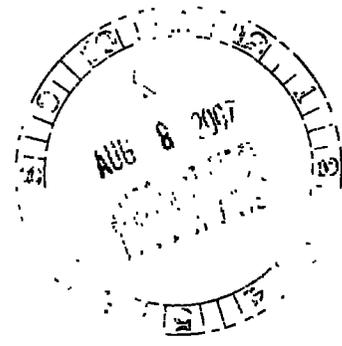


219977

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



6 August 2007  
by express

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
395 E Street S.W.  
Washington, D.C. 20024

Re: PYCO Industries -- Alternative Service -- South  
Plains Switching, Ltd., F.D. 34889

Motion to Permit Inspection and Repair

Expeditious treatment requested

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of a motion to authorize West Texas & Lubbock [WTL, the alternative service provider for PYCO Industries (PYCO)], PYCO, and contractors for WTL and PYCO to enter the premises of incumbent railroad South Plains Switching Ltd. to inspect and to repair track and to control weeds.

Because track safety is at issue, expeditious treatment is requested. WTL advises PYCO that the track issue is serious and must be dealt with promptly. If SAW wishes to make a response, we request that SAW be required to provide that response within two business days of filing of this pleading.

Thank you for your assistance.

ENTERED  
Office of the Secretary

AUG 6 2007

Public Records

Very truly,

Charles H. Montange  
for PYCO Industries, Inc.

Encls.

cc. counsel per certificate of service (w/encl.)  
Mr. McLaren (for PYCO) (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. -- )  
Alternative Rail Service -- ) F.D. 34889  
South Plains Switching, Ltd. Co. )

Motion to Permit Inspection and Repair  
or, in the Alternative,  
Petition to Reopen Decision  
in order to Permit  
Inspection and Repair

expeditious treatment requested



PYCO Industries, Inc. (PYCO) hereby moves this Board for an immediate order authorizing PYCO's alternative service provider [West Texas & Lubbock Railroad ("WTL")], PYCO, or independent contractors for WTL or PYCO to enter the premises of incumbent railroad South Plains Switching, Ltd. (SAW) in Lubbock for the purpose of inspecting the track, repairing track and structures that pose safety hazards, and controlling weeds.

Background

Based on statements by SAW's Lubbock legal counsel (Mr. Gorsuch), SAW has not inspected or repaired trackage used by WTL to serve PYCO pursuant to this Board's Orders in F.D. 34802 or 34889 since before the inception of alternative service in January 2006. Indeed, Mr. Gorsuch indicates that SAW denies any obligation or responsibility for such inspection or maintenance.

On or about July 11, 2007, WTL personnel began repeated contacts with SAW to request that SAW repair, or authorize them to repair, a defective "strip joint" in track 1 in the SAW yard. This track is used to serve PYCO. See Declaration of H.M. McConville (WTL), Exhibit A, paragraphs 1-2. A strip joint is a

joint that has basically pulled apart; it is tantamount to a broken rail; and it could be regarded as an infraction of Federal Railroad Administration safety requirements. Id. para. 1.

On or about the same date, SAW's Lubbock attorney, Mr. Gorsuch, sent a letter to WTL's president, Mr. Ellis, denying responsibility to inspect or to repair. A copy is attached as Exhibit B. The letter also advises WTL that Mr. Larry Wisener is again the General Manager of SAW. (Mr. Wisener has allegedly resigned his post with SAW when this Board authorized alternative service in January 2006 in F.D. 34802.)

No copy of the July 16 letter was sent to WTL counsel, or evidently any other WTL personnel, including the WTL personnel who had communicated with SAW. Mr. Ellis was on vacation and did not see the letter. On or about August 3, WTL Vice President Steve Gregory found the Gorsuch letter and forwarded same to PYCO and WTL counsel. After consultation with WTL's counsel, PYCO's counsel on the same date expressed a response to Mr. Gorsuch indicating, among other things, that in fact SAW is responsible for inspection and repair. A copy is attached as Exhibit C. The letter asked Mr. Gorsuch to confirm if his letter was intended to authorize WTL and PYCO to make repairs. PYCO and WTL have received no response to that letter.

WTL's Vice President for Operations (Mr. McConville) and WTL Superintendent Grosstueck expressed strong concern to WTL Vice President Steve Gregory about the strip joint on August 3,

2007. WTL and PYCO are prepared to make repairs immediately. On August 6, 2007, WTL's counsel (on vacation) arranged for a faxed letter to SAW's counsel Gorsuch requesting immediate (within 24 hours) repair by SAW, or authorization to WTL to repair. A copy of that letter is attached as Exhibit D. WTL operating personnel contacted Larry Wisener directly. A copy of that letter is attached as Exhibit E. WTL has received no response (e-mail attached as Exhibit F).

Mr. Wisener has warned WTL and PYCO against trespass many times. See Lacy Declaration, Exhibit G. As WTL's Vice President for Operations (Mr. McConville) indicates in his Declaration attached as Exhibit A at para. 4, SAW has even protested WTL's use of a vehicle on a yard access road to perform switching duties. PYCO in fact has a pending motion before this Board in F.D. 34889 (this docket) and F.D. 34870 (PYCO's complaint against SAW) seeking emergency relief against Mr. Wisener, d/b/a Choo Choo Properties, Inc., in connection with a trespass action he has brought in state court against PYCO regarding PYCO's access to its cottonseed stockpile.

#### November 21 Decision

This Board authorized alternative service for PYCO pursuant to 49 C.F.R. Part 1147 and 49 U.S.C. 11102(a) by a decision served November 21, 2006. At the time PYCO petitioned for Part 1147 service, PYCO was concerned that SAW was not inspecting or repairing, and would not inspect or repair, the trackage used to provide PYCO with alternative service. PYCO requested this

Board to issue a condition allowing PYCO to arrange for independent entities to inspect and repair SAW's rail lines. In its November 21, 2006 decision, this Board declined to enter such a condition. The Board explained that

"[i]n light of the Board's expectation to promptly decide the pending feeder line applications, we will not impose the requested condition allowing PYCO to arrange for independent entities to inspect and repair SAW's rail lines."

PYCO Industries -- Alternative Rail Service -- South Plains Switching, Ltd. Co., F.D. 34889, served Nov. 21, 2006, slip op. at 6.

PYCO and WTL construe this statement to bar them from inspection and repair of the SAW tracks.

#### Argument

Over eight months have now lapsed since the November 21 decision. No decision has yet issued establishing terms in the feeder line proceedings. Nevertheless, SAW has failed to inspect and to repair the relevant track. Indeed, per Mr. Gorsuch's July 16 letter (Exhibit A), SAW denies responsibility to repair the track used for alternative service.<sup>1</sup>

In its now typical passive-aggressive manner, SAW has not

---

<sup>1</sup> It is deeply ironic that Gorsuch in his July 16 letter (Exhibit B) claims that WTL has responsibility to inspect and to repair when SAW takes the position that any entry by WTL other than on a locomotive to perform a switch is a trespass (see Exhibit A, para 4; see also Exhibit G, para 4). The only logic linking SAW's twisted position is an intent to harm PYCO and to undermine the effectiveness of this Board's orders in F.D. 34889 and other dockets.

responded to urgent requests commencing July 11, 2007, that it address the repair issue, or authorize WTL and PYCO to proceed, with inspection and repair of track, and with weed control. This Board has inherent power to authorize entry by WTL, PYCO or their contractors to inspect, repair, and control weeds as part of the protocol governing alternative service to PYCO.<sup>2</sup> In the alternative, if the Decision of November 21, 2006, must be reopened to impose this modification, then such reopening is justified on grounds of the new evidence or changed circumstances concerning track deterioration, SAW's evasion of responsibility to repair, and delay in feeder line relief.

PYCO needs alternative rail service to move its products to market. In order to obtain that service, the track must be in repair and the weeds under control. The job is SAW's to do (see reasons stated in Exhibit C), but since SAW is not doing that job, PYCO must request that this Board immediately authorize WTL and PYCO, and their contractors, to enter for that purpose. Any entry by PYCO or contractors will be supervised for rail safety purposes by WTL personnel.

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<sup>2</sup> The basic protocol in the initial alternative service proceeding under Part 1146 was ordered in PYCO Industries-- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, served Feb. 16, 2006. In PYCO Industries -- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, served June 21, 2006, this Board modified the protocol to provide that "[d]uring the hours allocated to WTL under these protocols, SAW may not place or have any equipment on the wye coming out of the south side of its yard." Slip op. at 8, ordering paragraph 5.

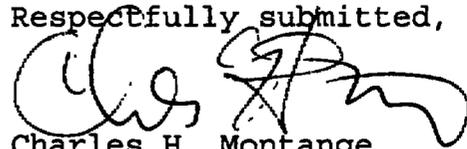
This protocol can be readily modified to provide that WTL, and (under WTL supervision) PYCO or contractors can inspect, repair, and control weeds on trackage used to provide alternative service to PYCO.

PYCO (and WTL) reserve the right to seek reimbursement or set-off from SAW for all expenditures to inspect and to repair trackage, or to control weeds, on SAW facilities.

Conclusion

For the reasons stated above, PYCO requests this Board immediately to issue an order authorizing WTL and, under WTL supervision, PYCO and contractors to enter the premises of SAW in Lubbock to inspect and to repair all track used by WTL to provide alternative service to PYCO and to control weeds on same.

Respectfully submitted,



Charles H. Montange  
for PYCO Industries, Inc.  
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.

Exhibit A -- McConville Declaration  
Exhibit B -- July 16 Gorsuch to Ellis letter  
Exhibit C -- August 3 Montange to Gorsuch letter  
Exhibit D -- August 6 Heffner to Gorsuch letter  
Exhibit E -- August 6 McConville to Wisener letter  
Exhibit F -- August 7 email from Gregory  
Exhibit G -- Lacy Declaration

Certificate of Service

I hereby certify service of the foregoing motion to permit inspection and repair upon the following counsel of record by express service, next business day delivery, this 6th day of August 2007:

Thomas McFarland  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60606-1112 (for SAW)

with a courtesy copy to

John D. Heffner, Esq.  
1750 K Street N.W., Suite 350  
Washington, D.C. 20006 (for WTL)

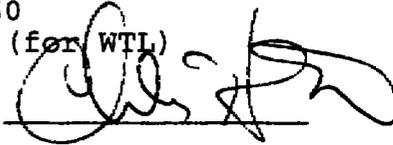
A handwritten signature in black ink, appearing to read "John D. Heffner", is written over a horizontal line. The signature is stylized and cursive.

Exhibit A

## Before the Surface Transportation Board

PYCO Industries, Inc.     )  
-- Alternative Rail Service --) F.D. 34889  
South Plains Switching    )

### Declaration of H. M. McConville

I, H. M. McConville, am Vice President-Operations for West Texas and Lubbock Railway and make this Declaration in support of relief allowing West Texas & Lubbock Railway (WTL), PYCO Industries, or their contractors immediately to enter the premises of South Plains Switching (SAW) in Lubbock to inspect the track condition, to make necessary repairs, and to control weeds.

1. On or about July 11, 2007, the WTL crew operating over SAW trackage pursuant to the Board's Decision in F.D. 34889 of November 21, 2006 discovered a track defect known as a "strip joint". This is a failure of the joint between two rails and creates a potentially unsafe track condition. It can also be determined by the Federal Railroad Administration to be a violation of track maintenance standards contained in the Code of Federal Regulations.

2. On July 11 WTL Superintendent Hans Grosstueck contacted SAW's Shad Wisener to request repair of the joint. On July 16 I left a message for SAW President Delilah Wisener advising her of this condition and requesting its repair. That message was not returned. Superintendent Grosstueck was in touch with Shad Wisener subsequently. No action has been taken to date.

3. SAW has failed to control the growth of weeds on trackage WTL must operate over to serve PYCO pursuant to the Board's Decision. The height and density of the weeds are now sufficient to create a safety hazard for WTL crews in performance of their switching duties.

4. SAW has consistently advised WTL personnel that it was not permissible to enter SAW property for the purposes of repair and maintenance, going so far as to accuse us of trespassing when our vehicle used a yard access road in the performance of switching duties.

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

Executed on August 7, 2007.



H. M. McCONVILLE

Exhibit B

**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

July 16, 2007

**CM/RRR 7004 1160 0004 0775 9948**

Mr. Ed Ellis  
Permian Basin Railways, WTL  
P.O. Box 618181  
Chicago, Illinois 60661

Re: Repair of Track 1 – Demand by West Texas Lubbock Railroad

Dear Mr. Ellis:

This firm represents South Plains Switching, Ltd. Co., in the Lubbock area and in connection with the above referenced matter. On Monday, July 16, 2007, South Plains Switching, Ltd. Co., received a call from an employee of West Texas Lubbock Railroad demanding that a strip joint on Track 1 be replaced. Track 1 is a track that was turned over to the West Texas Lubbock Railroad in order to serve Pyco Industries pursuant to an order of The Surface Transportation Board.

By order of January 26, 2006, The Surface Transportation Board granted Pyco's request for alternative rail service and allowed West Texas Lubbock Railroad to operate over South Plains' track and serve Pyco. The tracks included Track 1.

Under the applicable railroad regulation, 49 CFR 213.5(e), a common carrier which is directed by the Surface Transportation Board to provide service over the track of another railroad under 49 U.S.C. § 11123 is considered the owner of that track for the purposes of the application of this part during the period the directed service order remains in effect. Therefore, the responsibility of compliance, in maintaining and bringing the track to Class 1 condition, under 49 CFR 213.5 is that of West Texas Lubbock Railroad. Therefore the request of the personnel of West Texas Lubbock Railroad for South Plains Switching, Ltd. Co., to repair the track is not proper in that it is the responsibility of the West Texas Lubbock Railroad to repair the track.

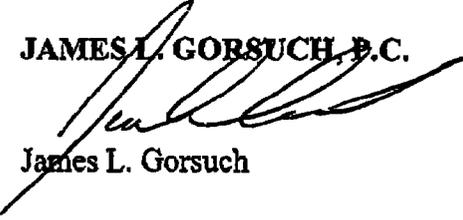
Further, please be advised that South Plains Switching, Ltd. Co., will perform an inspection of the tracks currently being used by the West Texas Lubbock Railroad and subject to the STB order and will make demands for repairs on all tracks that have been damaged due to the use of the West Texas Lubbock Railroad in serving Pyco Industries.

From this point forward, the General Manager of South Plains Switching, Ltd. Co., will be Larry Wisener and he can be reached at 806/828-4841.

We remain,

Very truly yours,

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



James L. Gorsuch

JLG/jeb

cc: Mrs. Delilah Wisener  
South Plains Switching, Ltd. Co.  
P.O. Box 64299  
Lubbock, Texas 79464-4299

Exhibit C

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX (206) 546-3739

3 August 2007  
express

James L. Gorsuch, Esq.  
4412--74th St., Suite B-102  
Lubbock, TX 79424

Re: your letter of July 16 to Mr. Ed Ellis;  
repair of trackage used for alternative  
service to PYCO in Lubbock

PYCO -- Alternative Service -- SAW,  
STB F.D. 34889

Dear Mr. Gorsuch:

This is a response (a) on behalf of PYCO Industries, Inc. and (b) with the approval of Mr. John Heffner [counsel for West Texas & Lubbock Railroad (WTL)] to your letter of July 16, 2007, addressed to Mr. Ed Ellis, evidently in his capacity as an officer of WTL. WTL is the common carrier currently authorized to provide alternative service to PYCO Industries, Inc., in Lubbock over lines of South Plains Switching Ltd. (SAW).

Due to the absence of Mr. Ellis and the fact that your letter was not copied to Mr. Heffner (WTL's counsel), Mr. Heffner was unaware of the letter until the afternoon of August 3, 2007, at which time a copy was also furnished to me. Since Mr. Heffner is leaving shortly for vacation, I am providing a reply which he has approved, which reply is also on behalf of PYCO.

Mr. Heffner requests that any correspondence by you on behalf of SAW to WTL should be provided to him directly. Similarly, any communications which you make with PYCO should be directed to myself or to Mr. McLaren. If circumstances are such that you believe a direct communication with one of our clients essential, then please make certain we are contemporaneously aware.

In your letter, you note that WTL personnel on July 16 requested that SAW repair SAW's Track 1. You assert that under 49 CFR 213.5(e) and 49 U.S.C. § 11123, a common carrier that is directed to provided service over the track of another is deemed the owner of Track 1 and is responsible for repair to Class 1 status. You apparently believe that WTL is such a carrier and

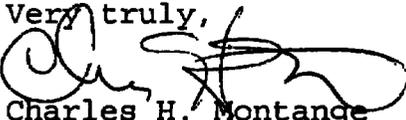
is thus deemed to be the owner of Track 1. You further assert that SAW intends to make an inspection and demand repair of "all tracks that have been damaged due to use by [WTL] in serving PYCO Industries."

WTL is authorized to provide service to PYCO pursuant to the Decision in Finance Docket 34889, served November 21, 2006. That decision does not "direct" WTL to provide service pursuant to 49 U.S.C. § 11123. Instead, the November 21, 2006, decision authorizes WTL to provide service pursuant to 49 U.S.C. § 11102(a) and 49 C.F.R. 1147.1. 49 CFR 213.5(e) and 49 U.S.C. § 11123 are therefore not applicable. Moreover, PYCO requested STB to condition service on allowing an independent inspector access to the track for inspection purposes, and on allowing an independent contractor access to the track to make repairs. In the Decision served November 21, 2006, STB denied PYCO's request. It follows that neither PYCO nor WTL have authority to inspect or to repair any SAW track; the obligation to inspect the track and to repair the track rests squarely on SAW.

SAW has failed to inspect the track, much less to repair it, and indeed eschews responsibility for same. SAW traditionally has only repaired the track when it is broken. PYCO has repeatedly complained about the deteriorated quality of the trackage. Problems currently experienced with the track flow from lack of maintenance by SAW, not from use by WTL.

If your letter is intended to indicate that SAW now gives PYCO and WTL a right of entry to inspect and to make repairs, please so confirm. PYCO and WTL in that event will make arrangements for necessary and prudent repairs as soon as possible. However, PYCO and WTL reserve the right to bill SAW for all work and materials associated with entry for inspection and repair, for the underlying responsibility for maintenance and repair rests with SAW.

A copy of your 16 July letter to Mr. Ellis is attached for your reference.

Very truly,  
  
Charles H. Montange  
for PYCO Industries

attachment

cc. Mr. John Heffner (WTL counsel)  
Mr. Gary McLaren (PYCO Lubbock counsel)  
Mr. Thomas McFarland (SAW STB counsel)  
Mr. Melvin Clemens (STB Office of Compliance)  
all w/att.

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

August 6, 2007

James L. Gorusch, Esq.  
4412 - 74<sup>th</sup> St. - Suite B-102  
Lubbock, TX 79424

*Via Fax* 806-771-6476

Re: PYCO - Alternative Service - SAW  
STB Docket No. F.D. 34889 & related dockets

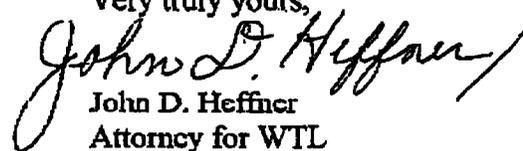
Dear Mr. Gorusch,

I am writing in behalf of my client, the West Texas & Lubbock Railroad (WTL) to advise you of two maintenance issues requiring South Plains Switching's (SAW) immediate attention.

Firstly, the strip joint on Track 1 needs immediate repair. Please have your client repair it within the next 24 hours, or in the alternative, provide your client's authorization for WTL to make the repair.

There is also a weed control problem around the SAW yard and at tracks 9200/9298. Could you please arrange for the weeds to be shredded in the next day, or else authorize WTL and PYCO to take care of the problems? Please let us know today how you wish to proceed by the close of business today.

I await your prompt reply. Thank you for your kind assistance.

Very truly yours,  
  
John D. Heffner  
Attorney for WTL

Cc: Melvin F. Clemens, Jr. (Director, STB OCCA *via fax* 202-245-0462)  
Thomas F. McFarland, Esq. (SAW STB counsel *via fax* 312-201-9695)  
Gary McLaren (PYCO Lubbock counsel *via fax* 806-798-8878)  
Steve Gregory (*via fax* 972-692-8016)  
Charles Montagne, Esq. (PYCO counsel *via fax* 206-546-3739)

Exhibit E



**Permian Basin Railways**  
Texas-New Mexico Railroad  
West Texas & Lubbock Railway  
Chicago Terminal Railroad  
118 South Clinton Street, Suite 400  
Chicago, IL 60661

August 6, 2007

Mr. Larry Wisener  
General Manager  
South Plains Switching, LTD. CO.  
VIA FAX: 806-828-4863

Dear Mr. Wisener:

The strip joint on track 1 needs immediate repair. Could you please have it repaired in the next 24 hours, or authorize WTL to make the repair? There is also a weed control problem around the SAW yard and at tracks 9200/9298. Could you please arrange for the weeds to be shredded in the next day, or authorize WTL and PYCO to take care of the problems? Please let us know today how you wish to proceed.

Thank you for your assistance in the matter.

Sincerely,

H. M. McConville  
Vice President - Operations

cc: James Gorsuch      VIA FAX: 806-771-6476  
John Heffner          VIA FAX: 202-296-3939  
Charles Montange      VIA FAX: 206-546-3739

Exhibit F

**c.montange**

---

**From:** "Steve Gregory" <gregorys@iowapacific.com>  
**To:** "c.montange" <c.montange@verizon.net>; <jheffner@comcast.net>; <jsavagelaw@aim.com>  
**Cc:** "Ed Ellis" <ellise@iowapacific.com>; "Mike McConville" <mconvillem@iowapacific.com>; "Robert Lacy" <rlacy@pycoindustries.com>; "Gary McLaren" <gmclaren@sbcglobal.net>; "Gail Kring" <gkring@pycoindustries.com>  
**Sent:** Tuesday, August 07, 2007 1:26 PM  
**Subject:** Re: Maintenance on SAW track

As of now there has been no response to WTLC re our letter yesterday and no effort made to perform any work on the track or weeds.

8/7/2007

Exhibit G

Before the Surface Transportation Board

PYCO Industries, Inc.       )  
-- Alternative Rail Service --) F.D. 34889  
South Plains Switching    )

Declaration of Robert Lacy

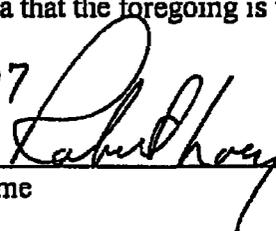
I, Robert Lacy, am Senior Vice-President for PYCO Industries, Inc. make this Declaration in support of relief allowing West Texas & Lubbock Railroad, PYCO Industries, or their contractors immediately to enter the premises of South Plains Switching (SAW) in Lubbock to inspect the rail, to make necessary repairs, and to control weeds.

WTL has given SAW 24 hours to both repair the rail and shred the weeds or to give WTL and PYCO permission to enter the property and do the work.

1. SAW has not responded to the WTL request within 24 hours.
2. The weeds in the SAW yard and at tracks 9200 and 9298 are approximately six feet tall and pose a real threat to the switch crews of both WTL and SAW.
3. These matters need to be address urgently to avoid and injuries to the WTL switching crews.
4. Mr. Wisener of SAW has repeatedly warned WTL and PYCO personnel not to trespass on SAW property.

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

Executed on August 7, 2007

  
\_\_\_\_\_  
Name