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THOMAS F. MCFARLAND

January 25, 2007



218516

By UPS overnight mail

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

Re: Finance Docket No. 34890, *PYCO Industries, Inc. -- Feeder Line Application --  
Lines of South Plains Switching, Ltd. Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Petition To Reopen And/Or For  
Reconsideration Of Decision Served January 24, 2007, for filing with the Board in the above  
referenced matter.

**FEE RECEIVED**  
JAN 26 2007  
SURFACE  
TRANSPORTATION BOARD

Very truly yours,

*Tom McFarland*

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

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**FILED**  
JAN 26 2007  
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Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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218516



PYCO INDUSTRIES, INC. -- FEEDER )  
LINE APPLICATION -- LINES OF ) FINANCE DOCKET  
SOUTH PLAINS SWITCHING, LTD. CO. ) NO. 34890

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PETITION TO REOPEN AND/OR FOR RECONSIDERATION  
OF DECISION SERVED JANUARY 24, 2007

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

Petitioner

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**FILED**  
JAN 26 2007  
SURFACE  
TRANSPORTATION BOARD

THOMAS F. McFARLAND  
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Attorney for Petitioner

DATE FILED: January 26, 2007

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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PYCO INDUSTRIES, INC. -- FEEDER            )  
LINE APPLICATION -- LINES OF            ) FINANCE DOCKET  
SOUTH PLAINS SWITCHING, LTD. CO.    ) NO. 34890

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**PETITION TO REOPEN AND/OR FOR RECONSIDERATION  
OF DECISION SERVED JANUARY 24, 2007**

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Pursuant to 49 C.F.R. §§ 1115.3 and 1115.4, SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby petitions to reopen and/or for reconsideration of the Board's decision in this proceeding served January 24, 2007. That decision voided transfer of Track 269 by SAW to Choo-Choo Properties, Inc. (Choo-Choo); voided cancellation by Choo-Choo of a lease of that Track by Hanson Aggregates (Hanson); and ordered SAW to provide rail service to Hanson over that Track on reasonable request.

**GROUND FOR REOPENING AND/OR RECONSIDERATION**

1. The Board's decision is defective procedurally. The Board's action was taken in response to Motions filed by Hanson in a pleading filed on January 12, 2007. Fearing that the Board would take action before consideration of SAW's reply to those Motions, SAW notified the Board, by letter filed on the same day as the Motions, that SAW would file a reply to the Motions, as permitted by Board regulation at 49 C.F.R. § 1104.13(a). The Board's action was taken without giving SAW the opportunity to reply, in disregard of (1) SAW's specific request; and (2) the 20-day period in the Board's own regulation for submitting replies. The Board attempted to justify its action on the basis that SAW had replied to an earlier request by Hanson

for similar relief (decision, note 5). However, the earlier informal request by Hanson was not the same as the formal Motions filed on January 12. SAW had a right to reply to the formal Motions. Moreover, the Board failed to cite any statutory authority for its precipitous action granting these Motions without opportunity for reply. The Board does not have general authority to take ex parte action. No findings were made, nor could have been made, to justify the Board's action under the emergency power at 49 U.S.C. § 721(b)(4). The combination of the foregoing factors leads to the conclusion that the Board's action is not compatible with procedural due process of law.

2. The Board's decision unlawfully requires a rail carrier to provide private track for a shipper. The verified statement of Delilah Wisener attached to this Petition establishes that Hanson has always used Track 269 as private track pursuant to lease from SAW. There is not now, and never has been, any private track on what Hanson refers to in its Motions as "Hanson Yard." Instead, Hanson uses Track 269 as private track, transloading aggregates directly from railcars on that Track to trucks adjacent to that Track. Cancellation of Hanson's lease of Track 269 deprived Hanson of use of that Track as private track, and would require Hanson to construct its own private track on its own property, as all shippers are required to do. (See 49 U.S.C. § 11103). A rail carrier does not have a legal obligation to make its track available by lease to a shipper for use as a private track. The Board's decision unlawfully requires SAW to do so. All rail carriers should be alarmed when the Board appropriates carrier track for a shipper's private use in lieu of the shipper constructing its own private track.

3. The Board does not have authority to order SAW to provide rail service to Hanson on Track 269 for the additional reason that the sole commodity received by Hanson on that Track

is aggregates, and rail transportation of aggregates has been exempted from application of 49 U.S.C. Subtitle IV, which includes the provision at 49 U.S.C. § 11101(a) requiring a rail carrier to provide transportation to a shipper on reasonable request. That exemption is published at 49 C.F.R. § 1039.11 for crushed stone, aggregates, gravel and sand. The Board cannot lawfully revoke that exemption without a petition requesting such relief, and without notice and opportunity for comment on whether the statutory standard for revocation at 49 U.S.C. § 10502(d) can be met in the circumstances of the case. Moreover, SAW does not have a legal duty to provide service to Hanson where, as here, Hanson does not own any private track on which it can receive railcars.

4. It is the filing of a feeder line application that freezes a rail carrier's rail line sales, not a person's intent to file a feeder line application at some future date. Consequently, there is absolutely no rational basis for the Board's finding (decision at 4) that SAW's transfer of Track 269 to Choo-Choo prior to filing of the feeder line application nevertheless was frozen because "the transfer occurred after SAW was on notice that PYCO intended to file a feeder line application for SAW's rail lines." This is a prime example of numerous facile findings leading to a result obviously desired by the Board.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the decision served January 24, 2007 should be reopened and vacated, and the Motions filed by Hanson on January 12, 2007 should be dismissed and/or denied.

Respectfully submitted,

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

Petitioner

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Attorney for Petitioner

DATE FILED: January 26, 2007

VERIFIED STATEMENT OF DELILAH WISENER

My name is Delilah Wisener. I am sole owner of South Plains Switching, Ltd. Co. (SAW). I have submitted several verified statements in this and related proceedings.

Contrary to the implication attempted to be left by Hanson Aggregates, Inc. (Hanson), there is no private track on what Hanson has referred to as "Hanson Yard." Hanson Yard consists of land adjacent to SAW's Track 269. Hanson leased Track 269 from SAW for use as Hanson's private track because Hanson does not have any private track of its own. Hanson's sole activity at Hanson Yard has been to transload aggregates directly from railcars located on Track 269 to trucks located adjacent to that Track.

The sole commodity received by Hanson on Track 269 is aggregates. I understand that rail transportation of aggregates has been exempted from Board regulation.

When SAW conveyed Track 269 to Choo-Choo Properties, Inc. in April, 2006, there was no feeder line application on file for that or any other SAW track. Contrary to the Board's statement in its decision served January 24, 2007, SAW was not on notice in April, 2006 that PYCO intended to file a feeder line application. SAW had no way of knowing at that time whether or not PYCO would file a feeder line application at a future date.

**VERIFICATION**

I, Delilah Wisener, declare under the penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified to file this Verified Statement.

Executed this 25<sup>th</sup> day of January, 2007.

  
Delilah Wisener

**CERTIFICATE OF SERVICE**

I certify that on January 25, 2007, I served the foregoing document, Petition To Reopen  
And/Or For Reconsideration Of Decision Served January 24, 2007, by UPS overnight mail, on  
the following:

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