

SEP 10 2007

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Public Record

ORIGINAL

220232

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- )  
FEEDER LINE APPLICATION -- ) F.D. 34890  
SOUTH PLAINS SWITCHING LTD. CO. )

KEOKUK JUNCTION RAILWAY CO. -- )  
FEEDER LINE APPLICATION -- ) F.D. 34922  
SOUTH PLAINS SWITCHING LTD. CO. )



**FILED**

SEP 10 2007

**SURFACE  
TRANSPORTATION BOARD**

PETITION FOR RECONSIDERATION  
in F.D. 34890 and 34922  
AND STAY IN F.D. 34922  
ON BEHALF OF  
PYCO INDUSTRIES, INC.

PYCO Industries, Inc. ("PYCO"), the main shipper on the lines of South Plains Switching, Ltd. Co. ("SAW") and the feeder line applicant in F.D. 34890, hereby petitions for reconsideration and stay of this Board's Decision served August 31, 2007, insofar as it granted the feeder line application of Keokuk Junction Railway Co. (KJRY) in F.D. 34922 to purchase SAW's Lubbock rail lines, and insofar as it denied (in total and without any discussion) a motion by PYCO in F.D. 34980 to void certain property transfers by SAW to Choo Choo Properties, Inc., made between January 9, 2006, and May 5, 2006. PYCO petitions for reconsideration of the grant of the KJRY application in F.D. 34922, and at the Board's failure in F.D. 34890 to void certain transfer of property from SAW to its alter ego Choo Choo Properties, Inc.

PYCO seeks a stay in connection with F.D. 34922 pending reconsideration and judicial review. As explained below, a stay is

is justified both pending reconsideration, and pending judicial review.

PYCO will first address certain merits issues, and then the showings of irreparable injury required under STB precedent for a stay.

#### Summary

This Board's Decision served August 31, 2007, granting the application in F.D. 34922 of KJRY should be reconsidered on grounds of material error. The Board erred in granting an application that it never "accepted" or erred in granting an "accepted" application for only a portion of the lines. In any event, public convenience and necessity (PCN) is not served by granting any KJRY application. KJRY is not likely to improve service over the SAW's lines. Granting the KJRY application converts 49 U.S.C. 10907 into a kind of revolving door for deficient rail service and continued deterioration of shipper service.

This Board also committed material error in failing without explanation to void certain additional property transfers by SAW to Choo Choo Properties between January 9, 2006, and May 5, 2006.

Since PYCO will sustain irreparable injury absent a stay, since there is no significant harm to others from a stay, since the public interest favors it, and since the grant of the KJRY application is in error, this Board should stay the grant or any closing in F.D. 34922. Appropriate relief should also be granted

in connection with property transfers to Choo Choo, which Choo Choo continues to use against PYCO per Exhibit A attached.

I. Basis for Reconsideration (Merits Issues)

1. F.D. 34922

1(a). Under 49 C.F.R. 1151.2(c)(2), this Board must issue a decision that "accept[s]" a competing application. After the competing application is accepted, the regulation provides for a comment period. The only competing application filed by KJRY which this Board has ever accepted is KJRY's competing application for "Alternative Two." See Keokuk Junction Railway Co. -- Feeder Line Application -- lines of South Plains Switching, Ltd. Co., F.D. 34922, served August 17, 2006, slip op. at p. 3. Alternative Two encompassed a subset of SAW lines used for service to three of SAW's shippers: Attebury, Compress, and PYCO.

The Board cannot grant that which it never accepted. Since the Board only "accepted" KJRY's application for Alternative Two, its subsequent decision served August 31, 2007, granting KJRY's application necessarily is limited to KJRY's application for Alternative Two.

The Board has recognized a consensus among all parties that it is desirable to keep the SAW lines intact. PYCO Industries, Inc. -- Feeder Line Application -- Lines of South Plains Switching, Ltd. Co., F.D. 34890 and related docket F.D. 34922, served August 16, 2006, slip op. at p. 4. The Board recognized that this would

enhance safety and efficiency, and minimize operational difficulties. Id. In its August 16, 2006, Decision, this Board formally accepted PYCO's application to acquire all the lines of SAW, notwithstanding KJRY's objection, on this basis.

It is arbitrary and capricious, and contrary to the statute, to grant KJRY's application to acquire only a part of SAW's lines, while at the same time granting PYCO's application to acquire all of SAW's lines. Under 49 U.S.C. 10907(c)(1)(E), this Board may only find a feeder line applicant meets the public convenience and necessity (PCN) standard if the sale of a line "will be likely to result in improved railroad transportation for shippers that transport traffic over such a line." That finding cannot be made for KJRY as to a part of SAW when PYCO has qualified to acquire all SAW. To allow the KJRY application to go forward in such circumstances amounts to the "cherry picking" of SAW's largest customer of which SAW complained at PYCO Industries, Inc. -- Feeder Line Acquisition -- South Plains Switching, Ltd., F.D. 34844 and related case, served July 3, 2006, slip op. 6.<sup>1</sup> This result is especially questionable given the hostility KJRY has displayed to PYCO, which would be most of the business in Alternative Two.

1(b). In all events, any and all KJRY applications are

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<sup>1</sup> Thus, while PYCO certainly agrees that it was not engaged in cherry picking when it filed applications seeking all of SAW, or, if it could not make sufficient showings for all-SAW, then for Alternative Two, the situation is quite different when the entirety of SAW is at issue.

deficient under 49 U.S.C. 10907(c)(1)(E). In other words, it is unlawful for the Board to grant a KJRY application for all of SAW even if the Board had properly accepted it, for the Board has no basis for finding that KJRY is likely to improve service in Lubbock. On the one hand, no shipper provided any letter of support for any of KJRY's applications. Instead, numerous shippers actually indicated they did NOT support KJRY. In sharp contrast to PYCO's rail service provider (WTL), KJRY has no operations in Texas, and the litigation and controversies surrounding KJRY and other Pioneer Railcorp subsidiaries at the very least calls into question whether KJRY will likely improve service. The Board's decision amounts to substituting a larger adversarial outfit for a smaller one. In addition, although the rail line is falling apart (as motions by both SAW and PYCO in F.D. 34889 illustrate), KJRY as this Board notes in its August 31 Decision has no plans to address the situation. The General Counsel for Pioneer informed PYCO's Lubbock counsel that KJRY was becoming involved at SAW's instigation when U.S. Rail Partners "dropped out."<sup>2</sup> KJRY has evidenced hostility to PYCO and PYCO's need for adequate rail service from the very inception of the proceeding, notwithstanding the fact that PYCO would be its largest customer. So far as PYCO is aware, this Board's August 31 decision is the first instance in

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<sup>2</sup>PYCO Reply to KJRY's Motion for Extension of Time, at p. 2, filed under cover letter dated 19 July 2007, in F.D. 34890.

which the Board has purported to grant an application, let alone a competing application, which no shipper supports, which attacks the interests of the largest shipper, and which the majority of shippers by volume, including the two largest shippers on the lines (PYCO and Hanson) opposed. Under these and other circumstances previously pointed out by PYCO, this Board simply cannot find that PCN is served by granting KJRY's "competing" "white knight" application. The question is not whether KJRY in theory could provide adequate service; it instead is whether KJRY is likely to improve service. That question cannot be answered affirmatively on this record.

1(c). When PYCO sought through discovery to show that KJRY and other shortlines owned by KJRY's parent Pioneer provided inadequate service, KJRY and Pioneer objected to such discovery. By Decision in F.D. 34890 and 34922 served October 5, 2006, this Board ordered KJRY and Pioneer to respond to PYCO's discovery by October 10, 2006. With the exception of certain limited financial data belatedly supplied by Pioneer, neither Pioneer nor KJRY responded; in particular, Pioneer and KJRY refused to make available shipper complaints and litigation records. This failure went to the heart of PYCO's ability to contest key aspects of the KJRY application.<sup>3</sup> PYCO accordingly moved for sanctions, including

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<sup>3</sup> In the August 31 Decision at p. 6, this Board states that PYCO failed to contest the adequacy of KJRY/Pioneer's discovery response on financial information. This is not correct. PYCO

specifically asked this Board to strike KJRY's initial application, and to strike all claims or evidence<sup>4</sup> by KJRY from the record that it is likely to improve service to shippers in Lubbock. PYCO noted that without any evidence, KJRY could not meet the burden of 49 U.S.C. 10907(c)(3).<sup>5</sup> It is arbitrary and capricious to preclude

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contested and still contests the adequacy of the response to demonstrate what needs to be shown to establish PCN under 49 U.S.C. 10907(c)(3)(E) in the situation here. But PYCO certainly contested then and now the adequacy of KJRY/Pioneer's discovery response on all other issues (like shipper complaints); indeed, they made none. This Board thus clearly erred insofar as the Decision at p. 6 denies PYCO's request for sanctions. Since Pioneer and KJRY stonewalled PYCO, essentially refusing to cooperate notwithstanding a direct order of this Board served October 5, 2006, they obviously should be sanctioned. It is no answer to say that PYCO was able to assemble some information showing that KJRY and Pioneer subsidiaries were the subject of shipper complaints and considerable administrative and court litigation. Given the abbreviated procedural schedule adopted by this Board in this proceeding, there was insufficient time for PYCO to canvass unknown shippers and search court records throughout the country. The Board's decision claims that PYCO did not say it could not find the information from public sources. Aug. 31 Dec. at 6. PYCO sought the information in the first place on this basis. PYCO is entitled to rely on an order compelling discovery; it should not have to seek to re-compel, especially under an abbreviated procedural schedule that did not leave room for discovery shenanigans. But more important, in the brief time available for PYCO's filings, obviously PYCO could not canvass courts, much less fly to Washington to spend a week combing through the Board's records. PYCO did not have the time, especially given the numerous on-going retaliatory actions by SAW and the need to respond to various pleadings by SAW and KJRY. The Board's refusal to sanction KJRY and Pioneer allows concealment of relevant evidence despite an order of the Board, on which PYCO was entitled to rely, and amounts to a denial of due process.

<sup>4</sup> KJRY submitted no evidence.

<sup>5</sup> PYCO Industries, Inc.'s Comments on KJRY Feeder Line Application in F.D. 34890 and F.D. 34922, filed under cover

compilation of a record through discovery and then make findings (or avoid findings) based on that curtailment of the record.

1(d). As indicated in note 3, the Board's August 31 decision erroneously denied PYCO's requested sanctions against SAW. The Board also does not make any finding that KJRY would be likely to improve service in Lubbock.<sup>6</sup> The Board's decision, insofar as it touches on the question at all, merely suggests that "PYCO has failed to show why PYCO would be able to operate the lines profitably but not KJRY." Decision served August 31, 2007, slip op. at 32. With respect, this completely misses the point. The feeder line statute (49 U.S.C. 10907) is not designed primarily for "profitable" lines. Instead, it is designed for lines that are so marginal that (as is apparently the case here) the carrier owning them cannot afford to keep them in repair. Consistent with section 10907, PYCO has never claimed the SAW lines could be

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letter dated 24 October 2006, at pp. 3-10.

<sup>6</sup> In contrast, PYCO indicated it intended to rely on its alternative service provider West Texas & Lubbock (WTL) should its feeder line application be granted, and it is undisputed that WTL has improved service for PYCO despite lack of cooperation from SAW.

The Board at one time says that KJRY will "provide adequate service" (August 31 Decision at p. 35) but that statement does not address PYCO's showings that PCN is not served by KJRY's application, in any event, it has no support in the record, and the Board erred in considering any evidence on the relevant issue submitted by KJRY given the inadequate KJRY/Pioneer discovery response, including the stonewalling of evidence on shipper complaints. The latter error amounts to a denial of PYCO's due process right to adequate discovery.

operated profitably. Indeed, PYCO believes them less "profitable" than this Board found, because they are falling apart and need substantial rehabilitation. PYCO instead said that it was a rail dependent shipper, that it expects to pay the operating costs out of proceeds from the BNSF rate division, and that it had the financial capability (and, due to its rail dependency, the incentive) to subsidize operations (i.e., buy the lines without any return on its capital investment, much less receiving that investment back). In short, PYCO showed it was prepared to operate at a loss. This Board's own decisions in F.D. 34802 and 34889 confirm PYCO's rail dependent status. In contrast, KJRY is not a shipper, but a for-profit company owned by a for-profit railroad holding company that according to this Board's decision will rely on bank loans to buy the lines. KJRY has no incentive to acquire lines on which it will not receive an ample return on its investment after expenses are paid.

This Board, relying on KJRY's own evidence, found that the Going Concern Value (GCV) is less than Net Liquidation Value (NLV). If GCV is less than NLV, then it follows that the lines cannot be operated profitably. Operational expenses might be covered, but there would be an inadequate return on investment.

In other words, according to KJRY's evidence and this Board's own findings, KJRY will have to pay more for the lines (NLV) than they are worth on an operating basis (GCV). Unless KJRY adopts the

abusive practices to boost revenues that SAW used against rail dependent shippers like PYCO, the expectation under the circumstances is that service will deteriorate. This follows from the simple fact that adequate service cannot be financed or provided due to lack of sufficient revenue to support the Board's stated purchase price.

The feeder line statute is supposed to address this kind of problem by shifting such lines to someone who is prepared to subsidize (a captive shipper); not to someone who will prolong the problem that caused shippers to invoke the feeder line statute in the first place. The Board is not in some kind of straight jacket that compels it to construe 49 U.S.C. 10907 in a counterproductive way that achieves, after lengthy litigation, so arbitrary a result. To the contrary, the Board must construe 49 U.S.C. 10907(c)(3)(E), or the PCN standard generally, to prohibit it from granting the KJRY application in light of the evidence on value as presented by KJRY itself and as incorporated in the Board's own findings. In short, granting any application by KJRY in the circumstances is inconsistent with section 10907 and defeats the very purposes of the feeder line statute.

It is especially important that this Board not create a revolving door of inadequate rail service here. This Board indicated in its August 31 Decision at p. 35 that it intended, pursuant to 49 U.S.C. 10907(h), to give SAW a first right of

refusal to buy back the lines should KJRY elect to sell them after it acquires them pursuant to the feeder line statute. Since Pioneer Railcorp's general counsel informed PYCO that KJRY was in this matter in the first place at the behest of SAW, PYCO is legitimately concerned that 49 U.S.C. 10907 is being converted from a shipper remedy into a sad and expensive joke.

## 2. Failure to Void Property Transfers

2. As this Board has found, SAW and Choo Choo are alter egos.<sup>7</sup> SAW is owned by the Wisener family and run by Larry Wisener. Choo Choo is owned and run by Larry Wisener. Unbeknownst to PYCO, SAW purported to assign all of PYCO's utility and crossing rights leases and agreements to use SAW property to Choo Choo. Subsequent to the filing of PYCO's initial feeder line application on May 5, 2006, Choo Choo subsequently purported to terminate all PYCO's lease and agreement rights. This action of course would put PYCO out of business. PYCO moved for emergency relief by motion filed July 17, 2006, in F.D. 34890 and related dockets. By Decision served August 3, 2006, this Board voided all transfers from SAW to Choo Choo after May 5, 2006, and voided all rescissions of leases and agreements concerning PYCO by SAW or Choo Choo after May 5, 2006. PYCO Industries, Inc. -- Feeder Line Application --

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<sup>7</sup> E.g., PYCO Industries, Inc. -- Feeder Line Application -- South Plains Switching, Ltd. Co., F.D. 34890 and related dockets, served August 3, 2006, slip op. at 2 & 6; id., served Jan. 24, 2007, slip op. at 2, 3, and 5-6.

South Plains Switching Ltd. Co., F.D. 34890 and related dockets, served Aug. 3, 2006, slip op at p. 9. PYCO believes that the Board unquestionably intended to void the transfer of the leases to Choo Choo. However, at the time the decision was issued, neither PYCO nor the Board knew the date on which SAW purported to transfer the leases to Choo Choo. PYCO subsequently ascertained through discovery that the SAW/Choo Choo transfer agreement was dated March 9, 2006. SAW and Choo Choo take the position that the Board's August 3, 2006 Decision thus did not invalidate the transfer. In state court, they also ignore the fact that the Board invalidated any rescission as well. On September 4, 2007, Choo Choo served a pleading (under cover letter dated 30 August 2007) seeking a trial to prevent PYCO from "trespass" by use of its leases. A copy is attached as Exhibit A.

Through discovery, PYCO ascertained that SAW had made a number of other property transfers to Choo Choo prior to May 5, 2006, including but not limited to the purported transfer of the PYCO leases and agreements.

PYCO subsequently filed a motion to void all these transfers, noting that they occurred after the date (January 9, 2006) that PYCO advised SAW (and this Board) that it intended to file a feeder line application.<sup>8</sup>

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<sup>8</sup> Verified Motion to Void Additional Transfers of Property Interests from South Plains Switching, Ltd. Co., to Choo Choo Properties, in F.D. 34890, 34889, and 34801, filed by PYCO under

In this Board's August 31 Decision, this Board denied this motion without discussion. Dec. served Aug. 31, 2007, in F.D. 34890 and related case, slip op. at 37, ordering paragraph 4. See also id. p. 10.

In the event KJRY acquires the SAW properties, Choo Choo will still hold the "profit" in the PYCO leases and agreements. As this Board has observed, shipper statements "indicate that SAW has engaged in a pattern of abusive behavior, including actual and threatened retaliation, against multiple shippers who voice concerns about their rail service." August 31, 2007 Dec. at 12. As Exhibit A demonstrates, Choo Choo/SAW continues to seek to terminate PYCO's leases and agreements as of September 4, 2007. Under the circumstances, the only reasonable expectation is that Choo Choo (Mr. Wisener, who runs SAW) will take advantage of any opportunity to retaliate against PYCO by continuing his efforts to terminate the PYCO leases and agreements assigned Choo Choo by SAW on March 9, 2006.

PYCO need not fear such a recision in the event PYCO acquires the SAW property, for PYCO will be the underlying owner, and will hold all rights necessary to continue its rail-dependent operations. However, if KJRY acquires the SAW property, the situation is different. PYCO will not have any lease or agreement relationship with KJRY, given the March 9, 2006 assignment out, and

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cover letter dated 13 October 2006.

SAW/Choo Choo/Wisener can threaten retaliation in the form of lease terminations which would negate PYCO's ability to continue its rail dependent operations. Unfortunately, the problem is magnified for it may occur this fall and winter, during the 2007 cotton rush.

Since SAW has indicated to PYCO that it will not transfer its property to PYCO under 49 U.S.C. 10907 if any other opportunity exists, and since SAW has called forth that "other opportunity" (namely KJRY), the Board's failure to void all property transfers after January 9, 2006 (or at least the March 9 lease transfer) simply sets PYCO up for continued and devastating retaliation by SAW/Choo Choo.

In its Decision served January 24, 2007 in PYCO Industries Inc. -- Feeder Line Application -- South Plains Switching, Ltd. Co., F.D. 34890, this Board voided a deed from SAW to Choo Choo dated April 28, 2006, at the request of Hanson Aggregates, a shipper on the SAW lines. This Board noted that PYCO put SAW on notice in a pleading filed in F.D. 34802 on January 9, 2006, that it planned to file a feeder line application. Slip op. at 3 & 5. The Board accordingly invalidated the transfer.

In the event this Board does not reconsider its Decision permitting KJRY to acquire the lines, then SAW will transfer its lines to KJRY. This Board in such event must expressly void the March 9, 2006, transfer of the PYCO leases and agreements to Choo Choo. The railroad that owns the property should be the party with

whom PYCO must deal with respect to its leases and agreements. The issue may be irrelevant if PYCO owns the property; it definitely is not if KJRY does.

PYCO's motion dated October 13, 2006, did not purport to provide as exhibits all of the deeds out by SAW to Choo Choo between January 9, 2006 and May 5, 2006. However, PYCO did attach two deeds, both of April 28, 2006 (like the one invalidated by this Board in its Decision served January 24, 2007). PYCO understands one of these deeds (No. 53081, which is Exhibit D to our motion dated October 13, 2006) to encompass the lead to 84 Lumber. The deed does not reserve a rail easement to SAW. 84 Lumber is an active shipper on the SAW system. This deed to Choo Choo from SAW would appear to cut 84 Lumber off from the SAW system. In the event PYCO acquires the SAW system, PYCO wishes to serve 84 Lumber, and all other shippers, without interference by the Wisener family. This Board has already found that the evidence shows a pattern of retaliating or abusing shippers; there is no reason to expect change to the extent SAW or Choo Choo remain somewhere on the lines. PYCO accordingly requests reconsideration of its motion to invalidate all SAW to Choo Choo deeds from January 9, 2006 through May 5, 2006, and certainly reconsideration of the motion insofar as it denied relief on deed 53081. The line should be kept open to 84 Lumber without interference by SAW or Choo Choo.

## II. Stay Issues

PYCO requests a stay of this Board's grant of the KJRY application in F.D. 34922. Even if the grant is not stayed, then PYCO requests a stay on any closing between KJRY and SAW in F.D. 34922, pending relief to PYCO. Finally, PYCO requests a stay pending the filing of a petition for judicial review by PYCO.

1. This Board sometimes grants "housekeeping" stays without a showing on the merits or concerning irreparable injury in order to consider questions which the Board feels it requires time to address. E.g., City of Alameda -- Acquisition Exemption -- Alameda Belt Line, F.D. 34798, served Dec. 15, 20005 (stay of an acquisition authorization granted without any showings on the merits, or of irreparable harm, or of a balance of harms). Such a stay is appropriate in the circumstances here. As in City of Alameda, PYCO has raised substantial issues concerning an acquisition authorization granted by this Board to KJRY.

This Board ordinarily requires a showing that the party seeking a stay (a) is likely to prevail on the merits and (b) will be irreparably harmed absent a stay. In addition, the Board considers (c) whether the stay would harm other parties and (d) whether issuance of a stay is in the public interest. See Northwestern Pacific Railroad Company -- Change in Operators, F.D. 35073, served Sept. 7, 2007, slip op. 1-2, citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc. (WMATC), 559 F.2d 841,

843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). (WMATC actually holds that the standard for stay is a balancing, so a strong showing of irreparable injury tends to require a lesser showing of merits success.) PYCO meets these criteria for a stay as to the grant of the application in F.D. 34922, any closing under F.D. 34922, and as to the need for further action to invalidate property transfers by SAW to Choo Choo.

PYCO has shown a probability of success on the merits. In the circumstances here, it is arbitrary and unsupported by the record, as well as a denial of due process, to grant KJRY's Alternative Two application, or any other KJRY application, in F.D. 34922. At the very least, any closing in F.D. 34922 must be stayed.

Moreover, it is arbitrary and unsupported by the record to leave the Wisener family in control of the PYCO leases and agreements (in the event KJRY closes a transaction with SAW pursuant to the grant of KJRY's application in F.D. 34922), and in control of the lead to 84 Lumber and possibly other leads to other shippers.

PYCO will suffer irreparable injury absent a stay. PYCO is currently unquestionably receiving adequate service from WTL pursuant to this Board's alternative service orders, first in F.D. 34802, and now in F.D. 34899. However, the alternative service will expire upon "a future authorized sale of SAW's rail lines

under the feeder line provision of 49 U.S.C. 10907 is closed...."  
PYCO Industries, Inc. -- Alternative Rail Service -- South Plains  
Switching, Ltd. Co., F.D. 34889, served November 21, 2006, slip op.  
at p. 5. Thus, in the event KJRY closes, PYCO's adequate rail  
service from WTL will end. KJRY has made no arrangements to  
provide adequate service to PYCO. To the contrary, KJRY adopted a  
hostile attitude to PYCO at the commencement of the feeder line  
proceedings and otherwise has not been in contact. In any event,  
if KJRY closes, it will mean that KJRY is purchasing SAW's lines at  
a value greater than their GCV. This in turn means that KJRY  
cannot both pay the expenses of the lines and obtain an adequate  
return on its investment. KJRY has no reason to subsidize the  
lines like PYCO; nor does KJRY have the financial capacity (its  
purchase, as the Board's findings indicate, is highly leveraged).  
In the circumstances, the only expectation is that service must  
necessarily deteriorate (i.e., revert to inadequacy). If KJRY is  
forced to sell, this Board indicates that SAW has a right to buy  
the property back, notwithstanding SAW's adverse track record.  
August 31 Decision at 35. The Board's Decision thus confronts  
PYCO with a kind of hamster-wheel or revolving door of inadequate  
service. Notwithstanding an expensive and prolonged feeder line  
process in which PYCO had to seek relief in numerous other  
proceedings in order to secure interim adequate service from a  
third party, PYCO will still be faced with inadequate service from

KJRY and then SAW. This denial of effective relief represents irreparable harm, just as any further instance of inadequate service represents irreparable harm. PYCO is unsure that it can arrange for an alternative rail provider in future instances of inadequate rail service if the Board so readily permits supplantation of such service by the kind of maneuver employed by KJRY and SAW here.

In addition, in the event of KJRY acquisition, PYCO will again be subject to economic blackmail by Choo Choo, which will terminate or threaten termination of PYCO leases and agreements at the height of the cotton rush. PYCO would be forced to shut down its rail dependent Lubbock operations. This Board has already recognized this threat as sufficient to justify exactly the kind of equitable relief which PYCO now seeks. PYCO Industries, Inc. -- Feeder Line Application -- South Plains Switching, Ltd. Co., F.D. 34890 and related dockets, served August 3, 2006 (voiding certain property transfers and rescinding lease terminations). See also id., served Jan. 24, 2007 (voiding another SAW to Choo Choo property transfer and lease termination).

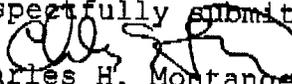
KJRY and SAW will suffer no harm from the grant of the relief sought. In the event of a stay, KJRY will not lose money on an investment its own data indicate will not support an adequate return. And since PYCO is prepared to acquire the property at the price set by the Board, SAW is assured it will not sustain any loss.

The public interest favors the stay sought. The feeder line program should be used to foster the preservation of adequate service, and not to perpetuate inadequate service by shifting ownership of lines whose NLV exceeds their GCV to parties like KJRY who have no incentive, ability, or wish to subsidize their continued operation. Indeed, allowing a party like KJRY to acquire the line without any shipper support or evidence that it would be able to provide adequate rail service tends to destroy 49 U.S.C. 10907 as an effective remedy for rail dependent shippers. Creating a disincentive to use of the feeder line provision to preserve lines is not in the public interest.

### III. Conclusion

For the reasons stated, this Board should grant PYCO's petition for reconsideration of the grant of KJRY's application (and related matters like the refusal to sanction Pioneer and KJRY from stonewalling the order compelling discovery responses), and for reconsideration of this Board's denial of PYCO's motion to void all property transfers from SAW to Choo Choo from January 9, 2006 to May 5, 2006. In addition, this Board should either (a) stay the August 31 Decision insofar as it granted the application of KJRY, or (b) stay any closing by KJRY pursuant to the August 31 Decision. A stay in F.D. 34922 should also be granted pending judicial review.

Respectfully submitted,

  
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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

Subscribed and sworn to before me on this \_\_\_th day of September, 2007, 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.

Lisa Buxton  
Notary Public

My commission expires: 2-24-08.



## Certificate of Service

I hereby certify that I caused copies of the foregoing and attached exhibits to be served by express service, next business day delivery, on this 10th day of September, 2007, upon the following counsel of record in these proceedings:

Thomas F. McFarland  
208 South LaSalle St., Suite 1890  
Chicago, IL 60604-1112 (for SAW)

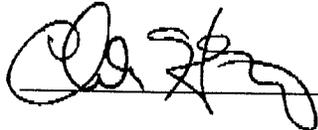
John D. Heffner  
1750 K Street, N.W., Suite 350  
Washington, D.C. 20006 (for WTL)

William Mullins  
Baker & Miller  
2401 Pennsylvania Ave., NW, Suite 300  
Washington, D.C. 20037

Michael Hyer  
General Counsel  
Hanson Building Materials  
8505 Freeport Pkwy, Suite 138  
Irving, TX 75063

Mr. O.E. Floyd  
Floyd Trucking, Inc.  
P.O. Box 50  
Brownfield, TX 79316

Andrew P. Goldstein  
McCarthy, Sweeney & Harkaway  
2175 K Street, N.W., Suite 600  
Washington, D.C. 20036



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Exhibit A

**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

August 30, 2007

Ms. Barbara Sucsy  
District Clerk of Lubbock County  
P. O. Box 10536  
Lubbock, Texas 79408

Re: No. 2006-535,682; Choo-Choo Properties, Inc. vs. Pyco Industries, Inc.; In the 237<sup>th</sup>  
District Court of Lubbock County, Texas

Dear Barbara:

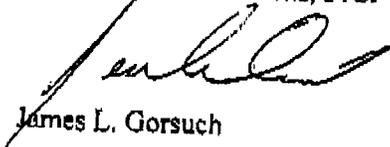
Enclosed herewith for filing please find the original and one copy of Plaintiff's Motion for Trial Setting in connection with the above entitled and numbered cause. Please have the original filed of record and return the file-marked copy to this office in the envelope provided.

By copy of this letter, Defendant's counsel is being furnished with a copy of this motion via certified mail, return receipt requested.

We remain,

Very truly yours,

JAMES L. GORSUCH, P.C.

  
James L. Gorsuch

JLG/jeb

Enclosures

cc: CM/RRR 7006 2760 0005 3677 8772

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

NO. 2006-535,682

**CHOO-CHOO PROPERTIES, INC.**

v.

**PYCO INDUSTRIES, INC.**

§  
§  
§  
§  
§

**IN THE 237TH DISTRICT COURT**

**OF**

**LUBBOCK COUNTY, TEXAS**

**MOTION FOR TRIAL SETTING**

**CHOO-CHOO PROPERTIES, INC.** ("CHOO-CHOO"), files this, its motion for a trial setting, and would show to the court as follows:

**I.**

On July 6, 2006, Plaintiff filed its Original Petition and Application for Temporary Restraining Order and Temporary Injunction. On July 7, 2006, the court granted a request for Temporary Restraining Order and set a hearing on a Motion for Temporary Injunction for July 20, 2006. Prior to the hearing date on the Motion for Temporary Injunction, the parties entered into an agreement for a Temporary Injunction. Pursuant to the parties' agreement, the court signed the Temporary Injunction on October 3, 2006, and the same was entered of record on October 5, 2006.

**II.**

The court heard arguments on a Plea of Abatement and Plea to the Jurisdiction in early fall of 2006. At the time arguments were made, the court took questions raised by the Plea to the Jurisdiction under advisement.

**III.**

The court issued a Scheduling Order setting this case for trial on January 17, 2007. The court signed and entered this Scheduling Order on September 1, 2006. As a part of the Scheduling Order,

*(Handwritten signature)*

a Pre-Trial Management Conference was scheduled for January 5, 2007.

At the Pre-Trial Management Conference the court suggested the parties draft a letter for the court to write to the Surface Transportation Board in Washington, D.C., for an opinion as to whether this court has jurisdiction over the contractual claims made herein or whether the Surface Transportation Board had jurisdiction. The parties drafted and agreed to a letter dated January 8, 2007. The letter was sent to the Surface Transportation Board shortly thereafter. The letter from the Surface Transportation Board failed to answer all of the questions raised by the parties and the court in connection with jurisdiction.

#### IV.

The parties held another meeting in April of 2007, with the court in connection with the settings of this case and the jurisdictional questions. At that time, it was agreed that another letter would be sent to the Surface Transportation Board inquiring about the STB's jurisdiction.

Counsel for CHOO-CHOO drafted such a letter and forwarded the same to counsel for PYCO INDUSTRIES, INC. ("PYCO") on July 17, 2007. To date, counsel for CHOO-CHOO has heard nothing in response to his proposed letter. A copy of the proposed letter is attached as Exhibit "A".

#### V.

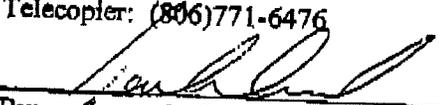
On September 22, 2006, CHOO-CHOO filed its Amended Petition seeking a Temporary Injunction prohibiting PYCO from trespassing on several leases that were owned by CHOO-CHOO. These leases each had cancellation clauses and the leases were duly canceled pursuant to their own terms. Despite the cancellation, PYCO remains in possession of the properties and its employees continue to trespass over said properties on an almost daily basis.

The STB has not made any ruling in connection with the leases that are set forth in CHOO-CHOO'S First Amended Original Petition. This court has jurisdiction over the lease questions and this case should be set for trial or, in the alternative, a Scheduling Order should be entered allowing the parties to get ready for trial on all issues set forth in CHOO-CHOO'S First Amended Original Petition.

WHEREFORE, Premises Considered, CHOO-CHOO prays that the court set this motion for a hearing, and after hearing, the court set this case for trial on the merits.

Respectfully submitted,

JAMES L. GORSUCH, P.C.  
4412 74<sup>th</sup> Street, Suite B-102  
Lubbock, Texas 79424  
Telephone: (806)771-6474  
Telecopier: (806)771-6476

  
By: James L. Gorsuch  
State Bar No. 08221250

**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing Motion for Trial Setting has been served on opposing counsel on the 4<sup>th</sup> day of ~~August~~ <sup>September</sup>, 2007:

CM/RRR 7006 2760 0005 3677 8772

Mr. Gary R. McLaren  
Phillips & McLaren  
3305 66<sup>th</sup>, Suite 1-A  
Lubbock, Texas 79413

  
James L. Gorsuch

**JAMES L. GORSUCH, P.C.**  
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jgorsuch@nts-online.net

Ms. Ellen D. Hanson, General Counsel  
Office of the General Counsel  
Surface Transportation Board  
Washington, D.C. 20423-0001

Re: Questions Dealing With Cause No. 2006-534,401 and Cause No. 2006-535,682 -  
Response to Your Letter of March 22, 2007

Dear Ms. Hanson:

We thank you very much for your letter of March 22, 2007, dealing with the background of the Surface Transportation Board ("STB") rail regulation and preemption, the background of the STB action on the various proceedings in front of it, and the relation of those proceedings to the two causes of action that are pending in my court.

**Cause No. 2006-535,682**  
**Choo-Choo Properties, Inc. v. Pyc Industries, Inc.**

In connection with this case, the causes of actions alleged here in state court are that of declaratory judgment and trespass. Choo-Choo Properties, Inc., claims that it owns certain land and leases pursuant to an agreement, which is attached hereto, dated March 9, 2006. The agreement transfers certain leases from South Plains Switching, Ltd. Co., to Choo-Choo Properties, Inc.

In your letter of March 22, 2007, you indicate that the STB found that various purported transfers of SAW's rail property, including transfers made to Choo-Choo are void and that SAW remains the owner of the property purportedly transferred. You also indicate the STB found that various purported rescissions by Choo-Choo or SAW of leases or agreements are void.

Your attention is drawn to The Surface Transportation Board's decision dated August 3, 2006 (a copy of which is enclosed), on page 6 where the STB held:

"Therefore we will void any transfers of any of SAW's rail properties, including the transfers made to Choo-Choo that occurred after May 5, 2006 (filing of the original Feeder Line Application). Likewise, we enjoin any such transfers by

Exhibit A

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Page 2

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SAW during the pendency of Pyco's new Feeder Line Application (and any competing applications that may be filed), until the closing of the sale or the Board's receipt of notice that the Feeder Line Applicant has decided not to go through with the sale."

In light of the Board's decision with regard to transfers prior to May 5, 2006, Choo-Choo takes the position that the agreement of March 9, 2006, is not covered by the Board's decision. Pyco takes the position that all transfers from South Plains to Pyco are void. If this is the case, this court may decide to proceed with jurisdiction of this proceeding to hear the issues arising out of that agreement.

Please advise if the STB, in its opinion, has jurisdiction over the agreement of March 9, 2006, as it relates to the transfer of certain leases and interest in property from South Plains Switching, Ltd. Co., to Choo-Choo Properties, Inc.

We thank you for your consideration thus far and look forward to hearing from you.

Very truly yours,

**SAM MEDINA, JUDGE**  
237<sup>th</sup> District Court

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Sam Medina, Judge