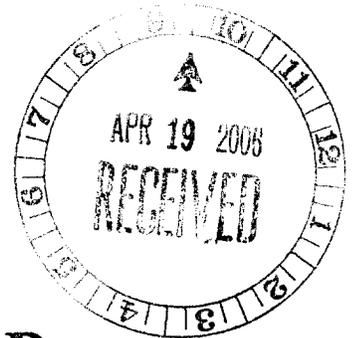


CHARLES H. MONTANGE  
ATTORNEY AT LAW  
426 NW 162ND STREET  
SEATTLE, WASHINGTON 98177  
(206) 546-1936  
FAX: (206) 546-3739



216279

18 April 2006  
by Federal Express

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

**FILED**

APR 19 2006

TRANSPORTATION BOARD

Re: PYCO Industries, Inc. v. South Plains Switching,  
F.D. 34802

Non-coal Complaint, per 49 USC 11701  
and 49 CFR 1111.1

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc., enclosed please find an original and ten copies of a Complaint against South Plains Switching, LLC. Also enclosed please find two checks in the amount of the newly revised filing fee (\$13,900) for non-coal formal complaints. By my signature below, I certify service by Federal Express, next day delivery, upon the following:

- a) South Plains Switching, Ltd. (as incumbent carrier)  
10917 -- E. FM 250 & E. Co. Road 78  
Slaton, TX 79364
- b) Thomas McFarland, PC  
208 South LaSalle St., Suite 1890  
Chicago, IL 60604-1112  
(counsel for SAW)

**FEE RECEIVED**

APR 19 2006

TRANSPORTATION BOARD

Thank you for your assistance in this matter.

Office of the Secretary  
Surface Transportation Board

Part of  
Public Record

Very truly,

Charles H. Montange  
counsel for PYCO Industries

Encls.

- cc. Gary McLaren, Esq. (w/encl.)  
(for PYCO)
- Thomas McFarland, Esq. (and SAW) (w/encl.)

216279

BEFORE THE SURFACE TRANSPORTATION BOARD



PYCO Industries Inc.

vs.

South Plains Switching, LLC

STB Finance Dkt. 34838

COMPLAINT

FILE RECEIVED  
SURFACE TRANSPORTATION BOARD

FILED  
SURFACE TRANSPORTATION BOARD

Pursuant to 49 U.S.C. § 11701 and 49 C.F.R. § 1111.1, this is a Complaint by plaintiff/shipper PYCO Industries, Inc. (PYCO), against defendant/rail carrier South Plains Switching, LLC (SAW), arising out of SAW's failure to discharge its obligations under 49 U.S.C. § 11101 (common carrier), 49 U.S.C. § 10702 (barring unreasonable practices), 49 U.S.C. § 10741 (non-discrimination), 49 U.S.C. § 11121 (unreasonable failure to provide facilities), 49 U.S.C. § 11103 (failure to operate switch connection for private side track) and other relevant statutes and regulations. This Complaint seeks monetary damages and other appropriate relief.

Parties

1. In accordance with 49 C.F.R. § 1111.1(a), plaintiff/shipper PYCO states as follows:

a. The full and correct name and address of plaintiff/shipper is:

PYCO Industries, Inc.  
P.O. Box 841  
Lubbock, TX 79408-0841

Office of the  
Public Records

b. The full and correct name and address of defendant/rail carrier is:

South Plains Switching, LLC  
10917 -- E. FM 250 & E. Co. Road 78  
Slaton, TX 79364

Jurisdiction

2. This Board has jurisdiction over this Complaint pursuant to 49 U.S.C. §§ 10501, 11701, 11704, 11103 and other relevant statutes and regulations.

Statement of Facts

3. As provided in 49 C.F.R. 1111.1(a), plaintiff/shipper PYCO makes the following "brief[] ... statement of facts":

a. Pursuant to South Plains Switching, Ltd. Co.-- Acquisition Exemption -- the Burlington Northern and Santa Fe Railway Company, F.D. 33752 (Sub-no. 1), defendant/railroad SAW acquired approximately 74,378 feet of rail lines for one dollar (\$1) from Burlington Northern & Santa Fe Railroad (BNSF) in Lubbock, Texas. The lines acquired by SAW pursuant to this order encompassed trackage to provide switching to approximately a dozen BNSF shippers in Lubbock. These lines included BNSF trackage employed to provide rail service to defendant/shipper PYCO. Pursuant to the contract, BNSF retained rights to operate, subject to SAW control of dispatch, on several tracks conveyed by BNSF to SAW, including tracks 9200 and 9298. At all times pertinent hereto, SAW has been and still is owned, operated, and managed by Delilah Wisener and/or her husband

Larry Wisener.

b. A true and correct copy of the contract between BNSF and SAW by which SAW acquired its trackage from BNSF is attached as Exhibit A.

c. PYCO Industries, Inc. is the largest cottonseed cooperative in the United States, with over 90 member gins. PYCO has been in business for more than sixty (60) years. PYCO operates two cottonseed mills (referred to herein as Plant No. 1 and Plant No. 2) in Lubbock, TX, and one cottonseed mill in Greenwood, MS. PYCO produces cottonseed oil for cooking and other purposes, whole cottonseed, and by-products of cottonseed processing (including cottonseed meal, cottonseed hulls, and linters). Cottonseed and cottonseed meal are used in the livestock and aquaculture industries as primary nutritional ingredients. Cottonseed hulls are used as fiber in the beef and dairy industries. Linters are used in the manufacture of mattresses, upholstery, and high quality papers and plastics.

d. PYCO is the largest shipper on SAW's lines, and encompasses nearly half SAW's overall deliveries and pick-ups. At current use levels, PYCO expects to ship or receive approximately 7000 rail cars per year, inclusive of those shipped by its consignee Penny Newman Grain Company.

e. PYCO is rail dependent for outbound shipments of cottonseed oil to its oil customers and cottonseed to its main cottonseed customer.

f. PYCO owns, among other trackage, two private side or

spur tracks serving its Plant No. 1. These side tracks are called, respectively, PYCO's "scale track" and PYCO's "shop track." PYCO also leased track #9298 for car storage, especially for cars serving PYCO's Plant No. 2.

g. Commencing no later than March 1, 2005, PYCO contacted SAW and BNSF to complain that timely and adequate rail service to PYCO's Plant Nos. 1 and 2 in Lubbock was decreasing, that PYCO was receiving less than twenty (20) cars per day, and that PYCO required at least twenty (20) cars per day. SAW blamed BNSF for service problems, claiming that BNSF had removed all but one switch serving Plant No. 2 and that BNSF was retaliating against SAW by blocking SAW switching obligations due to litigation brought by SAW against BNSF. Service continued to deteriorate, and PYCO was not supplied with 20 cars per day.

h. PYCO complained to Office of Compliance and Enforcement (OCE) Director Melvin Clemens, and supplied information to Mr. Larry Herzig of OCE, concerning the inadequate service in April and May. SAW per Larry Wisener responded with physical threats against officials of PYCO, instituted a \$20 per carload surcharge against PYCO, and on June 13, threatened an embargo. Mr. Wisener also responded by a directive to PYCO making Mr. Wisener the sole course of contact for all SAW rail services to PYCO. Mr. Wisener of SAW directed PYCO to make all car requests through him. Mr. Wisener of SAW indicated that SAW management would take care of PYCO's car needs. Mr. Wisener misled PYCO

in that SAW management did not, and did not intend to, take care of PYCO's car needs. Mr. Wisener of SAW also withdrew permission for PYCO to operate equipment on SAW trackage, and contrary to common carrier obligations, indicated that a "formal agreement" would be necessary for all service to PYCO.

i) On or about June 21, PYCO prepared a draft alternative rail service petition. However, due to further intervention by OCE Director Clemens, including the threat of recommending that the Surface Transportation Board initiate a complaint on its own motion, SAW service subsequently improved such that PYCO did not file that draft petition in response to the March through June inadequacies.

j) In or around May 2005, SAW circulated a request for proposals, signed by Delilah Wisener, for the acquisition of various portions of SAW's trackage in Lubbock (including those portions serving PYCO) subject to signed confidentiality agreements. Again in September 2005, Mr. Wisener informed PYCO's Senior Vice President for Marketing (Mr. Robert Lacy) that he (Wisener) wished to sell SAW and get out of the railroad business. Mr. Wisener asked PYCO if PYCO were interested in acquiring SAW. PYCO informed SAW that PYCO was interested in exploring acquisition. SAW then responded on October 11 with a letter demanding that PYCO sign an agreement to buy unspecified SAW assets for \$5,500,000 by October 17, 2005. The letter neither specifies the assets and rights to be transferred, nor provides for the completion of ordinary due diligence activities

prior to closing. On October 13, 2005, PYCO responded with a proposed amendment allowing it to conduct due diligence and secure acceptable financing.

k) Mr. Wisener on behalf of SAW rejected PYCO's position. Mr. Wisener orally informed PYCO that he intended to make business miserable for PYCO. By Letter dated November 3, 2005, Mr. Wisener broke off negotiations on acquisition (before negotiations had begun) claiming "agreement cannot be reached." SAW demanded that PYCO "cease all plant operations on SAW property immediately."

l) On or about November 17, 2005, SAW placed a derail on its track making it difficult for PYCO to prepare cars for daily switches at Plant No. 1. By letter of the same date (a true and correct copy of which is attached as Exhibit E), SAW cancelled PYCO's lease of track #9298. On November 18, 2005, when PYCO contacted Mr. Wisener to request that he move the derail so as to allow switching, Mr. Wisener said he was busy and would look into it later. He stated he was imposing additional charges on PYCO, and that PYCO "would have to figure out how to take care of [itself]" Mr. Wisener asked that PYCO executives "come over," but due to the physical threats and confrontational and abusive nature that he employs, PYCO executives declined to "come over." Mr. Wisener then told PYCO it would "cost a lot more for [PYCO] to continue doing business with [SAW]."

m. Due to the placement of the derail and SAW's refusal to allow PYCO to use its trackmobile on SAW trackage after

November 17, 2005, PYCO could no longer use its trackmobile to move cars to and from its private sidetracks and SAW's yard. Previously, PYCO had so employed its trackmobile without incident.

n. In the absence of use of its trackmobile, PYCO was totally dependent upon SAW to operate the switches to PYCO's private sidings (the shop and scale tracks) for Plant No. 1. Mr. Wisener directed his company to supply only one switch per day to PYCO. This effectively limited PYCO to 12 carloads per day at Plant No. 1. During the relevant time period, PYCO required in excess of 12 cars per day at Plant No. 1.

o. PYCO determined that it could move a few additional cars if SAW would place cars on the scale track as opposed to the shop track. At Mr. Wisener's direction, SAW refused.

p. No switch at all was provided to PYCO's plant No. 2 between November 22 and November 28, allegedly because of problems with SAW's locomotive. As a result, PYCO was unable to load 36 gondolas and 6 box cars. During the interval which includes this time period, SAW failed to deliver boxcars to Plant No. 2 at all, despite the fact that PYCO requested an average of one boxcar per day at Plant No. 2.

q. SAW has imposed and collected from PYCO a surcharge of \$20 per car, but is not imposing or collecting that surcharge from any other customer in Lubbock. The surcharge is (I) retaliatory because, among other things, PYCO complained about service problems to the Surface Transportation Board, and (II)

is discriminatory, because it is not levied on any similarly situated customer.

r. SAW has imposed and collected from PYCO a surcharge of \$150 for each car "constructively placed" for PYCO, but SAW is not imposing or collecting such a surcharge from any other customer in Lubbock. The surcharge is retaliatory and discriminatory for the same reasons as indicated in subparagraph (q) above. Moreover, SAW unreasonably created the need for storage by failing to provide adequate rail service. Furthermore, Mr. Larry Wisener (and possibly other Wisener family members) own and operate a track construction business. Mr. Wisener employs alleged and contrived shortage of facilities for car storage as a means to enhance opportunities for his track construction business. In particular, Mr. Wisener uses alleged and contrived shortage of track for car storage on his railroad as a grounds to demand that shippers construct additional storage facilities at their expense. Due to inadequate rail service by SAW and congestion induced or contrived by SAW, PYCO has undertaken to construct additional private siding track for PYCO Plant No. 1 at PYCO's expense. PYCO would not have needed to construct this trackage but for conditions wrongfully contrived by SAW. Because PYCO did not retain Mr. Wisener's track construction business to construct the new side trackage for PYCO, Mr. Wisener has employed SAW to retaliate against PYCO by providing inadequate rail service commencing November 17, 2005.

s. SAW's conduct is inconsistent with standards and practices of other shortline and switching railroads.

t. In order to obtain adequate rail service and in order to mitigate its damages, PYCO filed an alternative rail service petition with the Surface Transportation Board on 20 December 2005. See Petition, PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching Ltd., F.D. 34802 (Exhibit B). The Surface Transportation Board granted the petition for alternative rail service in an order issued January 26, 2006. PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching Ltd., F.D. 34802, served Jan. 26, 2006 (Exhibit C). SAW represented to the Surface Transportation Board that Mr. Larry Wisener had resigned as president and manager of SAW on the date of issuance of the alternative service order and that Mrs. Larry Wisener d/b/a/ Delilah Wisener had assumed the role as manager. However, Larry Wisener remains involved in the management of SAW and there has not been a material change in the SAW management. The alleged removal of Larry Wisener was a sham, stunt, and a public relations tactic, and without substantive effect.

u. West Texas & Lubbock Railroad began providing alternative rail service to PYCO's plants 1 and 2 on January 30, 2006. SAW took a variety of actions which harassed WTL and impeded WTL's ability to provide alternative rail service, and which increased WTL's cost to provide alternative rail service. These actions are described in more detail in statements filed

in the Alternative Rail Service proceeding (F.D. 34802).

v. Subsequent to this Board's order authorizing alternative rail service in F.D. 34802, SAW retaliated against PYCO by filing a lawsuit in Texas state court ostensibly to collect allegedly unpaid tariffs for "constructive placement" or storage of cars for PYCO. The alleged need for constructive placement was spurious and manufactured by SAW to retaliate and to discriminate against PYCO. In addition, SAW took further retaliatory actions, including blocking of crossings long used by PYCO for operation of its Plant No. 1. Furthermore, SAW prematurely filed (to the date of this complaint) two petitions to terminate alternative rail service in as many months, necessitating response by PYCO and increasing PYCO's costs to mitigate the damages which SAW was unlawfully inflicting, and unlawfully seeking to inflict, on PYCO.

w. Despite diligent efforts to mitigate its losses, including the filing of an alternative service petition, PYCO has sustained damages for lost and delayed sales as a result of SAW's unlawful conduct in an amount exceeding \$4,000,000. But for the successful alternative service petition, PYCO's losses would have been far greater. PYCO is entitled to recovery of damages against SAW for lost and delayed sales, for the costs of mitigation, for the costs of unneeded rail construction, and for other costs arising from SAW's unlawful conduct.

x. The mercurial, unstable and physical nature of the management of SAW results in threats, actions, inconsistencies,

and failures that are inconsistent with the lawful operation of an enterprise that owes a common carrier obligation to the public.

y. This statement of facts is hereby made a part of each Cause of Action set forth below.

First Cause of Action

Violation of Common Carrier Obligations

4. Pursuant to 49 U.S.C. 11101, a rail carrier must provide rail service upon reasonable request. SAW has violated this obligation by, among other things, (a) failing to provide cars between the beginning of March and the end of June in 2005, (b) refusing to provide switching services adequate to meet PYCO's needs, (c) threatening and taking retaliatory measures against PYCO management for raising the inadequacy of service with the Office of Compliance and Enforcement at STB, (d) threatening illegal and unwarranted embargoes on service to PYCO, and undertaking a de facto and unlawful partial embargo of service to PYCO, (e) employing threats of physical violence against PYCO officials for raising inadequacy of service matters with OCE, (f) retaliating against PYCO by dramatically cutting service when PYCO requested negotiations in response to SAW's demand that PYCO pay \$5,500,000 for undetermined assets of SAW, (g) abruptly placing a derail and refusing to move same to allow PYCO to operate its trackmobile, while at the same time directing its crews to provide only one pull per day to PYCO, (h) refusing to place cars on PYCO's scale track, and (i) taking

other and similar actions consistent with Mr. Wisener's threats to make life miserable for PYCO and to make PYCO "take care of itself."

5. For relief under this First Cause of Action, PYCO prays that this Board issue orders as follows:

a) that SAW pay PYCO an amount equal to the amount proved in the proceeding, but no less than \$4,000,000, for lost sales and delay damages, and an additional sum as proved in the proceeding for unneeded rail construction, and for the costs of mitigation.

b) that, should SAW once again become rail service provider to PYCO, this Board issue injunctive relief

-- (i) requiring SAW to provide such training as is necessary to PYCO employees as would qualify them to operate PYCO's trackmobile on SAW trackage to the satisfaction of the Federal Railroad Administration, and,

-- (ii) at that time, that SAW remove the derail and allow PYCO operation of its trackmobile such that PYCO can pick up from, and deliver cars to, SAW's yard in the absence of switching services by SAW directly to PYCO's plant;

-- (iii) in the event the alternative service order lapses, requiring SAW, until and unless PYCO is permitted to operate its trackmobile for the purpose of meeting PYCO's rail service needs (and in the event such operation is not sufficient for that purpose), to provide as many switches per day to PYCO, seven days per week, as are necessary to meet PYCO's needs;

-- (iv) in the event the alternative service order lapses, requiring SAW to spot cars on PYCO's shop and scale tracks serving Plant No. 1 on demand;

-- (v) requiring SAW to cease and desist from retaliating against PYCO for PYCO's discussions with STB's OCE concerning service inadequacies;

-- (vi) requiring SAW to cease and desist from threatening embargoes or partial embargoes against PYCO;

-- (vii) requiring SAW to cease and desist from using physical intimidation or physical threats in its dealing with PYCO and against PYCO officials, agents, or employees;

-- (viii) requiring Mr. Wisener, should he continue in any capacity with SAW, to enroll in and complete a course in anger management sponsored by a reputable medical or mental health organization and to be examined by a reputable expert in the field of mental health;

-- (ix) requiring Mr. Wisener completely to withdraw from all management or work activities for or on behalf of SAW until certified completion of an anger management course and such other steps as may be recommended by qualified health care providers; and

c) that this Board enter such other relief as is just and appropriate.

#### Second Cause of Action

##### Violation of § 10702 Barring Unreasonable Practices

6. Pursuant to 49 U.S.C. § 10702, a rail carrier may not

engage in unreasonable practices. SAW is violating this requirement by, among other things, (a) retaliating against PYCO by refusing to provide adequate transportation services because PYCO complained to STB about SAW's practices and because PYCO refused to pay SAW \$5,500,000 for unspecified facilities of SAW without completing due diligence, (b) abruptly placing a derail on SAW trackage preventing PYCO from operating its trackmobile on SAW trackage and refusing to provide more than one switch per day, thus arbitrarily preventing PYCO from receiving adequate rail service, (c) claiming to have multiple locomotives to this Board but then refusing to provide service to PYCO on the ground that one of the locomotives required repair, (d) representing that SAW would take care of car supply but then failing to do so for retaliatory or otherwise improper reasons, (e) employing threats of physical violence and physical intimidation against PYCO officials and representatives, (e) claiming to this Board that PYCO employees engaged in unsafe rail practices or have been involved in rail safety incidents, but failing to report the alleged practices or incidents contemporaneously to PYCO, (f) failing to arrange training of PYCO personnel on SAW operating rules if that is deemed necessary to allow PYCO to operate its trackmobile on SAW trackage in order to permit adequate service to PYCO, (g) creating increased need on the part of PYCO for car storage due to failure by SAW to furnish adequate rail service, (h) arbitrarily curtailing or purporting to terminate PYCO's rights with respect to car storage and

failing to provide adequate car storage and staging, (i) harassing and impeding the WTL as alternative service provider, and (j) imposing discriminatory and arbitrary charges on PYCO, which charges have not been imposed on any other shipper.

7. For relief under this Second Cause of Action, PYCO incorporates its requests for relief set forth in paragraph 5 above. PYCO also requests that this Board (i) issue an order directing and requiring that SAW cease and desist from harassing WTL as alternative rail service provider and to bear all increased costs incurred by WTL as a result of such harassment and other actions by SAW to impede or to prevent alternative rail service; and FURTHER, that should SAW become again the rail service provider for PYCO, that this Board direct SAW (ii) to provide such training as necessary to permit PYCO employees to operate PYCO's trackmobile on SAW trackage so as to allow PYCO to move PYCO traffic to and from SAW's yard, and (iii) to report to PYCO any alleged safety problems involving PYCO employees in connection with rail operations no later than 24 hours from when such problems allegedly occurred so that corrective action may be taken immediately.

Third Cause of Action

Violation of § 10741 Barring Discrimination  
by Rail Carriers

8. Pursuant to 49 U.S.C. 10741(a)(1), a rail carrier such as SAW may not subject a shipper such as PYCO to unreasonable discrimination. SAW is a switching operation. The equipment and personnel employed by SAW to switch are essentially similar

for all its customers. SAW's costs to conduct each switch are the same for its customers, or less for high volume customers like PYCO, which is SAW's largest customer. Yet SAW has purported to levy a variety of surcharges and premiums upon PYCO that it does not impose on any other similarly situated shipper in Lubbock. SAW is levying these surcharges and premiums, and imposing other discriminatory actions and practices, for retaliatory purposes. SAW is retaliating against PYCO for, among other things, lodging complaints with STB's OCE about service inadequacies in March to June of 2005, and requesting an ordinary due diligence clause in response to SAW's demand that PYCO pay SAW \$5,500,000 for undisclosed SAW rail assets.

9. For relief under this Third Cause of Action, PYCO prays that this Board issue orders as follows:

a) that SAW pay PYCO an amount equal to the amount of surcharges and premiums paid by PYCO to SAW in the case of all surcharges and premiums not imposed by SAW upon, and paid to SAW, by other shippers for SAW services in Lubbock;

b) that, should SAW again become rail service provider for PYCO, that this Board issue injunctive relief requiring SAW to cease and desist from imposing surcharges and premiums on PYCO which surcharges are not imposed upon, or if imposed upon, are not collected from or paid by other shippers on SAW track in Lubbock; and

c) that this Board enter such other relief as is just and

appropriate.

Fourth Cause of Action

Failure to Provide Adequate Car Service/Facilities

10. Pursuant to 49 U.S.C. § 11121, SAW must furnish safe and adequate car service and establish, observe and enforce reasonable rules and practices on car service, including the provision of facilities. SAW fails to provide adequate switching to PYCO. As a result, SAW exacerbates PYCO's car storage needs. In addition, for retaliatory reasons, SAW has terminated PYCO's lease of track # 9298, which PYCO had leased for storage and failed to provide for alternative storage. Moreover, SAW has instituted against PYCO a discriminatory charge of \$150 for alleged constructive placement of cars. Furthermore, SAW moved all cars for PYCO into SAW's yard sometime on the evening of January 29 or morning of January 30, 2006, with the result that service to PYCO by its alternative service provider was rendered more difficult, inefficient, and costly. SAW's actions in exacerbating PYCO's need for car storage, arbitrarily refusing to lease storage track, failing to provide adequate car storage facilities, and imposing charges for constructive placement in the circumstances violate 49 U.S.C. § 11121, as well as 49 U.S.C. § 10702.

11. For relief under this Fourth Cause of Action, PYCO prays that this Board issue an Order, in the event SAW becomes rail service provider again for PYCO, requiring SAW (a) to rescind its charges for constructive placement of cars for PYCO,

(b) to rescind its termination of PYCO's lease of track # 9298, (c) to require SAW to furnish adequate facilities to store cars in use by, or to be used by, PYCO, and (d) should the alternative service order lapse, to require SAW to provide timely and adequate switching services to PYCO so as to minimize the need for car storage.

Fifth Cause of Action

Violation of § 11103 Requirement to Operate Switch  
and to Furnish Cars

12. 49 U.S.C. § 11103 provides that a railroad must operate a switch to private side track when such connection is reasonably practical, safe, and will furnish sufficient business to justify its maintenance, and must furnish cars to move that traffic to the best of its ability and without discrimination. The connection to PYCO's shop and side tracks for Plant No. 1 are reasonably practical, safe, and will furnish sufficient business to justify its maintenance. However, in violation of § 11103, SAW refuses and fails to furnish cars to move that traffic to the best of its ability and without discrimination.

13. For relief under this Fourth Cause of Action, PYCO incorporates its prayer for relief in paragraph 5(a) and 5(b)(iii)-(iv).

Sixth Cause of Action

Violation of 49 U.S.C. § 11902

14. Pursuant to 49 U.S.C. § 11902(b), a person acting for or employed by a rail carrier under the jurisdiction of this Board may not solicit anything of value intending to be

influenced by it in an action of that person, or because of the action of that person, relating to the supply or movement of cars used in rail transportation. Mr. Wisener solicited the payment of \$5,500,000 from PYCO intending to retaliate in refusing to supply or to move adequate cars in the event PYCO did not accede to the demand to pay \$5,500,000. Mr. Wisener in fact did retaliate when PYCO declined to pay the \$5,500,000 which he demanded, and the retaliation took the form of a refusal to supply or to move adequate cars to meet PYCO's needs from and after 17 November 2005 continuing to the time this Complaint is filed. This conduct on the part of SAW and Mr. Wisener constitutes an unreasonable practice barred by 49 U.S.C. § 10702.

15. For relief under this Fifth Cause of Action, PYCO prays that this Board (i) bar SAW from retaliating against PYCO whenever Mr. Wisener does not like PYCO's negotiating position in connection with purchase of SAW, and (ii) request the Attorney General pursuant to 49 U.S.C. § 11703 to bring court proceedings to prosecute SAW and Mr. Wisener for violating 49 U.S.C. § 11902(b).

General Statement Concerning Relief  
Not Otherwise Specifically Requested

16. This Board has broad powers to initiate investigations, to impose civil penalties, and to seek enforcement by the Attorney General not specifically requested in the foregoing causes of action. PYCO requests this Board to consider initiation of its own investigation, the imposition of

civil penalties, and appropriate referrals to the Attorney General under the circumstances.

Respectfully submitted,

  
Charles H. Montange

426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
fax: -3739

for PYCO Industries, Inc.

Of counsel:

Gary McLaren, Esq.  
Phillips & McLaren  
3305 66th St., Suite 1A  
Lubbock, TX 79413  
(806) 788-0609  
for PYCO Industries, Inc.

Attachments:

Verification by Gail Kring, PYCO Manager and CEO

Exhibit A -- BNSF/SAW contract

Exhibit B -- Petition in F.D. 34802

Exhibit C -- Alternative Service Order in F.D. 34802

Verification

I, Gail Krings, depose and state that I am Manager and Chief Executive Officer for PYCO Industries, Inc., that I am authorized to make this Verification, and that I have read the foregoing Complaint, and know that the facts asserted therein are true and accurate as stated to the best of my knowledge, information and belief.

Gail Krings

Subscribed and sworn to before me on this 17<sup>th</sup> day of April 2006, by

GAIL KRINGS, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Lisa Buxton  
Notary public

My commission expires: 2-24-08



Exhibit A

5/3/99

AGREEMENT FOR  
SALE OF CERTAIN ASSETS, RIGHTS  
AND OBLIGATIONS  
OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO  
SOUTH PLAINS SWITCHING, LTD. COMPANY

AGREEMENT FOR SALE OF CERTAIN ASSETS, RIGHTS AND OBLIGATIONS  
OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO SOUTH PLAINS SWITCHING, LTD. COMPANY

TABLE OF CONTENTS

	<u>Page</u>
1. Description of Business Sold.	1
2. Consideration for the Sale.	4
3. Governmental Approval.	5
4. Representations and Warranties.	6
5. Inspection and Condition of Rail Line.	10
6. Liability and Indemnity.	11
7. Assignment; Seller's Right of First Refusal.	17
8. Obligations Are Continuing.	18
9. Liens and Encumbrances.	18
10. Pending Public Works Projects.	19
11. Closing.	19
12. Proration.	20
13. Interchange.	21
14. Car Hire Costs.	21
15. Liability Insurance.	22
16. Seller's Authority to Establish Through Routes and Offer Through Routes.	23
17. Division of Revenue.	24
18. Buyer to Offer to Hire Seller's Qualified Employees.	25
19. Transfer of Operations.	26
20. Collection of Revenues.	26
21. Transfer of Liabilities; Payment of Charges.	27
22. Electronic Data Interchange.	28
23. Assignment of Freight Transportation Contracts.	28
24. Applicable Law.	29
25. Effect of Waiver.	29
26. Notices.	29
27. Confidentiality.	30
28. Entire Agreement; Integration of Agreement.	30

Exhibit A	List of Tracks and Map/Print
Exhibit B	Quitclaim Deed
Exhibit C	Bill of Sale
Exhibit D	Agreements to be Assigned in Part to Buyer

AGREEMENT FOR  
SALE OF CERTAIN ASSETS, RIGHTS  
AND OBLIGATIONS  
OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO  
SOUTH PLAINS SWITCHING, LTD. COMPANY

This Agreement is entered into as of the third day of May, 1999, between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation (hereinafter referenced as "Seller"), and SOUTH PLAINS SWITCHING, LTD. COMPANY, a Texas limited liability company (hereinafter referenced as "Buyer").

WHEREAS, Seller desires to sell and convey to Buyer on the terms and conditions set forth in this Agreement Seller's interest in a rail line of Seller's in the vicinity of Lubbock, Texas, in Seller's Old BN Yard and former BN and ATSF tracks generally south of the Old BN Yard at Lubbock, Texas, the rail freight transportation business which Seller conducts on this rail line, and certain other rights, obligations and assets as specified in this Agreement; and

WHEREAS, Buyer desires to purchase, pursuant to the terms and conditions set forth in this Agreement, Seller's interest in a rail line of Seller's in the vicinity of Lubbock, Texas, in Seller's Old BN Yard and former BN and ATSF tracks generally south of the Old BN Yard at Lubbock, Texas, the rail freight transportation business which Seller conducts on this rail line, and certain other assets, rights and obligations as specified in this Agreement.

NOW THEREFORE, Buyer and Seller agree as follows:

1. Description of Business Sold.

(a) Seller shall convey to Buyer on the date of Closing, subject to the terms and conditions set forth in this Agreement and the terms, conditions, reservations and exceptions set

forth in the Quitclaim Deed conveying this property, all of Seller's interest in the rail line segments of Seller in the vicinity of Lubbock, Texas, shown on the map print and list attached hereto as Exhibit A, except that Seller's tracks 9200 and 9205 shall be included in the conveyance, as well as the metal depot and contiguous real estate near the Old BN Yard. The above rail line segments, together with related rail corridor property interests, less Seller's retained real property interests and access rights, are described specifically in the Quitclaim Deed set forth in Exhibit B, attached hereto, and are referenced collectively hereinafter as "Rail Line."

Seller shall furnish Buyer a complete legal description of Rail Line, and Seller shall use its best efforts to furnish such description on or prior to the date of Closing. This conveyance is expressly subject to Seller's retained interests, as specified in detail in the Quitclaim Deed, for: (1) an exclusive, permanent easement for construction, maintenance and operation of one or more pipelines or fiber optics communication lines facilities and appurtenances, in, under, across, along and through all or any portion of the Rail Line; (2) mineral rights and related permanent access easements; (3) water rights and related permanent access, construction, maintenance and water pipeline rights; and (4) Seller's continued access by rail to tracks 0340 and 9298, at no cost to Seller, and tracks 9200 and 9205, at no cost to Seller for the first five years following the date of Closing and at the rate of \$1,000 per year commencing the sixth year following the date of Closing (and thereafter until such time as Seller notifies Buyer in writing that Seller no longer desires to use said tracks), such rights to be subject to dispatching control and direction of Buyer.

(b) Seller shall convey to Buyer, on the date of Closing, the rail freight transportation business which Seller conducts on the Rail Line, subject to the terms and conditions set forth in this Agreement, in the Quitclaim Deed, or in any agreement assigned by Seller to Buyer in accordance with the terms of this Agreement.

(c) Seller shall convey to Buyer on the date of Closing, by a Bill of Sale identical in form to the Bill of Sale set forth as Exhibit C attached hereto, all of Seller's interest in all rail, ties, spikes, tie plates, rail anchors, bridges, culverts, signalling equipment, and other supporting structures, ballast, track materials and supplies, and the metal depot at or near the Old BN Yard (excluding any vehicles, maintenance equipment on wheels, radios, and computer equipment) that, on the date of the Closing, are not improvements that constitute the Rail Line, but which then are present on the real property comprising the Rail Line. This conveyance shall be subject to the terms and conditions set forth in this Agreement, including those set forth in Exhibit D, and the terms and conditions set forth in any agreement assigned by Seller to Buyer in accordance with the terms of this Agreement.

(d) Incident to the conveyance of the Rail Line, effective as of the date of the Closing, Buyer shall have the right to operate over Seller's tracks in Seller's Lower Yard at Lubbock, Texas, and over Seller's mainline between track 9298 and Seller's Lower Yard at Lubbock, Texas, all as designated by Seller's operating personnel (which rail line segments shall be referenced collectively herein as "Interchange Access Line"), at no charge to Buyer, for the sole purpose of interchanging rail traffic and equipment between Buyer and Seller at Seller's Lower Lubbock Yard. Buyer shall operate its trains over the Interchange Access Line subject to Seller's dispatching directions. Buyer agrees to keep the Interchange Access Line clear at all times, except when actually switching cars between Buyer and Seller. In dispatching the Interchange Access Line, Seller shall accord trains of Buyer equal priority with trains of Seller. Nothing herein shall preclude Seller from abandoning any portion of the Interchange Access Line if conditions otherwise warrant.

(e) Seller shall assign to Buyer on the date of Closing, subject to all terms and conditions set forth in this Agreement, or in any agreement assigned by Seller to Buyer in accordance with

the terms of this Agreement, all assignable rights and obligations of Seller to the extent that they are related to the Rail Line and are set forth in any agreement identified in Exhibit D, which is attached hereto. Buyer on the date of Closing shall accept the assignment of all such rights and obligations, as of the date of Closing, in accordance with their terms and the terms of this Agreement. Seller shall reserve all rights set forth in any agreement identified in Exhibit D to the extent those rights are related to one or more other rail lines or property of Seller. If any contract is related to the Rail Line and inadvertently is not identified in Exhibit D, it is the intent of Seller and Buyer that such contract be deemed to have been assigned by Seller to Buyer, in whole or in part as appropriate, effective the date of Closing. Seller promptly shall provide to Buyer a copy of any such contract immediately upon locating it. Buyer shall make no claim against Seller arising out of any failure to obtain a consent to assignment from any party to an agreement assigned by Seller to Buyer, in whole or in part. It is the intent of both Seller and Buyer that all assignments of rights and obligations related to the Rail Line shall be effective on the date of Closing, whether or not any consents to such assignments then have been obtained.

2. Consideration for the Sale.

(a) In consideration for Seller's sale of its interest in the Rail Line, and conveyance of the other rights, interests and obligations described in Paragraph 1 of this Agreement, Buyer agrees to all of the following:

- (1) - To accept all transferred real and personal property "AS IS, WHERE IS" and "with all faults", except for the specific representations and warranties set forth in this Agreement.

- (2) To pay on the date of Closing a purchase price of TEN DOLLARS (\$10.00), for Seller's assets, rights and obligations to be conveyed to Buyer as set forth herein.
- (3) To maintain the Rail Line at a level adequate for the required rail service.
- (4) To pay in addition to the purchase price all costs of Closing (except Seller's cost of preparation of documents to be delivered at Closing). This includes, but is not limited to, any escrow and service fees, real estate transfer taxes, recording fees and sales taxes associated with this Agreement or any of the conveyances governed by this Agreement.

(b) Buyer shall obtain the written consent of Seller, which consent shall not be unreasonably withheld or delayed, prior to entering into any agreement with any other party, or issuing any license or permit to any other party, which would allow such other party any right to cross or access any portion of the Rail Line to serve any customer located along the Rail Line.

(c) Without Seller's prior written consent, which consent shall not be unreasonably withheld, (1) Buyer shall not seek authority from the Surface Transportation Board or any other governmental agency having jurisdiction, to abandon or discontinue rail service over the Rail Line; and (2) Buyer shall not remove any track from the Rail Line except in connection with the repair or replacement of the track, unless (i) in the case of house track there has been no movement of revenue freight over the track for a period of three years, or (ii) in the case of lead track there has been no movement of revenue freight over the track for a period of five years.

### 3. Governmental Approval.

(a) Promptly following execution of this Agreement, Buyer, at its sole expense, shall prepare and file such documents as may be required to secure approval, or exemption from

approval, of this transaction by the Surface Transportation Board of the United States Department of Transportation ("STB"), as appropriate. Buyer shall make all reasonable efforts to obtain this approval or exemption in time for this transaction to close on or before May 31, 1999. Buyer shall permit Seller to review prior to filing all documents proposed by Buyer to be filed with the STB, or any court, to secure legal approval or exemption of this transaction.

4. Representations and Warranties.

(a) Seller hereby represents and warrants to Buyer, and Buyer's successors and assignees, the following facts, as of the date of this Agreement and as of the date of Closing:

- (1) Seller is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware;
- (2) Seller has the corporate power and authority to enter into this Agreement and carry out its obligations under this Agreement;
- (3) The execution, delivery and performance of this Agreement have been duly authorized and approved by all necessary corporate actions of Seller, and no further corporate proceedings of Seller are required to complete the transactions covered by this Agreement;
- (4) All of Seller's obligations set forth in this Agreement constitute legal, valid and binding obligations of Seller which are enforceable against Seller in accordance with their terms, except to the extent enforcement may be limited by bankruptcy, insolvency or reorganization law;

- (5) There is no provision in the Certificate of Incorporation or By-Laws of Seller which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement;
- (6) The negotiations related to this Agreement have been handled by Seller on its own behalf, without intervention of any agent or other person, so that no party has a valid claim on this basis for any finder's fee, brokerage commission, or other similar payment in connection with any of the transactions included in this Agreement;
- (7) Seller has duly filed with the appropriate agencies of the United States, the State of Texas, and appropriate local governments or political subdivisions in Texas, all tax returns and reports required to be filed; Seller either has paid in full, or is agreeable to paying in full as finally determined, all taxes, interest, penalties, assessments or deficiencies which are due for the period up to the date of Closing; and Seller has made all withholdings of tax which are required to be made under all applicable regulations of the United States, the State of Texas, and local governments in Texas;
- (8) To Seller's knowledge, there is no pending or threatened litigation or arbitration proceeding, or administrative proceeding or investigation, against or affecting the properties or assets comprising the Rail Line, or Seller's rights to conduct rail freight transportation operations over the Rail Line as Seller conducts those operations on the date of this Agreement, the result of which foreseeably would

materially adversely affect Buyer's ability to conduct rail freight transportation operations over the Rail Line on the day following the date of Closing;

- (9) Seller has received no written notice of any pending civil, criminal, or administrative actions with respect to any hazardous or toxic substance on or adjacent to the Rail Line (As used herein, "written notice" shall mean written notice delivered to either Seller's Assistant Vice President-Environmental and Hazardous Materials, or Seller's Director Environmental Remediation and Special Projects, who are the people designated by Seller to receive notice of such matters);
- (10) The physical condition of the Rail Line will be sufficient to enable Buyer to conduct rail freight transportation operations over the Rail Line on the day following the date of Closing; and
- (11) No representation or warranty by Seller in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to prevent that representation or warranty from being materially misleading.

(b) Buyer hereby represents and warrants to Seller, and Seller's successors and assignees, the following facts as of the date of this Agreement and as of the date of Closing, except where specifically noted to be as of the date of Closing only:

- (1) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas, and by the date of Closing will be qualified to do business in the State of Texas;

- (2) Buyer has all requisite authority to purchase Buyer's properties and Seller's rights and properties which are conveyed to Buyer by this Agreement; to enter into this Agreement; to conduct rail freight transportation business on the Rail Line; and to perform all of Buyer's obligations under this Agreement;
- (3) The execution of this Agreement and consummation of the transactions which are a part of this Agreement have been duly authorized and approved by all necessary company actions by Buyer, and immediately upon execution of this Agreement by Buyer's authorized representative, all of Buyer's obligations set forth in or referenced in this Agreement shall constitute legal, valid and binding obligations of Buyer, or Buyer's successors or assigns, which obligations are enforceable in accordance with their terms against Buyer or Buyer's successors or assignees;
- (4) There is no provision in the Certificate of Incorporation or By-Laws of Buyer which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement;
- (5) As of the date of Closing, Buyer shall have obtained all legal authority which is necessary to enable Buyer lawfully to conduct rail freight transportation operations over the Rail Line as a common carrier and under one or more rail freight transportation contracts, commencing at 12:01 a.m. on the day following the date of Closing;
- (6) The negotiations related to this Agreement have been handled by Buyer on its own behalf, without intervention of any agent or party, and in such manner as not to give rise to any valid claim by any party for any finder's fee, brokerage

commission, or other similar payment in connection with any of the transactions included in this Agreement;

- (7) Neither Buyer nor any of Buyer's equity owners or financing sources, nor any of their partners, is a Class I railroad or affiliated with a Class I railroad; and
- (8) No representation or warranty by Buyer in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to prevent that representation or warranty from being materially misleading.

5. Inspection and Condition of Rail Line.

(a) By signing this Agreement, Buyer acknowledges that Buyer has inspected the Rail Line, including all improvements and structures on the Rail Line. Buyer further acknowledges that (i) except as set forth in Paragraphs 4(a)(8), 4(a)(9), and 4(a)(10) of this Agreement, no representation has been made by Seller to Buyer concerning the state or condition of the Rail Line, or the age of any improvements on the Rail Line; (ii) Buyer has not relied upon any statement or declaration of Seller with respect to the physical condition of the Rail Line, Seller's title to the Rail Line, Seller's freight traffic volumes to or from the Rail Line, or any other matter, either oral or in writing, as an inducement to entering into this Agreement, other than as stated in this Agreement; and (iii) the sole consideration for execution of this Agreement by Buyer is set forth in this Agreement.

(b) EXCEPT AS SET FORTH IN PARAGRAPH 4(a) OF THIS AGREEMENT, SELLER HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF THE RAIL LINE, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY

OF THE MATERIAL OR WORKMANSHIP OF THE RAIL LINE, OR THE CONFORMITY OF THE RAIL LINE TO ITS INTENDED USES. SELLER SHALL NOT BE LIABLE TO BUYER FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT) WITH RESPECT TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF THE RAIL LINE OR THE CONFORMITY OF THE RAIL LINE TO ITS INTENDED USES. SELLER OFFERS, AND BUYER ACCEPTS, THE RAIL LINE IN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON SELLER'S RIGHTS, INTEREST, AND TITLE TO THE PROPERTY COMPRISING THE RAIL LINE.

6. Liability and Indemnity.

(a) Cooperation in Defense. Buyer and Seller agree that, following the date of Closing, they will cooperate as necessary in defense of any claim, demand, investigation or litigation arising out of Seller's or Buyer's ownership or operation of the Rail Line.

(b) Definition of Losses. In this Agreement the term, "Losses" shall include all costs, expenses, fees or liabilities of, or in any way related to the following: (i) any violation of law or regulation; (ii) any damage to property, the environment or to natural resources; (iii) any bodily injury or death of any person; or (iv) the breach of any contract. "Losses" shall include, but not be limited to, all costs of claims, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, court costs, and attorney, consultant and expert witness fees.

(c) General Liability and Indemnity.

- (1) Seller's General Liability and Indemnity. Except as provided in Paragraph 6(d) of this Agreement (environmental liability), Seller shall be responsible for, and shall indemnify, defend and hold harmless Buyer fully against, all Losses, which:
- (i) except as limited by clause (iii) just below, arise out of Seller's ownership or operation of the Rail Line on or prior to the date of Closing;
  - (ii) result from any breach by Seller of any of its representations or warranties set forth in Paragraphs 4(a) and 10 of this Agreement, or, except as covered by clause (iv) just below, any failure by Seller to perform any of its obligations under this Agreement;
  - (iii) result from claims of third parties caused by Seller's performance or nonperformance, or Buyer's nonperformance only where Buyer had no knowledge of the existence of the duty to perform, under any material contract, lease, permit, license, easement or commitment related to the Rail Line that is not identified in this Agreement or on Exhibit D; or
  - (iv) occur during Seller's operations on the Interchange Access Line, regardless of Seller's or Buyer's negligence or alleged negligence, solely to the extent that such Losses involve Seller's property or employees or lading on Seller's trains, or where third parties or their property (other than lading on Buyer's or Seller's trains) are involved, the negligent party shall respond in accordance with the law of the applicable jurisdiction.
- (2) Buyer's General Liability and Indemnity. Except as provided in Paragraph 6(d) of this Agreement (environmental liability), and further except for Losses resulting from one or more of Seller's representations or warranties set forth in this

Agreement containing any untrue or materially misleading statement of a material fact, or omitting any material fact that is necessary to prevent the representation or warranty from being materially misleading, Buyer shall be responsible for, and shall indemnify, defend and hold harmless Seller fully against, regardless of any negligence or alleged negligence of Seller prior to closing, all Losses which:

(i) except as limited by clause (iii) just below, arise out of Buyer's ownership or operation of the Rail Line after 12:01 a.m. on the day following the date of Closing; (ii) result from any breach by Buyer of any of its representations or warranties set forth in Paragraph 4(b) of this Agreement, or any failure by Buyer to perform any of its obligations under this Agreement; (iii) result from claims of third parties caused by Buyer's nonperformance or required performance under any material contract, lease, permit, license, easement or commitment relating to the Rail Line, where that contract, lease, permit, easement or commitment either is identified in this Agreement or on Exhibit D, or Buyer has specific knowledge of it, but then only from the time when Buyer acquired such specific knowledge; or (iv) arise out of, or are attributable to Buyer's activities or operations on the Interchange Access Line, regardless of Seller's negligence or alleged negligence, except to the extent Losses involve Seller's property or employees or lading on Seller's trains, or where third parties or their property (other than lading on Buyer's or Seller's trains) are involved, in which case the negligent party shall respond in accordance with the law of the applicable jurisdiction.

(d) Environmental Liability and Indemnity.

(1) Buyer Accepts the Rail Line "As Is, Where Is". Buyer acknowledges that Seller has provided Buyer with full access to inspect the Rail Line. Buyer further acknowledges that Seller makes only those representations and warranties to Buyer concerning the existence of any hazardous or toxic substances on or near the Rail Line, or compliance of the Rail Line with any statutes, ordinances, rules, regulations, orders or decisions with regard to hazardous or toxic substances on or near the Rail Line, which are expressly set forth in Paragraph 4(a)(9) of this Agreement.

(2) Seller's Environmental Liability and Indemnity. Notwithstanding any other liability or indemnification provision in this Agreement, Seller shall be responsible for, and shall indemnify, defend and hold harmless Buyer fully against, Losses incurred due to any claim, demand or litigation concerning violation of any applicable statute, ordinance, rule, regulation, order or decision in any way concerning any of the following: (i) any chemical, material or substance that is now, or at the time in question, is regulated or governed by any law, the release of which creates any liability under any applicable law; or (ii) any other material which, when released, would cause significant ecological damage (items described by (i) or (ii) above are referenced hereinafter as "Hazardous Materials") located on or near the Rail Line where such Losses:

(a) were caused by one or more acts of Seller that occurred on or prior to the date of Closing; and

(b) result from any written claim ("Claims") that is delivered to Seller within four years following the date of Closing; and

(c) exceed \$10,000.00 in the aggregate in any year.

(3) Buyer's Environmental Liability and Indemnity. As part of the consideration for this Agreement, and notwithstanding any other liability or indemnification provision in this Agreement, Buyer shall be responsible for, and shall indemnify, defend, and hold harmless Seller fully against, regardless of any negligence or alleged negligence of Seller occurring prior to Closing, Losses incurred due to any claim, demand or litigation concerning violation of any applicable statute, ordinance, rule, regulation, order or decision in any way concerning any Hazardous Materials located on or near the Rail Line where such Losses either:

(a) were not caused by one or more acts of Seller, or Seller's corporate predecessors, regardless of when the act or omission giving rise to the claim occurred; or

(b) regardless of cause, do not result from a Claim delivered to Seller within four years following the date of Closing; or

(c) were caused by Seller and result from a Claim delivered to Seller within four years of the date following Closing, but only up to \$10,000.00 in the aggregate in any year.

Buyer also shall be responsible for, and shall indemnify, defend and hold harmless Seller fully against, regardless of any negligence or alleged negligence of Seller, Losses incurred due to any claim, demand or

litigation concerning violation of any applicable statute, ordinance, rule, regulation, order or decision in any way concerning any Hazardous Materials on or near the Interchange Access Line, to the extent such Losses arise out of, or are attributable to, Buyer's activities or operations on the Interchange Access Line, except to the extent Losses result from Seller's affirmative negligent acts.

- (4) Arbitration of Allocation of Liability Between Buyer and Seller. Any dispute between Seller and Buyer as to allocation between them of Losses for which both Seller and Buyer are responsible under the terms of this Paragraph 6 shall be settled by binding arbitration in accordance with the rules of the American Arbitration Association.
- (5) Buyer To Comply With Hazardous Materials Laws. Buyer agrees to comply with all federal, state and local laws, regulations and rules concerning handling and disposal of Hazardous Materials.
- (6) Liability Remedies and Obligations Are Exclusive. Buyer and Seller agree that the remedies and obligations set forth in this Paragraph 6 shall be exclusive remedies and obligations of each one to the other with respect to any Losses relating to the release or existence of Hazardous Materials on or near the Rail Line.
- (e) Seller to Delivery Property Records to Buyer. Seller shall deliver to Buyer, on or soon following the date of Closing, originals or copies of whatever records, prints, archival information, or other evidence Seller locates in a reasonable search of Seller's records, which

bears upon the use of, maintenance, or title to the real estate comprising the Rail Line during the time the Rail Line was operated by Seller as a common carrier line of railroad. If, at any time after Closing, Seller locates any other documents which bear upon the use of, maintenance, or title to the real estate comprising the Rail Line, Seller promptly shall provide originals or copies of those documents to Buyer.

7. Assignment; Seller's Right of First Refusal.

(a) Buyer may not assign this Agreement, or any rights or obligations under this Agreement, to another railroad, or any party or individual who at the time of the assignment is affiliated with or working for another railroad, without the prior written consent of Seller, which consent shall not be unreasonably withheld. Any assignee, including any successor in interest, of Buyer's or Seller's rights under or property acquired by this Agreement, shall assume in writing all of Buyer's or Seller's continuing and existing or thereafter arising obligations under this Agreement, and under any then effective contract assigned by Seller to Buyer, in whole or in part, in accordance with the terms of this Agreement, which obligations are related to the property or rights involved in the assignment.

(b) Any subsequent agreement by Buyer to sell all or any portion of the Rail Line (except to an affiliate of Buyer) must contain the effective right for Seller to purchase the Rail Line, or portion thereof, from Buyer, on the same, or substantially similar, basis as that set forth in the subsequent sale agreement. Buyer shall deliver to Seller a copy of the executed subsequent sale agreement within seven days following its execution. After receiving such copy, Seller and Buyer then shall negotiate in good faith for sixty days Seller's purchase of the Rail Line, or portion thereof, from Buyer. If Seller, at any time during these sixty days, offers in writing to

purchase from Seller the Rail Line, or portion thereof, on the same, or substantially similar, basis as that set forth in the subsequent sale agreement, and at a purchase price equal to the average of the highest three bids received by Buyer, then Buyer, within seven days, shall accept such offer, and within thirty days thereafter, shall convey such property to Seller. The foregoing shall not apply where Buyer wishes to sell small segments of track or property comprising the Rail Line where such sale would not hinder the overall operations of Buyer on the Rail Line.

8. Obligations are Continuing.

The representations, warranties and obligations of Buyer and Seller in this Agreement are continuing and survive the Closing. Terms of continuing obligations in this Agreement are subject to amendment only by a written contract signed by both Buyer and Seller, or their respective successors or assignees.

9. Liens and Encumbrances.

Seller represents, warrants and covenants that Seller has not caused or suffered, and will not cause or suffer prior to the date of Closing, any liens or encumbrances to be filed against the Rail Line or the Interchange Access Line which would materially adversely affect Buyer's ability to conduct rail freight transportation operations on the Rail Line or the Interchange Access Line on the day following the date of Closing. Buyer agrees to take title to the Rail Line subject to all liens and encumbrances on the Rail Line, except for the liens that would violate one or more of Seller's representations and warranties in Paragraph 4(a) or this Paragraph. The only encumbrances on the Rail Line of which Seller is aware are related to the agreements identified in Part I of Exhibit D, attached hereto, and may encumber the Rail Line on the terms and conditions set forth in those agreements.

10. Pending Public Works Projects.

Seller shall notify Buyer prior to closing of all pending public works projects on the Rail Line of which Seller is aware. Seller shall pay the railroad's share of the cost of whatever work is performed on pending public works projects before the date of Closing, and Buyer shall pay the railroad's share of the cost of whatever work is performed on these projects after the date of Closing. Any payments received by Buyer or Seller from any government body for a pending public works project shall be apportioned on the basis that Seller shall receive that share of the payments applicable to work performed on these projects prior to date of Closing, and Buyer shall receive that share of the payments applicable to work performed on these projects after the date of Closing.

11. Closing.

(a) The closing of this transaction shall occur on May 31, 1999, or an earlier date mutually agreeable to the parties (referenced herein as "Closing").

(b) At Closing, Seller shall deliver to Buyer the following documents:

- (1) A sufficient number of original counterparts of executed Quitclaim Deeds to the Rail Line, in exact form as the Quitclaim Deed attached hereto as Exhibit B, to enable Buyer to file an original Quitclaim Deed in each county in which the real property comprising the Rail Line is located;
- (2) An executed Bill of Sale in exact form as the Bill of Sale attached hereto as Exhibit C;
- (3) A copy of Seller's Articles of Incorporation and By-Laws; and

(4) An opinion of counsel for Seller to Buyer with respect to those items represented by Seller to Buyer in Paragraphs 4(a)(1), 4(a)(2), 4(a)(3), 4(a)(4), 4(a)(5) and 4(a)(8) of this Agreement.

(c) At Closing, Buyer shall deliver to Seller:

(1) A copy of Buyer's Articles of Incorporation and By-Laws;

(2) A Certificate of Insurance establishing that Buyer has effective liability insurance meeting the requirements of Paragraph 16 of this Agreement; and

(3) An opinion of counsel for Buyer to Seller with respect to those items represented by Buyer to Seller in Paragraphs 4(b)(1), 4(b)(2), 4(b)(3), 4(b)(4), 4(b)(5) and 4(b)(7) of this Agreement.

(d) At Closing, Buyer shall deliver to Seller the purchase price, as set forth in Paragraph 2 of this Agreement.

12. Proration.

(a) Prepaid rentals, utilities, and other income or fees attributable to the contracts related to the Rail Line that are being assigned under Paragraph 1 of this Agreement, shall be prorated between Seller and Buyer in such manner as to allocate to Seller all income received, and all expenses incurred, on or prior to the date of Closing, and to allocate to Buyer all income received, and expenses incurred, after the date of Closing.

(b) Seller shall be responsible for all real estate taxes applicable to the Rail Line for the calendar year 1999. Buyer shall be responsible for all real estate taxes applicable to the Rail Line commencing on and following calendar year 2000.

13. Interchange.

(a) Buyer and Seller shall interchange rail freight cars and equipment to and from each other at Seller's Lower Lubbock Yard. Seller shall have the right to change the location at which such interchange occurs, within the Lubbock, Texas area, if Seller reasonably determines that such change is necessary for operational purposes. Such interchange may include tracks designated by Buyer on Buyer's property as mutually agreed between both parties. Interchange between Buyer and any party other than Seller will not be permitted at any location along the Rail Line other than at Seller's Lower Lubbock Yard. The trackage upon which such interchange takes place shall be referenced hereinafter as "Interchange Track". Buyer will block traffic for interchange with Seller in accordance with written instructions to be furnished by Seller.

(b) Cars and their contents delivered by one party to the other on an Interchange Track shall be deemed to be in the possession of the receiving party as of the time they are placed on the Interchange Track and uncoupled from the delivering party's train or engine, except that if any such car is rejected by the receiving party under the Interchange Rules of the Association of American Railroads ("AAR") or any successor rules, the refused car shall be deemed to remain in the possession of the delivering party until that car is accepted by the receiving party.

14. Car Hire Costs.

In connection with all loaded and empty rail equipment moving in rail freight transportation service to or from the Rail Line and interchanged between Buyer and Seller on an Interchange Track, the party in possession of any car shall be responsible for all car hire costs, per diem expenses and mileage allowances payable with respect to such car, for any per diem charges for trailers or containers carried by such car, and for any equipment use charges

applicable to any RoadRailer equipment or similar carless intermodal technology. Although Buyer is a line haul carrier, the parties acknowledge that for purpose of car hire only, Buyer will be eligible for treatment as a terminal switch carrier entitled to transfer of car hire liability for up to 96 hours within the provisions of Car Hire Rule 5 - Switching Car Hire Expense Recovery, as set forth in the Code of Car Hire Rules administered by the Association of American Railroads. Seller shall make reasonable efforts to make freight cars available at Buyer's request on an Interchange Track as needed by Buyer for rail service to or from facilities on or along the Rail Line, on a non-discriminatory basis between Seller's car needs on similar rail lines and Buyer's car needs; however, Seller makes no guarantee of equipment supply to Buyer. It is the responsibility of Buyer to provide all locomotives, freight equipment for local traffic, and maintenance of way equipment.

15. Liability Insurance.

(a) For so long as Seller conducts any activities on any portion of the Interchange Access Line, Buyer shall maintain a comprehensive general form of insurance covering liability in connection with any of Buyer's activities or operations on or near the Interchange Access Line, including but not limited to Public Liability, Personal Injury and Property Damage, Federal Employers Liability Act Liability, Bill of Lading and Foreign Rolling Stock Liability, and Contractual Liability, with such limits, deductibles and exclusions as Seller may agree are satisfactory, provided however, that: (i) such limits shall not be less than \$2 million per occurrence, and \$4 million in the aggregate; and (ii) policy terms shall not exclude or limit, in connection with any of Buyer's or Seller's activities or operations on or near the Interchange Access Line, coverage where activities or operations are near railroad tracks. Seller shall be

named as an ADDITIONAL INSURED on such liability insurance policy. Such liability insurance must be purchased from an insurance company licensed to do business in Texas, and possessing a current Best's Insurance Guide Rating of B and Class X or better.

(b) Buyer shall provide to Seller evidence of Buyer's liability insurance coverage at Closing, with copies of its insurance policies and any amendments, as soon as they are available, and with evidence of continued insurance coverage on January 1 and July 1 of each year. Buyer's failure to provide such evidence shall entitle Seller to purchase such liability insurance, and withhold from the divisions payment forwarded to Buyer the cost of this insurance.

16. Seller's Authority to Establish Through Routes and Offer Through Routes.

Buyer and Seller agree that, with respect to all current and future traffic originating or terminating on or along the Rail Line and interchanged between Buyer and Seller at Lubbock, Texas, for ninety-nine years following the date of Closing, Seller shall have authority to establish through routes and offer through freight rates via through routes involving both Buyer and Seller with interchange between Buyer and Seller at Lubbock, Texas. Buyer shall not impose a surcharge upon this traffic without the prior written consent of Seller, which consent shall not be unreasonably withheld. For these ninety-nine years, Seller shall specify junctions and routes for all traffic, effective the day following the date of Closing. For this same ninety-nine years, following the date of Closing, Buyer automatically concurs in all such through rates established by Seller, whether for present or future freight traffic, so long as Buyer shall receive for transporting the traffic the division of revenues that is set forth in Paragraph 17(a) of this Agreement.

17. Division of Revenue.

(a) Buyer and Seller agree that for so long as Seller establishes through freight rates for interline freight transportation service involving both Buyer and Seller, the through revenue accruing on all existing and future carload traffic movements interchanged between Buyer and Seller at Lubbock, Texas, to or from existing and future rail destinations or origins on or along the Rail Line, shall be divided between Buyer and Seller on the following basis:

- (1) For each carload of freight that originates or terminates on the Rail Line and is interchanged between Buyer and Seller at Lubbock, Texas, billed in a block of 27 or more cars for an individual shipper or receiver, Buyer shall receive \$40.00 per car from Seller.
- (2) Except as provided in subparagraph (3), below, for each carload of freight that originates or terminates on the Rail Line and is interchanged between Buyer and Seller at Lubbock, Texas, not billed in a block of 27 or more cars for an individual shipper or receiver, Buyer shall receive \$125.00 per car from Seller.
- (3) Commencing as of January 1, 2000, should the number of carloads of freight originating and terminating on the Rail Line, interchanged between Buyer and Seller at Lubbock, Texas, and not billed in blocks of 27 or more cars for an individual shipper or receiver exceed 3,300 carloads in any calendar year, Buyer shall receive \$115.00 per car from Seller for each carload commencing with car 3,301 for the duration of that calendar year.

For purposes of computing the division of revenue set forth above, two loaded trailers or containers in intermodal service shall count as one carload.

(b) For all current and future traffic originating or terminating on or along the Rail Line, and interchanged between Buyer and Seller at Lubbock, Texas, for twenty-five years following the date of Closing, the divisions set forth in Paragraph 17(a) shall be adjusted annually, commencing as of January 1, 2001, based on 50% of the increase or decrease between the fourth quarter of 2000 compared to the fourth quarter of 1999, in the Rail Cost Adjustment Factor, unadjusted for productivity, as published by the Association of American Railroads (or, if it ceases to be used, some similar rail cost index), and thereafter as of each January 1 based on 50% of the increase or decrease in the Rail Cost Adjustment Factor in the fourth quarter of the immediately preceding year compared to the fourth quarter of the year before that. However, in no event will Buyer's divisions be reduced to a level less than the amounts specified in subparagraph (a) of this Paragraph 17.

(c) Nothing in this Agreement shall preclude Seller and Buyer from negotiating and mutually agreeing to different divisions than those specified in this Paragraph. Divisions of revenue shall be paid by Seller only where Seller is entitled to receive linehaul revenues for a shipment. Buyer shall not impose any surcharge or any additional or increased charges to shippers without Seller's written consent, which consent shall not be unreasonably withheld.

18. Buyer to Offer to Hire Seller's Qualified Employees.

Buyer shall consider for employment those of Seller's employees who want to work for Buyer on the terms and conditions of employment that are offered by Buyer, at Buyer's sole discretion. Buyer shall give priority hiring consideration to employees of Seller who work on the Rail Lines and are represented by the Brotherhood of Maintenance of Way Employees. Any such individual who Buyer in its sole discretion determines to be qualified for a job that Buyer

has available, shall be offered such job by Buyer on the terms and conditions that Buyer establishes, in Buyer's sole discretion. Buyer promptly shall notify Seller of the name of each of Seller's current employees who Buyer offers to hire, and also the name of each of these employees who Buyer actually hires. Buyer shall assume a neutral stance in any Brotherhood of Maintenance of Way Employees union organizing effort.

19. Transfer of Operations.

All rail operations on the Rail Line shall be transferred from Seller to Buyer at 12:01 a.m. on the day following the date of Closing. Upon reasonable advance notice provided by Buyer to Seller, prior to the Closing Seller will switch up to two of Buyer's locomotives from Buyer's affiliates in Slaton, Texas, and in Oklahoma, to the Rail Line, at no charge to Buyer. Following the date of Closing, Seller will perform (at no cost or charge to Buyer) up to two switch movements per year of Buyer's locomotives between the Rail Line and Slaton, Texas, for locomotive maintenance purposes.

20. Collection of Revenues.

(a) Seller shall submit freight bills or interline settlements for, and shall collect, all revenues due for movements over the Rail Line of all shipments moved over the Rail Line, on or before the date of Closing. Seller shall assess and collect all charges due for all switching services performed on the Rail Line on or before the date of Closing. Seller shall assess and collect all demurrage and miscellaneous charges relating to car supply and other services performed on the Rail Line on or before the date of Closing.

(b) Except as otherwise provided by freight transportation contracts, all shipments which move to, from or via the Rail Line that are interchanged between Buyer and Seller, after 12:01

a.m. on the day following the date of Closing, and which are made under rates and routes established by Seller as set forth in Paragraph 16 of this Agreement, shall be settled between Buyer and Seller on the basis of a modified junction settlement plan, with Seller paying division of revenue payments to Buyer on a weekly basis within five working days following the date on which Seller issues the revenue waybill for the movement. Seller shall submit freight bills for, and shall collect all revenues due for, shipments originating or terminating on the Rail Line that are interchanged between Buyer and Seller, including all prepaid shipments that originate on the Rail Line, and all collect shipments that terminate on the Rail Line, except for shipments where Seller does not receive line haul revenues. Seller has the right to grant, or refuse to grant, credit to any customer on the Rail Line concerning any shipments routed to, from or via the Rail Line that are interchanged between Buyer and Seller. Buyer shall assess and collect all charges due for all switching services performed on the Rail Line at and after 12:01 a.m. on the day following the date of Closing. Buyer shall assess and collect all demurrage and miscellaneous charges relating to car supply and other services performed on the Rail Line at and after 12:01 a.m. on the day following the date of Closing.

21. Transfer of Liabilities; Payment of Charges.

For the period before and including the day of Closing, Seller shall be responsible for: (a) all common carrier rail operations, including car supply, on the Rail Line; (b) any freight loss and damage claims attributable to rail operations over the Rail Line; and (c) all car hire and car mileage allowance payments relating to rail operations over the Rail Line. At and after 12:01 a.m. on the day following the date of Closing, Buyer shall be responsible for: (d) all common carrier rail operations, including car supply, on the Rail Line; (e) any freight loss and damage claims

attributable to rail operations over the Rail Line; and (f) all car hire and car mileage allowance payments relating to rail operations over the Rail Line.

22. Electronic Data Interchange.

Within 30 days following the date of Closing, Buyer must have the ability to send and receive electronically waybills, advanced consists, and bills of lading; as well as Train II reports and passing/placement reportings for performance purposes. Transaction reporting should be at industry standard levels or one level behind.

23. Assignment of Freight Transportation Contracts.

The parties agree that, notwithstanding any other provision of this Agreement, the only freight transportation contracts to be assigned by this agreement are: (a) freight transportation contracts that apply to traffic moving to or from facilities on or along the Rail Line; or (b) freight transportation contracts with or involving shippers or receivers that have facilities on or along the Rail Line, and which would apply to one or more shipments to or from a facility on or along the Rail Line. Seller agrees to send on the date of Closing to each shipper (or consignee), and each railroad, who is a party to any freight transportation contract involving any existing or potential freight traffic movement to or from any rail origin or destination on the Rail Line, a Notice of Assignment, advising those parties of the following: (a) the occurrence of this sale; (b) the fact that all rates and service (and in the case of other railroads, revenue divisions) terms in each contract will remain the same; and (c) the fact that Buyer will replace Seller as the party responsible for all rail service to be performed under the contracts for all movements over all or any part of the Rail Line. Buyer agrees that as between Buyer and Seller, Seller's actions in

accordance with the terms of this Paragraph will discharge in full Seller's responsibility to assign freight transportation contracts to Buyer.

24. Applicable Law.

This agreement shall be governed by and construed in accordance with the laws of the State of Texas.

25. Effect of Waiver.

Any waiver by either Buyer or Seller, or failure of either Buyer or Seller to insist upon full and complete performance by Seller or Buyer of its obligations set forth in this Agreement, shall not constitute a waiver or release of such party's right to insist upon full and complete performance of any other obligations in this Agreement, or a waiver or release of such party's right to insist upon full and complete performance of the obligations that were waived or not enforced for periods prior to, or following, the waiver or failure to insist upon full and complete performance. This Agreement shall be amended or modified only by written agreement signed by the parties hereto.

26. Notices.

All notices and other communications under this Agreement shall be in writing and deemed properly served if delivered by hand to the party addressed or, if mailed, when received by the United States Postal Service in registered or certified mail, postage prepaid, or, if sent by a national overnight service, when received by the carrier service in a prepaid mailer, return receipt requested, addressed as follows:

Seller: Mr. Jerome M. Johnson  
Assistant Vice President  
Shortline/Interline Development  
The Burlington Northern and Santa Fe Railway Company

2650 Lou Menk Drive  
Fort Worth, Texas 76161

Buyer: Mr. Larry D. Wisener  
President/Manager  
South Plains Switching, Ltd. Company  
P.O. Box 676  
Slaton, Texas 79364

Either party hereto may change its address or addressee to which notices are to be given by providing written notice of the change to the other party.

27. Confidentiality.

Except to the extent that the terms of this Agreement are required to be disclosed by the STB, by order of any court of competent jurisdiction or any governmental agency, or by parties involved in financing this purchase, each party to this Agreement shall not disclose the contents of this Agreement to any other party, without the prior written consent of the other party to this Agreement. Any party who learns of any of the terms of this Agreement shall be required by the party to this Agreement who is disclosing the information not to disclose those terms to any other party without the prior written consent of both parties to this Agreement.

28. Entire Agreement; Integration of Agreement.

This document, together with all Exhibits attached hereto, constitutes the entire agreement between Buyer and Seller relating to this transaction. Any other prior or contemporaneous agreements, understandings, representations or statements, whether oral or written, relating to this transaction are merged herein. The headings and titles to provisions in this Agreement are for convenience only, and shall not be deemed to modify or affect the rights or duties of Buyer or Seller. All rights and obligations of Buyer and Seller set forth in this Agreement, or in any Exhibit attached hereto, are integral parts of this Agreement. The consideration inducing Buyer and Seller to enter into this Agreement includes all of the commitments by Buyer to Seller, and

by Seller to Buyer, as set forth in this Agreement, including terms set forth in the Exhibits attached hereto.

IN WITNESS WHEREOF, authorized representatives of the parties have executed this agreement as of the third day of May, 1999.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

SOUTH PLAINS SWITCHING, LTD., CO.

By: Douglas J. Babb  
Title: Senior Vice President  
Merchandise Business Unit

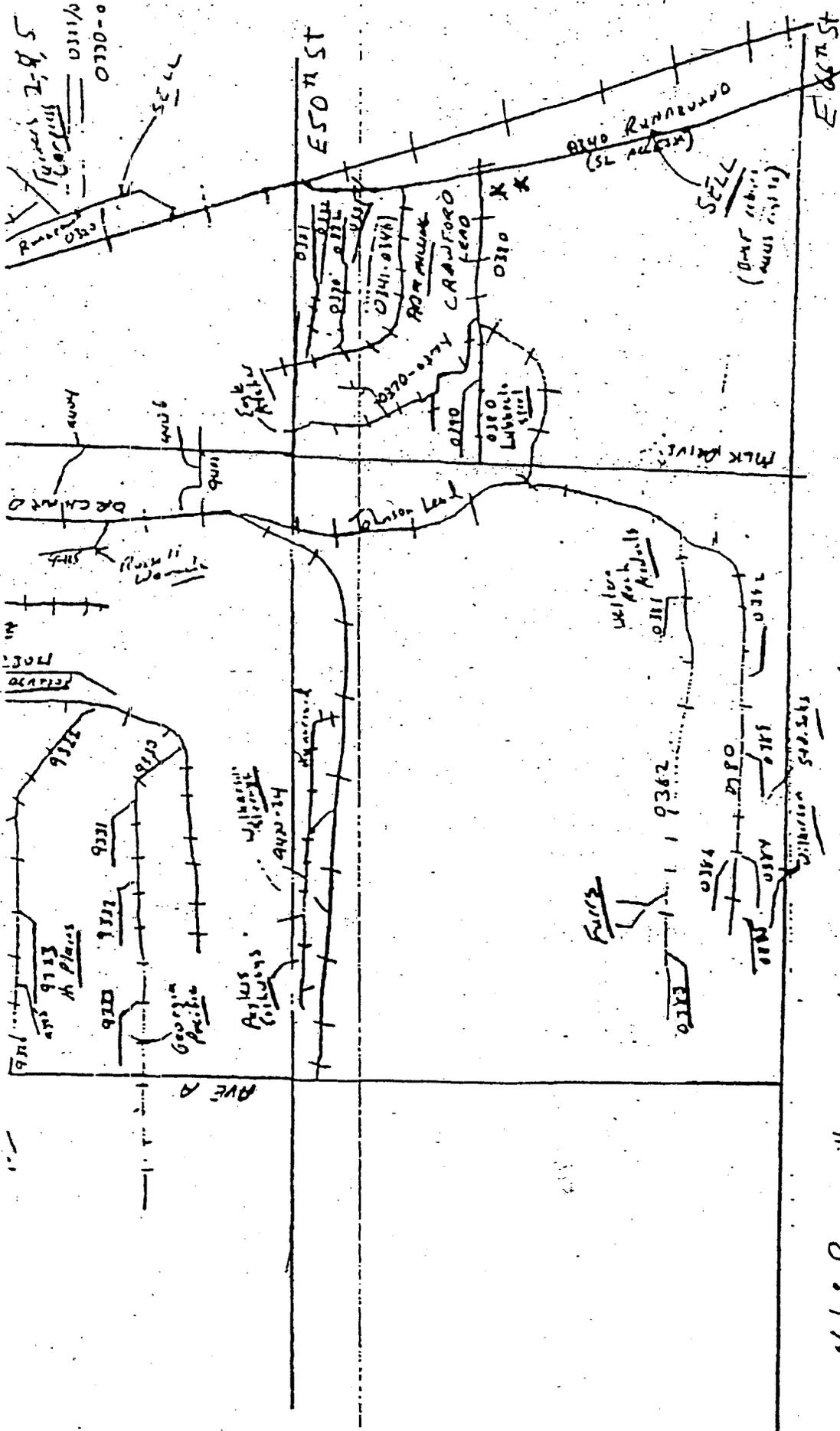
By: Larry Luker  
Title: President/Manager

EXHIBIT A

LIST OF TRACKS AND MAP/PRINT OF RAIL LINE

LUBBOCK TRACKS	ATSF Side(Track #)	Track Feet	BN Side(Track #)	Track Feet
(Includes both BNSF, Owned and Shipper Tracks)				
	0310	1804	9201	1808
	0311	255	9202	1531
	0312	120	9203	1460
	0313	49	9204	623
	0320	1686	9208	1100
	0330	366	9220	1026
	0331	995	9298	5067
	0332	678	9310	800
	0340	3146	9320	1026
	0341	432	9322	1685
	0370	4535	9330	1000
	0372	777	Orchard Lead	17298
	0373	110	9304	Unknown
	0300	12270	9311	Unknown
	0381	553	9312	Unknown
	0342	5815	9321	Unknown
	0386	100	9323-9326	Unknown
	0387	180	9331	Unknown
	0390	172	9333	Unknown
	Total	31660	9401-9406 9409-9412 9415 9420-9424	Unknown Unknown Unknown Unknown Unknown
	Total		Total	34224





Note: Buyer will receive title to all track and right-of-way properties as delineated in some cases, seller will convey an easement with the exception of tracks owned by shippers (industrial spurs). Seller will retain: ATSF Mainline, Track 9200 and Track 9205. Seller will also retain rights to operate lever tracks 9298 and 0340.

**EXHIBIT B**

**QUITCLAIM DEED**

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, Grantor, for Ten and no/100 Dollars (\$10.00) and other good and valuable consideration, to it duly paid, the receipt whereof is hereby acknowledged, does by these presents REMISE, RELEASE and QUITCLAIM, without any covenants of warranty whatsoever and without recourse to the Grantor, its successors and assignees, unto SOUTH PLAINS SWITCHING, LTD. COMPANY, Grantee, its successors and assignees, forever, all of its all the right, title and interest, if any, in and to a certain strip or parcel of land located in the County of Lubbock, Texas, as described in detail in Attachment 1, attached hereto.

SUBJECT, however, to all existing interests, including but not limited to all reservations, rights-of-way, easements and other encumbrances, of record or otherwise.

EXCEPTING AND RESERVING unto Grantor, its successors and assigns, all of the coal, oil, gas, casing-head gas and all ores and minerals of every kind and nature, including sand and gravel underlying the surface of the premises herein conveyed, together with the full right, privilege and license at any and all times to explore, or drill for and to protect, conserve, mine, take, remove and market any and all such products in any manner which will not damage

structures on the surface of the premises herein conveyed, or unreasonably interfere with the use of such premises, together with the right of access at all times to exercise these rights.

ALSO RESERVING unto Grantor, its successors and assigns, any and all water rights, and the exclusive right to develop and take water by any means, and to all appropriations, priorities, permits and certificates which are appurtenant to, associated with, used upon, flowing over, under, or lying on, in or under the premises herein conveyed, and an exclusive, permanent easement to construct, install, operate, replace, rework, reconstruct, rehabilitate and maintain any and all water diversion, production and transportation structures, equipment, improvements and piping, and to construct, install, operate and maintain water pumps and hydroelectric generation equipment necessary, convenient or related to the production, transportation or delivery of water from, on, under or across the premises herein conveyed, together with the right of access at all times to exercise these rights.

ALSO RESERVING onto Grantor, its successors and assigns, an exclusive, permanent easement for construction, reconstruction, maintenance, use and/or operation of one or more pipelines or fiber optic communication lines, facilities and appurtenances in, under, across, along and through all or any portion of the premises herein conveyed, including the right for Grantor, its successors and assigns, or any of its licensees, to enter, disturb the surface, and occupy the premises herein to be conveyed for purposes of constructing, reconstructing, maintaining, using and/or operating one or more pipelines or fiber optics communication lines, facilities and appurtenances in, under, across, along and through all or any portion of the premises herein to be conveyed; provided however, that all activities in the exercise of these rights shall be performed in a manner which will not damage structures on the surface of the premises herein

conveyed, and that Grantor shall notify Grantee in advance of any such entry, and shall enter and occupy such premises in a manner which does not unreasonably interfere with Grantee's use of such premises.

TO HAVE AND TO HOLD the same unto Grantee, its successors and assignees, forever.

IN WITNESS WHEREOF, Grantor has caused this instrument to be signed by its authorized representative, attested by its Assistant Secretary, and its corporate seal to be affixed hereto, on the \_\_\_\_ day of \_\_\_\_\_, 1999.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Assistant Secretary

STATE OF TEXAS                    )  
  ) ss.  
COUNTY OF TARRANT            )

On this \_\_\_\_ day of \_\_\_\_\_, 1999, before me, the undersigned, a Notary Public in and for the State of Texas, duly commissioned and sworn, personally appeared Douglas J. Babb, Senior Vice President Merchandise Business Unit and an Assistant Secretary, respectively, of The Burlington Northern and Santa Fe Railway Company, the corporation that executed the foregoing instrument, and acknowledged the execution thereof to be the free and voluntary act and deed of such officer and the voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the foregoing instrument and that the seal affixed in the corporate seal of said corporation.

Witness my hand and official seal affixed the day and year first above written.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

Attachment 1

[property description]  
to be supplied

MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY OF THE PROPERTY, OR THE CONFORMITY OF ANY OF THE PROPERTY TO ITS INTENDED USES. SELLER SHALL NOT BE LIABLE TO BUYER FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT) WHICH IS RELATED IN ANY WAY TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF ANY OF THE PROPERTY CONVEYED BY DELIVERY OF THIS BILL OF SALE; OR THE CONFORMITY OF SUCH PROPERTY TO ITS INTENDED USES. SELLER CONVEYS TO BUYER, AND BUYER, BY ACCEPTANCE OF SELLER'S DELIVERY OF THIS BILL OF SALE, HEREBY ACCEPTS, ALL PROPERTY CONVEYED BY DELIVERY OF THIS BILL OF SALE IN "AS IS, WHERE IS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON SELLER'S RIGHTS, INTEREST, AND TITLE TO SUCH PROPERTY.

IN WITNESS WHEREOF, Seller has caused this Bill of Sale to be executed by its duly authorized representative on this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

BILL OF SALE

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("Seller"), for and in consideration of promises made by SOUTH PLAINS SWITCHING, LTD., COMPANY ("Buyer"), to purchase all of Seller's interest in the rail line segments identified in the Agreement for Sale of Certain Assets, Rights and Obligations of The Burlington Northern and Santa Fe Railway Company To South Plains Switching, Ltd. Company, dated as of May 3, 1999 (which property is hereinafter referenced as "Rail Line"), hereby sells, grants and conveys to Buyer, and Buyer's successors and assignees, all of Seller's rights, interest and title, to the following property constituting the Rail Line, subject to all limitations on Seller's rights, interest and title to the following property:

All rail, ties, spikes, tie plates, rail anchors, turnouts, bridges, culverts, signalling equipment, and other supporting structures, ballast, other track materials and supplies, and the metal depot at or near the Old BN Yard (excluding: (1) any and all vehicles, maintenance equipment on wheels, radios, and computer equipment; and (2) if a notice of interim trail use is filed and accepted as to the Rail Line or if trail use is implemented during the abandonment or discontinuance process, also excluding all bridges, culverts and bridge support structures) that on the date of this Bill of Sale are present on the real property comprising the Rail Line, whether on that date they are installed or uninstalled.

SELLER HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY OF THE PROPERTY CONVEYED BY DELIVERY OF THIS BILL OF SALE, ITS

EXHIBIT D

AGREEMENTS TO BE ASSIGNED IN PART  
TO BUYER

[To be furnished]

Exhibit B

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET  
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

19 Dec. 2005  
by Federal Express

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

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

49 C.F.R. Part 1146: expedited  
relief for service inadequacies

Expedited Treatment Requested

Dear Mr. Secretary:

On behalf of PYCO Industries, Inc., enclosed please find an original and ten copies of a request for expedited relief for service inadequacies pursuant to 49 C.F.R. Part 1146 (and other related provisions). The petition arises from lack of adequate service by the incumbent carrier, South Plains Switching, Ltd., in Lubbock, TX.

I also enclose the filing fee (\$200) per STB Ex Parte No. 542 (Sub-no. 12), item (63)(i).

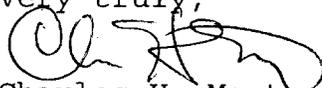
By my signature below, and as required by 49 C.F.R. 1146.1(b)(1)(iv), I certify service on this date by deposit of copies of the request with Federal Express, next business day delivery, upon the following:

- a) South Plains Switching, Ltd. (as incumbent carrier)  
10917 -- E. FM 250 & E. Co. Road 78  
Slaton, TX 79364
- b) Thomas McFarland, PC  
208 South LaSalle St., Suite 1890  
Chicago, IL 60604-1112  
(counsel for SAW)

- c) John Heffner, Esq.  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(counsel for West Texas and Lubbock, the  
proposed alternative carrier)
- d) Federal Railroad Administration  
1120 Vermont Avenue, NW  
Washington, DC 20590

Thank you for your assistance in this matter.

Very truly,



Charles H. Montange  
counsel for PYCO Industries

Encls.

cc. Gary McLaren, Esq. (w/encl.)  
(for PYCO)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

VERIFIED PETITION FOR ALTERNATIVE RAIL SERVICE  
EXPEDITED RELIEF REQUESTED FOR SERVICE EMERGENCY

EXPEDITIOUS TREATMENT REQUESTED

Pursuant to 49 U.S.C. § 11123(a), 49 C.F.R. Part 1146, and other applicable authorities,<sup>1</sup> PYCO Industries, Inc. ("PYCO") hereby petitions the Surface Transportation Board ("Board") for an order authorizing alternative rail service to customers currently served by South Plains Switching Ltd. ("SAW") in Lubbock, Texas. This Petition is verified, and is further supported by the attached Verified Statement of Robert Lacy, and other documents and exhibits.

PYCO is a major rail shipper in Lubbock, using in excess of 6000 carloadings per year. PYCO's high season for demand for rail transport is October through March.

As shown below, this petition is precipitated by the second episode this year in which SAW's failure to honor its common carrier obligations is resulting in disruption of PYCO's business. This time, SAW's actions threaten eminently to shut PYCO down: if adequate rail service is not promptly restored, PYCO will run out of storage capacity by mid-January. If PYCO's

---

<sup>1</sup> Other potentially applicable authorities include 49 U.S.C. §§ 11102(a), 11102(c), and 10705(a), and 49 C.F.R. Part 1147.

business fails, losses could exceed \$100,000,000. Because restoration of adequate rail service is critical to avert eminent losses, PYCO requests expedited treatment.

I. SPECIFIC RELIEF REQUESTED

PYCO requests an Order authorizing alternative rail service over SAW lines

(i) by West Texas & Lubbock Railroad ("WTL") so as to permit WTL to pick up and deliver all rail traffic for customers currently served by SAW in Lubbock,

and (ii) by PYCO itself solely to permit PYCO employ its own switching equipment to further facilitate movement of cars serving its facilities in Lubbock.<sup>2</sup>

In the alternative, should this Board not authorize alternative rail service for all SAW's customers in Lubbock, PYCO Industries requests that this Board authorize such service at least for PYCO Industries. In that event, PYCO requests that the Order authorizing alternative rail service over SAW lines

---

<sup>2</sup> PYCO is currently not an authorized rail carrier. PYCO does not propose to use its switch engine to interface with other carriers, but rather to operate on a short distance of SAW trackage in order to move rail cars between tracks otherwise located on PYCO property. PYCO for years used its switch engine for this purpose but was precluded by the placement of a derail by SAW this year. Even though PYCO does not propose use of its switch engine for interfacing with other carriers (see Expedited Relief for Service Inadequacies, Ex parte 645, at p. 12, served Dec. 21, 1998), PYCO is concerned that this Board may conclude that PYCO's proposed use of SAW trackage by PYCO's switch engine requires PYCO as a non-carrier to file a notice of exemption under the 7-day notices procedures (at 49 C.F.R. 1150.31) to obtain requisite operating authority. In that event, PYCO requests that this Board authorize the service as requested in the text contingent upon PYCO making a 49 C.F.R. 1150.31 filing.

provide that WTL have control over dispatch from 9 AM until 2 PM Monday through Friday, unless otherwise agreed by WTL and SAW. WTL requires control over dispatch in order to ensure safe operations.

PYCO requests that the Order authorize alternative rail service for the maximum time permitted by the applicable statute.

## II. SUMMARY OF FACTS

PYCO Industries, Inc. is the largest cottonseed cooperative serving the southern United States, with over 120 member gins. PYCO operates two cottonseed oil mills in Lubbock and one in Greenwood, Mississippi. PYCO's business, particularly in Lubbock, is heavily rail dependent. PYCO relies on rail service to serve both Plant No. 1 and Plant. No. 2. PYCO Industries produces and markets cotton oil for cooking, whole cottonseed and byproducts of cottonseed processing. These byproducts include meal, hulls and linters. Whole cottonseed and meal are used as nutritional ingredients in the livestock and catfish industries; hulls are a form of fiber in the beef and dairy industries. Cotton linters are used in a variety of consumer products (mattresses, upholstery, high quality paper, plastics).

PYCO had long been a customer of the Burlington Northern and Santa Fe Railroad ("BNSF"). In 1999, BNSF sold SAW certain trackage in Lubbock, Texas, including all trackage serving PYCO. PYCO understands that the sale was for one dollar. After the purchase, SAW became a monopoly supplier to PYCO, in that PYCO

has no access to BNSF or the national rail system other than by means of SAW.

PYCO's cottonseed oil business is heavily rail dependent. Trucks are not a viable or economic alternative. PYCO's current business need exceeds 6000 carloadings annually in Lubbock (currently 26 per day from Plant No. 1, and 12 per day from Plant No. 2, plus at least one additional boxcar/day). PYCO understands itself to be the largest shipper served by SAW.

SAW is a rail carrier providing transportation and services subject to the jurisdiction of this Board. Pursuant to 49 U.S.C. § 11101(a), such a carrier "shall provide the transportation or service on reasonable request." Because SAW stands as a monopoly rail supplier to a major rail-dependent shipper (PYCO), it is particularly important that SAW fulfill the obligation set forth in 49 U.S.C. § 11101(c), or that an alternative rail carrier be allowed to do so. Arkansas Midland Railroad Co. -- Alternative Rail Service -- Line of Delta Southern Railroad, Inc., STB F.D. 34479-0, served March 11, 2004.

In order to facilitate switching between sidings on PYCO property serving Plant No. 1, PYCO operates two track mobiles. Until this year, SAW permitted PYCO to operate its equipment on a portion of SAW trackage sufficient to allow PYCO to move cars between tracks at PYCO's Plant No. 1. This allowed PYCO to ship 26 or more carloads per day from Plant No. 1. SAW has now placed a derail on its track that now prevents PYCO from moving

more than one car at a time. This and related service inadequacies by PYCO limits PYCO to 12 carloads per day at Plant No. 1, a 16 carload/day shortfall. This adds to, and further complicates, the service inadequacies and disruptions discussed below.

First episode of service inadequacy. By 2005, SAW and BNSF were embroiled in a complicated dispute over the terms of the 1999 contract by which SAW acquired the BNSF trackage in Lubbock. Apparently incensed because PYCO declined to take sides in its favor in that contract dispute, SAW by early March stopped spotting and picking up cars on reasonable request at PYCO's two rail-dependent plants in Lubbock. Indeed, shortly before March 11, 2005, Mr. Larry Wisener (owner of SAW) informed PYCO that SAW was terminating service to PYCO's Plant No. 2, evidently due to a dispute between SAW and BNSF over the removal of certain switches. Despite efforts by PYCO to compose the differences between BNSF and SAW, service continued to deteriorate, with Mr. Wisener again threatening to shut down service to Plant No. 2 on April 4, 2005. On April 4, a derailment occurred on the track serving Plant No. 1. Mr. Wisener (SAW) stated that SAW "didn't have time to clean up a mess right now" resulting in suspension of service to Plant No. 1.

On April 5, 2005, PYCO complained in writing to Mr. Melvin Clemens, Director of STB's Office of Compliance and Enforcement ("OCE") about service to both its Lubbock plants. This was

followed by a May 3 letter from PYCO to Mr. Herzig in STB's OCE noting service problems and the threat by SAW to impose a surcharge on PYCO. By letter dated May 23 to STB, PYCO reported it had sustained \$450,000 in losses in April due to "slow switching of railcars" and that the situation had not improved. By letter dated June 8 to STB, PYCO indicated it was "experiencing worse service by the day." On June 17, 2005, Mr. Wisener sent a letter to PYCO (i) directing PYCO to make Mr. Wisener the sole source of contact for all SAW rail services to PYCO, (ii) withdrawing permission for PYCO to operate its equipment on SAW trackage, (iii) imposing surcharges, and (iv) requiring a "formal agreement" for future inbound and outbound service. On June 13, SAW threatened to "embargo any future PYCO shipments from handling." By approximately June 21, PYCO had drafted a petition for alternative rail service under 49 C.F.R. Part 1146. Although this draft was not filed, it summarizes key events in the service disruption which PYCO experienced March through June of 2005, and also collects as exhibits the correspondence discussed above. A copy of this draft petition is attached as Appendix A, along with its exhibits.

Intervention by STB's OCE. Although counsel for PYCO does not understand himself to have all the communications, PYCO understands that Director Clemens of STB's Office of Compliance and Enforcement informed SAW in writing of SAW's obligations to provide service on reasonable request. PYCO is in possession of letters from SAW's counsel to Mr. Clemens offering excuses for

SAW's failure to provide service (SAW chiefly claimed to be limited by policies of BNSF), and Mr. Clemens response of 10 June 2005 indicating that SAW needed to meet its service obligations. See Exhibit B. Due to Director Clemens' intervention, SAW improved service to PYCO at the end of June. PYCO, hoping that this marked a peaceful resolution of its service problems with SAW, did not file the emergency petition with STB for alternate rail service at that time.

Interregnum. In a request for proposals bearing date of May 10, 2005, SAW offered its Lubbock trackage for sale, including the trackage serving PYCO.

In September of 2005, Mr. Wisener informed PYCO's Senior Vice President for Marketing (Robert Lacy) that he (Wisener) wished to sell SAW and get out of the railroad business, and wished to know if PYCO was interested. After consulting internally, PYCO informed SAW that PYCO had an interest. See Exhibit C (Ver. Statement of Robert Lacy). SAW then made a specific demand to PYCO to sign an agreement by which PYCO would be bound to pay SAW \$5,500,000 (5.5 million dollars) for the trackage serving PYCO. That proposed agreement is set forth in a letter dated October 11, 2005, from SAW's Lubbock counsel to PYCO's Lubbock counsel, and is an attachment to the Lacy Verified Statement (Exhibit C). The proposed agreement as tendered by SAW does not specify what property or rights SAW proposed to transfer, nor provide for normal due diligence activities to be conducted and customary concerns to be

satisfied as a condition to closing. PYCO accordingly responded on October 13 that it was "still in the early stages of looking at the purchase" of SAW's assets, and requested a paragraph making the purchase contingent upon the completion of due diligence activities and upon PYCO's obtaining financing satisfactory to PYCO. See Letter attached to Exhibit C.

SAW angrily rejected PYCO's position. SAW's president, Mr. Wisener, orally informed PYCO that SAW intended to make business miserable for PYCO. By letter dated November 3, 2005 (also in Exhibit C), SAW through its president, Larry Wisener, effectively broke off negotiations on acquisition (before they had begun), claiming agreement "cannot be reached." SAW also demanded that PYCO "cease all plant operations on SAW property immediately."<sup>3</sup>

Second episode of service inadequacy. On or about November 17, SAW placed a derail on the track making it difficult for PYCO to prepare cars for the daily switches. By letter dated November 17, 2005, SAW cancelled PYCO's lease of track #9298.

On November 18, 2005, PYCO contacted Mr. Wisener to request that he move the derail to allow switching. Mr. Wisener initially said he was busy and would look into it later. Then he said he was imposing additional charges on PYCO, and desired

---

<sup>3</sup> Letter attached as part of Exhibit B. It is unclear what Mr. Wisener meant by plant operations. PYCO surmises that he felt PYCO was loading seed cars on SAW trackage, a claim that Mr. Wisener made in a telephone call on November 17, 2005. However, PYCO was loading seed cars on its own trackage. SAW's Mr. Wisener also perhaps meant that he no longer would store cars for PYCO.

PYCO to "come over." PYCO's representative, weary of the confrontational nature of Mr. Wisener in meetings, indicated that if Mr. Wisener had made up his mind, there was no need to come over. Mr. Wisener indicated that PYCO "would have to figure out how to take care of [itself]." Mr. Wisener told PYCO that it would "cost a lot more for [PYCO] to continue doing business with [SAW]." See Exhibit C and attachments thereto.

On November 22, 2005, PYCO determined that if SAW would switch cars on the scale track instead of the shop track, or if it would switch on both, PYCO could load more cars. PYCO asked SAW to switch on the scale track or on both tracks. SAW refused. SAW's representative indicated that Mr. Wisener would allow only one pull per day, and only on the shop track. From that day forward, SAW has refused to switch cars on the scale track and has otherwise engaged in conduct minimizing the number of cars which PYCO can switch each day. By November 29, SAW's policies or inabilities had resulted in PYCO's being unable to load an additional 80 cars at Plant No. 1. This deteriorated situation has continued until the date of filing of this petition.

No switch at all occurred at Plant No. 2 between November 22 and November 28, allegedly because of problems with SAW's locomotive. As a result, PYCO was unable to load 36 gondolas and 6 box cars. SAW has failed to deliver box cars at all, although an average of at least one per day is requested for Plant No. 2.

Summary as to Plant No. 1. PYCO on its own property is limited to handling approximately 12 cars per day maximum, if it can use both its scale track and shop track efficiently. PYCO desires 26 carloads per day at Plant No. 1. Due to the service inadequacy since November 18, PYCO is facing a shortfall of approximately 14 carloads per day at Plant No. 1. This is resulting in inventory accumulation such that PYCO must shut down at some point in mid-January for lack of storage for product. Shipment by truck is not an option. SAW's service to PYCO -- SAW's major shipper -- accordingly is inadequate despite reasonable request for service by PYCO to SAW.

Summary as to Plant No. 2. PYCO requires approximately twelve carloads per day at Plant No. 2. SAW failed to provide service despite reasonable request between November 22 and November 28, inclusive. SAW also fails to deliver boxcars to Plant No. 2 on a regular basis. This also renders SAW's service to PYCO inadequate despite reasonable request for service by PYCO to SAW.

Additional matters. SAW has further threatened to refuse to accept cars for PYCO (and to impose an embargo on shipments to PYCO), and has now for the first time actually billed PYCO for substantial surcharges, switch charges, and storage fees for PYCO cars. PYCO understands that it is the only shipper in Lubbock subject to such charges. This is unlawful discrimination which compounds the service inadequacy. PYCO reserves all rights to pursue its remedies in this connection,

as well as with respect to other losses due to SAW's conduct to date.

Rail cars intended for PYCO are backed up in large part because SAW (a) fails to spot or to pick up cars for PYCO on reasonable request and (b) does not permit efficient switching operations. From time to time, SAW's president, Mr. Wisener, has excused SAW's actions on the ground that SAW lacks adequate equipment and crews to serve PYCO and yet meet the needs of SAW's other rail customers.

Efforts to compose differences between PYCO and SAW are unavailing. Mr. Wisener employs a confrontational style, has engaged in verbal abuse of PYCO representatives, and has threatened physical retaliation against PYCO personnel.<sup>4</sup> Even if Mr. Wisener were prepared to negotiate, Mr. Wisener's conduct essentially prevents any effort to work out differences for PYCO personnel cannot be placed in a position where they must bear threats of physical violence or incur verbal abuse.

PYCO estimates that it has sustained over \$8,000,000 in lost sales and delay damages between the commencement (17 November) of SAW's most recent round of service inadequacy and December 15, 2005. See Exhibit C (Robert Lacy V.S.) ¶ 21. Due

---

<sup>4</sup> It is a criminal violation under 49 U.S.C. § 11902(b) for a person acting for or employed by a rail carrier under this Board's jurisdiction to solicit anything of value intending to be influenced by it in an action by that person relating the supply or movement of rail cars. Although not necessary for the resolution of this Part 1146 Petition, this Board should evaluate whether to refer Mr. Wisener for prosecution for what amounts to demanding a payment of \$5.5 million in return for adequate rail service.

to service inadequacy, PYCO must further curtail operations and indeed will face the need to shut down its plant in mid-January 2006 due to lack of storage space for product. This lack of space is due to SAW's failure to provide service on reasonable request. In short, PYCO has sustained large economic losses, and in the near future faces even greater losses, all the way up to shut down of its plant, loss of customers, and loss of business. If the shut down is long term, PYCO faces the loss of \$95,000,000 in inventory. If the shutdown causes PYCO itself to collapse, the firm's going concern value is approximately \$150,000,000. See Exhibit C (Robert Lacy V.S.) ¶22. Relief is needed on an urgent basis.

### III. APPLICABLE LEGAL STANDARD

49 U.S.C. § 11123(a)(1) authorizes this Board to "direct the handling, routing and movement of [rail] traffic of a rail carrier ... over its own or other railroad lines." The implementing regulations for this statute are set forth at 49 C.F.R. Part 1146. 49 C.F.R. § 1146.1(a) provides that

"Alternative rail service will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."

The showings required for this relief are specified in 49 C.F.R. § 1146.1(b). These showings include

-- a "full explanation, together with all supporting evidence" to demonstrate that the standard for relief specified in section 1146.1(a) is met;

-- a summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why

the incumbent carrier is unlikely to restore adequate service consistent with current transportation needs within a reasonable period of time; and

-- a commitment from another available railroad to provide alternative service, an explanation of how this service would be safely provided without degrading service to current customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service.

### III. PYCO Is Entitled to Relief

#### A. Rail Service Has Been Inadequate over an Identifiable Period of Time

Section 1146.1 is intended to "handl[e] requests for localized immediate service relief," Service Inadequacies, 3 S.T.B. at 972, n.11. In Arkansas Midland Railroad Company, Inc., supra, this Board observed that interruption of rail service had forced two shippers, totalling approximately 6000 carloads per year, to divert their shipments to motor carriers (at the rate of 90 truckloads/day). This Board indicated that a disruption of this magnitude established the kind of "substantial, measurable deterioration or other demonstrated inadequacy in rail service" which is the predicate for relief under 49 C.F.R. § 1146.1. As already indicated, PYCO normally ships over 6000 carloads per year. Current need at PYCO's Plant No. 1 is 26 carloads/day. Under SAW's inadequate service, carloadings are down to 12 per day, with a resulting inventory build-up which will force shut down of PYCO's facilities shortly. In addition, there has been an episode of total loss of service at Plant No. 2 from November 22 to 28, and SAW fails to deliver boxcars to Plant No. 2 despite reasonable request.

As demonstrated in the factual summary, SAW already is on the second bite of the apple this year. From approximately March 10 through the end of June, 2005, SAW service to PYCO was inadequate. Due to the intervention of STB's Office of Compliance and Enforcement, through its Director Melvin Clemens, SAW improved its service by the end of June.

However, on November 18, SAW's president, Mr. Larry Wisener, advised PYCO in effect that he intended to retaliate against them for refusing to contract to purchase PYCO assets for \$5.5 million without any due diligence or negotiation. Since then, Mr. Wisener's railroad has failed to provide adequate service.

SAW cannot lawfully make discharge of its common carrier obligation contingent upon whether PYCO makes some kind of wild commitment to pay the \$5.5 million SAW demands PYCO pay for SAW's rail property in Lubbock. SAW cannot lawfully make discharge of its common carrier obligation contingent upon the piques or emotional state of SAW's management at any particular moment in time, or upon whether SAW thinks it is "worth it."

"Rather, a carrier must adhere to its statutory obligations contingent even if it suffers hardship in so doing. See, e.g., Decatur County Commissioners v. STB, 308 F.3d 710, 715 (7th Cir. 2002) ("[railroads] may not refuse to provide service merely because to do so would be inconvenient or unprofitable") (citing G.S. Roofing Products Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998))..."

Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries--  
Petition for a Declaratory Order, F.D. 33989, served May 15,  
2003, at p. 8. This Board further explained that there are only  
two lawful ways that "a railroad may employ to excuse itself,  
permanently or temporarily, from its common carrier  
obligations:" abandonment or embargo. Id.

In the situation at bar here, SAW "has pursued neither."  
Id. PYCO is entitled to relief, including relief in the form of  
an order providing for alternative rail service by WTL.

B. SAW Is Unlikely to Restore Adequate Rail Service  
Consistent with Current Transportation Needs

There are three possible reasons for SAW's service  
inadequacies: (a) SAW is unwilling to provide service either  
out of the pique of its president (Mr. Wisener) or because Mr.  
Wisener hopes by making it impossible for PYCO to do business  
that he can force PYCO to buy SAW at a price and on terms which  
Mr. Wisener arbitrarily sets, (b) SAW lacks adequate equipment  
and personnel, or (c) a combination of (a) and (b). PYCO  
believes the most likely general explanation is (a), for SAW was  
able to provide service between July and October of this year,  
although SAW's management have complained about lack of  
resources from time to time.

In all events, SAW has now demonstrated an unwillingness  
and inability twice this calendar year to provide adequate rail  
service consistent with PYCO's current transportation needs.  
While the first instance might have been excusable as part of  
SAW's learning process on what it means to be subject to a

common carrier obligation, the second instance indicates that SAW management is inherently unable or unwilling to provide adequate rail service on a reliable basis.

In particular, PYCO has exhausted avenues at peaceful resolution, having already contact STB's Office of Compliance and Enforcement for that Office's assistance in obtaining adequate service. Yet the problem of service inadequacy has recurred.

PYCO believes the problem with SAW to flow at least in part from Mr. Wisener's confrontational style which is characterized by demands to customers which if not acceded to result in retaliation against the customer. Thus, while SAW probably could provide adequate rail service to PYCO if SAW chose to do so, SAW chooses not to do so in retaliation because (a) PYCO refused to purchase SAW's property at the price demanded by SAW without any due diligence or even an appraisal to justify the price, (b) PYCO declined to take SAW's side in SAW's disputes with BNSF, and (c) PYCO complained about SAW service to STB. SAW's approach is manifestly inconsistent with discharge of the federal common carrier obligation.

If the service problems faced by PYCO were not rooted in Mr. Wisener's confrontational and retaliatory style, then presumably they are due to SAW's lack of adequate plant and equipment, for Mr. Wisener sometimes excuses service failures on locomotive unavailability, or inability of his railroad to meet the needs of its customers.

Whether SAW is declining to provide service in order to punish PYCO, or whether SAW is declining to provide service because it lacks capacity, the repeated serious episodes of service inadequacy are sufficient to show that SAW is unlikely to be able to meet PYCO's current transportation needs.

C. Alternative Service Can Be Safely Provided  
by the Alternative Carrier without Jeopardizing  
that Carrier's Current Shippers or Unreasonably  
Interfering with SAW Operations

WTL has informed PYCO that it has adequate equipment and personnel to provide service to PYCO, without impinging on WTL's ability to provide service to WTL's existing customers. WTL already operates in the Lubbock area, is familiar with Federal Railroad Administration (FRA) requirements, and has informed PYCO that it can operate safely. WTL has furnished a letter to PYCO, attached as Exhibit D, confirming WTL's willingness and ability safely to provide alternative rail service to all SAW's current Lubbock customers, including PYCO.

If this Board issues an order making WTL the alternative rail provider for PYCO only, then some arrangement must be made for a sharing of the trackage so that WTL can reach PYCO's two facilities and conduct switching operations over at least some trackage on which SAW continues to operate. Because the management of SAW has exhibited a repeated inability to civil discussion and cooperative agreements, PYCO requests that in the event this Board makes WTL the alternative rail provider for PYCO only that this Board also impose a protocol giving WTL control over dispatch between 9 AM and 2 PM, Monday through

Friday, holidays inclusive, over SAW trackage. In that fashion, safe operations which minimize interference can be better assured.

D. Expedited Treatment Is Required

As demonstrated in the attached verified statements, the existing service disruption is resulting in exhaustion of PYCO's ability to store product, such that PYCO faces an eminent shut down of its Lubbock facilities. PYCO has already sustained over \$8,000,000 in damages due to SAW service inadequacies between November 17 and December 15, 2005. PYCO is now at risk of shut down, and potential loss of its inventory (\$95,000,000) and indeed its business (PYCO's going concern value is estimated at \$150,000,000). While the disruption to PYCO is enormous, this Board should also be mindful that PYCO is comprised of some 120 member gins throughout the southern portion of the United States. SAW's inadequate service threatens the economic viability of PYCO's 120 member gins as well. PYCO will run out of storage by mid-January. PYCO has hastened to place this Petition before this Board as quickly as possible in order to permit this Board to act before PYCO is forced to shut down due to failure of adequate common carrier service in contravention of the ICCTA. PYCO is mindful that the Board's regulations provide five business days for replies and three business days for rebuttals. PYCO requests that the Board adopt a time schedule for a decision permitting alternative service that allows such service to commence as soon as

practicable after January 1, 2006.

IV. Conclusion

For the reasons stated above, PYCO petitions this Board to issue an alternate service order.

Certification of service of this petition as provided in 49 C.F.R. § 1146.1(b)(1)(iv) is provided in the transmittal letter to Mr. Williams as STB Secretary.

Respectfully submitted,



Charles H. Montange  
426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
fax: -3739

Of counsel:

Gary McLaren, Esq.  
Phillips & McLaren  
3305 66th St., Suite 1A  
Lubbock, TX 79413  
(806) 788-0609  
for PYCO Industries, Inc.

Attachments:

Verification by Gail Kring, PYCO Manager and CEO

Exhibit A -- original draft petition (discussing in more detail service inadequacies March-June 05 with attached exhibits)

Exhibit B -- Exchange of letters, counsel for SAW to Mr. Clemens (STB); Mr. Clemens (STB) to counsel for SAW, June 2005

Exhibit C -- Verified Statement of Mr. Robert Lacy, PYCO Sr. V.P. and attached exhibits

Exhibit D -- WTL (proposed alternative carrier) Letter

Verification

I, Gail Kring, depose and state that I am Manager and Chief Executive Officer for PYCO Industries, Inc., that I am authorized to make this Verification, and that I have read the foregoing Petition, and know that the facts asserted therein are true and accurate as stated to the best of my knowledge, information and belief.

Gail Kring  
GAIL KRING

Subscribed and sworn to before me on this 15th day of December 2005, by GAIL KRING, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Cynthia J. Harrison  
NOTARY PUBLIC, STATE OF TEXAS

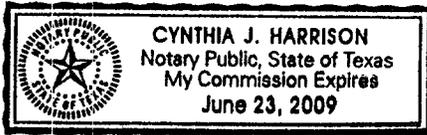


Exhibit A

A

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

STB SERVICE ORDER NO. \_\_\_\_\_

**PYCO INDUSTRIES, INC.  
EMERGENCY SERVICE ORDER**

**CONCERNING**

**SOUTH PLAINS SWITCHING LTD.**

---

**PETITION FOR EMERGENCY SERVICE ORDER**

**EXPEDITED CONSIDERATION REQUESTED**

---

Comes now, Petitioner, PYCO INDUSTRIES, INC. (hereinafter "PYCO") pursuant to 49 U.S.C. § 11123 and 49 C.F.R. § 1146, and files this Petition for Emergency Service Order ("Petition") against and concerning South Plains Switching Ltd. ("SAW") and would show as follows:

PYCO is a Texas corporation headquartered in Lubbock, Texas and engaged in the marketing of cottonseed and in the processing and marketing of cottonseed byproducts, including cottonseed oil. The business has been operating for decades and has a national customer base. PYCO is heavily dependent on rail service for the shipment of its products to all parts of the country.

PYCO has been told by SAW that PYCO is the switching company's largest customer. PYCO is aware that it is one of the largest, if not the largest, rail shipper in the Lubbock, Texas area.

In March 2005, PYCO contacted SAW and the main line carrier, BNSF, to inform both companies of two items. First, timely and adequate rail service to PYCO's two processing facilities was decreasing and PYCO was beginning to receive complaints about the timely shipment of its products by rail from PYCO customers. Second, PYCO informed the railroads that it was going to be increasing production in April 2005, and would need assurance of an adequate supply of railcars, 20 cars per day, timely switched, to handle the increased production.

Representatives from SAW informed PYCO that they would do all possible to meet the needs, but that they were largely hampered by actions of the main line carrier, the BNSF, in blocking SAW switching operations. SAW also noted that PYCO's Plant No. 2 was at one time serviced by four (4) switches and that all but one switch had been removed, thereby slowing switching operations at Plant No. 2.

The timely shipment of railcars is of paramount importance since PYCO in March 2005 had upcoming customer contracts with a product value in excess of \$40,000,000 and requiring somewhere in the neighborhood of 635 railcars to deliver the product. PYCO utilizes a fleet of between 170 and 200 leased railcars to meet its customer's need.

SAW officials indicated to PYCO that the slow service was not of SAW's making, but was instead a retaliatory measure against SAW, with the BNSF blocking SAW's switching operations, resulting from tension between SAW and BNSF over long standing litigation between the two parties. PYCO indicated that it did not want to be 'caught in the middle' of the lawsuit and PYCO's legal counsel sent a letter to BNSF Vice President, Paul Hoefler, on March 11, 2005, detailing its emergency situation and asking for specific assistance unlocking Switch #231 to restore greater

service to its Plant No. 2. A copy of the aforementioned letter is attached hereto and incorporated herein as Exhibit 1.

The BNSF responded to PYCO's letter and a meeting between PYCO and BNSF's legal counsel was held in late March. At that meeting, several options were discussed pertaining to assistance the BNSF might provide to alleviate and provide help for the soon to be increased rail traffic. The possible reinstallation of the previously removed Switch #320 was discussed, as is summarized by PYCO's legal counsel's letter of March 28, 2005 to BNSF's legal counsel, same attached hereto as Exhibit 2 and incorporated herein by reference.

From April to the present date, service has only grown worse at PYCO. None of the discussions between PYCO, BNSF and SAW and their respective legal counsel proved fruitful in gaining an additional switch to serve PYCO's Plant No. 2 or in gaining better service. Timely switching and the provision of twenty (20) cars per day to PYCO has also not been achieved.

On April 5, PYCO first contacted by letter, Mr. Melvin Clemens with the Surface Transportation Board. Attached is said letter, incorporated herein by reference, as Exhibit 3. The letter states that PYCO would be needing the switching of approximately 20 rail cars per day for approximately 90 days and that PYCO was caught in the middle of a fray between BNSF and SAW.

On May 5, PYCO sent correspondence to Larry Herzig with STB detailing the continuing problems and indicating that Mr. Larry Wisener of SAW had informed PYCO that his company was not to blame for the delays, but instead BNSF was only giving SAW limited switching involving the main line and that the problems were that of the BNSF. This letter is incorporated herein by reference and attached as Exhibit 4.

Again on May 23 and June 5, 2005, letters were sent to Mr. Clemens with the STB regarding the ongoing problems and are incorporated herein by reference as Exhibits 5 and 6 respectively.

In the meanwhile, Mr. Wisener of SAW has made physical threats against officials of PYCO, has instituted a surcharge on the switching of railcars and has threatened an embargo.

The latest set of "instructions" sent to PYCO on June 17, 2005, by Mr. Wisener of SAW indicates that he is to be the sole contact for PYCO at SAW concerning switching services. See Exhibit 7 incorporated herein by reference.

PYCO can no longer afford to sit idly by and believe that any resolution is going to be achieved without formal complaint. PYCO is receiving inadequate rail service pursuant to 49 C.F.R. § 1146 and has documented the rail car movements to its facilities and incorporates same as Exhibit 8 of this complaint. A review of the documentation will show that, with few exceptions, PYCO has not been furnished 20 rail cars per day for loading, even though a large number of railcars are supposedly available for immediate switching according to Mr. Wisener's legal counsel's letter dated June 13, 2005, incorporated herein as Exhibit 9.

PYCO has secured a commitment from West Texas & Lubbock Railway dated June 21, 2005, for the provision of switching services. Same is incorporated herein by reference as Exhibit 10. The BNSF has indicated to PYCO that cooperation would be given to PYCO and the alternative switching company should the Board grant this emergency petition.

PYCO continues to lose revenue and the goodwill of purchasers of its products delivered by railcar as a result of the actions expressed in this complaint. All PYCO has ever asked since the initial notification of the rail companies and the STB is the timely provision of 20 cars per day for

PYCO's use. Instead, PYCO continues to be ignored by SAW and given additional requirements for service, service which has been entirely inadequate.

PYCO respectfully requests the emergency action of the STB to remove SAW as the switching entity for PYCO's rail operations in Lubbock and to install West Texas & Lubbock Railway as the switching entity.

Respectfully submitted,

PHILLIPS & McLAREN, L.L.P.  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, Texas 79413  
Telephone: (806) 788-0609  
Facsimile: (806) 785-2521

By: \_\_\_\_\_  
Gary R. McLaren  
State Bar Number 00791232

ATTORNEYS FOR PYCO INDUSTRIES, INC.

VERIFICATION

THE STATE OF TEXAS           §  
  §  
COUNTY OF LUBBOCK       §

BEFORE ME, the undersigned Notary Public, on this date personally appeared GAIL KRING, who, after being duly sworn, stated under oath that he is the President of PYCO INDUSTRIES, INC., Petitioner in this action; that he has read the above Petition for Emergency Service Order; and that every statement contained in the Petition in is within his personal knowledge and is true and correct.

\_\_\_\_\_  
Gail Kring

SWORN TO AND SUBSCRIBED BEFORE ME on this the \_\_\_\_\_ day of June 2005, to certify which witness my hand and seal of office.

\_\_\_\_\_  
Notary Public State of Texas

**EXHIBIT 1**

**RICHARDS, ELDER, SRADER, PHILLIPS & McLAREN, L.L.P.**

ATTORNEYS AT LAW

GARY R. McLAREN

3305 66<sup>TH</sup> STREET, SUITE 1A  
LUBBOCK, TEXAS 79413

TELEPHONE: (806) 788-0609  
TELECOPY: (806) 785-2521  
gmclaren@respm.com

March 11, 2005

Mr. Paul Hoefler  
Vice President  
BNSF Railway  
**Via Telefax 817-352-2399**

RE: Emergency Situation - Switch #231, Track #9298, 9200, Lubbock, Texas

Dear Paul:

Please recall that I was with the Lubbock law firm of McWhorter, Cobb and Johnson for years and assisted D. Thomas Johnson in railroad litigation for the Company. I left the firm last year, but have an emergency situation involving my client, and BNSF customer, PYCO Industries, Inc. here in Lubbock.

You will recall that PYCO is a cottonseed oil mill, one of the largest industry sidings in Lubbock, and a longtime BNSF customer. The situation involves their Plant No. 2 and specifically track numbers 9298 and 9200 and switch number 231. Because of an ongoing conflict between BNSF and short line South Plains Lamesa Railroad, switch number 231 has been locked out, effectively stranding millions of dollars of PYCO cottonseed oil dependent on said switch.

Over time, PYCO has suffered as a result of the continuing conflict between BNSF and South Plains. Plant No. 2 originally benefitted from four switches allowing ingress/egress to the plant and is now down to zero. Over the course of the last 48 hours, the owner of South Plains, Mr. Larry Wisener, has told PYCO that all service to Plant No. 2 is now terminated and that no service will be available until new contractual arrangements can be reached between BNSF and South Plains and PYCO.

PYCO, as you can well appreciate, depends on the rail to ship its product. The direct and consequential damages arising from a lock out of switch #231 will be significant. Moreover, PYCO will be entering its heaviest delivery season within the next two weeks. It is imperative that service be restored immediately to PYCO at switch #231.

PYCO does not wish to become a part of the fray between BNSF and South Plains; however, if PYCO cannot ship its product we will have no choice but to seek legal redress and injunctive relief.

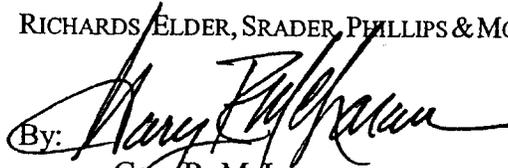
March 11, 2005  
Page 2

As a former railroad lawyer, I am asking for your assistance in this matter without need for litigation. My clients and I will be available for conference call at any time during the day or will fly to Fort Worth immediately to address this problem. Notwithstanding that this letter comes to you on Friday morning, for which I wish I could alter the timing but can't, the weekend does not relieve the stress on our client's shipping needs. Consequently, if we need to be at the BNSF campus on Saturday morning, we will be present.

Thank you for your attention to this matter of utmost importance. I look forward to your response.

Very truly yours,

RICHARDS ELDER, SRADER, PHILLIPS & McLAREN, L.L.P.

By:   
Gary R. McLaren

GRM/cjh

**EXHIBIT 2**

**RICHARDS, ELDER, SRADER, PHILLIPS & MCLAREN, L.L.P.**

ATTORNEYS AT LAW

GARY R. MCLAREN

3305 66<sup>TH</sup> STREET, SUITE 1A  
LUBBOCK, TEXAS 79413

TELEPHONE: (806) 788-0609  
TELECOPY: (806) 785-2521  
gmclaren@respm.com

March 28, 2005

Mr. Donald E. Herrmann  
Kelly, Hart & Hallman  
201 Main Street, Suite 2500  
Fort Worth, Texas 76102  
**Via Telefax 817-878-9280**

RE: PYCO Industries, Inc./BNSF

Dear Don:

Thank you for meeting with the management of PYCO Industries, Inc. and me last Friday to discuss PYCO's rail problems.

I hope that the Burlington Northern Santa Fe ("BNSF") will be able to gain an appreciation of the scope of PYCO's problem here in Lubbock. Consistent with the documents provided to you on Friday, sluggish rail movement at PYCO's Plant Number 2 is only growing worse. As we discussed, PYCO will need to ship in excess of 635 rail cars of product from Plant Number 2 over the course of the next six months. If one considers that the total value of the product needed to be shipped exceeds \$40 million, it is easy to understand PYCO's urgency in gaining a solution to the present problem.

As we discussed, PYCO does not have an interest in the ongoing legal battle between the BNSF and Mr. Wisener. Indeed, PYCO is probably one of the larger customers for both entities in the Lubbock area. However, PYCO will not stand by and allow sluggish rail movements to damage existing and future sales. Certainly, we seek an amicable and business solution short of litigation.

As we discussed, when PYCO constructed Plant Number 2 years ago, it had access to the main lines from four switches. Over time, all but one switch has been removed. Our investigation reveals that the removal of the other three switches is the cause of PYCO's present rail problems and that removal was done between BNSF and Mr. Wisener as a part of the ongoing dispute between those parties, having nothing to do with PYCO, other than the present price that PYCO is having to pay for not getting its product to destinations in a timely manner as a direct result of the feud between BNSF and Mr. Wisener.

March 28, 2005

Page 2

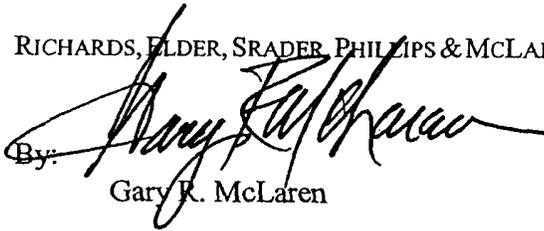
As we also discussed on Friday, a relatively simple solution exists to the problem. If switch 320 were reinstalled, PYCO's Plant Number 2 would once again have the most direct access to rail service, and we are convinced the present problem would be solved. We understand that this will require a certain amount of cooperation between BNSF and Mr. Wisener in order to facilitate our movements along the main line. We have spoken with Mr. Jim Gorsuch, Mr. Wisener's attorney, and he informs us that his client is agreeable to such a reinstallation to solve the existing problems and avoid further litigation.

Don, as you know, time is of the essence. Rail shipments from Plant Number 2 will begin increasing on April 1 as the plant reaches full production capacity. We would urge the BNSF to commit to a reinstallation of Switch 320 as soon as possible.

Thank you for your help in this matter.

Very truly yours,

RICHARDS, ELDER, SRADER, PHILLIPS & McLAREN, L.L.P.

By:   
Gary R. McLaren

GRM/cjh

**EXHIBIT 3**

# P Y C O

**PYCO Industries, Inc.**  
Processors of Cottonseed Products

P.O. BOX 841  
LUBBOCK, TX 79408-0841  
TELEPHONE: (806) 747-3434  
FAX: (806) 744-3221

P.O. BOX 1320  
GREENWOOD, MS 38935-1320  
TELEPHONE: (662) 453-4312  
FAX: (662) 455-6607

April 5, 2005

Via Facsimile 866-254-1792

Mr. Melvin F. Clemens, Jr.  
Director, Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street NW, Suite 780  
Washington, D.C. 20423-0001

RE: Threat of Discontinuing Rail Service by South Plains Switching, Ltd. Co. and South Plains Lamesa Railroad, L.L.C. to PYCO Industries, Inc.  
Track location - Lubbock, Texas

Dear Mr. Clemens:

PYCO Industries, Inc. ("PYCO") is headquartered in Lubbock, Texas and is the largest cottonseed processing facility in the world. In Lubbock, PYCO operates two plant facilities, each receiving rail service. We believe that PYCO is one of the larger industry sidings in Lubbock.

PYCO leases its rail cars and depends on South Plains Lamesa Railroad, Ltd. and South Plains Switching, Ltd. Co. (collectively referred to as "South Plains") to accomplish switching at Plant Number 1 and Plant Number 2 in Lubbock. After switching, railcars are handed off to the Burlington Northern Santa Fe Railroad ("BNSF") for shipment and empty cars are collected from same.

Approximately one month ago, South Plains was advised by PYCO that beginning around April 1, 2005, the number of railcars that needed to be switched at Plant Number 2 would increase from 6 to 8 railcars per week to 20 railcars per day for a period of approximately 90 days. The increase in railcars pertained to an increase in product being shipped from Plant Number 2 resulting from a large cotton crop.

Upon being told of the planned shipping increase, Mr. Larry Wisener of South Plains advised PYCO management that South Plains might not be able to accommodate the increased switching traffic because of the locking of Switch 231. We have enclosed for your convenience a map showing the location of Plant Number 2 and the subject trackage. As you will note on the map, Plant Number

April 5, 2005  
Page 2

2 is supplied by Track Number 310. Mr. Wisener indicated that South Plains and the BNSF were in litigation over a variety of rights pertaining to the BNSF's sale of certain trackage to South Plains. Mr. Wisener indicated to PYCO that South Plains' "hands were tied" and that PYCO needed to speak with the BNSF to make certain that switching could occur at Plant Number 2.

By way of history, when Plant Number 2 was constructed in the mid 1990's, the facility was supplied by track with four switches providing ingress/egress to our industry track. Today, the track serving Plant Number 2 has only one switch, the remainder having been removed or locked out by the BNSF or South Plains.

Aware of the impending problems, PYCO representatives tried to talk with the local BNSF representatives about the possibility of reopening Switch No. 231, which according to South Plains had been locked out by the BNSF. Both PYCO and South Plains are of the opinion that reopening Switch 231 would allow more timely switching at Plant Number 2. The local BNSF representatives said that because of the ongoing litigation between BNSF and South Plains, reopening Switch 231 would not be possible.

On March 11, 2005, PYCO instructed its attorney to draft a letter to BNSF seeking their assistance in the matter. All PYCO wanted, and all PYCO seeks today, is timely rail service not obstructed by the ongoing litigation between the railroads. A copy of PYCO's legal counsel's letter to the BNSF is attached.

BNSF responded by arranging a meeting in Lubbock between PYCO and their attorney, Mr. Don Hermann of Fort Worth, Texas, on March 25, 2005. PYCO was told at that meeting that it was unlikely that BNSF would unlock Switch 231. An alternative of reinstalling Switch 320 was discussed and Mr. Hermann pledged to discuss same with the BNSF. Also attached for your convenience is PYCO's legal counsel's letter dated March 28, 2005, summarizing the meeting.

On Monday, April 4, Mr. Wisener informed PYCO that on Wednesday morning, April 6, South Plains intended to "shut down" service to Plant Number 2 because the industry track was "unlevel and unsafe." Mr. Wisener gave no indications as to how long the track would be closed. Mr. Wisener presented no evidence or documentation that an "embargo" on the subject track had been secured. A closure of this track will have direct and consequential damages to PYCO in their not being able to ship contracted product to their customers. Sales on current customer contracts between April 1 and July 1 total over \$40,000,000 in product value. We also enclose our attorney's letter to South Plains's legal counsel dated April 4, 2005.

Finally, during the night between Monday April 4 and Tuesday April 5, a derailment occurred at PYCO's Plant Number 1. Mr. Wisener was called by PYCO and came to the location. Mr. Wisener informed PYCO that he "had customers other than PYCO" and "just didn't have time to clean up a mess right now." As of the time of this letter, South Plains has made no efforts to begin work on the derailment, effectively shutting down Plant Number 1.

April 5, 2005

Page 3

PYCO is in great jeopardy of tremendous financial harm as a result of the actions of the railroads mentioned herein and the contemplated actions in the near future. We would respectfully request that the Surface Transportation Board act immediately to prevent the closure of the track servicing Plant Number 2 of PYCO, and to take action to solve the problems existing between the railroad companies which are using PYCO as a pawn in their litigation. Finally, we would also request the Surface Transportation Board's help in ordering South Plains to begin work to rectify the derailment at Plant Number 1 at PYCO.

This matter is of the utmost importance to our business. I would be happy to provide you with any additional information necessary to assist us in this matter. Please do not hesitate to contact me. Thank you for your cooperation in this matter.

Yours very truly,

PYCO INDUSTRIES, INC.

By: *Gail Kring*  
Gail Kring

GK:cjh  
Enclosures

**EXHIBIT 4**

# P Y C O

P.O. BOX 841  
LUBBOCK, TX 79408-0841  
TELEPHONE: (806) 747-3434  
FAX: (806) 744-3221

**PYCO Industries, Inc.**  
Processors of Cottonseed Products

P.O. BOX 1320  
GREENWOOD, MS 38935-1320  
TELEPHONE: (662) 453-4312  
FAX: (662) 455-6607

May 3, 2005

**Via Facsimile 202-565-9011**

Mr. Larry Herzig  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street NW, Suite 780  
Washington, D.C. 20423-0001

Re: PYCO Industries, Inc. of Lubbock  
Application for relief from inadequate  
Service through the Consumer  
Assistance Program

Dear Mr. Herzig:

Consistent with our telephone conversation of earlier this afternoon, please find faxed herewith a letter sent to Mr. Clemens and dated April 5, 2005. The contents of the attached letter is supplemented by the information contained in this letter.

As we discussed in our telephone conversation, PYCO continues to be used as a pawn in ongoing litigation between the BNSF and South Plains Lamesa Railroad, Ltd., and South Plains Switching, LTD., Co. (collectively referred to as "South Plains"). Each entity blames the other for the poor service being afforded to PYCO. When a possible solution is proposed by one railroad, the other railroad balks at the solution and claims that the proposal would interfere with the ongoing litigation. Meanwhile the situation grows worse at PYCO.

Railcars loaded at PYCO are resting from four to seven days before being switched onto an outbound train. The amount of time between loading and switching seems to vary based upon the temperament of South Plains or the BNSF. Mr. Larry Wisener claims that BNSF is to blame because the BNSF only gives South Plains a small amount of time to use their track for switching, always on a spur of the moment basis with no regularity, routine or frequency. The BNSF claims that South Plains is given daily access to the mainline. This is one example of the competing excuses voiced by the railroads, while no resolution is ever reached.

PYCO has sought a daily switch on Monday through Friday from the railroads since the problems were first identified in mid-March 2005. Various proposals have been put forth

from BNSF including the installation of a new switch, use of adjoining trackage, etc, but in each instance, the proposals die due to a lack of cooperation between the railroad companies.

As a result of the slowing of car movements PYCO is beginning to accumulate significant financial costs and losses, in addition to customer complaints to PYCO resulting from an inability to timely receive refined cottonseed oil.

To add insult to injury, South Plains has instigated a per car surcharge and the BNSF has increased its demurrage charge. Efforts to discuss purchase of the South Plains track involved in this situation have stalled due to a lack of ability to receive financial information about the track from South Plains. We also understand that BNSF has a contractual right of first refusal to purchase said trackage, if sold.

Although the circumstances and inter disputes are complex, PYCO seeks only one true measure of relief, timely rail service. We began petitioning the railroad companies before the problems increased. To date, we receive less timely service than when we first began to ask for assistance from these railroads. The promises are many, but the solution never materializes.

We respectfully request the Surface Transportation Board's intervention in this matter. Without your continued assistance to final resolution of the problem, nothing will occur except the continued financial losses occurring to PYCO because of inadequate rail service. Please do not hesitate to contact us for any additional information needed.

Thank you for your consideration of these issues.

Yours truly,



Gail Kring  
President

attachment

**EXHIBIT 5**

# P Y C O

P.O. BOX 841  
LUBBOCK, TX 79408-0841  
TELEPHONE: (806) 747-3434  
FAX: (806) 744-3221

**PYCO Industries, Inc.**  
Processors of Cottonseed Products

P.O. BOX 1320  
GREENWOOD, MS 38935-1320  
TELEPHONE: (662) 453-4312  
FAX: (662) 455-6607

May 23, 2005

Via Facsimile 866-254-1792

Mr. Melvin F. Clemens, Jr.  
Director, Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street NW, Suite 780  
Washington, D.C. 20423-0001

RE: Continuing Inadequate Rail Service by South Plains Switching, Ltd. Co. and  
South Plains Lamesa Railroad, L.L.C. to PYCO Industries, Inc.  
Track location - Lubbock, Texas

Dear Mr. Clemens:

PYCO Industries, Inc. ("PYCO") has been in contact with your office on several occasions during the previous sixty (60) days concerning problems of inadequate rail service at our two locations in Lubbock, Texas. As you are aware, the South Plains Lamesa Railroad, Ltd. and South Plains Switching Ltd., Co. (collectively referred to as "South Plains" or "SAW") performs switching for PYCO, after which the railcars are handed off to the Burlington Northern Santa Fe ("BNSF") for shipment and empty cars are collected from same.

Our letter to you dated April 5, 2005, copy enclosed for your convenience and same incorporated herein by reference, detailed the beginning of our company's switching problems which began to grow worse in March 2005.

In May, we sent a letter to Larry Herzig with your agency, copy enclosed for your convenience and incorporated herein by reference, which detailed the situation only growing worse, even though South Plains and the BNSF had paid lip service to wanting to "fix" our problem.

Indeed, no "fix" has occurred. We enclose a document entitled Railroad Switching Log which we incorporate herein by reference. This log was compiled by PYCO personnel and details the railcar switching problems for just eight days, from May 11 to May 19, 2005. Moreover, we have attempted to contact Mr. Eddie Hale with the BNSF for over a week concerning rail problems, and Mr. Hale will not return our calls.

As a direct result of the slow switching of railcars, PYCO lost approximately \$450,000 during the month of April. Consequently, pursuant to 49 CFR Section 1146.1, PYCO seeks your

agency's assistance with our rail problems. PYCO has had a substantial measurable deterioration in its rail service over an identified period of time from April 1, 2005, to date.

PYCO's discussions with South Plains and BNSF have not resulted in any positive change to the switching crisis. Each day PYCO's rail problems grow worse, resulting in lost revenues which are directly attributable to poor, and sometimes non-existent rail service. PYCO does not have reason to believe that adequate rail service consistent with its current transportation needs will be restored within a reasonable period of time given the continuing war between the BNSF and South Plains, a war in which PYCO is the casualty.

Our situation is urgent. Please let us know what additional information you need from our company in order to give us some assistance.

Thank you for your help in this matter.

Yours very truly,

PYCO INDUSTRIES, INC.

By: *Gail Kring*  
Gail Kring

GK:cjh  
Enclosures

**EXHIBIT 6**

# P Y C O

P.O. BOX 841  
LUBBOCK, TX 79408-0841  
TELEPHONE: (806) 747-3434  
FAX: (806) 744-3221

**PYCO Industries, Inc.**  
Processors of Cottonseed Products

P.O. BOX 1320  
GREENWOOD, MS 38935-1320  
TELEPHONE: (662) 453-4312  
FAX: (662) 455-6607

June 8, 2005

Via Telefax No. 202-565-9011

Mr. Melvin F. Clemens, Jr.  
Director, Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street NW, Suite 780  
Washington, D.C. 20423-0001

RE: Threat of Discontinuing Rail Service by South Plains Switching, Ltd. Co. and  
South Plains Lamesa Railroad, L.L.C. to PYCO Industries, Inc.  
Track location - Lubbock, Texas

Dear Mr. Clemens:

This morning I received by fax a copy of a letter from Tom McFarland, attorney for South Plains Lames Railroad and South Plains Switching ("SAW") addressed to you. Mr. McFarland's letter of five pages and multiple enclosures entirely blames the BNSF for all of PYCO's rail service problems. Just guessing, we believe you will receive a letter from the BNSF blaming SAW for the problems. Meanwhile, just as I told you in our very first communication, PYCO is stuck in the middle of the fight, experiencing worse service by the day, while the railroads collect their fees and blame one another.

I thought it was the job of the STB to help the shipper of rail freight under circumstances such as described? We began talking with you in April, it is now June, nothing has happened except the continued exchange of finger pointing by the railroads. It would seem that this set of facts would surely warrant the STB taking action on its own to remedy the situation, rather than putting PYCO through the hardship of a formal complaint and subsequent problems of having to deal with the railroads on a daily basis, after our company files a formal complaint.

Our company cannot afford continued delays towards a resolution. Please tell us of the STB's proposed actions in this matter. Meanwhile, we feel that our elected representatives may find these matters of interest as to the rail industry during an era of record railroad industry earnings and declining quality of rail service.

We would appreciate a phone call from you at your earliest convenience.

Yours very truly,

PYCO INDUSTRIES, INC.

By: *Gail Kring*  
Gail Kring

cc: Congressman Randy Neugebauer  
Longworth House Office Building  
Room 1026  
Washington, DC 20515

Senator Kay Bailey Hutchison  
Russell Office Building  
Room 284  
Washington, DC 20510

Senator John Cornyn  
Russell Office Building  
Room 370  
Washington, DC 20510

**EXHIBIT 7**

**South Plains Lamesa Railroad, Ltd.  
South Plains Switching, Ltd. Co.  
P. O. BOX 64299                      LUBBOCK, TEXAS 79464  
PHO: (806)828-4841                      FAX: (806)828-4863**

June 17, 2005

Mr. Gail Kring  
PYCO Industries  
P. O. Box 841  
Lubbock, TX 79408

Dear Mr. Kring:

In reference to the fax I received from Robert Lacey dated June 10, 2005, (copy attached) referencing seed shipments from Plant #2. I do not see where BNSF was notified of this activity nor did I see a date for the re-installation of switch #320, that is needed to insure dependable rail service to Plant #2. Please keep us advised as to when the re-installation will occur.

PYCO personnel will need to contact Larry D. Wisener at the Slaton office (see address and phone numbers in letterhead) concerning all rail services that may be required other than the number of rail cars and the type of car that is needed for each days loading. This daily information may be given to the SAW foreman and /or switch crew.

Any car and /or track damage is the sole responsibility of PYCO. NO repairs of any kind are to be made on SAW property by either PYCO or PYCO's outside contractors.

PYCO is not allowed to conduct switching operations in or on SAW property. Such operations in the last four (4) months have resulted in two (2) major derailments causing extensive track and equipment damage. SAW will no longer assume the liability in these situations.

A formal agreement between PYCO and SAW will need to be entered into concerning designated inbound and outbound tracks. Also a formal agreement will need to be entered into concerning any easements that PYCO may have in use now or may need. A formal agreement will need to be entered into concerning PYCO meeting the

requirements that SAW is requiring for liability coverage for continued access to SAW property.

As of June 13, 2005, SAW had in excess of 200 railcars on storage tracks and in SAW's Yard, restricting SAW's switching operations and delaying service to SAW's other customers. As information, total track capacity on these tracks is approximately 320 rail cars.

It is necessary for PYCO to secure its own infrastructure for railcars outside of plant capacity. All railcars that cannot be received by PYCO after July 1, 2005, will be "constructively placed" and will therefore come under SAW Miscellaneous Service Program, Effective April 11, 2005, copy of which was recently given to you.

PYCO personnel should begin to review easements and rights-of-way to determine what is needed at Plant #1, Mr. Wisener should be contacted so that a formal agreement which meets all the requirements, can be agreed upon.

We hope to resolve these issues quickly in order to accommodate both PYCO's and SAW's operational needs.

Sincerely,



Larry D. Wisener  
President

Copy Faxed: Gary McLaren  
James Gorsuch  
Thomas McFarland  
Mel Clemens

LDW/dnw

**EXHIBIT 8**

## Railroad Switching Log

Wednesday, May 11<sup>th</sup> 2005. Tarped and switched fifteen loaded seed cars to #5 track. Only five empty seed cars in SAW switch yard. Forty empty seed cars are setting on #9200 track next to cemetery. SAW sat waiting from 3:30pm to 5:45pm to cross BNSF main line, due to a train with an engine and five cars.

Thursday, May 12<sup>th</sup> 2005. Tarped and switched five loaded seed cars to #5 track. Put four tank cars on #6 track to be taken to Plant #2. Talked to Rodney (SAW Foreman) at 9:45am, he said the car will be switched to Plant #2 tomorrow morning. Loaded and switched four meal hoppers to #5 track. SAW switched fifteen empty seeds cars to main track from BNSF yard. Switched and cleaned fifteen seed cars.

Friday, May 13, 2005. Tarped and switched fifteen seed cars to #5 track. SAW switched forty-five empty seed cars from BNSF yard and #9200 track to their main. Cleaned twenty seed cars for Sunday loading. The four tank cars from Plant #2 has not been moved and is still on #6 track. Called Rodney at 10:45am about switching the tankers. He said it would be Monday morning. Loaded five meal hoppers and set out on SAW main track.

Saturday, May 14, 2005. Switched and loaded five meal hoppers. Switched to SAW tracks at 2pm.

Monday, May 16, 2005. Tarped and switched twenty seed cars to #5 track. Switched and cleaned twenty seed cars. Tank cars still sitting on #6 track for Plant #2.

Tuesday, May 17, 2005. Tarped and switched twenty seed cars to #5 track. Switched and cleaned eighteen seed cars. Tank cars pulled off #6 track at 10:30am. SAW pulled two lint cars from plant #2 at 2:30pm, but did not have the tank cars with them. Called Rodney at 4:24pm. He said he would spot them at 8:30am Wednesday due to his work load. "They have run out of time!"

Wednesday, May 18, 2005. Tarped and switched eighteen seed cars to #5 track. Tank cars arrived at Plant #2 @ 11am. Eleven empty seed cars on SAW main track, and twenty-one empty seed cars on #9200 track which has been in Lubbock since 4/14/05. Four meal hoppers were loaded and switched to #5 track. SAW brought twelve empty seed cars from BNSF yard to their main track @ 4:35pm. Switched and cleaned four seed cars @ 4:40pm to have at least fifteen cars ready to load.

Thursday, May 19, 2005. Tank cars at Plant #2 filled and weighted out @ 8am. Tarped and switched fifteen seed cars to #5 track. Only eight seed car remained on SAW main track, these were switched and cleaned by 1pm. Talked to Rodney @

11am about empty seeds cars, he said he would have fifteen cars on the main track in about 10 minutes. SAW switched thirteen seed cars on to the main track @ 3pm.

Friday, May 20, 2005. Tarped and switched fifteen seed cars to #5 track. Only six empty seed cars on main track. Talked to Rodney @ 9:45am, he said he would have me twenty seed cars by noon. Switched and cleaned the six seed cars on the main track. Called Rodney @ 1:41pm and he said it was going to after 4pm because of a derail.

Monday, May 23, 2005. Tarped and switched six seed cars to #5 track. Loaded and switched one meal hopper to #5 track. Switched and cleaned the twelve empty seed cars on SAW main track. Penny-Newman showed fifty-three empty cars in town. Track #9200 still has the twenty-one empty seed car sitting on it since April. Talked to Rodney @ 11:35am, he said he would get us at least twenty cars by 5pm. I asked him if he would just bring the cars from #9200 track. His response was he would when they had time; there were a lot of cars needed to be switched in the BNSF yard.

Tuesday, May 24, 2005. Tarped and switched twelve seed cars to #5 track. SAW switched thirty empty seed cars for BNSF yard to their main track. Track #9200 still has the twenty-one empty seed car sitting on it since April. Switched and cleaned fifteen seed cars. Switched and loaded four meal hopper cars to #5 track by 7pm. Talked to Rodney @ 8:25am about making sure to tanks and box cars at plant #2 would be switched today. His response was that he would try. These cars were released to the SAW on Wednesday, May 18, 2005. Cars were switched at plant #2 by the SAW @ 10:30am.

Wednesday, May 25, 2005. Tarped and switched fifteen seed cars to #5 track. SAW switched in around thirty-one empty seed cars to their main track. Cars on track #9200 still have not been moved. Switched and cleaned twenty seed cars. Switched and loaded four meal hoppers to #5 track.

Thursday, May 27, 2005. Tarped and switched twenty seed cars to #5 track. Switched and cleaned fifteen seed cars. Switched and loaded four meal hoppers to #5 track.

Friday, May 27, 2005. Tarped and switched fifteen seed cars to #5 track. Switched and cleaned fifteen seed cars. Switched and loaded six meal hoppers to #5 track. One empty seed car left on SAW main track. Talked to Rodney @ 9:45am about switching the seed cars on #9200 track to their main track. He said they would try to get them switched today sometime. Switched and retarped #BN585294 seed car on #6 track. This car had been sitting on #6 track awaiting parts to repair it.

**Tuesday, May 31, 2005.** Tarped and switched fifteen seed cars to #5 track. SAW switched thirty-four seed cars in on their main track. Switched and cleaned fifteen seed cars. Do not know if these cars were switched from #9200 track or BNSF yard.

**Wednesday, June 1, 2005.** Tarped and switched five seed cars to #5 track due to heavy rain. Switched and cleaned five seed cars.

**Thursday, June 2, 2005.** Tarped and switched eleven seed cars to #5 track. Switched and cleaned eleven seed cars.

**Friday, June 3, 2005.** No seed cars were loaded or switched due to rain.

**Monday, June 6, 2005.** Tarped and switched thirteen seed cars to #5 track. Switched and cleaned thirteen seed cars.

**Tuesday, June 7, 2005.** Tarped and switched ten seed cars to #5 track. Switched and cleaned fifteen seed cars. Track #9200 still has roughly twenty-eight empty seed cars on it and around fifteen empty seed cars on SAW main. Switched and loaded four meal hoppers to track #5.

**Wednesday, June 8, 2005.** Tarped and switched ten seed cars to #5 track. Switched and cleaned ten seed cars. Derailed clay car on SAW main track @ 5:30pm.

**Thursday, June 9, 2005.** No switching for seed cars due to tarping 4W seed pile.

**Friday, June 10, 2005.** Tarped and switched ten seed cars to #6 track. Switched and cleaned six seed cars due to SAW main track being repaired.

**Monday, June 13, 2005.** Tarped and switched eight seed cars to #6 track.

**EXHIBIT 9**

**JAMES L. GORSUCH, P.C.***Attorney at Law*

4412 - 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424

Telephone: (806) 771-6474  
Facsimile: (806) 771-6476  
jgorsuch@nts-online.net

June 13, 2005

**Via Facsimile: 785-2521**

Mr. Gary R. McLaren  
**RICHARDS, ELDER, SRADER,  
PHILLIPS & McLAREN, L.L.P.**  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, Texas 79413

Re: Potential Embargo of PYCO Rail Cars – South Plains Switching

Dear Gary:

Larry Wisener of South Plains Switching informs me that as of Monday, June 13, 2005, there were over 200 PYCO cars in his yard. The yard is plugged and movement of rail cars, including PYCO cars and other customers, cannot occur because there were so many cars in storage.

South Plains Switching plans to embargo any future PYCO shipments from handling. We attach to this letter a copy of Revised Circular TD-1 from the Association of American Railroads regarding embargos.

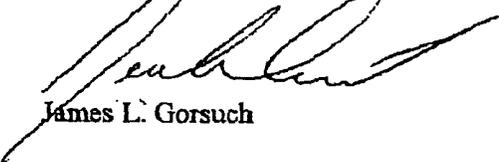
South Plains wishes to notify PYCO in an effort to obtain PYCO's cooperation in rerouting or finding storage places for other cars that may be headed to Lubbock as soon as possible.

If you have any questions, please give me a call.

We remain,

Very truly yours,

**JAMES L. GORSUCH, P.C.**



James L. Gorsuch

JLG/jeb

**EXHIBIT 10**



---

**Permian Basin Railways**

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

---

June 21, 2005

Mr. Melvin F. Clemens, Jr.  
Director, Office of Compliance and Enforcement  
Surface Transportation Board  
Suite 780  
1925 K Street, N. W.  
Washington, DC 20423-0001

RE: PYCO Industries, Inc.

Dear Mr. Clemens:

This is to certify that West Texas & Lubbock Railway (WTLC) is willing to provide alternative rail transportation service to meet the requirements of PYCO Industries, Inc. at Lubbock, Texas.

Sincerely,

E. E. Ellis  
President

cc: Mr. Robert Lacy  
PYCO Industries, Inc.  
Lubbock, Texas

Exhibit B



**Surface Transportation Board**  
 Washington, D.C. 20423-0001  
 June 10, 2005

*Office of Compliance and Enforcement*

1925 K Street, N.W., Suite 780  
 Washington, DC 20423-0001

Mr. Thomas F. McFarland, P.C.  
 208 South LaSalle Street - Suite 1890  
 Chicago, Illinois 60604-1112

202-565-1573

OPTIONAL FORM 99 (7-90)

**FAX TRANSMITTAL**# of pages **2**To **Hail Kring**  
Dept./AgencyFrom **Mel Clemens**  
Phone #Fax # **816-744-3221**Phone # **202-565-1575**

Re: Service Complaint by PYCO Industries, Inc.  
 against South Plains La Mesa Railroad, LTD.  
 South Plains Switching, LTD.

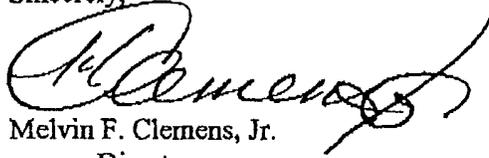
Dear Mr. McFarland:

This responds to your numerous communications in response to my May 25<sup>th</sup> letter to Larry Wisener, President of South Plains La Mesa Railroad, LTD/South Plains Switching (SAW) in Lubbock, Texas, regarding his failure to provide service to Pyco Industries, a major cotton seed processor. The complaint outlined problems with unreliable switching service and lack of service to the PYCO facilities, provided by South Plains and sought our assistance in resolving this switching problem which Mr. Kring indicates has cost PYCO approximately \$450,000 in lost sales and additional costs. Mr. Kring has also indicated concern for threats by Mr. Wisener of discontinuation of service by SAW.

As we have discussed previously, in issues involving SAW service to its customers, it is our effort to assist rail customers with service problems and to encourage serving carriers to communicate effectively with their customers on service issues so that the Board does not have to become involved formally in these issues. My letter to Mr. Wisener was intended to remind him of his obligation as a common carrier by rail to provide service on request, and to provide him an opportunity to avoid a formal proceeding before the Board by indicating to me those steps being taken by SAW to address PYCO's service concerns. Instead, I have received no response from Mr. Wisener and only endless finger-pointing by you presumably intended to try and excuse SAW from its service failures, which have been ongoing for several months now. In my view your efforts fall far short and only increase the likelihood of a formal proceeding before the Board to address the service issues. Moreover, as noted in recent legislation before Congress, there is an expressed intention in the legislation to significantly revise the Rail Transportation Policy and provisions addressing the Use of Terminal Facilities, to ensure that the Board will take a more proactive role in resolving issues involving rail service and competition. As Counsel to SAW, I would hope that you would encourage Mr. Wisener to respond to my letter and to take a more positive and professional approach to the service issues which PYCO Industries, a major SAW customer, has addressed to him and to this office.

Letter to Tom McFarland. Page 2.

Sincerely,

A handwritten signature in cursive script, appearing to read "Melvin F. Clemens, Jr.", written in black ink.

Melvin F. Clemens, Jr.  
Director

cc: Gail Kring, PYCO Industries.

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

THOMAS F. MCFARLAND

June 8, 2005

By fax to 202-565-9011

Mr. Melvin F. Clemens, Jr.  
Director  
Office of Compliance and Enforcement  
Surface Transportation Board  
1925 K Street, N.W. - Suite 780  
Washington, DC 20423-0001

Re: Service Complaint by PYCO Industries, Inc.

Dear Mel:

This responds to your recent letter about the above subject. Attached to your letter were copies of three letters to the Board from Mr. Gail Kring of PYCO. However, the following attachments to Mr. Kring's letter of April 5, 2005 were omitted and have not been furnished in response to my request:

- (1) letter from PYCO legal counsel to BNSF dated on or about March 11, 2005;
- (2) letter of PYCO's legal counsel dated March 28, 2005 summarizing a meeting between representatives of PYCO and BNSF on March 25, 2005; and
- (3) map showing the location of PYCO Plant Number 2 and related trackage.

The service difficulties being experienced by PYCO have resulted primarily from the following factors, all of which are beyond the ability of South Plains Switching (SAW) to control:

- (1) Delay resulting from BNSF's practice of accumulating loaded PYCO cars for larger outbound trainloads. It is alleged in Mr. Kring's letter of May 3, 2005 that railcars loaded at PYCO are resting from four to seven days before being switched onto an outbound train. SAW is informed and believes that the reason for that delay is BNSF's practice of holding loaded PYCO cars near origin to make up larger outbound trainloads. After SAW delivers loaded PYCO cars to BNSF's Lubbock Yard for interchange, BNSF transports those cars several miles to Burris, TX where they are held until enough cars have been accumulated to make a large

THOMAS F. MCFARLAND

Mr. Melvin F. Clemens, Jr.

June 8, 2005

Page 2

trainload. That practice benefits BNSF, but harms PYCO. PYCO is blaming SAW for this delay, but BNSF, not SAW, is solely responsible for this delay.

(2) BNSF's failure to provide SAW with timely access to BNSF's yard for interchange of PYCO's traffic. There have been many days when SAW has had traffic for PYCO and others ready for interchange to BNSF, but BNSF has refused to accept the traffic until the following day or later. Not only does that delay the time when the interchange is accomplished, the traffic unable to be interchanged remains on SAW's tracks causing increased congestion and further delay. Attached to this letter as Appendix 1 are copies of communications sent by SAW to representatives of BNSF documenting BNSF's service failures both before and after PYCO experienced service difficulties at Plant Number 2. Mr. Ice is BNSF's Executive Vice Present and Chief Operating Officer at BNSF corporate headquarters in Fort Worth, TX. Mr. Curtright is a regional BNSF operations officer in Kansas City, MO with jurisdiction over Lubbock, TX operations. Mr. McCracken is BNSF Trainmaster locally at Lubbock, TX. Despite SAW's complaints, BNSF's failure to provide reasonable interchange service has worsened, especially during the period of PYCO's increased traffic volume and service difficulties. SAW cannot provide service to PYCO if BNSF will not interchange PYCO traffic with SAW on a timely basis.

(3) BNSF's refusal of requests by both SAW and PYCO to reinstall the switch and track connection to Track No. 330 to permit SAW to serve PYCO in an efficient manner. Attached to this letter as Appendix 2 is a copy of a drawing of trackage in the Lubbock area as it existed in 1992 and at the time of SAW's acquisition of that trackage in 1999.

PYCO's Plant Number 2, which was constructed in 1994, and related trackage have been added to the drawing (extending from Track No. 323 near the center of the drawing). Track No. 330 is shown at the far right of the drawing. Although Track No. 330 was conveyed by BNSF to SAW in the 1999 sale, BNSF on its own volition removed the switch and track connection between Track No. 330 and the BNSF main line shortly after the sale.

As a result, SAW is required to provide service to PYCO by means of Track No. 310, which is shown on the left side of the drawing. Track No. 310 extends through private property owned by Farmers Compress, another SAW shipper. Track No. 310 goes right through Farmers Compress's plant loading dock in Warehouse 1. Track 310 also passes adjacent to Farmers Compress Warehouse 3. Those facilities regularly provide rail traffic for SAW. Track No. 310 is often blocked for extended periods in conjunction with loading, unloading and switching activities being performed at one or both of those Warehouses. That has resulted in considerable delay in providing rail service to PYCO over Track No. 310.

In addition, Track No. 310 is constructed of 90-pound rail, which is inadequate to accommodate the larger volumes of 100-ton cottonseed loads being transported over that Track.

THOMAS F. MCFARLAND

Mr. Melvin F. Clemens, Jr.  
June 8, 2005  
Page 3

As a result, SAW was required to take Track No. 310 out-of-service for a few days in early April in order to make emergency repairs to ensure safe rail operations. The need for additional repairs of that nature is likely to recur. As a result, SAW and PYCO have attempted to secure BNSF's approval of means to provide service to PYCO more efficiently. Attached to this letter as Appendix 3 is a copy of a letter from an attorney for SAW to an attorney for BNSF, dated March 25, 2005, in which, among other things, SAW, for the benefit of PYCO, requested that BNSF put the switch to Track No. 330 back in place and permit SAW to provide rail service to PYCO via Track Nos. 330, 323 and the main line. According to Mr. Kring's letter to you of April 5, 2005 (at page 2), Mr. Kring made the same request of BNSF at a meeting between PYCO and BNSF on March 25, 2005. BNSF has not responded to the request in SAW's letter of March 25, 2005.

There is no indication in any of Mr. Kring's correspondence that BNSF has responded to PYCO's request. SAW is unable to provide improved rail service to PYCO via Track No. 330 as long as BNSF continues to refuse to restore the switch and track connection to Track No. 330.

(4) PYCO does not have nearly enough of its own track capacity in the Lubbock area to accommodate the larger volumes of traffic that it has recently begun to ship from Lubbock. In view of PYCO's lack of adequate infrastructure, SAW leased its Track No. 9298 to PYCO for storage of cars at nominal rental. A copy of that lease is attached to this letter as Appendix 4. As a further accommodation to PYCO, SAW has not imposed a charge in its tariff of \$50 per car inbound to storage track and \$40 per car outbound from storage for switching cars to and from storage tracks. As a further accommodation to PYCO, SAW has permitted PYCO to move cars on the leased track with PYCO's equipment.

SAW was shocked when PYCO complained to the Board about SAW's service. Without SAW's lease of track to PYCO and other active SAW cooperation, PYCO would not have been able to ship nearly as much traffic from Lubbock as PYCO has been able to ship.

As of the date of this letter, there are more than 150 PYCO loaded or empty cars in the Lubbock area. More than 60 of those cars are located on Leased Track 9298. Another 40 cars are in BNSF's Yard because of the absence of track space on PYCO or SAW. The volume of PYCO's traffic is straining SAW's ability to provide adequate rail service to PYCO and SAW's other customers. SAW has under consideration several alternatives to alleviate the situation, including potential embargo and switching charges to and from storage tracks. The absence of sufficient track space on PYCO property is a major cause of PYCO's service difficulties.

BNSF's failure to interchange traffic with SAW on a reasonable basis and BNSF's refusal to restore the switch and track connection to Track No. 330 are in apparent retaliation against SAW for having brought suit against BNSF to enforce provisions of the Line Sale Agreement between SAW and BNSF for the Lubbock trackage. On April 22, 2004, a jury in a Tarrant County, Texas issued a verdict in favor of SAW and against BNSF on all four issues involved in

THOMAS F. MCFARLAND

Mr. Melvin F. Clemens, Jr.  
June 8, 2005  
Page 4

that lawsuit (copy of jury verdict attached to this letter as Appendix 5).

BNSF's uncooperative behavior toward SAW and its shippers materially worsened after BNSF lost that case. For example, SAW's service records show that there were empty tracks in BNSF's Yard in instances in which BNSF refused to interchange with SAW on the alleged ground of congestion in BNSF's Yard (see Appendix 1 attached to this letter). In other words, BNSF refused to interchange with SAW because BNSF was unwilling to do so, not because it was unable to do so.

A number of allegations in Mr. Kring's several letters to you require a brief response.

- (1) Allegation - April 5, 2005 letter, page 2 - Mr. Wisener's allegedly failed to provide information regarding repairs to the track serving PYCO.

Response - information on that subject was provided in a letter from SAW's counsel faxed to PYCO's counsel on April 5, 2005, item number 6 on page 2 (copy attached as Appendix 6). PYCO was advised that Track No. 310 was between 4 and 4½ inches out of level, with no support for the track on the north rail, requiring immediate repair for safe operations. PYCO was advised that the repairs would take 3 to 5 working days.

- (2) Allegation - April 5, 2005 letter, page 2 - South Plains has made no efforts to repair a derailment near PYCO Plant No. 1.

Response: this was a derailment of three loaded 100-ton cottonseed cars that was caused by a PYCO employee's faulty operation of a switch. Mr. Wisener attempted to get a crane capable of rerailling 100-ton cars on the scene on the same day of the derailment, but a crane of that size was not immediately available. Lubbock is located in a remote area of western Texas. However, Mr. Wisener was able to get such a crane to reraill the cars the very next morning, which was a weekend day. SAW acted promptly in repairing this derailment that SAW did not cause.

- (3) Allegation - May 3, 2005 letter, page 2 - SAW has instigated a per car surcharge.

Response - the surcharge amounts to only \$20 per car. It is designed to partially offset the increased cost of switching and storing cars for PYCO on SAW's tracks. There is a published switching charge of \$50 per car inbound to a storage track and \$40 per car outbound from a storage track in SAW's tariff. SAW could have assessed that charge on all cars in storage for PYCO, but refrained from

THOMAS F. MCFARLAND

Mr. Melvin F. Clemens, Jr.  
June 8, 2005  
Page 5

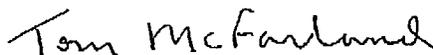
doing so. The much lesser surcharge was published and noticed to PYCO in accordance with the law.

- (4) Allegation - May 23, 2005 letter, page 1 - Attached Railroad Switching Log shows railcar switching problems.

Response - the Log does not identify service failures attributable to SAW. For the most part, service delays were attributable to waiting for BNSF operations (May 11, 2005) and SAW personnel being required to cease operations due to the 12-hour Hours of Service law. (May 17, 2005).

It is respectfully submitted on the basis of the foregoing that there is no basis either for an action for directed service under 49 U.S.C. § 11123, or for a complaint for failure to provide adequate rail service on reasonable request under 49 U.S.C. § 11101(a).

Very truly yours,



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

*TMcF:kl:wp8.0\1091\trmfcl*

cc: Mr. Gail Kring, *by fax to 806-744-3221*  
Mr. Larry Wisener, *by fax to 806-828-4863*  
Gary R. McLaren, Esq., *by fax to 806-785-2521*  
James L. Gorsuch, Esq., *by fax to 806-771-6476*

Exhibit C

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT OF MR. ROBERT LACY  
IN SUPPORT OF PETITION FOR  
ALTERNATIVE RAIL SERVICE

THE STATE OF TEXAS §  
§  
COUNTY OF LUBBOCK §

BEFORE ME, the undersigned authority, on this day personally appeared **ROBERT LACY**, who after being duly sworn, stated under oath stated as follows:

1. "My name is ROBERT LACY. I am over the age of eighteen (18) years, am competent to make this Affidavit, and affirm that the following statements are within my personal knowledge and are true and correct.
2. I am presently employed by PYCO Industries, Inc. ("PYCO") as Senior Vice President of Marketing. I have been continuously employed by PYCO for the previous 15 years. As part of my job responsibilities, I oversee rail shipments to and from PYCO's facilities in Lubbock, Texas, known as Plant No. 1 and Plant No. 2. I also communicate with representatives of South Plains Switching Ltd. ("SAW"), including Mr. Larry Wisener, about the switching of railcars being utilized by PYCO.
3. I began advising SAW in the early days of 2005 that PYCO's switching needs would be increasing due to the company's increased sale of cottonseed byproducts resulting from record cottonseed production. I spoke with Mr. Larry Wisener about the projected switching increases in January 2005, informing him that beginning approximately April 1, 2005, PYCO would be increasing its product shipments by rail.
4. Mr. Wisener's response at that time was that he could not promise any results to PYCO's increased rail traffic because he was being hampered by the BNSF. When pushed for details, Mr. Wisener gave some details about an ongoing lawsuit between SAW and BNSF and essentially told me that he probably couldn't accommodate any increases unless PYCO could help relieve switching pressures being placed on him by the BNSF.

5. Accordingly, PYCO contacted the BNSF and ultimately met with an attorney for BNSF, Mr. Don Herrmann, in March 2005. PYCO detailed its anticipated needs to Mr. Herrmann along with a suggested solution related to unlocking a particular switch, Switch #231, to perhaps relieve switching pressures. Mr. Herrmann vowed to relate the information to his client, BNSF, and we believe he did so.

6. During April 2005, Mr. Wisener's attitude towards PYCO stiffened after he mentioned that he learned of our meeting with the BNSF's lawyer. Correspondence was exchanged between our local attorney and Mr. Wisener's attorneys and it became evident to the management of PYCO that Mr. Wisener's bullying attitude was only growing worse and that switching was becoming more of a problem on a daily basis.

7. Accordingly, PYCO grew tired of trying to pursue an amicable solution among all the parties and contacted the Surface Transportation Board ("STB"). After we began discussions with the STB, and began drafting a formal complaint to the STB of which Mr. Wisener gained knowledge, switching operations suddenly began to steadily improve. Since this was PYCO's only goal to begin with, PYCO chose not to file a formal complaint with the STB, thinking that matters had been resolved.

8. On or about September 2005, Mr. Wisener informed me that he wanted to get out of the railroad business and was interested in selling SAW and wanted to know if PYCO was "interested in buying a railroad." I communicated this conversation to our management team at PYCO.

9. On October 11, 2005, PYCO's attorney, Gary McLaren, forwarded a letter he received from one of Mr. Wisener's attorneys, Jim Gorsuch, setting forth a Letter of Intent between PYCO and SAW. The Letter of Intent contained binding language for the purchase of a "shortline railroad business in East Lubbock" for \$5,500,000. A copy is attached as Exhibit "1". There was no listing of the assets included in the offer and no discussion had ever occurred between SAW and PYCO about specifics of such a sale, other than very generalized discussions. Mr. Wisener's lawyer wanted a response within 6 days, before the close of business on October 17, 2005.

10. Having further discussed the matter, we instructed our lawyer on October 13, 2005, to send to Mr. Gorsuch a simple proposed "due diligence" paragraph to be added to the Letter of Intent. This, we believed, was a minimal solution that would allow PYCO to gain financing of a possible solution and to assemble details to be approved by our board of directors. We also believed that a simple paragraph, as opposed to rewriting the entire document, might keep Mr. Wisener in a calm enough state to continue discussions about a purchase of certain assets. A copy is attached as Exhibit "2".

11. On November 3, PYCO received a letter from Mr. Wisener, a copy of which is attached to this verified statement as Exhibit "3". The letter cut off negotiations. This was the first time that PYCO was aware that SAW did not intend to move forward with revising the Letter of Intent or continuing with discussions about the purchase of SAW assets. Then matters between SAW and PYCO grew measurably worse.

12. On November 17, I received an angry call from Larry Wisener. He said that PYCO needed to come to his office and hear from him how things were about to change between SAW and PYCO. Having been to Mr. Wisener's office before in situations where Mr. Wisener progressively becomes more profane and begins discussing how he can "throw out" people that have opposing opinions, none of the PYCO management team wished to suffer through another of these unpleasant episodes.

13. During the November 17 telephone conversation with Mr. Wisener, I came to the conclusion that his tone and attitude represented a genuine business threat to PYCO. I reduced our conversation to written notes and began making contemporaneous notes concerning SAW beginning on November 17. These are attached as Exhibit "4".

14. I called Mr. Wisener on November 18 concerning a letter PYCO received from SAW canceling the lease of track #9298. Mr. Wisener was very belligerent and began telling me that he was in charge of SAW and that PYCO was going to have to fend for itself because doing business with SAW was about to become a lot more costly. It was apparent during the conversation that Mr. Wisener continued to be upset that PYCO did not "buy a railroad."

15. As my attached notes since November 17 indicate, there has been a substantial, measurable deterioration in rail service supplied by SAW since November 17, 2005. All efforts to resolve the switching problems with SAW have been unsuccessful and the attitude of Mr. Wisener towards PYCO continues to be just short of physically confrontational. PYCO management is concerned about possible physical retribution by Mr. Wisener.

16. PYCO utilizes about 6,250 railcars per year. At present, it is not feasible economically to convert any significant percentage of our product shipments from rail to truck due to the transcontinental nature of the shipments and the profit margin of the products being shipped. Consequently, it is imperative to the continued operations of PYCO that adequate rail service be restored.

17. PYCO's present service deficit amounts to 14 railcars per day at Plant No. 1. PYCO needs 26 cars per day at Plant No. 1 and SAW has reduced service to Plant No. 1 to only 12 railcars per day.

18. SAW failed to provide any service to PYCO's Plant No. 2 for approximately six days during the 2005 Thanksgiving holiday period. While

service has been presently restored to the requested 12 railcars per day since Thanksgiving, SAW continues to fail in providing at least one boxcar per day to Plant No. 2 as has been repeatedly requested.

19. Based upon the present number of switches by SAW, PYCO will run out of storage capacity for its products by mid-January 2005. Already the lack of adequate switching has resulted in delayed and cancelled orders with customers of PYCO.

20. PYCO could handle 26 railcars per day at Plant No. 1 if an alternative carrier could utilize SAW trackage. Currently, SAW has placed a derail in such a position so as to limit car movement to track owned by PYCO. Under the present derail placement, the maximum number of cars that PYCO can accommodate is 16 to 17 railcars per day; however, PYCO is forced to order only 12 cars per day because SAW will not place the cars where requested. Consequently, PYCO presently faces a 14 railcar per day shortage, and when coupled with the inability to get boxcar switching at Plant No. 2, PYCO incurs a daily loss as a direct result of SAW's inadequate switching.

21. As a direct result of SAW's switching deficiencies, PYCO is suffering economic losses on a daily basis resulting from delays in shipment by SAW. The slowness of PYCO's rail shipments is resulting in both delayed revenues from slowed shipments and lost sales. I directed PYCO staff to supply me with a summary of all delayed cars and also lost sales due to lack of cars. On the basis of that information, I have prepared the chart below which summarizes the losses mentioned herein that have accrued since November 17, 2005. There are two main sources of damages arising from the SAW service inadequacy: losses due to delays in shipment and losses due to lack of cars resulting in lost sales.

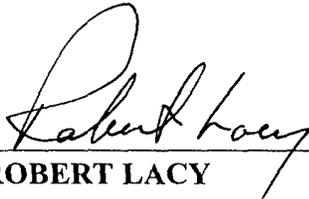
Calculation of Damages	# Cars	lbs/tns per Car	Total lbs/tns	Avg Price (\$)	Total Revenue	Interest Cost	Carrying Cost (\$)	Total Damages (\$)
<b>*Losses Arising from Delayed Cars:</b>								
Tank Cars Behind Schedule (oil)	8	185,000	1,480,000	0.33	488,400	6.00%		29,304
Box Cars Behind Schedule (lint)	12	129,320	1,551,840	0.14	217,258	6.00%		13,035
Gondola Cars Behind Schedule	50	95	4,750	127.00	603,250	6.00%		36,195
Approximate Total Tons CS			9,375				25.00	234,375
<b>Losses Arising from Lack of Cars Resulting in Lost Sales:</b>								
Tank Cars	30	185,000	5,550,000	0.33	1,831,500			1,831,500
Gondola Cars (CS)	525	95	49,875	127.00	6,334,125			6,334,125
<b>TOTAL CURRENT DAMAGES</b>								<b>\$8,478,534</b>

\*Currently only Interest Cost and Carrying Cost damages. Continued delays will result in additional charges by customers or lost sales.

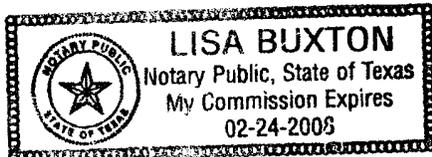
22. Should PYCO be forced to shut down operations as a result of the above-described switching problems, PYCO's very survival could be threatened. The corporation's value as a going concern is approximately \$150,000,000. Daily, PYCO is placed in the position of losing corporate goodwill and contractual integrity with its owners and customers as a direct consequence of switching problems. Focusing only on the value of the inventory that could be lost through a long term shut down, the inventory at risk is valued at approximately \$95,000,000.

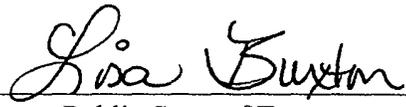
23. All discussions with SAW since November 17, 2005, to restore adequate rail service have proven unfruitful. As a member of PYCO's management team, the present switching difficulties are an imminent threat to the financial wellbeing of PYCO and we have no reason to believe that adequate service is going to be restored within a reasonable period of time short of intervention by the Surface Transportation Board."

Further, Affiant saith not.

  
\_\_\_\_\_  
ROBERT LACY

SWORN TO AND SUBSCRIBED BEFORE ME on this the 15<sup>th</sup> day of December, 2005, to certify which witness my hand and seal of office.



  
\_\_\_\_\_  
Notary Public State of Texas

**EXHIBIT 1**

**JAMES L. GORSUCH, P. C.***Attorney at Law*

---

4412 - 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424

Telephone: (806) 771-6474  
Facsimile: (806) 771-6476  
jgorsuch@nts-online.net

October 11, 2005

**Via Facsimile:**

Mr. Gary R. McLaren  
**RICHARDS, ELDER, SRADER,  
PHILLIPS & McLAREN, L.L.P.**  
5214 68<sup>th</sup> Street, Suite 302  
Lubbock, Texas 79424

Re: Sale of Portion of the Assets and Obligations of South Plains Switching, Ltd. Co., to Pyco Industries, Inc.

**Letter of Intent**

Dear Mr. McLaren:

This Letter of Intent sets forth our agreement and understanding as to the essential terms of the sale to Pyco Industries, Inc. ("Purchaser"), by South Plains Switching, Ltd. Co. ("Seller"), of a portion of Seller's business ("Business") located in Lubbock County constituting a shortline railroad business in East Lubbock. The parties intend this Letter of Intent to be binding and enforceable and will inure to the benefit of the parties and their respective successors and assigns.

1. **Purchased Assets.** At the closing, Purchaser will purchase the specific assets set forth in the Sale Agreement associated with the Business, including all contracts and agreements, and all legally assignable assets and obligations.
2. **Assumed Liabilities.** Purchaser will assume as of Closing Date the liabilities and obligations set forth in the Asset Sale Agreement between South Plains Switching, Ltd. Co., and The Burlington Northern & Santa Fe Railway Company, executed in May of 1999. In addition, Purchaser will assume the liabilities and obligations arising in connection with the operation of the Business by the Purchaser after the Closing Date.
3. **Purchase Price.** The purchase price will be \$5,500,000.00, payable in cash in immediately available funds on the Closing Date.

October 11, 2005  
Page 2

---

4. **Pre-closing Covenants.** The parties will use their reasonable best efforts to obtain all necessary third party and governmental consents, if required, including all certificates, permits and approvals required in connection with Purchaser's operation of the Business. The Seller will continue to operate the Business consistent with past practice. The parties agree to prepare, negotiate and execute a Purchase Agreement which will reflect the terms set forth in this Letter of Intent.
5. **Expenses.** Subject to the provisions of this Letter of Intent, each party will pay all of its expenses, including legal fees, incurred in connection with the acquisition of the Business.
6. **Confidentiality:** Any information obtained by Purchaser from Seller regarding this sale, will be kept strictly confidential.

Seller and Purchaser warrant that they have all required authority to enter into this Letter of Intent, and both Purchaser and Seller represent that they have full permission from the Board of Directors and the Officers to enter into this Letter of Intent.

If you are in agreement with the terms of this Letter of Intent, please sign in the space provided below and return a signed copy to James L. Gorsuch, P.C., by the close of business on October 17, 2005. Upon receipt of a signed copy of this letter, we will proceed with our plans for consummating the transaction in a timely manner.

Very truly yours,

**SOUTH PLAINS SWITCHING, LTD. CO.**

By: \_\_\_\_\_  
CHIEF OPERATING OFFICER

**PYCO INDUSTRIES, INC.**

By: \_\_\_\_\_  
CHIEF OPERATING OFFICER

**JAMES L. GORSUCH, P.C.**

*Attorney at Law*

•4412 - 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424

Telephone: (806) 771-6474  
Facsimile: (806) 771-6476  
jgorsuch@nts-online.net

**FAX COVER SHEET**

**DATE:** *October 11, 2005*

**TO:** *Gary McLaren  
Fax 785-2521*

**FROM:** *Jim Gorsuch*

**RE:** *LETTER OF INTENT*

\*\*\*\*\*

**TOTAL NUMBER OF PAGES SENT, INCLUDING THIS PAGE: 3**

*If you do not receive legible copies of all pages, please  
telephone (806)771-6474 immediately and ask for JAN.*

\*\*\*\*\*

The information contained in this fax is considered by the sender to be confidential and may be of an attorney-client privileged nature. It is intended only for the use of the individual or entity named above. If the reader of this message is not the named recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is prohibited. If you have received this communication in error, please notify us by collect telephone and return the original message to us at the address above at our expense. This paragraph does not apply to pleadings or other documents intended for filing in public records, or for filing with any department or agency whose records are open to the general public for inspection.

**EXHIBIT 2**

**PHILLIPS & MCLAREN, L.L.P.**

ATTORNEYS AT LAW

JAMEY LANEY PHILLIPS  
jameyp@sbcglobal.net

3305 66<sup>TH</sup> STREET, SUITE 1A  
LUBBOCK, TEXAS 79413  
TELEPHONE (806) 788-0609  
TELECOPY (806) 785-2521

GARY R. MCLAREN  
gmclaren@sbcglobal.net

October 13, 2005

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

RE: Letter of Intent

Dear Jim:

As you know, PYCO is still in the early stages of looking at the purchase of your client's assets. Much remains to be done in terms of investigation and evaluation of the purchase.

We would need to add the following provision to your proposed Letter of Intent in order to move forward.

**Purchase Conditional Upon Due Diligence and Financing.** Seller acknowledges and agrees that Purchaser's purchase of the assets made the subject of this Letter to Intent is conditional and contingent upon Purchaser's satisfaction with the results of Purchaser's due diligence in the investigation, evaluation and appraisal of said Assets, at Purchaser's sole discretion. Seller further acknowledges and agrees that Purchaser's purchase of said Assets is further conditional and contingent upon Purchaser's ability to obtain financing for the purchase of said Assets at terms and conditions favorable to Purchaser, at Purchaser's sole discretion. Seller further acknowledges and agrees that should Purchaser be dissatisfied with the results of its due diligence concerning these Assets, or be unable to obtain financing for the Assets at terms and conditions favorable to Purchaser, both at Purchaser's sole discretion, then Purchaser is entirely relieved of all obligations and duties arising under this Letter of Intent, save and except the duty and obligation of Confidentiality as provided for herein.

October 13, 2005

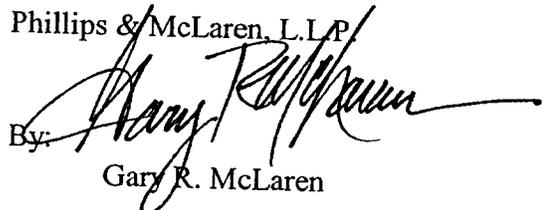
Page 2

Please let me know if this is acceptable.

Yours very truly,

Phillips & McLaren, L.L.P.

By:

  
Gary R. McLaren

GRM/cjh

# SENDING CONFIRMATION

DATE : OCT-13-2005 THU 16:33  
NAME : GARY MCLAREN  
TEL : 806 788 1807

---

PHONE : 7716476  
PAGES : 3/3  
START TIME : OCT-13 16:32  
ELAPSED TIME : 00' 23"  
MODE : ECM  
RESULTS : OK

---

FIRST PAGE OF RECENT DOCUMENT TRANSMITTED...

C O V E R  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
S H E E T

FAX

---

To: James L. Gorsuch  
Fax #: 771-6476  
Re: Letter of Intent  
Date: October 13, 2005  
Pages: 3, including cover sheet

---

From the desk of...  
Gary R. McLaren  
Attorney at Law  
Phillips & McLaren, L.L.P.  
3305 68<sup>th</sup> Street, Suite 1A  
Lubbock, Texas 79413  
(806) 788-0809  
Fax: (806) 785-2821

**EXHIBIT 3**

**South Plains Lamesa Railroad, Ltd.  
South Plains Switching, Ltd. Co.  
P. O. BOX 64299                      LUBBOCK, TEXAS 79464  
PHO: (806)828-4841                      FAX: (806)828-4863**

---

November 3, 2005

NOV 03 2005

Mr. Robert Lacey  
PYCO Industries  
P. O. Box 841  
Lubbock, TX 79408

Dear Mr. Lacey:

South Plains Switching, Ltd. Co., (SAW) has come to the conclusion after discussions with PYCO's attorney that an agreement on a letter of "intent to purchase" certain assets of SAW cannot be reached.

SAW is going forward with talks to other prospective buyers, if none are found to be satisfactory, SAW will continue to operate all its property in Lubbock.

However, in the interim, SAW feels it must request, for liability and violation of FRA Rules and Regulations, that PYCO Industries cease all plant operations on SAW property immediately. Storage of and placement of PYCO equipment needed for its operations needs to be addressed as soon as possible.

Please call or have a PYCO representative contact me at my office in Slaton, TX, to discuss future operational and rail service issues required of SAW. Your immediate attention to this matter will be appreciated.

Respectfully,



Larry D. Wisener  
President

**EXHIBIT 4**

South Plains Lamesa Railroad

November 17, 2005

3:45pm

Larry Wisener called to ask me if we had received his letter dated November 3<sup>rd</sup> (copy of letter available) and was wondering why we haven't been in touch with him to discuss our operational needs. I explained that we had received his letter and that we knew that he was going to make the rules and we didn't believe that we would have any input in his decisions. He said we were ignoring his requests and that we had been loading seed cars on his track again (track between dump 5 and seed stacks). I told him politely "no sir, we have been loading seed inside our plant." He accused me again of the same thing and I politely stated again that "we were loading inside our plant from seed house number one and that we did not have any fumigated seed in the area that he indicated." He started telling me that we were not going to be able to get on his tracks anymore and that he was putting in a derail to make sure that we couldn't get on his property to switch our cars. He said that we needed to sit down with him so he could tell us how much he was going to charge us to store our cars, to service our plant, and that he was canceling the lease on track #9298. He said he had 100 seed cars on that track and that he wasn't going to allow us to keep cars over there for free anymore. He mentioned other leases that he was looking at that he would be canceling soon and that we had better come over and talk. Larry said that he wasn't going to store cars for us anymore and was going to turn them back to the BNSF and they could store them for us.

November 18, 2005

8:30am

Lewis, Ronnie, Kelly, Les, and I went down into the plant to plan how we need to go about our business. Larry did put the derail on the track so that we could not get on his property and we told our people to do what they could do and we would request in writing anything that we needed the SAW to do to service our operation.

9:15am

Lewis came to the office with a plan to move our cars around inside of our plant and asked if we could call Larry and see if he could move the derail back about 100 feet to the drainage ditch where it was place last time. With the derail where it was currently, we did not have enough room to put a car on the switch in order to get it weighed. With the switch moved, we would be able to get all of the cars ready inside our plant in order to have the daily switches ready for them and make everything easier for both parties.

9:30am

Received a letter dated November 17<sup>th</sup> canceling the lease of track #9298 effective February 28, 2006.

11:00am

I place a call to Larry and ask him if he could move the derail back to the drainage ditch so that we could get all the cars weighed and ready for him daily. He said that he was busy and would have to look at it later. That is all that I wanted from him and asked if he would let me know. He told me that he had been going through all of the leases and encroachments and there were a lot of loose ends that he was going to cancel. He said that it included overhead conveyers and roads that he would be sending a letter out to cancel. And that he wasn't going to store any cars for us and needed us to come and talk to him about how much he was going to charge us for all services. I told him that if he was going to tell us what he was going to do, would there be any need in us coming to talk to him. He said if you care about your operation you need to come over. I said that if he already things set; we didn't need to go sit down with him just to listen to him vent and argue about everything. Larry said that we wouldn't argue about anything because there was nothing for us to argue about. I again said that we didn't need to sit down with him if he had things figure out already. Larry then told me that he was going to set charges for everything that he could and cancel leases and that we would have to try to figure out how to take care of ourselves. I told him that we are working on taking care of ourselves and he stated that is was going to cost a lot of money for us to continue doing

business with his railroad and that we would start receiving letters next week on cancellations and rates that he is going to charge us to switch and store cars. I replied that all I had only the one question for him about the derail and that I didn't intend on getting into any further discussions at this time. Larry then stated that the answer is no, he is not going to move the derail at all. I said okay thanks for your time, bye.

We faxed in the list of cars needed on Friday morning and did receive a switch at both plants at about 4:30pm.

November 21, 2005

9:00am

We sent in our switch list for the day and had everything lined out for them to pick up from within our plants. Les observed Larry and 2 other guys watching us switch from the derail that he had put in on Thursday. We have figured out how to just barely get one car on that at a time in order to get back to our scales and weigh the cars. I wouldn't be surprised if he did not move the derail slightly today so that the one car won't fit anymore.

3:00pm

SAW switched both plants between 3 and 4 pm. Lewis observed only two people on switch crew versus the usual 4-5, Rodney and Shad.

November 22, 2005

9:00am

Our guys have been looking at the track situation inside our plant because of only being able to handle about 12 cars a day currently. They decided that if they had the SAW switch our cars on the scale track instead of the shop track or if we could get cars on both, we would be able to handle more cars each day. Les asked Rodney (SAW) if we could get switched on both and he replied that Larry would only allow them to do one pull per day. They then asked if they would switch on the scale track today. Rodney asked Larry and he said that they would switch only on the shop track. The switch is inside our plant and we could lock it out and have the SAW set the cars where we need them without any input from the Larry.

11:00am

We sent in our request for the days switching a little late because we were waiting for the answer from the SAW concerning the scale track. We are leaving the switch on the shop track for now until we here from our attorney's.

3:30pm

The SAW picked up cars at 10am this morning and did not leave any cars for us to load. We had some seed cars that were not ready yet and they left them. After they were loaded they set them out on our shop track to be picked up this afternoon. This afternoon they pushed cars in on top of the seed cars instead of pulling them out limiting the number of empties that we could bring in to load. Les asked them if they would just put them on the scale track and was told that Larry wouldn't let them. Instead of making a big deal out of it today we conceded to take what we had and will still request in writing on Monday morning when we send our car list in that they set the cars on the scale track. We will see what happens then.

November 23, 2005

9:30am

We sent in our order list as usual this week. We did not specify which track that we wanted the cars to be placed. The SAW sent a notice to our office on the 22<sup>nd</sup> that they would be closed for the holiday and would not switch on the 24<sup>th</sup> and 25<sup>th</sup>. We will start requesting cars be put on scale track on Monday. Rodney (SAW) told Les that he would like to have our switch list by about 5pm for the next day. The next switch will not be until Monday morning and we were making the track change on the switch list so we aren't going to fax until early Monday morning. We did not get a switch at plant #2 today and now will not get any cars to load over the long weekend.

November 28, 2005

7:30am

I sent the switch list to the SAW railroad and requested that the cars be placed on the scale track and the loaded cars pulled from the shop track.

2:45pm

We got switched at plant #1 and they would not place the empty cars on the scale track. They pulled the cars from the shop track and then placed the empties back on the same track. Even though it would be easier to push in on one track and pull out on the other.

4:30pm

Les talked to Rodney and was told they were having problems with their engine today and would not be able to switch us at plant #2 again. We now have not had a switch at plant #2 since November 22nd. We sent the switch list to the SAW for tomorrow and sent a cover letter this time requesting that the inbound cars be placed on the scale track (copy attached) at plant #1 and that they switch as request on the 23<sup>rd</sup> and 28<sup>th</sup> at plant #2.

November 29, 2005

8:00am

Les said that Rodney called him this morning and told him that they would be switching at plant #2 this morning because they finally got their locomotive working again. He also told Les that he would pull from the shop track twice today if we could get cars loaded. He did not indicate which track he would push cars into our plant.

12:00pm

We finally got a switch at plant #2. Larry has complained about storing cars for us recently, but if the SAW would have switched us on the 23<sup>rd</sup> and 28<sup>th</sup>, we would have been able to load 36 more Gondolas and 6 more box cars by today.

12:30pm

We were switch on the shop track again today. The first day they could have said that they didn't see the instructions, but today there is no reason that the SAW didn't know that we wanted the cars pushed in on the scale track. Larry is being stubborn and is not going to switch the cars like we request. The answer to his problems about having to store our cars and the demurrage that we are incurring on our hopper cars can be attributed directly to the SAW not being willing to switch on the scale track. We could load an additional 5+ cars per day by using the scale track versus the shop track. Since this nonsense began the first part of November, PYCO plant #1 could have loaded an additional 80 cars. At this time we are behind 13 boxcars of Linters, 5 hopper cars, 40 Gondolas, and about 6 tank cars. This could have all been prevented and we would still be abiding by the rules that Larry put in place.

5:00pm

We faxed our list in to the SAW railroad that still shows that we want the cars placed on the scale track. We haven't taken any other steps until we get advice from counsel.

November 30, 2005

2:00pm

We received a switch at plant #2 as requested today. They pulled the cars from the shop track at plant #1 at about 2:30, but when they pushed in our empty cars about 15-20 minutes later it was on the shop track. This is the 3<sup>rd</sup> day in a row that the crew would not put the cars onto the scale track as requested. That is another 5+ cars that we could have loaded tonight that are going to be lost. It is costing PYCO a lot of money for him to deny our switching requests each day, not to mention we are getting further behind each day. I had noticed that I haven't seen any charges for surcharges, storage, or demurrage yet like was promised on one of our phone calls the other day. Not only has he not sent the charges, but also the letters that he was going to send to cancel all of our leases and easements.

4:45pm

We sent our switching request in along with the cover letter again telling the SAW that we want our cars pushed in on the scale track. This is the fourth day of asking and if it doesn't happen tomorrow, we will need to take additional steps to make sure that he has to switch us on the scale track.

December 1, 2005

11:30am

We were switched at plant #1 they pulled cars from the shop track and then came back and pushed the empties onto the same track. They still will not push the cars on the scale track where we requested.

1:30pm

We received our switch as ordered at plant #2. It seems that we are getting that worked out at the present time.

4:30pm

We sent the fax in to order cars for Friday.

December 2, 2005

8:20am

Rodney at the SAW called and said that they didn't receive the switch list that Kelly had faxed at 4:30pm on Thursday. Les gave Rodney the instructions over the phone and told him that we wanted the cars on the scale track.

11:00am

The SAW pulled from the shop track as requested and then they pushed the empties onto the same track. They still refuse to set the cars on the scale track. We are only ordering the cars that will fit on the shop track; we cannot order more cars until they start pushing the empties onto the scale track.

12:00pm

We received the cars that were requested at Plant #2.

4:30pm

We sent in our order for cars to be placed on Monday. We continue to order the cars for plant #1 to be placed on the scale track.

December 5, 2005

9:00am

We finally received an invoice today for charges incurred on the SAW railroad. The normal bills were received as in the \$20 per car surcharge that the SAW starting sending a while back and \$150 per loaded oil car sent from plant #2 to Plant #1. Those two invoices were normal, but now we are getting and invoice for \$150 per car for each car that is constructively place at either one of our plants. So far he has only billed us for November 21<sup>st</sup>, 22<sup>nd</sup>, and 23<sup>rd</sup> which are a few days after we started keeping this log again. The \$150 charge is on his new tariff that he sent to us in May.

10:30am

The SAW pulled the cars from the shop track and pushed them back onto the same track, they did not give us the gondolas we ordered only the tank cars and hoppers. Les told Rodney again today that we needed the cars pushed on the scale track and was told that Larry still would not allow him to push the cars on the scale track. There is no reason that Larry should be able to dictate which track our cars get placed.

5:00pm

We still have not been switched at plant #2, but Rodney told Les he would get it done before they went home. We will see in the morning. We are sending the list to the SAW for Tuesday.

December 6, 2005

8:00am

We finally got switched at plant #2 at about 6pm last night. Les also told me that at plant #1 we did not get any Gondolas to load yesterday, only tanks and hoppers. Les said that when he would ask Rodney to push the cars on the scale track he would only say that Larry wouldn't let him do it that way.

11:30am

The SAW switched our cars to us, but we had asked for 12 Gondolas and 3 Tank cars and they only had 11 Gondolas and they tried to give us 4 tank cars. We did not need the extra tank car and told Rodney to keep the car.

1:30pm

We received all of the cars that we ask for, but they were pushed in on the shop track again. Les said that he asks Rodney about the scale track every time they talk.

December 7, 2005

9:00am

I had an opportunity to sell 50,000 more tons of cottonseed at \$120 today, but did not take the bid because of our switching situation. This is another case where the SAW is costing PYCO money by preventing us from shipping the seed that we will need to move in order to hold everything that we will receive.

11:00am

The SAW pulled the loaded cars at plant #2 and did not push anything into us today. We had ordered 12 Gondolas and Les was told that they didn't have any empty Gondolas to bring.

11:30am

Rodney pulled the loaded cars from the shop track today and then set in 4 Gondolas to us, allowing us to pull them over to the meal track before he set any more cars. This allowed us to take 16 cars today versus the normal 12 that we have been getting on the shop track. Larry still will not let his employees switch us on the scale track, but Rodney bent the rules a little and let us pull those cars to the other track before he set the ones that we had ordered.

December 8, 2005

10:00am

We received our switch at plant #1. We did not ask for any Gondolas because we were told they did not have any in town, but we did ask for 6 tank cars and 6 box cars to load. We received the 6 tank cars and only 2 of the boxes because we were told that they had run out of box cars also. We have a written order in with the SAW for a certain number of box cars each day and he is responsible for getting them ordered from the BNSF. We did not order any gondolas for plant #2 either, but we ordered 4 boxcars. We were told that they would not switch today because they have no boxcars available. It doesn't look like we are the ones that are sitting on cars and making the SAW use their tracks to store our empty cars. We were loading 6 tank cars, 2-4 boxcar, 2 hoppers, and up to 15 gondolas per day at plant #1 so if they would let us go, we would not have too many cars in town waiting to be loaded.

December 9, 2005

11:00am

We did not order any gondolas for plant #2 for today; only 4 boxes were requested the day before and not received. This morning we received 12 empty gondolas and no boxes. The reason for not ordering gondolas was that we wouldn't be able to load any until Monday because the tarp couldn't be pulled from the fumigated pile until Monday morning. We really need boxcars to load our linters in at both plants, but at plant #2 we have to stack them on the ground because we are out of room.

5:00pm

We finally got a switch today but they only set in 7 tank cars (4-empty, 3-loaded). We didn't get any boxes at plant #1 either which is going to put us further behind each day. We order boxcars a month at a time for both plants and tell the SAW how many cars we need each day. The SAW will send the order to the BNSF or UP railroad on most equipment that we order, but on the boxcars he doesn't. He has a contract to store boxcars for the railroad and says that he can get any boxcars that we need. I would say that isn't the case right now and we are in need of boxcars quick.

December 12, 2005

9:00am

Kelly Jack talked to the SAW about our lack of boxcars today and Dale told him that they sent our order to the BNSF on November 21<sup>st</sup>, when they received it in their office. Kelly called the BNSF and was told that they don't have an order in from PYCO and haven't seen on since the November order was placed at the end of October. I told Kelly to send in an order immediately to both the SAW and the BNSF so that we could get on record needing the boxcars. I don't know who was at fault on the order, but it wasn't a mistake in our office. The SAW did get the order from us and the problem is between the SAW and the BNSF.

12:00pm

We received 12 gondolas at plant #2, but no boxes. At plant #1 we received 7 tank cars, 4-empty and 3-loaded on the shop track. We still need to get some boxcars in town for us to get caught up on our linter shipments.

December 13, 2005

2:00pm

We received our switch at plant #2 and received 12 gondolas and 2 boxcars as requested. Plant #1 was switched later and we 6 tank cars and 2-hoppers (we just ordered 1) and no boxcars even though we ordered 5. We are still in need of boxcars to ship out our linters.

Exhibit D

**JOHN D. HEFFNER, PLLC**

1920 N STREET, N.W.

SUITE 800

WASHINGTON, D.C. 20036

(202) 263-4180

FAX (202) 296-3939

j.heffner@verizon.net

December 19, 2005

Hon. Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 34802, Petition  
of Pyco Industries, Inc., for Emergency  
Service Order over the tracks and facilities  
of South Plains Switching Ltd.

Dear Mr. Williams:

I am writing on behalf of my client, West Texas & Lubbock Railway Co., Inc. ("WTL") in connection with the above-captioned proceeding. Subject to the caveats and conditions identified below and pursuant to the Board's regulations at 49 CFR 1146 (Expedited Relief for Service Emergencies), WTL is willing to provide alternative rail service for Pyco Industries, Inc. (Pyco) and other customers currently served by the South Plains Switching Ltd. (SAW) at Lubbock, TX.

WTL is a class III short line railroad owned by Permian Basin Railways, Inc. (Permian), a short line railroad holding company headquartered in Chicago, IL. WTL currently owns and operates over 100 miles of track in and around Lubbock, TX, and contiguous areas. WTL currently handles approximately 4000 carloads of traffic annually utilizing 3 engines and 10 employees. WTL connects with the Burlington Northern Santa Fe Railway (BNSF) at Lubbock. WTL's owner, Permian Basin, currently owns two other short lines in the southwestern part of the country and will be acquiring a third property on December 22, 2005. Its senior management collectively has over 125 years of experience in providing railroad service, much of it obtained through employment with either class I carriers

or other regional or short line railroads before starting Permian Basin in 2002.

Pyco seeks alternative service from WTL because its current carrier (SAW) is either unwilling and/or unable to provide service. Barring relief from the Board, Pyco and SAW's other Lubbock area customers will either be forced to turn to truck service permanently or even shut down operations. WTL has reviewed the Board's alternative service regulations and believes that Pyco and SAW's other Lubbock area customers are entitled to relief.

Briefly, the Board's regulations require that the alternative rail service provider -- WTL here -- 1) commit to providing service, 2) be able to provide service safely without degrading service to its existing customers, and 3) be able to provide service without unreasonably interfering with the incumbent carrier's ability to service the needs of its own customers.

In response, WTL states:

1. Subject to its making appropriate arrangements with BNSF for interchange of Pyco's traffic and the traffic of SAW's other Lubbock area customers and commercial arrangements with BNSF for transfer of freight and further subject to WTL's determining that it can safely operate over the subject track, WTL will commit to providing service to Pyco and other customers on the subject line of SAW. The fact that WTL has a longstanding, good relationship with BNSF generally and its people in Lubbock specifically should help to insure a smooth takeover of operations.
2. WTL represents that it can undertake to provide the requested service without jeopardizing service to its current customers. WTL has sufficient locomotives, crews, equipment, and experience that it can provide service over SAW without affecting service over its own railroad. In that regard, WTL will assign one of its own engines to serve customers on the affected trackage and is making arrangements to bring in additional power from another subsidiary. Furthermore, because WTL's railroad is physically

separate from SAW's Lubbock trackage, there should be no operating conflicts or other operational problems.

3. Because Pyco seeks alternative rail service authority covering all of SAW's trackage and operations in the Lubbock area, WTL's service would replace that of SAW entirely. Accordingly, WTL's operations should not adversely affect those of the incumbent carrier [SAW].

Please contact me if you have any questions

Sincerely yours,



John D. Heffner  
Counsel for West Texas  
& Lubbock Railway Co., Inc.

cc: Mr. Melvin Clemens (by fax)  
Charles Montagne, Esq.

Exhibit C

36603  
EB

SERVICE DATE – JANUARY 26, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34802

PYCO INDUSTRIES, INC.–ALTERNATIVE RAIL SERVICE–  
SOUTH PLAINS SWITCHING, LTD. CO.

Decided: January 25, 2006

On December 20, 2005, PYCO Industries, Inc. (PYCO) filed a petition under 49 U.S.C. 11123 and 49 CFR part 1146,<sup>1</sup> seeking an order authorizing interim alternative rail service, for an initial period of 30 days and a total period of not more than 270 days, over the lines of South Plains Switching, Ltd. Co. (SAW) in Lubbock, TX, by West Texas & Lubbock Railway Company, Inc. (WTL) to all shippers on the line including PYCO, and by PYCO to itself. Alternatively, PYCO seeks an order authorizing WTL to provide interim service exclusively to PYCO. WTL has certified that it is willing to provide interim rail service to PYCO and all other shippers on SAW's lines.

SAW filed a reply in opposition to the petition on December 28, 2005. PYCO filed a rebuttal on January 3, 2006, and SAW filed a letter in "clarification" of a matter contained in PYCO's rebuttal on January 6, 2006. On January 9, 2006, PYCO replied to the clarification letter, asking the Board to strike it from the record. On January 10, 2006, WTL joined in the request to strike. Also, SAW and PYCO filed letters on January 19, 2006, and January 20, 2006, respectively.

We will grant the alternative request for WTL to provide service to PYCO.

PRELIMINARY MATTER

SAW submitted its clarification letter under 49 CFR 1117.1, which authorizes a party to seek relief not otherwise provided in another rule. PYCO asks us to strike the clarification from the record on grounds that it does not request any relief and constitutes an impermissible reply to the final pleading allowed under the applicable rule, a petitioner's rebuttal under 49 CFR 1146.1(b)(3). PYCO correctly notes that the purported clarification constitutes an additional reply that is not contemplated in the rule. However, the additional information in the clarification will be instructive in our analysis, and for that reason we will not strike it from the record. Rather, in the interest of fairness and a complete record, we will also accept into the record PYCO's January 9, 2006 reply to the clarification and the letters filed on January 19 and 20, 2006.

---

<sup>1</sup> These rules were adopted in Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998) (Service Inadequacies).

## BACKGROUND

In 1999, SAW received authority to acquire and operate approximately 14.1 miles of rail line from The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF),<sup>2</sup> in Lubbock, TX, and approximately 3 miles of incidental trackage rights over BNSF's main line to a BNSF yard, where SAW interchanges with BNSF.<sup>3</sup> Since that time, SAW has switched rail cars for shippers located on this line and transported the cars to and from BNSF's yard for interchange with that linehaul carrier. PYCO, a large processor of cottonseed oil, is heavily rail dependent and is served only by SAW.<sup>4</sup>

At Lubbock, PYCO has two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Previously, SAW permitted PYCO to operate a rail car mover<sup>5</sup> on a portion of SAW's track, which allowed PYCO to move rail cars between tracks located on PYCO's property. Through this means of operation, PYCO could load 26 cars per day at its Plant No. 1. It could also load 12 cars per day from Plant No. 2. Because of a record cottonseed harvest, PYCO advised SAW that, beginning on April 1, 2005, PYCO would have an increased need for switching of rail cars.

Mr. Robert Lacy, PYCO's senior vice president of marketing, recites problems with SAW's service beginning in March 2005 that led PYCO to seek solutions from both SAW and BNSF. When these discussions did not resolve the service deficiencies, PYCO complained to the Board's Office of Compliance and Enforcement (OCE) about SAW's slow switching of rail cars. According to PYCO, after OCE's intervention, it received satisfactory service from SAW from July through October 2005, a period in which PYCO continued to need large numbers of rail cars to handle the record harvest.

PYCO states that, in September 2005, SAW inquired whether PYCO was interested in purchasing SAW's Lubbock rail lines. According to PYCO, when it expressed interest, SAW tendered a draft "Letter of Intent" that would have bound PYCO

---

<sup>2</sup> Effective January 20, 2005, The Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company.

<sup>3</sup> South Plains Switching, Ltd. Co.—Acquisition Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33753 (Sub-No. 1) (STB served July 15, 1999).

<sup>4</sup> PYCO asserts that it is the largest shipper served by SAW.

<sup>5</sup> A rail car mover is a vehicle equipped with sets of both steel rail wheels and rubber tire road wheels, which allows the vehicle to move rail cars along rail lines as well as travel on surface roads. Its operating functions are controlled from within an operator's cab much like a locomotive.

to purchase these rail lines for \$5.5 million. Considering its negotiations to be in the early stages, PYCO states that it requested an addition to the draft letter of intent to make the purchase contingent upon PYCO's completing a due diligence examination and obtaining satisfactory financing. PYCO asserts that SAW then cut off sale negotiations.

PYCO states that, shortly thereafter, SAW's president, Mr. Larry Wisener, demanded that PYCO immediately cease operating its rail car mover on SAW's property. On November 17, 2005, SAW placed a derail device on the track to prevent PYCO's equipment from entering onto SAW's rail line. PYCO's representative, Mr. Lacy, asked Mr. Wisener to remove the device but declined Mr. Wisener's request to meet in person, due to what he asserts was his past experience with Mr. Wisener's confrontational demeanor and profane language.

PYCO also contends that SAW has engaged in other conduct that severely hampers its ability to obtain adequate transportation. PYCO reports that on November 17, 2005, SAW cancelled PYCO's lease of a track on which PYCO stored rail cars, stating only that SAW was not obligated to provide storage.<sup>6</sup> According to PYCO, since that date, SAW has switched cars for PYCO at Plant No. 1 only on a shop track outside PYCO's fence, which greatly reduces the number of cars that PYCO can load. PYCO indicates that it asked SAW to instead switch cars on a scale track inside PYCO's fence or on both the shop and the scale tracks, to allow PYCO to load more cars. PYCO relates that SAW responded that it would switch cars only on the shop track and that SAW now claimed that it would be unsafe to continue to use the scale track because PYCO personnel had to cross the track and it was close to buildings—which is true in many industrial plants. PYCO emphasizes that, in any event, the shop track cannot accommodate the number of rail cars that PYCO needs to ship.

SAW did not switch any cars at all at PYCO's Plant No. 2 between November 22 and November 28, 2005, because of "a locomotive breakdown."<sup>7</sup> SAW also admits that it has not recently provided as many boxcars as PYCO requests at that plant because SAW lacks sufficient cars to meet PYCO's needs. See Reply, Appendix LDW-8. According to PYCO, since November 2005, SAW has billed PYCO for surcharges, switch charges, and storage fees that SAW has not billed its other Lubbock shippers for comparable services.

PYCO asserts that it is now able to load only about 12 cars per day at Plant No. 1, instead of the 26 cars it formerly was able to load. In addition, PYCO claims that SAW's lack of delivery of sufficient boxcars continues to limit loading of a product at Plant No. 2. PYCO complains that the resulting shortfall of switched cars has caused lost sales, delayed shipments, and an inventory accumulation such that PYCO soon will be forced to curtail operations for lack of storage for its products.

---

<sup>6</sup> Petition, Exhibit C, Verified Statement (V.S.) Lacy at 3 and Exhibit 4 (entry of Nov. 17, 2005).

<sup>7</sup> Reply, V.S. Wisener at 7.

DISCUSSION AND CONCLUSIONS

1. Interim Alternative Service to Shippers Other Than PYCO.

The claim of inadequate service to shippers other than PYCO is not well supported. One potential shipper, Floyd Trucking, Inc., submitted a letter supporting PYCO's petition and indicating that SAW's response to its service requests has been inadequate. But the record here suggests that, ultimately, Floyd Trucking has other transportation alternatives and has chosen not to use rail service because of the cost.

The record shows that there are numerous other shippers served by SAW on these lines, and the "service and support comments" attached to SAW's reply rated SAW's service favorably.<sup>8</sup> Although PYCO's witness, Mr. Gail Kring, states that some of the other shippers told him informally that they supported PYCO's petition, none of the other shippers has provided a statement criticizing SAW's service. Nor is there anything else in the record to establish a measurable deterioration in the service SAW has provided to them. Accordingly, we find that PYCO has not demonstrated a substantial deterioration in service to the other shippers on SAW's line. For this reason, there is no basis to grant PYCO's request to authorize WTL to serve the other customers currently served by SAW in Lubbock.

2. PYCO's Rail Car Mover.

We turn next to PYCO's request that we authorize PYCO to operate its rail car mover on SAW's line. SAW has the right to bar PYCO from operating on its line, especially in light of derailments that occurred in the last year (nine in the 12-month period ending in November 2005). PYCO does not dispute that it caused these derailments, that the derailments damaged SAW's track and equipment, or that a crane was needed to repair three of the derailments. Indeed, PYCO paid for the crane.<sup>9</sup> Therefore, we deny PYCO's request for an order directing SAW to allow PYCO to operate its own switching equipment on SAW's line. However, should WTL and SAW agree that PYCO may safely move railcars to and from its facilities, they may permit such activities.

3. Interim Alternative Rail Service By WTL for PYCO.

We have established procedures under which shippers receiving poor service may obtain interim relief. Under 49 CFR 1146.1, a petition seeking such relief must: (1) show substantial, measurable service deterioration or service inadequacy;

---

<sup>8</sup> One shipper, Goetz, gave SAW the lowest numerical rating but also commended SAW's crew, which indicates it may have meant to give a high rating.

<sup>9</sup> Rebuttal, V.S. Kring at paragraph 9d.

(2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable time; and (3) contain a commitment from an alternative carrier to meet current transportation needs and show that this service can be performed safely without hurting service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's service.<sup>10</sup> We discuss these criteria below.

Substantial and Measurable Deterioration in Service. The procedures at 49 CFR 1146.1 are for localized immediate service relief. Service Inadequacies, 3 S.T.B. at 972 n.11. PYCO is a rail-dependent shipper with two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Moreover, PYCO is served only by SAW. Here, the daily shortfall of 14 carloads for switching at Plant No. 1 (more than half of the 26 carloads that PYCO previously could load there), the continued lack of delivery of sufficient boxcars to serve Plant No. 2, and the period in November 2005 during which SAW performed no switching at all at Plant No. 2 indicate a serious deterioration in SAW's service to PYCO. PYCO has demonstrated through ample, credible evidence that, as a consequence of these service inadequacies, it will soon run out of storage capacity for its cottonseed oil and related products, and will be forced to curtail or close operations.<sup>11</sup> Consequently, we find that PYCO has shown, as to itself, "a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier."<sup>12</sup> 49 CFR 1146.1(a).

Discussions with the Incumbent and Reasons Why Restoration of Adequate Service Is Unlikely. The purpose of requiring pre-filing discussions is to ensure that the shipper and the carrier have done all that they can do to resolve the service issues before coming to the Board for relief. American Plant Food Corporation—Alternative Rail Service—Line of Texas Northeastern Railroad, STB Finance Docket No. 33795, slip op. at 2-3 (STB served Dec. 7, 1999) (American Plant Food) (denying alternative service request where the shipper had not contacted the incumbent carrier in the 9 months prior to filing the petition). This is not a case where the parties sought relief from us prematurely, before attempting to resolve the service issues themselves. Rather, there were many discussions between PYCO and SAW representatives in 2005 concerning the decline in SAW's service.<sup>13</sup>

<sup>10</sup> The petition must be served, by hand or overnight delivery, on the incumbent and proposed alternative carriers and the Federal Railroad Administration. PYCO has certified that it served its petition on the required parties by overnight delivery.

<sup>11</sup> See Rebuttal, V.S. Kring and appended charts; PYCO's January 9, 2006 reply, Supplemental V.S. Kring.

<sup>12</sup> See Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc., STB Finance Docket No. 34479 (STB served Mar. 11, 2004) (authorizing alternative, interim rail service after two weeks of service problems on a rail line that generated about 6,000 carloads of traffic per year).

<sup>13</sup> See Petition, Exhibit A and attached Exhibits 7, 8; Exhibit C, V.S. Lacy and Exhibit 4.

It is true that, after SAW barred PYCO from operating its rail car mover, Mr. Wisener invited a PYCO representative to discuss in person alternative ways of loading PYCO's rail cars. But PYCO's explanation as to why its personnel declined to meet with Mr. Wisener in person—because the relationship had become acrimonious—was not unreasonable. According to Mr. Lacy, in previous meetings in his office, Mr. Wisener had become progressively more profane and threatened to “throw out” people with opposing opinions, and his “bullying attitude” had worsened after SAW cut off negotiations for PYCO to purchase the line, at which point SAW cancelled the lease of the track on which PYCO had stored rail cars.<sup>14</sup> In any event, it does not appear that another meeting would have been productive. Mr. Wisener now states that, had PYCO managers agreed to meet with him in person, he would have offered the option of ordering a second daily switch for a \$500 surcharge.<sup>15</sup> However, SAW ultimately provided that option to PYCO in its December 2005 reply, as revised in its January 2006 clarification. Thus, another in-person meeting was not necessary.

The record here shows that, unlike the situation in American Plant Food, there were many contacts between PYCO personnel and SAW personnel in the months prior to filing the petition.<sup>16</sup> Given the evidence showing a history of communications between the parties during the course of the events that led to the filing of this petition, we find that PYCO has made adequate attempts to work with SAW to try to resolve the service deficiencies.

The second part of this criterion requires a showing that the incumbent is unlikely to restore adequate rail service within a reasonable time. We find that the requisite showing has been met in this case. At the outset, we note that PYCO experienced a series of problems with SAW's service in March through June 2005: slow service because of SAW's failure to spot and pick up cars on reasonable request; two threats to terminate service at Plant No. 2; suspension of service to Plant No. 1; and threats of imposing surcharges on service SAW had been providing in the past without surcharges.<sup>17</sup> Mr. Wisener has not refuted the fact that SAW's service deteriorated during that period. SAW's principal response was to offer to sell the line to PYCO. But short of that potential resolution, which evidently came to naught when SAW refused PYCO's request to make the sale contingent upon PYCO's completion of due diligence

---

<sup>14</sup> See Petition, Exhibit C, V.S. Lacy.

<sup>15</sup> Reply, V.S. Wisener at 4.

<sup>16</sup> Petition, V.S. Lacy at paragraphs 12-15 and Exhibit 4 (notes showing conversations between Lacy and other PYCO personnel and Wisener and other SAW personnel).

<sup>17</sup> See Petition at 5-6 and Exhibit A at Exhibit 8, Railroad Switching Log.

and the obtaining of financing, it took intervention by OCE before SAW itself restored adequate service to PYCO in the period from July through October 2005.<sup>18</sup>

In any event, the service problems began to recur in mid-November 2005. SAW did not provide any switching for 6 days at Plant No. 2 because of a breakdown experienced by one locomotive. While equipment failure might be a valid basis for a temporary service interruption, SAW states that it has six locomotives, and it has not provided any reason why one of the other five could not have been used to switch cars at Plant No 2 during that time.<sup>19</sup> Nor has SAW given any reassurances that it will provide switching regularly for PYCO should there again be difficulty with a locomotive.

Since mid-November 2005, PYCO plainly has not received enough empty railcars to load its products that are ready for transport. PYCO uses tank cars, gondolas, hopper cars, and boxcars to ship its products. PYCO itself owns a fleet of tank cars, and its customers provide PYCO with privately owned gondolas, but SAW has not delivered a sufficient number of these privately owned cars. Concerning boxcar supply, SAW claims that it cannot provide enough boxcars because of BNSF's decision in August 2005 not to store boxcars on SAW's lines for free. Nevertheless, SAW provided sufficient boxcars to PYCO during September and October 2005, after BNSF's policy change. Therefore, BNSF's action does not explain SAW's more recently claimed inability to provide sufficient boxcars.

A major reason for this inadequate railcar supply is SAW's refusal of PYCO's repeated requests for SAW to deliver empty railcars to PYCO's scale track. SAW claims that it would be unsafe to use that track because PYCO personnel must cross it and the track is very close to some of the plant buildings. We question the sincerity of that claim in this case, however, because WTL recently inspected the scale track and concluded that it is safe.<sup>20</sup>

SAW now asserts that all PYCO needs to do to receive adequate rail service at Plant No. 1 is to request a second daily switch. According to PYCO, SAW initially claimed that it lacked sufficient personnel to provide a second daily switch,<sup>21</sup> and only after PYCO filed this petition did SAW express any willingness to provide a second daily switch.<sup>22</sup> Thus, this offer, which could have been made much sooner,<sup>23</sup> appears to have

---

<sup>18</sup> See Petition at 6-7 and Exhibit A at Exhibits 3-7; Exhibit B.

<sup>19</sup> SAW January 6, 2006 clarification letter at 2.

<sup>20</sup> Rebuttal, V.S. Ellis at 2 ("WTL has inspected the tracks in question and believes service can be safely provided over these tracks. The idea that close clearances or crossings without warning devices within industrial areas could be used as a reason for not occupying those tracks is inconsistent with industry practice.").

<sup>21</sup> Rebuttal, V.S. Kring at paragraph 9f.

<sup>22</sup> Reply, V.S. Wisener at 1-2, 5.

been made only to avoid an order from the Board authorizing alternative service by a different carrier.

SAW suggests that PYCO simply is unwilling to pay the surcharge that would be imposed if the second daily switch were outside the crew's regular 12-hour day, and that PYCO's real complaint is that the charges it must pay are too high. Rates or charges that shippers believe are too high are not a basis to order alternative, interim rail service. See Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003) (denying alternative service order because “[r]ate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123”). Here, however, PYCO has made clear that it wants the service it needs, even if it has to pay the surcharge, as that would be less costly to it than the current situation.<sup>24</sup> Thus, we do not view PYCO's request for alternative service as driven by dissatisfaction with the level of charges.

If we were persuaded that SAW's eleventh-hour offer to provide a second daily switch would fully resolve the service inadequacies for PYCO, we would not need to order the alternative service requested by PYCO. But, given SAW's broader pattern of conduct—including its unexplained abrupt cancellation of the lease of the track on which PYCO had been storing its cars and SAW's refusal to allow continued use of the scale track—we are not persuaded that SAW will do what is necessary and what it has done in the past to provide satisfactory service to PYCO, which is served only by SAW, and is heavily dependent on rail service. Therefore, based on all of the circumstances presented here, we find that PYCO has made the required showing that SAW is unlikely to restore adequate rail service to PYCO within a reasonable time and that formal intervention by the Board is appropriate.

Interference with Operations. SAW does not dispute WTL's statement that WTL can provide safe, adequate transportation service to the shippers on SAW's line without degrading service to WTL's customers on its other lines.

Because we find no need to authorize alternative service to the other shippers, we must also consider whether WTL can provide PYCO with service without unreasonably interfering with SAW's service to the other shippers on this line. To address concerns raised by having two operators on SAW's lines in Lubbock, PYCO has suggested that we authorize WTL to control dispatch over the line weekdays from 9 a.m. to 2 p.m. While we agree that two operators can safely and efficiently share this line, we will not dictate

---

<sup>23</sup> For example, when Mr. Wisener of SAW telephoned Mr. Lacy on November 17, 2005, to inform PYCO that SAW was installing the derail device, SAW could have offered to make a second daily switch, but did not do so. Instead, per Mr. Wisener's direction, SAW provided only one daily switch at Plant No. 1. Petition, Exhibit C, V.S. Lacy at Exhibit 4 (entry of Nov. 22, 2005: “Larry [Wisener] would only allow [SAW's crew] to do one pull per day.”).

<sup>24</sup> Rebuttal at 3 and V.S. Kring at paragraph 9f.

specific terms at this point. Rather, we will order the two carriers promptly to enter into operating protocols that will allow for safe joint operations on this line. We recognize that it will require good faith on the part of both SAW and WTL for this arrangement to work, and we expect both parties to act in that manner. Accordingly, both SAW and WTL will be required to report to the Board that the required protocols are in place.

In sum, the criteria have been met for PYCO to obtain interim alternative rail service. Accordingly, we will grant PYCO's request for an order authorizing WTL to provide it with alternative service on SAW's line on an interim basis.

Under 49 CFR 1146.1(c), there is a rebuttable presumption that alternative service will need to continue for more than 30 days, but that presumption can be rebutted by the incumbent carrier, and a further Board order will be needed for alternative rail service to continue at the end of the 30-day period.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. PYCO's motion to strike SAW's clarification of January 6, 2006, is denied. SAW's January 6, 2006 clarification, PYCO's January 9, 2006 reply to the clarification, the letter submitted by SAW on January 19, 2006, and the letter submitted by PYCO on January 20, 2006, are accepted into the record.

2. WTL is authorized to provide alternative service to PYCO on SAW's lines, beginning at 11:59 p.m. on January 26, 2006 until 11:59 pm on February 25, 2006, under the provisions of 49 CFR 1146.1, and SAW is directed to allow such operations on its lines.

3. PYCO and SAW shall promptly enter into operating protocols that will allow for safe joint operations on this line, and they shall report to the Board that the required protocols are in place.

4. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary