SAW protocol as adequate because it did not take into account BNSF's operations, it did not address PYCO's traditional use of track 9298, and it did not permit evening service. SAW provided no explanation or excuse for these deficiencies, and they have proved a headache for WTL.

6. To WTL's credit, notwithstanding lack of cooperation by

SAW, WTL has managed to work off PYCO's backlog of shipments by this past weekend (Feb. 11-12).

7. It is my understanding that on or about Friday, February 3, SAW's local attorney called our Lubbock counsel, Mr. McLaren, suggesting that Mrs. Wisener wished to meet with me to discuss service issues. Mr. McLaren was not in the office and did not receive or discuss the call with me until the following Monday, February 6. We thought that Mrs. Wisener wished to discuss the service protocol, we certainly agree that the service protocol dictated by Mrs. Wisener could be improved, and we advised that operational issues should be handled through WTL and the attorneys addressing STB on the issue. Although we were not ourselves in a position to discuss rail operations, we instructed our Lubbock counsel to send a letter to SAW's Lubbock counsel requesting that SAW send us any non-operational proposals to us in writing. A copy is attached hereto. PYCO's goal in sending the letter to SAW's counsel was to ensure that an efficient and potentially productive line of communication remained open if SAW had a proposal it wished us to consider. PYCO has yet to receive a response, other than to see in SAW's petition to revoke that SAW is ignoring Mr. McLaren's letter, and is indeed trying to use a version of the events to cast PYCO and myself in particular in a bad light.

8. Because SAW has terminated our lease to track 9298, has failed to provide adequate alternative facilities for car storage,

and has augmented the car storage problem by not providing adequate rail service, PYCO is constructing additional trackage at plant no. 1. This does not mean that we acknowledge that existing trackage is inadequate; it does mean that we take Mr. Wisener at his word that PYCO must take care of itself and can expect only misery from SAW. Moreover, since WTL began providing service to PYCO, BNSF has informed us that it has been able to load a 70 car unit train every 3 days versus every 5 days when SAW provided the switching service. This is a significant improvement in velocity that benefits both BNSF and PYCO. For one thing, it reduces the number of cars needed by PYCO, as well as allows PYCO to move more product. It also reduces storage needs, proving our point that SAW's allegations about lack of storage space for PYCO's cars are nothing more than a symptom of SAW's failure to provide adequate switching service. SAW creates car storage needs due to its irregular and inadequate service.

9. PYCO had to shutdown plant no. 2 for five days to fumigate cottonseed because SAW failed to deliver cars on a dependable basis disrupting our regular processing schedule. The fact that we had to shutdown thus corroborates the fact that we receive inadequate rail service from SAW. It does not show, as SAW claims, that our contention that we received inadequate rail service is some kind of lie. The very fact that SAW continues to refuse to acknowledge that its prior actions were somehow inadequate and that somehow

PYCO's problems are the fault of PYCO or BNSF itself indicates that SAW is not yet ready, willing or able to provide adequate rail service to PYCO. Until SAW recognizes that its policies, restrictions, and artificial limitations are problems, SAW will continue to be unable and unwilling to provide adequate rail service.

10. PYCO is well-satisfied with service from WTL. We request that the alternative rail service order continue in place so we have a rail provider to turn to which has demonstrated an ability to meet our needs, address our concerns, solve problems (including the many problems caused or exacerbated by SAW), work with BNSF, and get the job done. As BNSF has indicated, WTL has been able to expedite switching permitting BNSF to load out 70 unit trains in 3 days as opposed to 5, and this increase in velocity benefits both BNSF and PYCO.

11. SAW claims that its difficulties in providing service to PYCO are due to a record cotton crop. The cotton crop this year is essentially the same as last year. WTL seems to be able to provide adequate rail service to PYCO notwithstanding the size of the cotton crop. SAW's reliance on the cotton crop as an excuse for service problems suggests that SAW is not able to provide adequate service during the cotton harvest. SAW's own argument seems an admission of its inability to provide adequate service for agricultural users of its line during the work season.

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 15th February

Neil King

PHILLIPS & MCLAREN, L.L.P.

ATTORNEYS AT LAW

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GARY R. MCLAREN
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February 7, 2006

Mr. James L. Gorsuch, P.C.
Attorney at Law
4417 74th Street, Suite B-102
Lubbock, Texas 79424
Via Telefax No. 771-6476

RE: PYCO

Dear Jim:

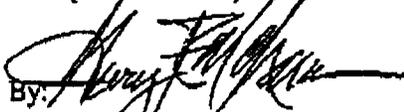
Thank you for your call of Friday and yesterday requesting a meeting between Mr. Kring and Mrs. Wisener. As I stated yesterday, Mr. Kring has no desire to have an "operational" meeting, as rail operations details are, among other things, being handled by the respective STB lawyers of the various parties.

If Mrs. Wisener has a proposal that she wishes PYCO to consider, we would like to review same in writing, and we will endeavor to respond as appropriate.

Thanks for your cooperation concerning this matter.

Yours very truly,

Phillips & McLaren, L.L.P.

By: 
Gary R. McLaren

GRM/cjh

Exhibit B

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

Verified Statement of
Robert Lacy

I, Robert Lacy, make this verified statement in response to the Petition to Terminate Alternative Rail Service filed by South Plains Switching ("SAW") in this proceeding, and in support of continuation of the alternative rail service provided by West Texas & Lubbock Railroad ("WTL") which PYCO Industries, Inc. ("PYCO") has been receiving commencing on 30 January.

1. I am the Senior Vice President-Marketing for PYCO Industries, Inc., and am responsible for overseeing shipment of product to customers. As such, I am familiar with PYCO's rail-dependent operations. I will focus my statement on some specific issues raised by SAW or germane to the question of continuation or revocation of the alternative service order.

2. I was a party to several conference calls concerning alternative service, including the one on SAW's draft service protocol on February 2. PYCO was anxious to provide some flexibility so WTL could work with BNSF and so PYCO could rely upon its traditional use of track 9298 for car storage and staging. Rather than negotiate, Mrs. Wisener basically indicated that WTL had to "take it or leave it" and hung up on all of us. Unfortunately, this has been Mr. Wisener's approach as well.

3. PYCO is pleased with WTL's alternative service. According to our records, in the first 17 days of alternative service (January 30 to February 15), we have shipped 369 cars; in the preceding 17 days under SAW, we shipped 164. This represents a doubling of service. Our shipping people tell me that we could have shipped even more in the past 17 days, but SAW was hoarding boxcars and we had to reorder from BNSF and WTL. BNSF reports to us that it can now assemble a 70 unit train in 3 rather than 5 days, and that is a very good indication of the marked improvement in service. We have worked off our backlog.

4. Our productivity improvement is dependent on continued WTL service. We certainly oppose SAW's request that it be allowed to serve Plant No. 2, even if WTL is permitted to continue to serve Plant No. 1. Especially since SAW terminated our lease to track 9298 and literally has hung up on attempts even to discuss that issue, we are concerned that SAW service to Plant No. 2 will again result in congestion, and destroy the improvement in car utilization that BNSF has remarked upon. This is contrary to the interests of PYCO, PYCO's customers, BNSF, other shippers, and the public.

5. Mrs. Wisener in her Verified Statement indicates that WTL did not have permission to operate on Attebury trackage at the time of a derail. This is not correct. PYCO had contacted Attebury's headquarters and obtained permission. We also obtained Attebury's permission for WTL to clear the derail. We

understand that WTL was forced onto the Attebury trackage due to congestion of all other routes to serve PYCO Plant No. 2. We believe the congestion was induced by SAW or the result of actions by SAW.

6. At my direction, PYCO staff has photographs showing Mr. Wisener apparently supervising SAW crews on SAW trackage post-January 26, notwithstanding his resignation as manager of SAW. PYCO has also been told Mr. Wisener is in touch with customers of SAW post-January 26. We have not heard or seen any material change in management of SAW or management practices of SAW notwithstanding the alleged reshuffling of management from husband to wife.

7. In order to ensure more orderly switching, BNSF offered to participate in a morning conference call to work out operational issues each day. WTL agreed to and is participating. PYCO also was invited, and initially participated, but now relies on WTL. SAW declined to participate and I understand it does not participate.

8. PYCO remains rail dependent for its shipping needs, and we are in our most rail dependent season. There is no indication that SAW is willing or capable of providing adequate rail service to either of PYCO's two plants in Lubbock, and we respectfully request that the alternative service order be extended for the maximum period allowed by statute.

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 1-16-06.

Robert Loay

Exhibit C

Exhibit C

VERIFIED STATEMENT OF
STEPHEN GREGORY

Stephen Gregory, being duly sworn, deposes and states as follows:

My name is Stephen Gregory. I am a Vice President of Permian Basin Railways, a short line railroad holding company and corporate owner of the West Texas & Lubbock Railway ("WTLC"). My business address is P.O. Box 618181, Chicago, IL 60661.

WTLC is a class III short line railroad with operating headquarters in Brownfield, TX. As relevant here, WTLC is the railroad designated by Pyco Industries, Inc. ("PYCO") to be its alternative rail service provider in these proceedings before the federal Surface Transportation Board. Pursuant to the Board's order dated January 26, 2006, WTLC has been providing alternative rail service over the railroad lines of South Plains Switching, Ltd. Co. ("SAW") for an initial 30 day period beginning on Jan. 27, 2006.

I am the WTLC corporate officer responsible for coordinating rail commercial and operating matters with both BNSF Railway, Inc. ("BNSF") and SAW. I have read the "Petition to Terminate Alternative Rail Service" prepared by SAW's counsel and the accompanying Verified Statement of

Delilah Wisener and am prepared to address allegations in each. In addition, I am the WTLC corporate officer who has been on the conference calls with BNSF and PYCO pertaining to this alternative rail service (SAW declined to participate on these calls). See, Attachments 1 and 2.

Essentially, SAW alleges that WTLC's service is not safe and impairs its ability to service its own customers. In that regard, SAW identified four incidents said to be unsafe: a "form B" violation, one or more derailments involving WTLC, use of motive power having too little horsepower, and violation of applicable operating agreements. With respect to SAW's service, SAW claimed that WTLC and BNSF-induced congestion prevented SAW from serving several customers including Womack and ADM. Additionally, SAW claims that WTLC violated the operating protocol when it was a verbal agreement in principle and has continued to violate it once committed to writing. Specifically, SAW blames WTLC for leaving the mainline track in its yard blocked on February 7 and placing SAW cars on WTLC's track on February 6. Our records indicate all SAW cars were placed on SAW tracks on February 6. In general, WTLC makes every effort to avoid blocking the yard main and to deliver SAW cars promptly. In cases where this is not done the most prevalent causes are (1) delays in

switching the BNSF interchange due to BNSF operations, (2) observance of the protocol windows, and (3) actions taken by SAW, such as preventing switching in the west end of Track 3 by means of a locked switch.

In response, I have reviewed daily list of incidents alleged by SAW and found in the "dismal service performance and operating practices of WTL" portion of Ms. Wisener's statement. I will respond to each.

January 27-29. SAW states WTLC did not provide any service.

There was no operation on Friday the 27th because the 9am - 2pm window was impractical. There was no operation on the weekend even though WTLC was prepared to do so because SAW through McFarland's office refused permission for WTLC to operate.

January 30. SAW alleges that WTL used an unsafe switching practice called "drop and kick" as well as used the lead track of a customer (Acme Brick) for switching PYCO traffic. SAW also alleged that BNSF's insistence that WTLC handle all inbound traffic moving to SAW would delay traffic to SAW customers by one day.

WTLC did not provide service on this day due to continuing concerns about the ground rules for operation pending the Monday conference call, and because SAW filled

available yard tracks with cars from Tracks 9200 and 9298, severely hampering startup switching and interchange operations.

The "drop" switching operation actually occurred on Tuesday, January 31. This practice is not unsafe and is permitted by General Code of Operating Rules (GCOR) section 7.7. The following communication took place with Mr. Dennis Olmstead, SAW consultant, on January 31:

On Tuesday afternoon I received a telephone message from Mr. Olmstead listing three purported safety issues: the dropping of cars, switching without lanterns, and an unlocked derail (location unspecified). After getting the facts from our Superintendent, I left a message for Mr. Olmstead with the following: (1) WTLC had dropped a car consistent with GCOR rules but in case such practice was prohibited by a SAW-specific rule such practice was immediately prohibited by WTLC; (2) WTLC employees are provided with lanterns and in any case no WTLC switching was done that morning while it was still dark; (3) all derails involved in WTLC switching were closed behind a switching operation and locked if a lock was provided. There was no response to this message, and to date SAW has not provided WTLC with any SAW safety manuals, bulletins,

etc., despite a specific request to do so by letter of February 4. See, Attachment 3.

January 31. SAW implies that WTLC misrouted traffic destined for ADM (Southern Cotton Oil) to a closed ADM facility located on WTLC's own line. SAW again alleged that BNSF's insistence that WTLC handle inbound traffic for SAW would result in one day's delay.

The ADM cars referred to were received by WTLC in interchange from BNSF before the start of the alternative service. This was certainly a regrettable error on BNSF's part but was beyond WTLC control.

With respect to customer cars delayed enroute, BNSF like all Class I railroads is experiencing high levels of traffic that affect network performance. WTLC, like SAW, can only pull cars from the BNSF yard that are placed on the track designated for interchange. When WTLC was made aware of "hot" cars that needed to be expedited, it made every effort to pull such cars from BNSF and place them on SAW designated tracks as soon as possible within the protocol windows. WTLC has no desire nor incentive to discriminate between delivering cars to SAW and switching PYCO. In fact there have been cases where WTLC was prepared to give priority to SAW cars in a manner that

would have resulted in a delay to PYCO switching. WTLC has been in regular communication with SAW customers by phone and e-mail on the status of cars destined to it.

February 1. SAW alleges that WTLC received but did not sign and return the operating protocol letter, implying that this failure somehow made coordination more difficult. Moreover, SAW alleged that WTLC engines employed during the first week of service lacked sufficient horsepower to switch traffic resulting in a blockage of BNSF's mainline for an extended time period.

WTLC did experience difficulty while on the BNSF main line on February 1. Since interchange with BNSF was not made on Tuesday our crew attempted to deliver an abnormally heavy interchange cut of cars. Working in cooperation with the BNSF we were able to clear the main in approximately 25 minutes, about 10 or 15 minutes longer than the move would have taken without an interruption.

In planning for this operation with BNSF and PYCO it appeared that one GP-35m type locomotive (about 1.5 times more powerful than SAW units) was sufficient for the volumes involved, and WTLC always planned to have a second unit available at its Doud Yard a short distance away. Due to events beyond its control WTLC started operations in a

situation with a high level of congestion at both the BNSF and SAW yards, exacerbated by SAW's movement of cars from Track 9298 to its yard. This congestion, combined with delays occasioned by SAW's harassment and BNSF delays, resulted in our attempt to move a train slightly heavier than the GP-35m could handle. This was quickly resolved and WTLC provided its second locomotive as planned. We are not familiar with any statement or claim that 3 locomotives would be provided.

February 2. SAW alleges that there was still no signed operating protocol. The parties discussed this matter on a conference call and eventually reached agreement on the first three points for service to PYCO plant 1. But before the call participants could address service to plant 2, BNSF called to report an operating emergency involving a "Form B violation" and that BNSF removed WTLC's crew from their yard.

Following is a summary of the discussion surrounding the protocol:

The protocol schedule that was discussed and agreed to on the January 30 conference call was that WTLC would operate on SAW trackage during the hours of 7-10am and 2 - 7pm, with SAW operations confined to 10am - 2pm. This was

never confirmed by SAW attorney McFarland, in fact a different schedule was listed in his letter of February 1, which provided more flexibility to the parties and which WTLC supported as an improvement. As noted below we continued to have other concerns.

In her comments for January 31, Ms. Wisener states the protocol was good for both parties. It's not clear to which protocol she refers, the one agreed to on Monday or the one subsequently detailed in the McFarland letter of February 1, although I assume the latter since it offered SAW more flexibility. WTLC supported then and supports now a clear delineation of operating times, but the challenge with the process is that the protocol cannot be static but needs to evolve to meet different operating requirements. For example on February 8 WTLC was advised it would not have access to roads or driveways paralleling tracks it would operate on, and we had to petition for that access to be included in the protocol. As will be shown below, WTLC operation outside the protocol windows became necessary to best serve all customers on SAW but SAW would not consider this. A critical factor in the adherence to any protocol at this location is the availability of interchange with BNSF. The reality is that BNSF cannot guarantee interchange times or frequencies. During our period of

operation there have been at least two occasions when interchange could not be made during the day, although without the flexibility to operate beyond the protocol it is not known whether interchange could have occurred then. This situation obviously affects both WTLC and SAW and all customers currently located on SAW, including PYCO, but it is beyond WTLC's control.

We recognize the seriousness of the Form B violation but note it did not happen on any of the trackage covered by the Board's ruling or while performing service to PYCO. The internal WTLC hearing results on this issue have not yet been compiled so I wonder how Ms. Wisener knows the status of the involved engineer certificate.

I must also note that for 8 out of the last 9 years the WTLC received the same safety awards Ms. Wisener refers to.

Throughout this period SAW employees were seen throughout the WTLC work day standing on the rail, in crossings, following the WTLC train, driving alongside of the cars WTLC was moving, causing our crews to be concerned for both the safety of the SAW employees and the possibility of some type of action by the SAW employees that could negatively affect our movements. Also after dark SAW employees were taking several flash photographs of

the WTLC train and crews and shining vehicle headlights in what seemed to be a deliberate attempt to blind or obstruct our crews' vision and line of site, severely hampering our movements and at one point causing our crew to stop movement. These are hardly the hallmarks of a railroad with a strong safety culture. See the log submitted here as Attachment 4 for a record of harassment of WTLC crews and observed SAW operating practices not consistent with generally accepted safety rules.

Ms. Wisener refers to cars on Tracks 9200/9298. While WTLC suggested options to the BNSF to help reduce BNSF yard congestion, ultimately BNSF made the decision to place PYCO related equipment on Track 9298. WTLC believes that Tracks 9200 and 9298 have historically been used primarily, if not exclusively, as part of the rail service package to PYCO, namely to hold the inevitable bunching of empties that occurs in a seasonal movement with high rail volume. We further understand that SAW cancelled a track lease with PYCO that had the effect of arbitrarily reducing the capacity of these tracks to service PYCO. The cars that BNSF placed on these tracks were no more or less than what would have happened if standard practice had been followed in serving PYCO.

February 3. SAW alleges that after it thought the parties had agreed on the protocol letter language, I had made some changes in pen. I did indeed make a proposed addition to the protocol, which I had discussed with Ms. Wisener beforehand, and she indicated I should submit my proposal.

Since the February 1 McFarland letter changed the protocol that had been agreed to on Monday, WTLC felt it appropriate to raise new questions. Had Ms. Wisener discussed the matter in a reasonable manner on the Thursday call these questions might have been resolved. The major questions include: (1) resolution of the Track 9200-9298 capacity issue; (2) clarification of the use of Compress 310 Track and discussion of apparent continuing SAW efforts to prevent its use; and (3) the ability for WTLC to work outside the 7am - 7pm protocol.

I attach to this statement my letter to Ms. Wisener dated Feb. 3 expressing my views on how to resolve these protocol issues as well as other pertinent correspondence. Attachments 5-7.

Additionally, SAW alleges that WTLC had a derailment of cars on track owned by Attebury Grain and used to access PYCO plant 2. SAW alleges that WTLC simply uncoupled its engine and left the scene.

The use of the Attebury track was made necessary by SAW placing a red flag on Track 310 directly in front of our locomotive while our crew was stopped to line back a BNSF main line switch after leaving BNSF main in route to Track 310. The alternative route via Tracks 9200-9298 was blocked by congestion. Our interpretation of the Board's order was that we should serve Plant 2 via any open and safe route. PYCO management had arranged with Attebury management to use this track.

We did experience a derailment on the return trip. The local Attebury representative informed our Superintendent that he preferred that we not participate in the re-railing of the cars, and that is why our engine departed. The representative later told our Superintendent that this location has experienced several derailments of loaded cars due to a track flaw. Since we were not allowed to inspect the track at the time of the incident we can't confirm this.

Subsequently WTLC was authorized by Attebury management to remove PYCO loaded cars from this track to deliver to BNSF. To do so we had to break a lock SAW placed on the switch serving this private track.

In a conversation with Ms. Wisener, myself, and WTLC president Ed Ellis on February 4, in connection with a

statement she made concerning possible Attebury ownership of a portion of the track between Track 9298 and Plant 2, she stated that SAW did not have a full understanding of track ownership and/or control in the area, an unusual state of affairs for a railroad that has been operating for seven years.

SAW also notes that Southern Cotton Oil had to be placed in a "shutdown mode" because they could not get tank cars sitting in BNSF's yard which WTLC could not interchange to SAW. Similarly, SAW says that Dodson Lumber's traffic was sitting in the BNSF yard.

I was in contact by phone with Mr. Tony Dawson of Archer Daniels Midland (ADM), in their Decatur office, regarding the shipments of beans to Womack for which ADM is a supplier. I was also in contact with Mr. Darryl Dawson of ADM's Lubbock subsidiary Southern Cotton Oil concerning empty tank cars for delivery to them. I was not advised of a shutdown as such but delivery of their cars was clearly affected by congestion in this period. This congestion was not of WTLC's making. All that any switch carrier can do is work with the linehaul railroad to insure cars are delivered as promptly as possible, then advise the customer once the cars are available when they will be delivered to the customer (or in the case to the SAW), which I did,

making special efforts on its own line if possible. As noted elsewhere, lack of cooperation with SAW and protocol restrictions contribute to car delays. The following is an example from February 2:

At 10:30 that morning WTLC was advised that BNSF had two "hot" SAW cars in the interchange, UP 74704 (beans for Womack) and TTZX 864703 (lumber for Dodson). I immediately called Mr. Olmstead, who had been my primary contact, for authority to deviate from the protocol in order to deliver the cars to SAW immediately. I left a message. Having heard nothing by 11:10, I contacted Mr. McFarland's office. At 12:10 we were advised by the BNSF Lubbock yardmaster that SAW would like to pull these two cars itself and would WTLC agree? We immediately did so. We learned at 12:30 that SAW had elected not to pull these cars and left the yard. WTLC ultimately delivered the cars to SAW about 4:30pm that afternoon, a delay of approximately 5 hours from the time WTLC could have delivered them originally.

February 7. SAW alleges that WTLC blocked SAW's mainline.

WTLC was short on time partly due to SAW switching in the SAW yard from an unknown time until 08:00 hours costing us 1 hour of our window, in violation of the protocol.

When WTLC's crew knew they would be short on time they called and informed System General Manager McConville who called the SAW office to ask permission and got the answering machine. He then instructed the WTLC crew to get off BNSF and tie down on the main and, then for protection of our property, to make sure the locomotive power was in a secure place. The hour that SAW took from us in the morning would have been the time we needed to clear the main.

In an effort to resolve situations such as these, WTLC and BNSF have instituted a series of daily conference calls at 6:30AM CT and have invited SAW to participate. Unfortunately, SAW has repeatedly declined to do so. I am attaching copies of pertinent correspondence with Ms. Wisener to this statement. See, Attachments 1-3, and 5-7 and additional correspondence marked Attachment 8.

February 8. SAW claims that after WTLC's Mike McConville sought and received permission to remain on SAW property for an additional 15 minutes beyond the close of its operating window to complete its work WTLC still had not left BNSF's Lubbock Yard.

WTLC left SAW yard at 8:50am to perform interchange with BNSF. The plan was to get the SAW cars, deliver them

back to SAW, and then go to Plant 2 because we were up against the 10:00 protocol window. Our crew felt that if they had the extra 15 minutes this could be done.

SAW did not do as Ms. Wisener states. After we asked for the extra 15 minutes the WTLC crew learned that SAW was switching on the lead between the SAW yard and the BNSF main blocking us from returning to the SAW yard. I later learned that SAW was switching in the SAW yard from approximately 9:00am, just after we left to go to BNSF, until just about 10:00am, a violation of the protocol.

The WTLC crew made a decision to take just the Plant 2 cars and go to Plant 2. During the time it took for WTLC to gather up the Plant 2 cars and depart the BNSF yard, SAW proceeded to the Farmers Compress and blocked the WTLC crew from about 10:10 until 10:40.

WTLC Service Initiatives

Despite the pattern of harassment, interference with operations, and lack of communication and cooperation, WTLC has initiated the following improvements in service to PYCO:

1. Car supply. SAW recently took over ordering of empty boxcars for loading from PYCO. At the time WTLC began service PYCO believed SAW had cars ordered on behalf of

PYCO for loading but those were unavailable to us. WTLC was able to provide cars from its fleet as an interim measure pending the arrival of more BNSF-supplied equipment, and would do so again in the future.

2. Switches. WTLC has increased the frequency of PYCO switching operations. Only the restrictions of the protocol window, lack of SAW cooperation and communication, and occasional BNSF operating problems have prevented WTLC from providing 2 switches per day to Plant 1 and 1 per day to Plant 2. WTLC is also willing to spot cars on more than one PYCO track for loading, a practice we understand SAW was unwilling to follow.

3. Congestion relief. During the WTLC startup week empty cars approximating 4 - 6 days' PYCO loading capability were at Lubbock or very close enroute. This contributed to severe congestion on BNSF. Even though WTLC had limited track capacity and was not allowed by SAW to perform operations outside the protocol window, this congestion was largely eliminated by early the following week.

4. Car repair. WTLC's affiliated company, Central Car Repair, is authorized to make repairs to freight car

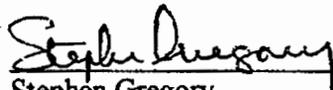
equipment and is in discussions now with PYCO. One benefit of this is to improve equipment utilization and efficiency since some repairs can be made on PYCO tracks that would otherwise have required the return of the cars to BNSF.

Overall I believe WTLC has made significant strides in safe and efficient switching for PYCO in a very short startup period in a very hostile environment. I have no doubt that this trend will continue.

VERIFICATION

I, Stephen Gregory, declare under penalty of perjury, under the laws of the United States of America, that I have read the foregoing Verified Statement and that its assertions are true and correct to the best of my knowledge, information, and belief. I further declare that I am qualified and authorized to submit this verification on behalf of West Texas & Lubbock Railway. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Denver, Colorado, this 16th day of February 2006.


Stephen Gregory

ATTACHMENT 1



Permian Basin Railways
Texas-New Mexico Railroad
West Texas & Lubbock Railway
Post Office Box 618181
Chicago, IL 60661

February 7, 2006

Ms. Delilah Wisener
VIA FACSIMILE: 806-828-4863

Dear Ms. Wisener:

As you probably know yard track 3 has been blocked since yesterday with a switch locked with a SAW Master lock that WTLC can't access. BNSF had 30 cars for SAW this morning and as of now I've not been able to reach you to discuss how we work around this.

In order to maximize service to all customers and promote safe operation we are instituting a conference call at 6:30am CT seven days a week to review the operating outlook, any SAW planned trackwork or other anticipated track closures, etc. WTLC operating people will be on the call and I expect that BNSF and PYCO people will be as well.

We are providing our toll-free number for this call, which is 877-679-3457, passcode 673229.

I hope this will facilitate operating communication between WTLC and SAW.

Yours very truly,

Stephen Gregory
Vice President

cc: Eddie Hale, Donna Thomas, Brent Westbrook, BNSF
Robert Lacy, PYCO
Ed Ellis, Mike McConville, Hans Grosstueck, Chuck Davis, WTLC

ATTACHMENT 2

Feb 07 06 02:25p Larry or Delilah Wisener

806-863-3202

p.2

**SOUTH PLAINS SWITCHING, LTD. CO.
(SAW)**

P. O. BOX 64299**LUBBOCK, TEXAS 79464****PHO: (806)828-4841****FAX: (806)828-4863**

February 7, 2006

Mr. Gregory:

I had a lock placed on the West end of track 3 only, so track 3 is clear for SAW interchange. WTLC has track 5 and track 1 in the SAW Yard and the Main as agreed to in the signed protocol. The Main is to be used and left clear after your operating window is over at 10 AM and at 7 PM, not blocked with Outbound PYCO interchange as on Sunday and Monday nights. Please comply with the operating protocol.

I also wish to have safe and efficient operations within SAW Lubbock Yard. Any normal yard maintenance would be coordinated with you. Of course I expect "emergency" situations would be handled between us.

As for the 6:30 AM CT conference call with "a cast of thousands", I will be unable to participate. Again, we have an operating protocol in place and I urge WTLC to comply with the provisions of the protocol. I will address specific problems you might have with SAW, feel free to contact me or my attorney during normal business hours.

I remain,



Delilah Wisener

CC: Tom McFarland
Dennis Olmstead

ATTACHMENT 3



Permian Basin Railways
Texas-New Mexico Railroad
West Texas & Lubbock Railway
Post Office Box 618181
Chicago, IL 60661

February 4, 2006

Ms. Delilah Wisener
VIA FACSIMILE: 806-828-4863

Dear Ms. Wisener:

This refers to your letter of February 3.

With respect to GCOR, WTLC also observes those operating rules. The only question I've heard in this regard is a voicemail message from Dennis Olmsted last Tuesday afternoon that mentioned that cars were kicked or dropped, not in itself a violation of GCOR rules. I confirmed this did happen, and in case SAW has specific rules against this practice directed that WTLC would no longer kick or drop cars. I advised Dennis of this in a message I left with him Tuesday afternoon and have heard nothing further on this.

We would be pleased to receive a copy of any SAW rules more restrictive than GCOR practice, as well as any other safety manuals, bulletins, etc. Anything that can be faxed should be directed to 888-522-6675; email to gregorys@iowapacific.com; or mail to WTLC at 821 W. Broadway, Brownfield, TX 79316.

We intend to remove the cars on 9200 and 9298 as soon as possible.

Yours very truly,

Stephen Gregory
Vice President

cc: Mike McConville, System General Manager
Hans Grosstueck, Superintendent

ATTACHMENT 4

SAW Event Log

In general SAW personnel shadowed WTLC operations. WTLC crews feel unsafe and threatened because of intermittent “surprise appearances”, considered harassment.

Tuesday 1/31:

0715 2 SAW units switching west of Ave A with one tank car – no headlight or ditch lights

1400 – Olmstead left Gregory message with 3 complaints: WTLC dropping one car; switching in darkness with no lantern or flashlight; derail left open. Hans response: did drop car; WTLC crew equipped with lanterns, no switching before light this morning; derail on SAW track protecting the BNSF main has no lock, WTLC opened in advance and closed behind, derail on route to 9298 has lock, Hans locked behind move. I reported this in message to Olmstead, adding even though GCOR permits dropping, we would refrain from doing so if it was a violation of a specific SAW rule. There was no return call.

1400 - Shad on ground next to locomotive no earplugs

1400 – Shad and Rodney standing on a rail

1430 Rodney riding loco across Juniper on lower step, no earplugs or safety glasses

1445 SAW train to BNSF – no flag on rear, no air test performed

1445 Observed unknown SAW employee cross 30 ft in front of moving loco to line switch against movement on track 3

1515 SAW train from BNSF – trailing unit no headlight on dim

1830 Shad observing at Plant 2; Hans asked if we could do anything for him, Shad said he was a rail buff

1915 Shad vehicle headlights pointed towards WTLC crew requiring crew to stop; Hans asked him to turn off; after Shad complained about operation after 1900, he complied, complaining we were violating FRA Hours of Service (split rest OK). At 1830 Shad said he had been taking pictures since 0700; if worked in train service this would be an hours of service violation?

2015 Shad taking flash pictures of engineer, causing distraction and a safety hazard

2040 Shad driving length of train several times, causing delay to crew account required to insure no operating hazards resulting, at cemetery

Wednesday 2/1

0700 WTLC made up BNSF interchange and left SAW property at 0900

0930 Shad and 3 other SAW employees on BNSF main line property, east end lower yard, distraction (WTLC train stalled at this point); also Shad and one other SAW employee standing between rails on SAW track with no safety glasses

1703 Rodney between the rails of track 3 with foot on north rail

1710 Shad standing in grade crossing taking pictures of WTLC train

1730 Shad and Rodney in middle of track 3, no earplugs, safety glasses, safety shoes

1745 WTLC crew discovered angle cock open on east end of track 2 after we had closed it. WTLC crew discovered when brakes would not set, causing switching delay.
1820 WTLC crew asked Shad to turn off headlights pointed at the conductor on the ground, could not see movement shoving to him, Shad refused and rolled up the car window.
1835 Shad makes obscene gesture to WTLC engineer.

Thursday 2/2

1030 WTLC advises Dennis Olmstead BNSF can take outbound interchange and deliver hot cars for SAW customers, although outside protocol window. WTLC needs SAW authority to do so.
1110 No response from Olmstead, advised McFarland in an attempt to get SAW response.
1210 BNSF advises SAW is willing to pull hot cars from BNSF yard, asks for WTLC permission which is granted
1230 BNSF advised SAW decided not to pull hot cars
1320 Shad standing in front of WTLC engine on crossing taking pictures
1330 Switch left against WTLC train by SAW engine
1757 Shad walking in and around Track 5 (assigned to WTLC in protocol) with no safety glasses
1849 Shad shines hi-beam vehicle headlights at WTLC engine and takes picture of engine and crew while engine is being tied down.
1850 Shad confronts Hans, blocks road so we have no access to our engine.

Saturday 2/4

1010 SAW employee Davidson getting on and off moving equipment, SAW track 2.
1445 Permission from Compress to use track 310, Shad on Compress property taking pictures

Monday 2/6

0700-0750 SAW switching in SAW yard
1516 WTLC left cut of cars on the yard main with angle cock closed on the east end. WTLC engine ran around cut to couple on west end, determined brakes were not functioning properly, checked and found angle cock on the east end had been opened.
1520 SAW in yard switching
1530 Davidson sitting on rail on SAW lead, east end yard.

Tuesday 2/7

0730 SAW placed Master lock on switch west end of track 3; WTLC asked to have it opened, has never been unlocked. Creates delay in spotting SAW cars.

1200 SAW employees standing next to running engine without ear plugs or safety glasses. Juniper grade crossing partially blocked for 12 minutes with no protection.

1850 Shad taking pictures of WTLC crew tying down train. He then advised Superintendent that access to the road through the yard was not permitted. When the Superintendent questioned this he was insulted.

Wednesday 2/8

0900-1000 WTLC return to SAW yard from BNSF interchange was blocked by SAW switching in SAW yard outside the protocol window.

1000 – 1040 WTLC access to Plant 2 through Compress was delayed by SAW switching in the Compress outside the protocol window.

ATTACHMENT 5

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
 208 SOUTH LASALLE STREET - SUITE 1890
 CHICAGO, ILLINOIS 60604-1112
 TELEPHONE (312) 236-0204
 FAX (312) 201-9695
 mcfarland@aol.com

THOMAS F. MCFARLAND

February 1, 2006

By e-mail to j.heffner@verizon.net

John D. Heffner, Esq.
 John D. Heffner, PLLC
 1920 N Street, N.W., Suite 800
 Washington, DC 20036

Re: STB Finance Docket No. 34802, *PYCO Industries, Inc. -- Alternative Rail Service*
 -- *South Plains Switching, Ltd. Co.*

Dear John:

This is intended to implement the agreement on operating protocols and other issues that were reached during conference telephone calls on January 30 and January 31.

During the period between January 27, 2006 and February 26, 2006, inclusive, control of dispatch over tracks used to provide rail service to PYCO Plant 1 and Plant 2, as identified below, shall be as follows, seven days per week:

- (1) 7 AM to 10 AM - WTL at PYCO Plant 1, SAW at Farmers' Plants 1 and 2, or Atterbury Grain
- (2) 10 AM to 2 PM - WTL at PYCO Plant 2, SAW in Yard
- (3) 2 PM to 7 PM - WTL at Yard, PYCO Plant 1 or PYCO Plant 2

(4) 7 PM to 7 AM - WTL AT YARD, PYCO PLANT 1 OR PYCO PLANT 2 PROVIDED SAW HAS COMPLETED ALL THE WORK FOR THE DAY.

Those times shall be flexible in the sense that neither party shall object to the other party holding work over for short periods of time not to exceed 15 minutes in duration.

The control of dispatch shall apply to the following tracks:

- (1) Track No. 1, Track No. 5 and the main track in SAW's Lubbock yard;
- (2) The lead track used to provide service to PYCO Plant 1;
- (3) Track 9298 as the primary means to provide service to PYCO Plant 2, except that Track 310 can be used for that purpose if it is not blocked and if complete movement to Plant 2 would not delay operations of Farmers Compress Company.

WTL's locomotives shall be tied up off SAW's tracks.

THOMAS F. MCFARLAND

John D. Heffner, Esq.
February 1, 2006
Page 2

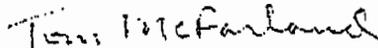
On each inbound switch from the BNSF yard, WTL shall transport cars for PYCO and for SAW's customers to SAW's yard, where the cars for SAW's customers shall be set off onto Tracks 2 and 3.

SAW shall perform its outbound switch to the BNSF yard separately and independently of WTL's outbound switch. SAW shall be able to provide its outbound switch at any time during the day, provided that the switch does not unreasonably interfere with WTL's operations.

WTL shall move empty cars located on Track Nos. 2 and 3 in SAW's yard for loading by PYCO before bringing additional empty cars of the same type from the BNSF yard for loading by PYCO.

Please sign below if this implements the agreement accurately.

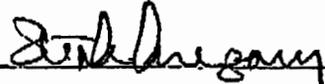
Very truly yours,



Thomas F. McFarland
Attorney for SAW

TMcf:kl:wp8.0:1144e-mailJDH1

AGREED: WEST TEXAS & LUBBOCK RAILWAY CO., INC.

By: 
Title: VICE PRESIDENT

ATTACHMENT 6

Feb 06 08:37 AM

Delilah Wisener

3038637673

P. O. Box 24277
Lubbock, Texas 79464
PHO: (806) 828-4841
FAX: (806) 828-4863

To: Steve Gregory **Fac:** 744-3221

From: Delilah Wisener **Date:** 02/3/2006

Re: Operating Protocol **Pages:** 5 including this cover sheet

CC:

Urgent For Review Please Comment Please Reply

Comments:

Mr. Gregory:

You are now over the 12:00 Noon time given you to sign the ORIGINAL operating protocol. While I am willing to remain flexible item #4 is unacceptable. I had hoped you would do as we agreed...sign the protocol and then submit your requests for other matters. You are refusing to sign an operating protocol that was agreed to by all parties involved including the STB on 01/30/06 and 01/31/06. Please sign the operating protocol, as written by 4PM today. Delilah Wisener

.....

ATTACHMENT 7



Permian Basin Railways
Texas-New Mexico Railroad
West Texas & Lubbock Railway
Post Office Box 618181
Chicago, IL 60661

February 3, 2006

Mr. Thomas F. McFarland
Ms. Delilah Wisener
VIA FACSIMILE 312-201-9695

Dear Mr. McFarland and Ms. Wisener:

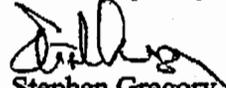
Mr. McFarland's letter of February 1 is enclosed, approved for West Texas & Lubbock Railway. I add the following for the record.

Ms. Wisener, in your fax cover sheet received this afternoon you state "You are now over the 12:00 Noon time given you to sign the ORIGINAL operating protocol." As you know, we discussed my proposed change, and you indicated I should make the proposed change and return the document, which I did, before noon.

Your assertion that "You are refusing to sign an operating protocol that was agreed to by all parties. . ." as well as the first paragraph of Mr. McFarland's letter, is incorrect. PYCO, WTLC, and BNSF had a different understanding of the arrangements. However the first items (1) - (3) are more flexible for WTLC and SAW than the original protocol, and an improvement for both parties, a position we could have made clear had we been able to have a reasonable discussion of the merits of the letter.

It would be in the interests of all SAW customers including PYCO if we are able to agree on a variable bases that WTLC be allowed to use SAW trackage to interchange with BNSF between the hours of 7:00pm and 7:00am, without interference to SAW's operations, and I hope you will consider this as your statement that you are willing to remain flexible implies.

Yours very truly,


Stephen Gregory
Vice President

cc: John Heffner
Charles Montagne

ATTACHMENT 8

Feb 08 06 03:19p Larry or Delilah Wisener

806-863-3202

p.2

SOUTH PLAINS SWITCHING, LTD. CO.
(SAW)

P. O. BOX 64299**LUBBOCK, TEXAS 79464****PHO: (806)828-4841****FAX: (806)828-4863**

February 8, 2006

Mr. Gregory:

It has come to my attention that you have 12 TTX 100 foot cars in your possession that belong to the SAW. I respectfully request that the 12 cars in question be interchanged to the SAW as quickly as possible. My customer is very distressed that these cars have been interchanged to the WTLC.

I have notified the BNSF of this problem and our contact with TTX in Chicago is talking with the BNSF on their end. My customer assures me the billing was correct until today.

Your cooperation in this matter would be greatly appreciated.

I remain,



Delilah Wisener

CC: Tom McFarland
Dennis Olmstead



Permian Basin Railways
Texas-New Mexico Railroad
West Texas & Lubbock Railway
Post Office Box 618181
Chicago, IL 60661

February 9, 2006

Ms. Delilah Wisener
VIA FACSIMILE: 806-828-4863

Dear Ms. Wisener:

With respect to your letter concerning 12 TTX cars, we received 11 QTTX empties from BNSF Wednesday morning. Since the protocol window expired before they could be placed on your tracks they were delivered at our next opportunity this afternoon. We will watch for a 12th car.

If we can arrange communication to coordinate, we are certainly willing to extend the protocol window in a case such as this to deliver cars to you.

If you will provide Dennis Olmstead's email or fax I will be happy to copy him on my correspondence.

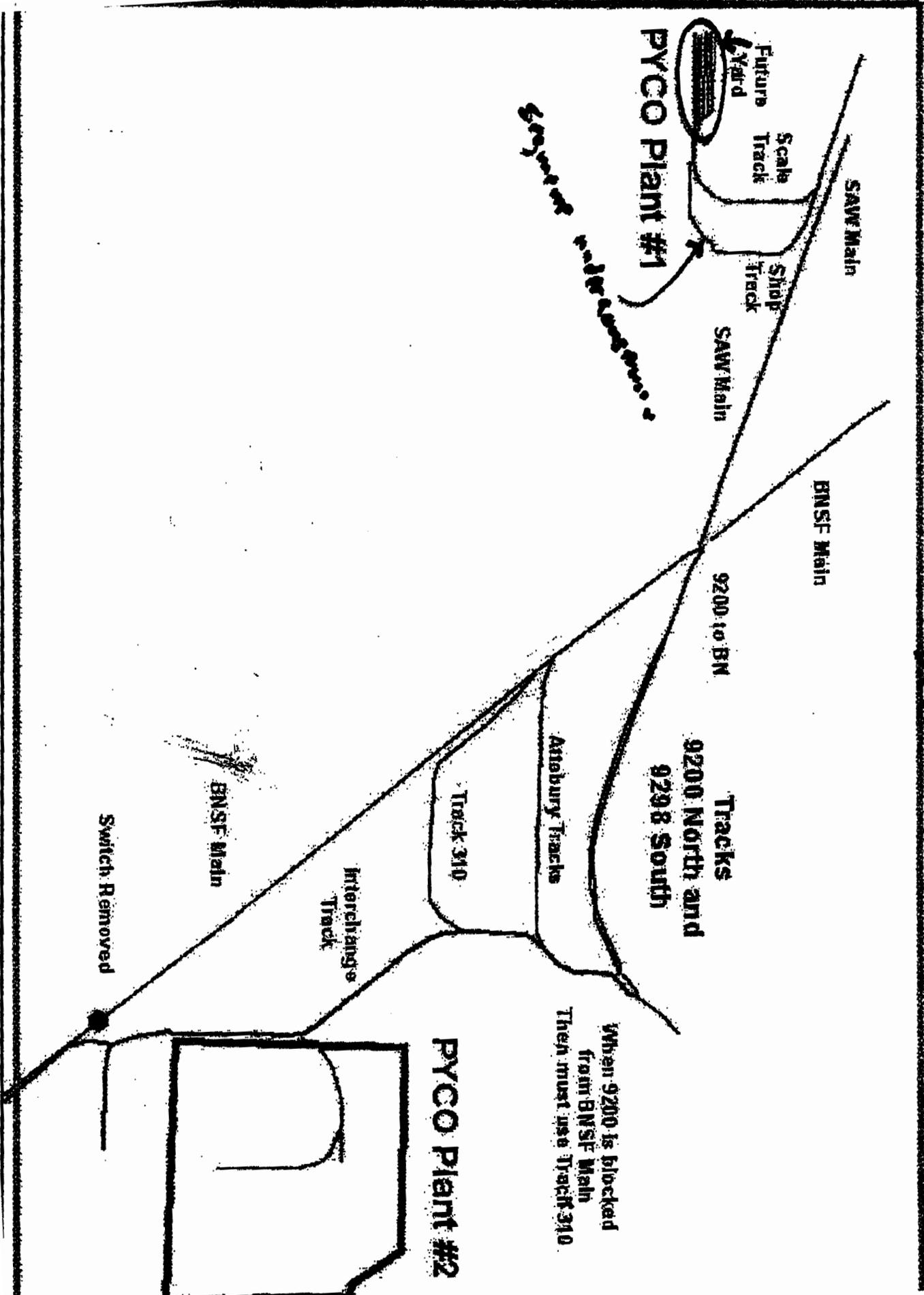
Yours very truly,

Stephen Gregory
Vice President

cc: Tom McFarland, Facsimile 312-201-9695

Exhibit D

~~DELETED~~



PYCO Plant #1

Future Yard

Scale Track

Shop Track

SAW Main

SAW Main

BNSF Main

9200 to BN

9200 North and 9298 South

Attebury Tracks

Track 310

Interchange Track

BNSF Main

Switch: Removed

PYCO Plant #2

When 9200 is blocked from BNSF Main They must use Track 310