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February 21, 2006

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

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

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Rebuttal Statement, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

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

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BEFORE THE
SURFACE TRANSPORTATION BOARD



PYCO INDUSTRIES, INC. –)
ALTERNATIVE RAIL SERVICE –) FINANCE DOCKET
SOUTH PLAINS SWITCHING, LTD. CO.) NO. 34802

REBUTTAL STATEMENT

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

Petitioner

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Attorney for Petitioner

DATE FILED: February 22, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. –)
ALTERNATIVE RAIL SERVICE –) FINANCE DOCKET
SOUTH PLAINS SWITCHING, LTD. CO.) NO. 34802

REBUTTAL STATEMENT

Pursuant to 49 C.F.R. § 1146.1(d)(3), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby files this Rebuttal Statement in support of its Petition to Terminate Alternative Rail Service, filed on February 9, 2006. This Rebuttal Statement is supported by the Rebuttal Verified Statement of Mrs. Delilah Wisener, owner of SAW, attached as an Appendix.

The governing statute and implementing regulation define the issues to be decided when a Petition to Terminate is filed during the initial 30-day period of alternative rail service, i.e.:

- (1) under 49 U.S.C. § 11123(c)(1), does the initial transportation emergency continue to exist?; and
- (2) under 49 C.F.R. § 1146.1(d)(1), is the incumbent carrier prepared to provide adequate service?

PYCO's lengthy Reply Statement engages in extensive name-calling but it does not address those controlling issues. As shown in SAW's Petition, any initial transportation emergency does not continue to exist, and SAW is prepared to provide adequate service. Accordingly, alternative rail service should be terminated effective on February 25, 2006.

I. THERE IS NO CONTINUING TRANSPORTATION EMERGENCY AT PLANT 2

There is nothing in PYCO's Opposition Statement that rebuts SAW's showing that there is no continuing transportation emergency at Plant 2.

PYCO made no attempt to rebut SAW's showing that SAW supplied each and every boxcar that PYCO ordered at Plant 2 in January, 2006 (Opp. Stat. at 17 . . . while that may be true . . .). In light of SAW's 100-percent boxcar supply, there surely is no basis for a finding that there is a continuing transportation emergency at Plant 2 on the ground of inadequate boxcar supply.^{1/}

Neither is there any PYCO rebuttal of SAW's showing that SAW failed to provide requested service on only one day in November, 2005 due to a locomotive breakdown. Instead of challenging SAW's service records or providing service records of its own, PYCO merely repeats its unsupported claim that service was not provided "for six consecutive days inclusive of a weekend" (Opp. Stat. at 18). SAW cannot legitimately be found to have failed to provide service when service was not requested on the Thanksgiving weekend. There is thus no basis for a finding that there is a continuing transportation emergency at Plant 2 on the ground that SAW failed to provide requested rail service.

The absence of a continuing transportation emergency at Plant 2 was shown most vividly when the Plant was closed for a full week shortly before alternative rail service began. The Plant was closed at that time for cottonseed fumigation, not because of inadequate rail service. If the closure had been caused by inadequate rail service, PYCO certainly would have said so at the

^{1/} There is no evidence whatsoever to support PYCO's claim that SAW is hoarding boxcars needed by PYCO (Opp. Stat. Ex. B at 2, para. 3). SAW has been unable to get cars for its own shippers during alternative service, let alone hoarding boxcars ordered by PYCO.

time. Instead PYCO Witness Kring's contemporaneous statement was as follows (declaration, Jan. 27, 2006, at 2, para 2[b]):

... PYCO did not order cars on five business days for Plant 2 in January because PYCO has to fumigate the cottonseed and cannot ship for a five day period ...

Now, confronted with SAW's showing that the plant closure is inconsistent with a continuing transportation emergency, PYCO Witness Kring simply changes his testimony saying for the first time that inadequate rail service caused the Plant closure, viz. (Opp. Stat, Ex. A at 4, para. 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 ...

That statement is entirely lacking in credibility. It is contradicted by Mr. Kring's prior contemporaneous statement, which surely would have implicated inadequate SAW rail service as the cause for the plant closure if that had been the fact. The statement is wholly unsupported. There is no evidence, nor even a contention, that SAW failed to deliver cars to Plant 2 on a timely basis at any time during either December or January. The statement is a non sequiter. Absolutely no connection was shown between the five-day plant closure for cottonseed fumigation and undependable car delivery.

Those blatant deficiencies deprive that testimony of any weight and undercut PYCO's argument about the plant closure at page 17, which goes far beyond Mr Kring's testimony in any event.

There simply has been no transportation emergency at Plant 2 and there certainly is no continuing transportation emergency at Plant 2 within the meaning of 49 U.S.C. § 11123(c)(1).

PYCO alleges that there would be operational complications if SAW were to provide service to Plant 2 and WTL were to provide service to Plant 1. (Opp. Stat at 18-19). There is no basis for that allegation. Plant 2 always has been rail served separately from Plant 1.

It is more difficult to serve Plant 2 than Plant 1 because of the need to operate through facilities owned by other shippers, whereas Plant 1 is virtually adjacent to SAW's yard. PYCO has always been able to instruct SAW as to which cars go to Plant 2 and which go to Plant 1. In any event, the legal standard is whether or not there is a continuing transportation emergency at Plant 2, not whether it would be convenient for Plants 1 and 2 to be served by the same railroad. As shown above and in SAW's Petition to Terminate, there is no such continuing transportation emergency at Plant 2. It follows that the Board is required to terminate alternative rail service at Plant 2, effective on February 25, 2006, regardless of disposition of the Petition to Terminate as to Plant 1.

II. THERE IS NO CONTINUING TRANSPORTATION EMERGENCY AT PLANT 1

PYCO apparently does not understand the legal standard applicable to the issue of extension of a 30-day alternative service order. PYCO says (at 6):

... But the fact that PYCO is finally receiving adequate rail service is hardly grounds to terminate alternative service ... (emphasis added).

The fact that PYCO is now receiving adequate rail service means that the transportation emergency is not continuing as of the 30th day of alternative service, which is the specified statutory ground for terminating alternative rail service at the end of 30 days. It does not matter under the statute whether the alternative service railroad is responsible for ending the transportation emergency. What matters is that the transportation emergency is not continuing.

Where, as here, PYCO acknowledges that the emergency is not continuing, there is no statutory basis for continuing alternative service beyond 30 days. *See* 49 U.S.C. § 11123(c)(1). (“The Board may extend [alternative rail service] beyond 30 days if the Board finds that a transportation emergency described in subsection [a] continues to exist”).

The evidence and argument of PYCO itself establishes that any transportation emergency at Plant 1 is not continuing. Thus, PYCO Witness Kring stated (Opp. Stat, Ex. A at 3, para. 6):

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

PYCO Witness Lacy stated (Opp. Stat. at 2, para. 3):

... We have worked off our backlog ...

WTL Witness Gregory stated (Opp. Stat. Ex. C at 18):

... this congestion (of empty cars for PYCO) was largely eliminated by early the following week.

PYCO has stated in argument (Opp. Stat. at 1, 6):

... WTL has worked off PYCO’s backlog ...

* * *

... after some two weeks of service PYCO’s back log is under control ...

Thus, according to PYCO itself, the transportation emergency at Plant 1 that precipitated alternative rail service is over. Inasmuch as the transportation emergency is not continuing as of the 30th day of alternative rail service, the statute requires that the alternative rail service be terminated. *See* 49 U.S.C. § 11123(c)(1).

The statute authorizing alternative rail service is not intended to punish. Its continued application depends on whether the transportation emergency that precipitated the alternative

service order continues as of the 30th day of alternative service. Here, by PYCO's own admission, it does not. It follows that the Board is required by 49 U.S.C. § 11123(c)(1) to terminate alternative rail service.

III. SAW IS PREPARED TO PROVIDE ADEQUATE SERVICE TO PLANTS 1 and 2

SAW is better able to provide adequate service to PYCO now than when alternative rail service was ordered because Mrs. Delilah Wisener is now in charge of day-to-day SAW operations rather than Mr. Larry Wisener, with whom PYCO clashed.

PYCO's response has been to attack Mrs. Wisener unfairly and viciously. PYCO should be ashamed to be associated with the crude attempt to impugn Mrs. Wisener's character in the Opposition Statement.

Mrs. Wisener's behavior during a February 2 telephone conference on operating protocols was the exact opposite of PYCO's characterization. Contrary to the allegations of PYCO Witness Kring (Opp. Stat., Ex. A at 2, para. 4), Mrs. Wisener did not insist during that conference that her attorney's write-up of the agreed protocols be accepted. She did not decline to negotiate. She did not say that worse terms would be imposed if the agreed protocol were not signed. She did not issue an ultimatum that the agreed protocols had to be signed by Noon the next day. Contrary to the allegation of PYCO Witness Lacy (*id.*, Ex. B at 1, para. 2), Mrs. Wisener did not indicate to WTL that it had to take it or leave it. And contrary to the implications sought to be left by Messrs. Kring and Lacy, Mrs. Wisener hung up only after gracefully and apologetically advising the parties that an operating emergency required her immediate attention. These false allegations by PYCO are inexcusable.

The fact is that what little Mrs. Wisener did say during that conference was polite and cooperative. For example, she said to WTL representative Gregory that she wanted to be informed if SAW was in WTL's way in any respect so that she could make sure that any problem would not continue. She asked representatives of WTL, PYCO and BNSF whether any of them disagreed that a Letter Agreement prepared by SAW's counsel accurately reflected operating protocols that were agreed to as a result of extensive negotiations. There was no expression of disagreement

In addition, Mrs. Wisener sought an early meeting with PYCO Witness Kring to try to improve the working relationship between SAW and PYCO. Mrs. Wisener believed that the best way to improve those relations is between the two chief executive officers, eye-to-eye. Mr. Kring's refusal to meet with Mrs. Wisener is disappointing.

Mrs. Wisener's positive and cooperative manner is a strong indication that SAW is now prepared to provide adequate service to PYCO Plants 1 and 2. The Board should so find.

An equally strong indication that SAW is now prepared to provide adequate service to PYCO is SAW's offer to provide a second switch to PYCO Plant 1, even with a second crew as long as PYCO ships 24 loaded cars from Plant 1 in the two switches. WTL has not matched that offer. SAW is thus in a better position than WTL to provide efficient and economical service to Plant 1.

CONCLUSION AND REQUESTED RELIEF

PYCO has not rebutted SAW's demonstration that there is no continuing transportation emergency at PYCO Plant 2. PYCO's own statements demonstrate that any transportation

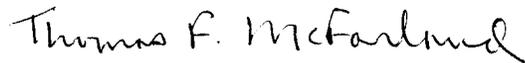
emergency at Plant 1 has ended (i.e. is not continuing). The evidence shows that SAW is prepared to provide adequate service to PYCO Plant 1 and PYCO Plant 2.

WHEREFORE, the Board should terminate the alternative rail service in this matter as of February 25, 2006, which is the 30th day after the commencement of alternative rail service.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
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Petitioner



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Attorney for Petitioner

DATE FILED: February 22, 2006

REBUTTAL VERIFIED STATEMENT OF DELILAH WISENER

My name is Delilah Wisener. I am the sole owner of South Plains Switching, Ltd. Co. (SAW). I previously provided a verified statement in this proceeding. My Rebuttal Verified Statement is directed to the Verified Statements of Messrs. Kring, Lacy and Gregory in PYCO's Opposition Statement.

Mr. Kring and Mr. Lacy have completely mischaracterized my behavior during a telephone conference on February 2. Operating protocols had been successfully negotiated earlier that week and SAW's counsel had put the agreement in writing. During the conference, I specifically asked the representatives of WTL, PYCO and BNSF if any of them disagreed that the letter agreement of protocols accurately reflected the matters that were agreed upon. No disagreement was expressed. It is absolutely untrue, as alleged by Mr. Kring (at 2, para. 4), that I insisted that the protocols be accepted; that I declined to negotiate; that I threatened that worse terms would be imposed if the protocols were not accepted; and that I issued an ultimatum for signature by noon the next day. It is not true, as alleged by Mr. Lacy (at 1, para. 2), that I indicated that WTL had to take it, or leave it. And contrary to the implication attempted to be drawn by both Mr. Kring and Mr. Lacy, I "hung up" only after explaining apologetically that an operating emergency required my immediate attention. PYCO's description of my behavior is entirely false.

It is important for the Board to understand that my behavior since taking over day-to-day operation of SAW has been cooperative toward WTL and conciliatory toward PYCO. During the February 2 telephone conference, for example, I asked the representative of WTL whether SAW had been in WTL's way during WTL's operation so that I could arrange to fix any

problems, if necessary. My first action upon taking over the SAW operation was to attempt to set up a meeting with Mr. Kring so that the problems between SAW and PYCO could be worked out eye-to-eye at the highest corporate level.

These facts show that under my direction SAW is prepared to provide adequate rail service to PYCO at both Plant 1 and Plant 2. I hereby reaffirm SAW's offer to provide two switches per day to PYCO Plant 1 without extra charge even if a second switch crew is required, provided that PYCO ships out at least 24 cars in the two switches. I hereby reaffirm that SAW will provide the same level of adequate rail service to PYCO Plant 2 that SAW has consistently provided.

The Board has treated SAW with unusual harshness in this matter. It was unusually harsh for the Board to have amended the agreed operating protocols without awaiting for a responsive filing by SAW, especially since SAW notified the Board promptly that it intended to file a reply and SAW's reply was filed within five business days. In the amended protocols, the Board awarded use of SAW Track 9200 to WTL for storage of empty cars for PYCO despite evidence in SAW's reply that Track 9200 had never been used for that purpose, and that SAW has a contract for use of that track for revenue storage of TTX cars. The Board's action deprived SAW of revenue at the expense of storage for PYCO's cars when WTL has a Lubbock-area yard of its own where PYCO cars can be stored. It was also extremely harsh for the Board to award 20 of the 24 hours of operating time per day for service to one shipper whose traffic constitutes only 42 percent of total traffic.

I refuse to get into a battle of quotations of scripture, Shakespeare or descriptions of animals.

I find it disturbing that the Board responded quickly to PYCO's request for alternative rail service, while it has yet to respond for over a year to many requests by SAW and PYCO for reinstallation of switch 320 that would allow direct uninterrupted service to PYCO Plant 2. Track 320 connecting to that switch was sold to SAW and the switch was promptly removed by BNSF.

The Board's alternative service order was based on misleading statements and accusations. PYCO is well aware of SAW's and its employees' dedication to servicing all SAW customers and our commitment to servicing PYCO's needs since July of 1999.

I stand by all of the facts in my statement of February 8, 2006 requesting termination of alternative rail service.

I have furnished documentation verifying my ownership of SAW. I have demonstrated my ability to take necessary and corrective actions to try to resolve disputes with PYCO and to fulfill SAW's common carrier obligations. This can only be accomplished by the lifting of this order and quickly establishing a dialog between SAW and PYCO.

VERIFICATION

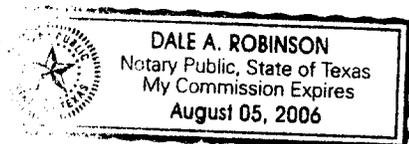
STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

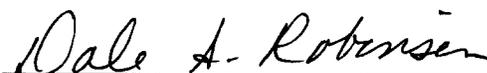
DELILAH WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.



DELILAH WISENER

SUBSCRIBED AND SWORN TO before me on this the 21st day of February, 2006.





NOTARY PUBLIC

My Commission Expires: August 05, 2006

CERTIFICATE OF SERVICE

I certify that on February 21, 2006, I served the foregoing document, Rebuttal Statement,
by UPS overnight mail, on the following:

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