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July 28, 2006

The Honorable Vernon Williams, Secretary
SURFACE TRANSPORTATION BOARD
1925 K Street N.W.
Washington, D.C. 20423-0001

Re: Pyco Industries, Inc. – F.D. 34802, F.D. 348⁸⁹~~99~~, F.D. 34890, F.D. 348³⁴⁸⁷⁰~~38~~, F.D. 33753;
Before The Surface Transportation Board

Dear Mr. Secretary:

The undersigned, representing South Plains Switching, Ltd. Co., along with Mr. Thomas McFarland, of Chicago, Illinois, hereby file the original and eleven copies of the enclosed Response to Motion for Enforcement of Protocol, Motion for Order Staying Retaliatory Actions, Motion to Stay Purported Sale of Property, Motion to Preserve Status Quo and Motion to Submit New Evidence in Support of Petition filed by Pyco Industries, Inc.

Respectfully Submitted,

JAMES L. GORSUCH, P.C.


James L. Gorsuch

THOMAS F. McFARLAND, P.C.


Thomas F. McFarland by *PO [illegible]*

JLG:jeb

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

217173
F.D. 34802

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

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PYCO INDUSTRIES, INC. – §
FEEDER LINE DEVELOPMENT – §
SOUTH PLAINS SWITCHING LTD. §

217175
F.D. 34890
(Revision of F.D. 34844)

PYCO INDUSTRIES, INC. v. §
SOUTH PLAINS SWITCHING LTD. §

217176
F.D. 34838
34870

SOUTH PLAINS SWITCHING, LTD. -- §
ACQUISITION EXEMPTION – §
BNSF RAILWAY COMPANY §

217177
F.D. 33753 (Sub-no. 1)



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Public Record

**RESPONDENT, SOUTH PLAINS SWITCHING, LTD. CO.'S
RESPONSE TO MOTION FOR ENFORCEMENT OF PROTOCOL,
MOTION FOR ORDER STAYING RETALIATORY ACTIONS,
MOTION TO STAY PURPORTED SALE OF PROPERTY,
MOTION TO PRESERVE STATUS QUO AND MOTION TO
SUBMIT NEW EVIDENCE IN SUPPORT OF PETITION**

SOUTH PLAINS SWITCHING, LTD. CO. ("SAW") files this, its Response to Petitioner's Motion for Enforcement of Protocol, Motion for Order Staying Retaliatory Actions, Motion to Stay Purported Sale of Property, Motion to Preserve Status Quo and Motion to Submit New Evidence in Support of Petition and would show to **THE SURFACE TRANSPORTATION BOARD ("STB")** as follows:

ORIGINAL

I.

STATEMENT

Each of the motions filed by **PYCO INDUSTRIES, INC. ("PYCO")** should be denied. None of the actions of **SAW** warrant the relief sought by **PYCO**.

PYCO and **CHOO-CHOO PROPERTIES, INC. ("CHOO-CHOO")** and **SAW** have entered into an agreement in connection with the matters dealing with the crossing set forth in the motions, and, therefore, the motions should be denied as moot.

The relief requested by **PYCO** in connection with the cancellation of the leases involved between **CHOO-CHOO** and **PYCO** is clearly outside of this Board's jurisdiction and does not relate to rail traffic or any rail line.

Action by **STB** is not required by August 4, 2006, for the reason that the only basis for such a request is the cancellation of leases, which, as set out above, is outside the jurisdiction of this Board.

II.

PROTOCOL VIOLATIONS

PYCO complains of certain protocol violations and attaches evidence of **SAW'S** activity on the line allegedly outside of the protocol hours.

SAW serves nineteen (19) customers. After the Board's Amended Protocol Order, **SAW** now has only four hours to serve each of those customers. There is not sufficient time to serve each of the customers in the time allotted by the protocol.

SAW has noticed that on many days, the West Texas Lubbock Railroad ("**WTL**") does not begin switching operations until after 2:00 P. M. Therefore, the rail lines are totally empty from the

period of approximately 7:00 A. M. until 2:00 P. M. SAW has been forced to operate during those hours to serve its customers. However, SAW operates only when it is clear that WTL will not be switching in the morning. If WTL trains are working from 7:00 a.m. to 2:00 p.m., SAW suspends operations outside the protocol hours. SAW is operating only in the morning, on very few occasions, in order to serve its nineteen customers. SAW operates when WTL is not working. (D. Wisener Dec. ¶¶ 2 - 4).

The evidence supporting PYCO'S motion on the protocol is vague and general (Attachment IV). There are three notations of "SAW moving in Yard." Just exactly where in the yard SAW is moving is not set out and the nature of the movement is not set out. There is one notation, "SAW on the BNSF mainline." There is no evidence as to the location of this alleged movement and no evidence as to the nature of the movement. There is a notation, "SAW moving East to switch customers." There is no location set forth and no definitive statement as to where the "moving East" was located. This direction is away from PYCO'S facility. There is also no indication that any of these movements, with the exception of the one movement on 7/11/06, in anyway interfered with the operations of WTL.

A review of the "SAW Log" purportedly put together by the employees of WTL, is also vague and general. Very few of the entries actually have to do with switching operations and on only two occasions, does WTL even allege that their operations were somehow impeded by the actions of SAW. Most of the allegations set forth have nothing to do with rail operations and the allegations in the "SAW Log" are not accurate and do not portray the incidents as they occurred. (D. Wisener Dec. ¶ 16).

Consistently in their motion and their supporting declarations, **PYCO** talks about the danger to **PYCO** employees and the rights of **PYCO** employees during the protocol. **PYCO** employees have no right to be on **SAW** track either within the protocol hours or without the protocol hours. **PYCO** employees' presence on the **SAW** track constitutes trespass. The only party entitled to operate on **SAW** tracks during the protocol hours is **WTL**. **WTL** has not filed any motions with this court in connection with the violation of protocol. **PYCO** employees have no standing to either complain about the protocol or complain about incidents regarding the protocol because they are not entitled to be on **SAW** property at any time. (D. Wisener Dec. ¶ 4).

As the **STB** has already ruled, **PYCO** is not entitled to operate its track mobile over **SAW** property. **SAW** informed **PYCO** that the track mobile would no longer be allowed on **SAW** property after several near misses involving the track mobile. The track mobile was not run by qualified railroad personnel and a danger existed as long as the track mobile was operating freely on **SAW** property. The **STB** agreed and ordered that the track mobile was to stay off of **SAW** property. After **SAW** made the demand regarding the track mobile to **PYCO**, **PYCO** instituted these proceedings in front of the **STB**. (L. Wisener Dec. ¶ 10).

OPERATING ISSUES

Repeated references made in **PYCO'S** filings with regard to the alleged "unwillingness" of **SAW** to participate in a conference call. The sole evidence to support this comes from a conference call that had to be terminated. The call was terminated for the reason that an emergency came up regarding a crew that may have run through a Form B and endangered employees working on the track. The phone call was terminated for that reason. It was later determined that a **WTL** crew was involved. (D. Wisener Dec. ¶ 13).

It has also been consistently alleged by **PYCO** that the lease from **SAW** to **PYCO** covering Track 9298 was terminated in late 2005. The lease was not terminated. The lease expired on its own accord. Allegations of this nature are set forth merely to try to buttress the theory of “retaliation” consistently pushed by **PYCO** in this case. (L. Wisener Dec. ¶ 9).

PYCO complains that they were subject to a “discriminatory” constructive placement charge for their rail cars. Pursuant to the tariff of **SAW**, **SAW** had the right to impose at any time a constructive placement charge up to \$150.00 per car. **SAW** did not impose a maximum constructive placement charge but imposed only a charge of \$60.00. **SAW** had the right, pursuant to its tariff, to place a constructive placement charge on a customer’s cars and was acting fully within its rights when it did so. (L. Wisener Dec. ¶ 12).

The facts of the sale negotiations between **PYCO** and **SAW** in November of 2005, have now been brought to light. Contrary to **PYCO’S** assertions, the sale agreement did not go through because **PYCO** was unwilling to give a required letter of intent to **SAW**. There were no threats or intimidation that occurred after the failure of the sale to consummate. (L. Wisener Dec. ¶ 8).

PYCO has made the repeated assertion that Track 9200 was used historically for the storage of **PYCO’S** cars. This was not the case. Track 9200 was used by **BNSF** for the unloading of Vulcan Materials’ cars. The track was never used primarily for storage of **PYCO** cars. (L. Wisener Dec. ¶ 15).

III.

SALE TO CHOO-CHOO PROPERTIES

The sale of certain **SAW** properties to CHOO-CHOO is primarily a small portion of a track and an assignment of various leases held by **SAW**. The assignment of the leases has nothing to do

with any rail operations and is clearly outside the jurisdiction of this Board.

The sale of one small portion of the track, approximately 1,400 feet in length, also does not affect any of the rail operations of either **SAW** or **WTL**. The track sold was located on the west end of the “wye” track. This track does not serve **PYCO**. This track serves no other customers.

The track was used primarily for storage purposes and was not involved in switching operations. (D. Wisener Dec. ¶¶ 5, 6).

No approval of this sale was required from **BNSF**. Other than the Asset Sale Agreement, **SAW** and **BNSF** agreed to the following:

“The foregoing shall not apply where Buyer wishes to sell small segments of track or property comprising the rail line which such sale would not hinder the overall operations of Buyer on the rail line.”

The sale of the west end of the “wye,” a track not used for switching operations or to service any customers, does not affect the overall operation of **SAW**, or, for that matter, **WTL** on the rail line. (D. Wisener Dec. ¶ 7) (J. Gorsuch Dec., Exhibit “E”).

PYCO, early in the year, started to extend its “shop track”, around to the south and eventually to the west. The extension of this track caused problems with the clearance between the already existing west end of the “wye” track. The clearance was not sufficient between the two tracks for safe operations. The west end of the “wye” track had been built for several years and **PYCO** has encroached, unsafely, in attempting to extend its shop track causing a potential of serious safety incidents. (D. Wisener Dec. ¶ 6).

SAW deeded to **CHOO-CHOO** the property covering the west end of the track. While **PYCO** complains that such deed was not recorded, it is not a requirement under Texas law that deeds be recorded to be valid. A conveyance of an estate and land must be in writing and must be

subscribed and delivered by the conveyor or the conveyor's authorized agent. TEX. PROP. CODE §5.021. *McDaniel and Triad Supply Co. v. Carruth*, 637 S.W.2d 498 (Tex. App.-Corpus Christi 1982, no writ). There is no requirement that a deed, in order to constitute a valid conveyance, be recorded. **PYCO's** comment about the recording of the deed is especially ironic in light of the fact that **SAW** deeded various other properties subject to leases to **PYCO** in the year 2000. **PYCO** has yet to record that deed.

The Board entered an order in connection with the moving of railcars that were blocking a crossing of the west end of the "wye" and east end of the "wye." When the order was entered, the rail cars were moved. (D. Wisener Dec. ¶ 10).

A dispute arose between **SOUTH PLAINS** and **PYCO** regarding the use of the rail crossing. **PYCO** attempted to enforce the **STB's** prior order in this case in the U. S. District Court. **PYCO** claimed that the **STB** order, which ordered that **SAW** shall keep its equipment clear of the south end of the "wye," somehow granted **PYCO** the authority to use the crossing. A temporary restraining order was granted by the United States District Court. However, upon hearing the evidence, the United States District Court concluded that the use of the crossing is a state law matter. **PYCO's** Motion for Preliminary Injunction was denied. The attempted action in federal court to enforce the **STB** Order is now dead. (D. Wisener Dec. ¶ 11) (J. Gorsuch Dec. Exhibits "B" and "C").

CHOO-CHOO then filed a state court action to determine the parties' rights to use the crossing. A temporary restraining order was obtained by CHOO-CHOO prohibiting **PYCO** from using the crossing. (J. Gorsuch Dec. Exhibit "D").

At the hearing for a temporary injunction, CHOO-CHOO, **PYCO** and **SAW** reached an agreement in connection with the crossing. Under the agreement, **PYCO** is able to use the crossing

for thirty(30) days, which should alleviate **PYCO**'s claim that the cottonseed on the east portion of its plant must be moved to the west portion of the plant for processing. Therefore, any claim of **PYCO** in front of the **STB** in connection with the crossing and its alleged problems with the cottonseed has now been rendered moot. (D. Wisener Dec. ¶ 12) (J. Gorsuch Dec. ¶ 7).

DISTINGUISHING PYCO AUTHORITIES

The authorities cited by **PYCO** in an attempt to void the sale are so factually different from this case as to be inapplicable. The total trackage owned by **SAW** is over fourteen (14) miles. The length of the track that was conveyed was only 1,400 feet. This amounts to approximately 1.8% of the track owned by **SAW**. As set out above, the track neither served **PYCO** nor any of the other customers of **SAW**. The sale in no way affected rail service to **PYCO** or rail service to the other customers of **SAW**. The track was sold, not abandoned.

In *Rail Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002), the Court dealt with a **STB** action in connection with the *abandonment* of a rail line. The 6th Circuit upheld **STB**'S decision not to set aside certain sale transactions between the railroad and other third parties. The plaintiff had challenged those transactions on the grounds the sales diminished the value of the line. The **STB** concluded that the sale of a 4.02 acres segment of the right-of-way to a third party and a contingent sale of 20.6 acres for a 4.2 bicycle trail did not interfere with rail operations but would be factored into the calculation of the line's value. The **STB** did negate the conveyance of the line's entire non-rail crossings, aerial and subsurface rights to an affiliate. The transfer in this case nowhere reaches the scope of the attempted transfer in the RVI case. In addition, the RVI case dealt with *abandonment* of a line rather than a feeder line application.

At most, the sale of the west end of the “wye” would only affect the value of any purchase of **SAW** assets. Therefore, the **STB** should:

1. Deny **PYCO**’s request for an order that **SAW** not engage in any further sales of railroad property;
2. Decline to take jurisdiction over the sale of track and assignment of leases to **CHOO-CHOO** and decline to declare such sale null and void.

EXEMPTED TRACKS

The tracks in question are excepted switching tracks under 49 U.S.C. §10906. The Board lacks authority to void a sale over this trackage. **SAW** entered General Order No. 1, dated January 2, 2001. The order was posted according to law. By that order, **SAW** designated all lines formerly known as the Fort Worth and Denver Railroad as classified by FRA Standards as exempted track. In two subsequent track inspections, by the FRA, the class of the track has been noted as “X”, which means exempted. (L. Wisener Dec. ¶¶ 13, 14).

While **SAW** initially sought and received authority to acquire the track, this track is not used by more than one shipper. The track in question is not used by any shipper and does not serve any shipper who is a customer of **SAW**. **SAW** did not seek prior Board approval of this sale for the reason that **SAW** is not in the process of abandoning this line. (D. Wisener Dec. ¶ 6).

An operating agreement exists between **CHOO-CHOO** and **SAW** for use of the line. Therefore, the **STB** would retain jurisdiction over rail operations of the line by virtue of the fact that **SAW** has an agreement for rail operations, if any should arise, in the future. (D. Wisener Dec. ¶ 6).

IV.

CANCELLATION OF LEASES

CHOO-CHOO properly acquired certain leases from **SAW**. The leases do not affect rail

service. **PYCO** admits as much where it indicates that CHOO-CHOO purports to terminate for “no rail reason whatsoever” rights that **PYCO** needs to continue operating its plant. The leases do not cover the rail crossing which has been a previous issue between the parties. (D. Wisener Dec. ¶ 15).

The operations of **PYCO**’s plant which may be covered by the leases do not relate at all to any rail service. The leases do not involve rail lines, terminals or switching tracks. The leases cover real property upon which **PYCO** has leased, or become a licensee or permittee under agreements with the successors-in-interest to CHOO-CHOO.

If **PYCO** has a complaint regarding the termination of the lease, its remedy is in state court. **PYCO** has not presented to the **STB** any evidence that any *rail service* would be interrupted by the cancellation of the leases. Conclusionary speculative statements to such effect do not invoke the **STB**’S jurisdiction.

Authority cited by **PYCO** on this question actually supports the position of **SAW**. In *In Re: Jefferson Terminal Railroad Company*, STB Fin. Docket No. 33950 (March 15, 2001), the **STB** revoked the notice of exemption filed by Jefferson to acquire and operate approximately 1.2 miles of rail line in Detroit, Michigan. When the exemption was filed, Jefferson did not advise the **STB** that there was pending condemnation proceeding filed by the City of Detroit. The City intervened and requested **STB** to reopen and revoke the exemption of Jefferson. While rail service had not been provided over the track for 13 years, the line had never been abandoned and therefore remained subject to **STB** jurisdiction.

The **STB** held:

“Additionally, we are troubled by Jefferson’s failure to disclose that the property was about to be condemned. This failure lends credence to the City’s allegation that the proposal Jefferson submitted to this Board was merely a devise to acquire or retain property for non-rail purposes using Federal preemption as a shield. The timing and failure to inform us of the condemnation proceedings suggests an effort by Crown

and Jefferson to use our exemption process to insulate the property from the condemnation process by invoking our jurisdiction to bolster Jefferson's claim that the property is a rail line beyond the reach of state or local condemnation authority. We will not permit our processes to be misused in this matter."

In *Township of Woodbridge v. Consolidated Rail Corp.*, STB Docket No. 42053, 2000 W.L. 1771044, the **STB** held that a rail carrier that has voluntarily entered into a contract cannot use pre-emption to shield itself from state law liability, involving a contract between a railroad and a town to curtail noise from idling trains. The same reasoning should be adopted by the **STB** to claims by **PYCO** in this instance.

Here **PYCO** is requesting the Board assume jurisdiction of a transaction involving the assignment of leases not covering rail lines from one Texas corporation to another Texas corporation and to nullify the second corporation's desire to legally enforce certain provisions of the leases. The leases do not affect the rail line. This controversy is a state law matter that should be resolved by the courts of the State of Texas and not the **STB**.

The leases between the parties are contracts; subject to state court contract remedies. **STB** jurisdiction does not preempt a breach of contract claim to the extent that the parties voluntarily entered into valid enforceable agreements and the agreements do not interfere with interstate commerce. *Pejepscot Industrial Park v. Maine Central Railway Company*, 297 F.Supp.2d 326 (D.Me. 2003).

CHOO-CHOO's assertion of its rights under the various lease contracts is a state law matter and if a dispute exists, the state courts are the proper forum for remedy. **PYCO** should be discouraged for running to the **STB** any time any party to which it has a contract asserts valid contract rights. Such action belittles the jurisdiction and the status of this Board.

V.

INTENT OF SAW

A last swiping allegation is made in the motions that it appeared to **PYCO** that **SAW** never intended to operate as a common carrier. **SAW** began operations in July of 1999. The disputes that gave rise to this proceeding did not occur until late 2005. In its first year, **SAW** handled approximately 4,000 cars. In its last year of operation, **SAW** handled approximately 14,000 cars and **SAW** has recently obtained a new customer. Most objective observers would consider this history a successful growth of a business, not the running of an “extortion racket”.

In its filings, **PYCO** refers to spots and leopards, animals and communications problems. The bottom line is that since Delilah Wisener took over as Chief Operating Officer of **SAW**, she has not received any communication from Robert Lacey or Gail Kring or other employees about **PYCO** regarding service operations or problems. (D. Wisener Dec. ¶ 14). By the nature of its filings and the language used herein, **PYCO** apparently has never considered that option.

VI.

CONCLUSION

Considering the recent events that have occurred between **CHOO-CHOO** and **SAW** and considering the evidence attached to this Response, **SAW** prays that the **STB** deny **PYCO**’s Motion for Enforcement of the Protocol, deny Motion for Order Staying Retaliatory Acts, deny **PYCO**’s Motion for a Stay of Any Purported Sale, deny **PYCO**’s Motion to Preserve the Status Quo and deny **PYCO**’s Motion to Submit New Evidence in Support of Its Petition to Revoke.

Respectfully submitted,

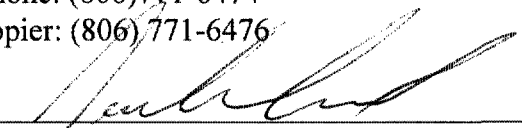
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing response has been sent to the following parties via certified mail, return receipt requested, on the 28th day of July, 2006:

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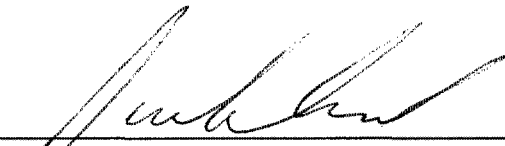
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BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. –	§	
ALTERNATIVE RAIL SERVICE –	§	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	§	
PYCO INDUSTRIES, INC. –	§	
ALTERNATIVE RAIL SERVICE –	§	F.D. 34899
SOUTH PLAINS SWITCHING LTD.	§	
PYCO INDUSTRIES, INC. –	§	
FEEDER LINE DEVELOPMENT –	§	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	§	(Revision of F.D. 34844)
PYCO INDUSTRIES, INC. v.	§	
SOUTH PLAINS SWITCHING LTD.	§	F.D. 34838
SOUTH PLAINS SWITCHING, LTD. --	§	
ACQUISITION EXEMPTION –	§	F.D. 33753 (Sub-no. 1)
BNSF RAILWAY COMPANY	§	

DECLARATION OF DELILAH WISENER

I, **DELILAH WISENER**, make this Declaration in support of the response of **SOUTH PLAINS SWITCHING, LTD. CO.** to **PYCO INDUSTRIES, INC.’S (“PYCO”)** motions regarding various actions of **SOUTH PLAINS SWITCHING, LTD. CO. (“SAW”)** in connection with orders of the Surface Transportation Board.

“Since early 2006, I have been Chief Operating Officer of **SAW**. As such, I have knowledge of matters set forth in this Declaration. The knowledge I have is personal knowledge and every statement made herein is true and correct.

“I reviewed the Motions for Enforcement of Protocol, to Void a Sale, to Halt Retaliatory Actions, and to Preserve Status Quo (“the Motion”) filed by **PYCO INDUSTRIES, INC.** and hereby make my response to the Motion.

“**Violation of Protocol.** **SAW** has not violated the protocol put in place by the Surface Transportation Board. The only time **SAW** would operate outside of

the protocol is at a time when it was clear that the WEST TEXAS & LUBBOCK RAILROAD ("WTL"), is not working. **SAW** has nineteen customers to serve and only a four hour window in the day to serve all of these customers. On days that WTL is working or switching, **SAW** does not work outside of the protocol hours. On most days WTL does not work in the **SAW** yard or serving **PYCO** until 3:00 p.m. or 4:00 p.m. Therefore, the yard and tracks are available for **SAW** to serve its customers for most of the day.

"In reviewing the latest motions filed by **PYCO**, reference is made to the employees of **PYCO** needing safety protection and having the right to operate and work on **SAW** property. The protocol in place between **SAW** and WTL does not include **PYCO**. Only WTL employees should be operating on **SAW** property. **PYCO** employees have no right or business being on **SAW** at any time under the protocol with the trackmobile.

"Sale of Real Property." In June, 2006, **SAW** sold real estate under a small portion of its track to CHOO-CHOO PROPERTIES, INC. ("CHOO-CHOO"). CHOO-CHOO is a Texas corporation that was formed primarily to deal in real estate ownership and management. The total amount of real estate conveyed to CHOO-CHOO was approximately 1,400 feet. This track is known as the west end of the "wye" track. This track does not service any customers. This track does not service **PYCO**. The track generally runs in a northwesterly direction off a north-south track.

"**PYCO** began extending its shop track which is very close to the west "wye" track. **PYCO**, in fact, built its rail track too close to the existing "wye" track because there is not sufficient clearance for both tracks under Texas law. The track was transferred to CHOO-CHOO PROPERTIES, INC. but **SAW** has operating rights over the track.

"Permission was not obtained from the BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY ("BNSF") pursuant to an Asset Sale Agreement signed between **SAW** and BNSF, for the reason that the track was not used in the operations of **SAW** and did not serve any customers. Under the Asset Sale Agreement, small increments of track can be transferred if they do not affect the overall operation of **SAW**. This track was most recently used only for storage when a number of tracks were taken away from **SAW** by the Surface Transportation Board and given to WTL for use.

"**PYCO** makes the assertion, unsupported, that perhaps the entire yard was sold from **SAW** to CHOO-CHOO. As set out above, only approximately 1,400 feet were involved in the sale plus various leases. The sale of the property and the transferring of the leases in no way affects the operations of **SAW** or service to any of **SAW's** customers.

“CHOO-CHOO PROPERTIES, INC. is a Texas corporation. It is a separate corporation from SAW. SAW does not do business as CHOO-CHOO and CHOO-CHOO does not do business as SAW.

“Movement of Rail Cars. After the STB entered its order ordering SAW to remove the rail cars from the west end of the “wye” track, the rail cars were immediately removed. At that point, PYCO began construction on the crossing from the west plant to its storage facility on the east side of the track. PYCO does not have a written easement or lease conferring any right upon it to use the crossing. Signs were posted by CHOO-CHOO PROPERTIES to keep PYCO personnel off the property. PYCO personnel tore down the signs.

“PYCO then filed an action in the United States District Court for the Northern District of Texas seeking enforcement of the Surface Transportation Board’s order to the effect that PYCO could now use the crossing. The Surface Transportation Board order merely indicated that the crossing was to be kept clear. When the cars were moved, the crossing was clear. After hearing the sworn testimony and argument of counsel, the United States District Court ruled that the question of who had a right to the use the crossing was a state law matter and should be decided in a state court. PYCO’S request for a preliminary injunction was denied.

“CHOO-CHOO PROPERTIES then filed an action in state court and obtained a temporary restraining order prohibiting PYCO from using the crossing in question. Prior to the hearing for a temporary injunction, settlement was reached whereby PYCO would be able to use the crossing in question for thirty (30) days in order to alleviate their problem with the cottonseed. At the end of thirty days, the temporary injunction will be placed back in force. Therefore, that alleged immediate need of PYCO has been met by agreement of the parties in a state court action.

“Telephone Call. In connection with the allegations regarding a telephone call, there was a conference call held with regard to operations. The conference call ended when I was advised on the other line that a train ran through a Form B causing a near miss with a section gang that was working on the railroad track. At the time we did not know whose engines were involved and where the section gang was located; therefore, the telephone call was terminated, so each of the parties could find out this necessary information. I felt it was necessary to find the facts quickly about this near miss and that is the reason the telephone call was terminated. We determined that a WTL crew was involved.

“Communications with PYCO. Since I have been Chief Operating Office of SAW, I have not received one call from either Robert Lacy or Gail Kring, or other employees of PYCO to talk about service, operations or problems that have arisen between SAW and PYCO.

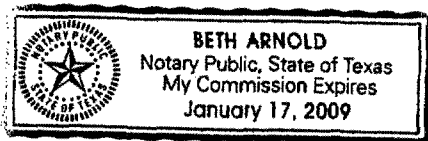
"Assignment of Leases. Various leases were assigned from SAW to CHOO-CHOO PROPERTIES, INC. These leases do not affect rail service to any customer, or affect the rail service provided by WTL or BNSF. In an offer to sell from SAW made to PYCO on or about June 16, 2006, the leases were offered in the offer of sale. PYCO refused the offer of sale.

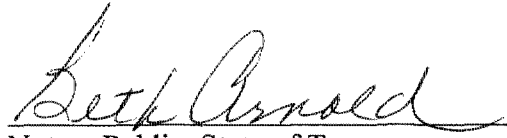
"WTL Logs. I have reviewed the "logs" of WTL attached to PYCO'S Motion. I am in constant communication with SAW employees and know of their activities. I receive reports from SAW employees often and based on that information, the "entries" in WTL'S logs are not correct and the events described therein did not happen as portrayed.

"Further Affiant sayeth not."


DELILAH WISENER

SUBSCRIBED AND SWORN TO BEFORE ME by the said Delilah Wisener on the
26th day of July, 2006.




Notary Public, State of Texas

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PYCO INDUSTRIES, INC. –	§	
ALTERNATIVE RAIL SERVICE –	§	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	§	
 PYCO INDUSTRIES, INC. –	 §	
ALTERNATIVE RAIL SERVICE –	§	F.D. 34899
SOUTH PLAINS SWITCHING LTD.	§	
 PYCO INDUSTRIES, INC. –	 §	
FEEDER LINE DEVELOPMENT –	§	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	§	(Revision of F.D. 34844)
 PYCO INDUSTRIES, INC. v.	 §	
SOUTH PLAINS SWITCHING LTD.	§	F.D. 34838
 SOUTH PLAINS SWITCHING, LTD. --	 §	
ACQUISITION EXEMPTION –	§	F.D. 33753 (Sub-no. 1)
BNSF RAILWAY COMPANY	§	

DECLARATION OF LARRY WISENER

I, **LARRY WISENER**, make this Declaration in support of the Response of **SOUTH PLAINS SWITCHING, LTD. CO.** to **PYCO INDUSTRIES, INC.’S (“PYCO”)** motions regarding the various actions of **SOUTH PLAINS SWITCHING, LTD. CO. (“SAW”)** in connection with orders of the Surface Transportation Board.

“Until early January, 2006, I was CEO of **SAW** and as such have knowledge of the operations of **SAW**, the ownership by **SAW**, and the general matters dealing with the service of various customers by **SAW**, including **PYCO**. I have personal knowledge of every statement made herein and every statement made herein is true and correct.

“**Choo-Choo Properties, Inc.** In March, 2006, **CHOO-CHOO PROPERTIES, INC. (“CHOO-CHOO”)** was incorporated in the State of Texas. I am the sole shareholder. I am also the sole director and officer of the corporation. **CHOO-CHOO PROPERTIES, INC.** was formed to invest in various real estate properties, including properties once owned by **SAW**.

7

"The Crossing. SAW deeded the west portion of the "wye" track to CHOO-CHOO on June 13, 2006. The "wye" track that was deeded was approximately 1,400 feet long. The west end of the "wye" track was not used to service any customers and was not used to service PYCO. The west end of the "wye" was not necessary for the operations of SAW in serving its customers. In fact, the "wye" had primarily been used for storage prior to mid-June, 2006.

"In June 2006, after the Surface Transportation Board issued its order, PYCO personnel began work on a crossing that crosses from east to west over the west "wye" track and the east "wye" track. PYCO personnel had no permission from CHOO-CHOO PROPERTIES to be on the property or to do work on the property. Signs were placed saying, "No Trespassing." Those signs were torn down by PYCO personnel.

"The police were called to the area but, after talking to both sides, the police indicated that the matter was a civil matter and should be taken up in the courts. There were no threats or violence at the site, with the exception of PYCO personnel tearing down "No Trespassing" signs put up by CHOO-CHOO PROPERTIES, INC.

"After the STB entered its order, I understand that SAW moved the cars that were blocking the crossing in question. There have been no cars blocking the crossing since that time.

"The Leases. CHOO-CHOO was assigned various leases held by SAW in which SAW was the lessor. I have reviewed PYCO'S Motions for Enforcement of Protocol, to Void a Sale, to Halt Retaliatory Actions, and to Preserve Status Quo. These leases do not have anything to do with rail transportation. The leases are for property that do not have any rail lines upon it.

"November Sale. I have reviewed the various motions filed by PYCO and the Declaration of Robert Lacy. Mr. Lacy's assertions with regard to the proposed sale of SAW to PYCO in November are incorrect. I never told Mr. Lacy or PYCO that I would make things miserable for PYCO because the sale did not go through. The sale did not go through because PYCO did not provide SAW with a sufficient commitment letter so the parties would have a clear understanding of the agreement.

"Track 9298. PYCO asserts the lease from SAW to PYCO covering Track 9298 was terminated. This is not true. The lease expired on its own terms and was not renewed. There was no termination of the lease covering Track 9298.

"Trackmobile. PYCO was informed that its trackmobile, which had been previously allowed to operate in the SAW yard and on SAW property, would have to cease such operations. The trackmobile had been involved in some near misses and it was determined that it was not safe for the trackmobile to operate in the SAW yard without qualified rail personnel operating the trackmobile. After this decision was

made and **PYCO** was informed, **PYCO** then started these proceedings with the Surface Transportation Board.

“Constructive Placement. **PYCO** asserts that **SAW** placed a “discriminatory constructive placement” on cars held for a certain period of time by **SAW**. Under **SAW**’s tariff, which was published and known to **PYCO**, **SAW** had the right to impose, at any time, a constructive placement charges from anywhere up to \$150 per car. **SAW** did not impose the maximum constructive placement charge but imposed a charge of \$60.. **SAW** has the right, pursuant to its tariff to place a constructive placement charge on a customer’s cars and was acting fully within its rights when it instituted the charge.

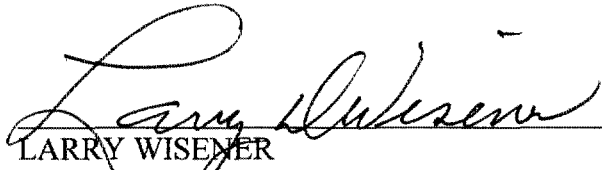
“Intent to Operate as Common Carrier. **PYCO** asserts, through its attorney, that **SAW** did not intend to operate as a common carrier. **SAW** began operations in July, 1999 and has operated to this date. In the first year of operation, **SAW** handled approximately 4,000 cars. In its latest year of operation, **SAW** handled 14,900 cars and **SAW** has recently obtained a new customer. This is known as running and growing a successful business, it is not known as running a “racket.”

“Track Exemption. **SAW** takes the position that the tracks are exempted. Attached to my affidavit as Exhibit “A” is General Order No. One, dated January 2, 2001. The order has been posted according to law. By that order, **SAW** designated all lines formerly known as the Fort Worth & Denver Railroad as classified by FRA Standards as exempted track.

“In addition, attached to my affidavit as Exhibits “B”and “C” respectively are two inspection reports from the Federal Railroad Administration. In both of those reports, the class of the track is noted as “X”, which means “exempted.”

“Track 9200. **PYCO** continues to assert that Track 9200 was primarily used for storage of **PYCO** train cars. This is not the case. Track 9200 was used primarily for storage and loading and unloading of Vulcan Materials’ railcars. Starting in late 1999 or early 2000, BNSF placed Vulcan trains directly onto Track 9200 for unloading. BNSF would then move the empty trains to its yard for interchange to other points. Track 9200 has never been primarily used for the storage of **PYCO** cars.”

"Further Affiant sayeth not."


LARRY WISENER

SUBSCRIBED AND SWORN TO BEFORE ME by the said Larry Wisener on the
26th day of July, 2006.


Notary Public, State of Texas



South Plains Lamesa Railroad, Ltd.
P. O. BOX 676 **SLATON, TEXAS 79364**
PHO: (806)828-4841 **FAX: (806)828-4863**

South Plains Switching, Ltd. Co.
P. O. Box 676
Slaton, Texas 79364-0676

GENERAL ORDER #1

**NOTICE OF
EXCEPTED TRACK**

January 2, 2003

TO: TRAIN CREWS AND ALL CONCERNED

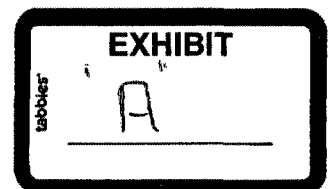
EFFECTIVE IMMEDIATELY, THE LINE FORMERLY KNOWN AS THE FORT WORTH AND DENVER AND WHAT IS NOW SOUTH PLAINS SWITCHING, LT. CO. (SAW) WILL BE CLASSIFIED BY FRA STANDARDS AS EXCEPTED TRACK.

IN ORDER TO MEET THE REGULATIONS, CERTAIN OPERATING REQUIREMENTS LISTED BELOW WILL BE STRICTLY ADHERED TO:

1. NO TRAIN SHALL BE OPERATED IN EXCESS OF 10 MPH.
2. NO REVENUE PASSENGER TRAIN SHALL BE OPERATED.
3. NO FREIGHT TRAIN SHALL BE OPERATED THAT CONTAINS MORE THAN FIVE (5) CARS REQUIRED TO BE PLACARDED BY HAZARDOUS MATERIAL REGULATIONS (49 CFR, PART 172)

Be governed accordingly, failure to comply is cause for immediate dismissal.


Larry D. Wisener
Resident



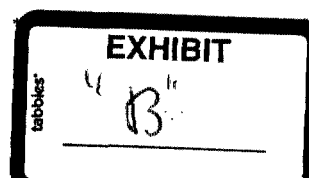
DEPARTMENT OF TRANSPORTATION

INSPECTION REPORT

FEDERAL RAILROAD ADMINISTRATION (FRA)

OMB Approval No.: 2130-0509

Inspector's Name ROBERTS, DAVID		Inspector's Signature <i>David Roberts</i>		Inspector's ID No. 0048B		Report No. 91		Date yy mm dd 2004 6 8					
Railroad/Company Name & Address SOUTH PLAINS SWITCHING CO. 3204 JUNIPER AVE. LUBBOCK, TX 79404				R/C R		Division LUBBOCK		RR/Co. Representative (Receipt Acknowledged) Name LARRY D. WISENER Title PRESIDENT/ MANAGER Signature					
From: City LUBBOCK		Codes 4140		Destination City & County		Codes 4140		From Latitude					
State TX		Codes 48		City LUBBOCK		Codes 4140		From Longitude					
County LUBBOCK		Codes C303		County LUBBOCK		Codes C303		To Latitude					
Mile Post: From _____ To _____				Inspection Point: YARD TRACK				To Longitude					
Activity Code: TOY		YTW		DER		RWP		RXY					
Units: 12		3		2		6		1					
Item 1	Initials/Milepost YD	Equipment/Track #	Type/Kind Y	49 CFR/USC 213	Defect Code 0109	Subrule 02	Speed 10	Class X	Train #/Site	SNFR* N	RCL** N	# of Occ.*** 1	Activity Code YTW
Description No effective support ties within the prescribed distance from a joint. Hanson trk.													
Violation Recommended Yes ☐ No ☒				Latitude:				Longitude:					
Written Notification to FRA of Remedial Action is: Required ☐ Optional ☒				Railroad Action Code 6				Date (mm/dd/yyyy) 6-15-04				Comments on back? ☐	
Item 2	Initials/Milepost YD	Equipment/Track #	Type/Kind Y	49 CFR/USC 213	Defect Code 0113	Subrule 04	Speed 10	Class X	Train #/Site	SNFR* N	RCL** N	# of Occ.*** 1	Activity Code YTW
Description Vertical split head 4 rails west of Hanson rock loading dock. North Rail.													
Violation Recommended Yes ☐ No ☒				Latitude:				Longitude:					
Written Notification to FRA of Remedial Action is: Required ☐ Optional ☒				Railroad Action Code 6EF				Date (mm/dd/yyyy) 6-16-04				Comments on back? ☐	
Item 3	Initials/Milepost YD	Equipment/Track #	Type/Kind T	49 CFR/USC 213	Defect Code 0133	Subrule 07	Speed 10	Class X	Train #/Site	SNFR* N	RCL** N	# of Occ.*** 1	Activity Code TOY
Description Worn or missing cotter pins. 9298 switch.													
Violation Recommended Yes ☐ No ☒				Latitude:				Longitude:					
Written Notification to FRA of Remedial Action is: Required ☐ Optional ☒				Railroad Action Code F				Date (mm/dd/yyyy) 6-16-04				Comments on back? ☐	



DEPARTMENT OF TRANSPORTATION

INSPECTION REPORT

FEDERAL RAILROAD ADMINISTRATION (FRA)

OMB Approval No.: 2130-0509

(Continuation)

Inspector's ID No.	Report No.	Report Date
004813	91	6/8/2004

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
4	YD		T	213	0135	06	10	X		N	N	1	TOY

Description

Heel of switch insecure. 9892 Switch. North Rail.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		F	6-7-04	☐

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
5	YD		T	213	0133	07	10	X		N	N	1	TOY

Description

Worn or missing cotter pins. 9205 Switch.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		F	6-7-04	☐

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
6	YD		T	213	0135	12	10	X		N	N	1	TOY

Description

Improper switch closure due to metal flow. 9205 Switch.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		F	6-18-04	☐

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
7	YD		T	213	0135	06	10	X		N	N	1	TOY

Description

Heel of switch insecure. North Rail. 9201 Switch.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		F	6-18-04	☐

DEPARTMENT OF TRANSPORTATION

INSPECTION REPORT

FEDERAL RAILROAD ADMINISTRATION (FRA)

OMB Approval No.: 2130-0509

(Continuation)

Inspector's ID No.	Report No.	Report Date
0048B	91	6/8/2004

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
8	YD		T	215	0135	06	10	X		N	N	1	TOY

Description

Heel of switch insecure. 9202 Switch. Both rails.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		F	6-18-04	☐

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
9	YD		X	215	0133	12	10	X		N	N	1	RXY

Description

Loose, worn, or missing frog bolts.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		G	6-21-04	☐

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
10	MD		Y	215	0109	02	10	X		N	N	2	YTW

Description

No effective support ties within the prescribed distance from a joint. Main trk.

Violation Recommended	Yes ☐ No ☒	Latitude:	Longitude:
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Written Notification to FRA of Remedial Action is:	Required ☐ Optional ☒	Railroad Action Code	Date (mm/dd/yyyy)	Comments on back?
		G	6-24-04	☐

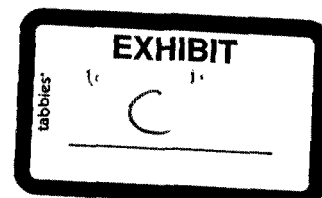
DEPARTMENT OF TRANSPORTATION

INSPECTION REPORT

FEDERAL RAILROAD ADMINISTRATION (FRA)

OMB Approval No.: 2130-0509

Inspector's Name ROBERTS, DAVID		Inspector's Signature		Inspector's ID No. 0048B		Report No. 116		Date yy mm dd 2005 10 24					
Railroad/Company Name & Address SOUTH PLAINS LAMESA RR, LTD. 3204 JUNIPER AVE. LUBBOCK, TX 79404				R/C R RR/Co. Code SLAL		Division SLATON Subdivision		RR/Co. Representative (Receipt Acknowledged) Name LARRY D. WISENER Title PRESIDENT/MANAGER Signature					
From: City LUBBOCK		Codes 4140		Destination City & County		Codes 4140		From Latitude					
State TX		48		City LUBBOCK		4140		From Longitude					
County LUBBOCK		C303		County LUBBOCK		C303		To Latitude					
Mile Post: From YD To YD				Inspection Point: LUBBOCK YARD				To Longitude					
Activity Code: TOY		RWP		YTW		DER							
Units: 17		9		2		3							
Item 1	Initials/Milepost YD	Equipment/Track #	Type/Kind T	49 CFR/USC 213	Defect Code 0135	Subrule 06	Speed 10	Class X	Train #/Site	SNFR* N	RCL** N	# of Occ.*** 1	Activity Code TOY
Description HEEL OF SWITCH INSECURE. Peach Orchard Switch													
Violation Recommended Yes ☐ No ☒				Latitude: 0				Longitude: 0					
Written Notification to FRA of Remedial Action is: Required ☐ Optional ☒				Railroad Action Code F				Date (mm/dd/yyyy) 10-24-2005				Comments on back? ☐	
Item 2	Initials/Milepost YD	Equipment/Track #	Type/Kind Y	49 CFR/USC 213	Defect Code 0121	Subrule 03	Speed 10	Class X	Train #/Site	SNFR* N	RCL** N	# of Occ.*** 1	Activity Code YTW
Description CENTER CRACKED OR BROKEN JOINT BAR. east of E 5 trk switch													
Violation Recommended Yes ☐ No ☒				Latitude: 0				Longitude: 0					
Written Notification to FRA of Remedial Action is: Required ☐ Optional ☒				Railroad Action Code G				Date (mm/dd/yyyy) 10-24-2005				Comments on back? ☐	
Item 3	Initials/Milepost YD	Equipment/Track #	Type/Kind Y	49 CFR/USC 213	Defect Code 0135	Subrule 06	Speed 10	Class X	Train #/Site	SNFR* N	RCL** N	# of Occ.*** 1	Activity Code TOY
Description HEEL OF SWITCH INSECURE. 5 E. trk Switch													
Violation Recommended Yes ☐ No ☒				Latitude: 0				Longitude: 0					
Written Notification to FRA of Remedial Action is: Required ☐ Optional ☒				Railroad Action Code F				Date (mm/dd/yyyy) 10-24-2005				Comments on back? ☐	



DEPARTMENT OF TRANSPORTATION

INSPECTION REPORT

FEDERAL RAILROAD ADMINISTRATION (FRA)

(Continuation)

OMB Approval No.: 2130-0509

Inspector's ID No.	Report No.	Report Date
0048B	116	10/24/2005

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
4	YD		T	213	0135	03	10	X		N	N	1	TOY
Description IMPROPER FIT BETWEEN SWITCH POINT AND STOCK RAIL. East Main Switch 1/4 inch													
Violation Recommended				Yes ☐ No ☒		Latitude: 0		Longitude: 0					
Written Notification to FRA of Remedial Action is:				Required ☐ Optional ☒		Railroad Action Code F		Date (mm/dd/yyyy) 10-24-2005		Comments on back? ☐			
5	YD		T	213	0135	07	10	X		N	N	1	TOY
Description INSECURE SWITCH STAND OR SWITCH MACHINE. East Main Switch													
Violation Recommended				Yes ☐ No ☒		Latitude: 0		Longitude: 0					
Written Notification to FRA of Remedial Action is:				Required ☐ Optional ☒		Railroad Action Code F		Date (mm/dd/yyyy) 10-24-2005		Comments on back? ☐			
6	YD		T	213	0121	03	10	X		N	N	1	TOY
Description CENTER CRACKED OR BROKEN JOINT BAR. east of East 2 trk switch													
Violation Recommended				Yes ☐ No ☒		Latitude: 0		Longitude: 0					
Written Notification to FRA of Remedial Action is:				Required ☐ Optional ☒		Railroad Action Code G		Date (mm/dd/yyyy) 10-24-2005		Comments on back? ☐			
7	YD		T	213	0135	07	10	X		N	N	1	TOY
Description INSECURE SWITCH STAND OR SWITCH MACHINE. West 3 trk Switch													
Violation Recommended				Yes ☐ No ☒		Latitude: 0		Longitude: 0					
Written Notification to FRA of Remedial Action is:				Required ☐ Optional ☒		Railroad Action Code F		Date (mm/dd/yyyy) 10-24-2005		Comments on back? ☐			

DEPARTMENT OF TRANSPORTATION

INSPECTION REPORT

FEDERAL RAILROAD ADMINISTRATION (FRA)

OMB Approval No.: 2130-0509

(Continuation)

Inspector's ID No.	Report No.	Report Date
0048B	116	10/24/2005

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect Code	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
8	YD		T	213	0133	14	10	X		N	N	1	TOY
Description LOOSE, WORN OR MISSING GUARD RAIL CLAMPS, WEDGE, SEPARATOR BLOCK, OR END BLOCK, West 3 trk Switch													
Violation Recommended				Yes ☐ No ☒		Latitude:				Longitude:			
Written Notification to				Required ☐ Optional ☒		Railroad Action Code		G		Date (mm/dd/yyyy)		10-28-2005	
FRA of Remedial Action is:												Comments on back? ☐	

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PYCO INDUSTRIES, INC. –	§	
ALTERNATIVE RAIL SERVICE –	§	F.D. 34802
SOUTH PLAINS SWITCHING LTD.	§	
PYCO INDUSTRIES, INC. –	§	
ALTERNATIVE RAIL SERVICE –	§	F.D. 34899
SOUTH PLAINS SWITCHING LTD.	§	
PYCO INDUSTRIES, INC. –	§	
FEEDER LINE DEVELOPMENT –	§	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	§	(Revision of F.D. 34844)
PYCO INDUSTRIES, INC. v.	§	
SOUTH PLAINS SWITCHING LTD.	§	F.D. 34838
SOUTH PLAINS SWITCHING, LTD. --	§	
ACQUISITION EXEMPTION –	§	F.D. 33753 (Sub-no. 1)
BNSF RAILWAY COMPANY	§	

DECLARATION OF JAMES L. GORSUCH

I, **JAMES L. GORSUCH**, make this Declaration in support of the Response of **SOUTH PLAINS SWITCHING, LTD. CO.**, to **PYCO INDUSTRIES, INC.’S (“PYCO”)** motions regarding the various actions of **SOUTH PLAINS SWITCHING, LTD. CO. (“SAW”)**, in connection with orders of the Surface Transportation Board.

“Since 2003, I have been counsel for SAW in the Lubbock area and handle legal matters including being counsel of record in various state court proceedings involving SAW and third parties. I am familiar with the filing in federal court by **PYCO** in an attempt to enforce an order of the Surface Transportation Board and I am familiar with the proceedings filed in the 237th District Court of Lubbock County in connection with a railroad crossing. I was counsel of record for Choo-Choo Properties, Inc., in both cases. In addition, I am familiar with **CHOO-CHOO PROPERTIES, INC. (“CHOO-CHOO”)**, the transfer of property to **CHOO-CHOO**, and the cancellation of various leases held by **CHOO-CHOO** in which **PYCO** is a licensee or permittee.

"**PYCO** filed an Original Complaint and Application for Injunctive Relief on June 26, 2006, in Cause No. 5-06CV0131-C, styled "*Pyco Industries, Inc. v. South Plains Switching, Ltd. Co.*", seeking an enforcement of the Surface Transportation Board decision on STB Finance Docket No. 34802, decided on June 20, 2006. After CHOO-CHOO intervened, the court entered an order denying a motion by **PYCO** to reconsider the intervention. A true and correct copy of the court's order denying the motion to reconsider is attached as Exhibit "A".

"After a hearing on the matter in which three witnesses testified, the court made findings. A true and correct copy of the court's findings are attached as Exhibit "B". The court found that this is state law matter and should be brought before state court. The court denied the Applications for Preliminary Injunctions.

"Based on the findings, the court entered an order denying the Applications for Preliminary Injunctions. A true and correct copy of the order is attached as Exhibit "C" to this Declaration.

"The court, in its findings, indicated "this is a state law matter and should be brought before state court". The court was ruling on the parties' various contentions in connection with the rail crossing and whether or not **PYCO** has the right to use the crossing.

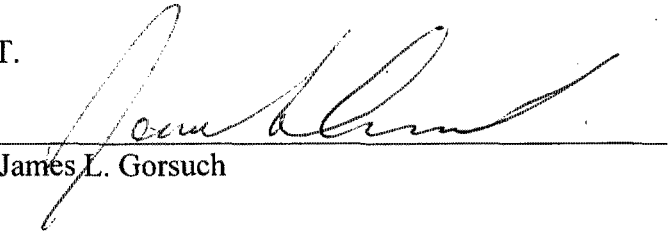
"Thereafter, CHOO-CHOO filed an Original Petition and Application in state court in Lubbock County in Cause No. 2006-535,682, styled "*Choo-Choo Properties, Inc. v. Pyco Industries, Inc.*", in the 237th District Court of Lubbock County, Texas. The trial court granted a Temporary Restraining Order restraining **PYCO** from using the crossing in question on July 7, 2006. A true and correct copy of the court's order is attached as Exhibit "D" to this Declaration.

"On the date scheduled for the hearing for the Temporary Injunction, **PYCO**, **SAW** and CHOO-CHOO reached an agreement regarding the use of the crossing. **PYCO** was allowed to use the crossing for thirty days. **PYCO** was to provide proof of insurance for its vehicles using the crossing and was to pay CHOO-CHOO \$750.00 for the rights to use the crossing during the thirty days. At the end of the thirty-day period, the Temporary Injunction was to be entered by the court. On the afternoon of the hearing, **PYCO** delivered the required insurance documents and the check to CHOO-CHOO'S counsel. From that point forward, **PYCO** has been able to use the crossing in question unimpeded.

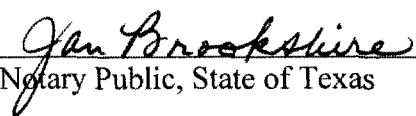
"As counsel of record in various state court actions for **SAW**, I am familiar with the Asset Sale Agreement between **SAW** and **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF")**. Attached to this Affidavit as Exhibit "E" is a true and correct copy of the following pages of the Asset Sale Agreement: cover page, Table of Contents, pps. 17 and 18 regarding

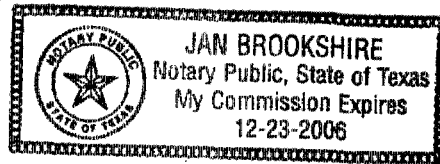
BNSF'S first right of refusal. The last sentence under the paragraph indicates that certain procedures under the Asset Sale Agreement, such as approval of **BNSF** or first right of refusal of **BNSF** shall not apply when **SAW** wishes to sell small segments of the track or property comprising the rail line or such sale would not hinder the overall operations of buyer on the rail line."

FURTHER AFFIANT SAYETH NOT.


James L. Gorsuch

28th **SUBSCRIBED AND SWORN TO BEFORE ME**, by the said James L. Gorsuch on the day of July, 2006.


Notary Public, State of Texas



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PYCO INDUSTRIES, INC.,

Plaintiff,

v.

SOUTH PLAINS SWITCHING, LTD., CO.,

Defendant.

CHOO-CHOO PROPERTIES, INC.,

Intervenor-Plaintiff,

v.

PYCO INDUSTRIES, INC.,

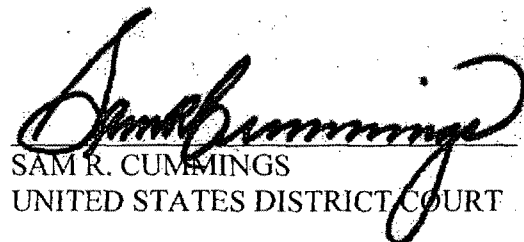
Intervenor-Defendant.

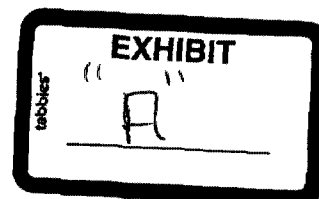
Civil Action No. 5:06-CV-131-C
ECF

ORDER

The Court having considered PYCO Industries, Inc.'s Motion for Reconsideration of Intervention of Choo-Choo Properties, Inc., filed June 30, 2006, is of the opinion that the same should be **DENIED**.

SO ORDERED this 3rd day of July, 2006.


SAM R. CUMMINGS
UNITED STATES DISTRICT COURT



MINUTE ORDER - UNITED STATES DISTRICT COURT - NORTHERN DISTRICT OF TEXAS

PLACE Lubbock JUDGE Sam R. Cummings DATE 07/03/2006
REPORTER Mechelle Daniel MARSHAL _____ DEPUTY S. Hartman
INTERPRETER _____ CSO _____ COURT TIME 2 hours

CIVIL ACTIONS

Time Case Number & Style - Type of Hearing and Results - Attys. Present

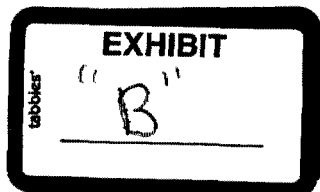
5:06-CV-131-C "Application for TRO" Hearing
Pyco Industries, Inc. v. South Plains Switching, Ltd. Co.

Plaintiff
Gary McLaren

Defendant
Jim Gorsuch

1:15 PM- Hearing for Preliminary Injunction held. Case called. Parties
3:15 PM Announced ready. Witnesses called and sworn. Testimony
given. Exhibits admitted. Plaintiff evidence concluded.

Court's Findings: This is a state-law matter and should be
brought before the state court. Court denies the application
for preliminary injunctions.



Certified a true copy of an instrument
on file in my office on 7-19-06
Clerk, U.S. District Court,
Northern District of Texas
By CBurk Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PYCO INDUSTRIES, INC.,)
)
Plaintiff,)
)
v.)
)
SOUTH PLAINS SWITCHING, LTD., CO.,)
)
Defendant.)

CHOO-CHOO PROPERTIES, INC.,)
)
Intervenor-Plaintiff,)
)
v.)
)
PYCO INDUSTRIES, INC.,)
)
Intervenor-Defendant.)

Civil Action No. 5:06-CV-131-C
ECF

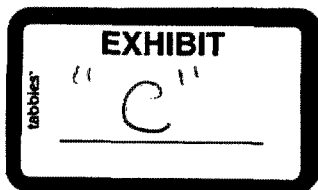
ORDER

Came on for hearing the Applications for Preliminary Injunction filed by the Plaintiff and Intervenor in the above-styled and -numbered cause.

The Court having heard the evidence and considered argument of counsel, is of the opinion that for the reasons stated in open court, the Applications for Preliminary Injunction should be **DENIED**. The exhibits are withdrawn from evidence and returned to counsel.

SO ORDERED this 5th day of July, 2006.


SAM R. CUMMINGS
UNITED STATES DISTRICT COURT



Certified a true copy of an instrument
on file in my office on 7-19-06
Clerk, U.S. District Court,
Northern District of Texas
By CP Clark Deputy

NO. 2006-535,682

CHOO-CHOO PROPERTIES, INC.

v.

PYCO INDUSTRIES, INC.

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§

IN THE 237th DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

2006 JUL -
PM 1:26

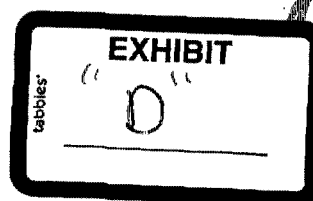
FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
DEPUTY

**ORDER GRANTING REQUEST FOR TEMPORARY
RESTRAINING ORDER AND ORDER SETTING HEARING**

CHOO-CHOO PROPERTIES, INC., Plaintiff in this cause, has filed a Verified Petition for a Temporary Restraining Order and a Temporary Injunction, and in connection therewith, has presented a request for a Temporary Restraining Order, as set forth in its Original Petition. It clearly appearing from the facts set forth in its Verified Original Petition that unless **PYCO INDUSTRIES, INC.**, its agents, servants or employees, are immediately restrained from directly or indirectly doing anything to interfere with **CHOO-CHOO PROPERTIES, INC.**'S use of its property and rail line extending on the "wye" portion of the track and located between **PYCO'S** west plant and **PYCO'S** east storage facility, **PYCO** will continue to trespass upon the property of **CHOO-CHOO PROPERTIES, INC.**, and that unless restrained, **PYCO** will commit the foregoing acts of trespass and damage before notice can be given and a hearing had on **CHOO-CHOO PROPERTIES, INC.**'S Motion for Temporary Injunction, and that if the commission of these acts is not restrained immediately, **CHOO-CHOO PROPERTIES, INC.**, will suffer irreparable injury because of the actions committed by **PYCO** in trespassing upon the property and rail lines of **CHOO-CHOO PROPERTIES, INC.**

IT IS THEREFORE ORDERED, that **PYCO INDUSTRIES, INC.**, its agents, servants and employees, be, and are hereby commanded forthwith to desist and refrain from directly or

CHOO-CHOO PROPERTIES, INC. v. PYCO INDUSTRIES, INC.
ORDER GRANTING REQUEST FOR TEMPORARY RESTRAINING ORDER AND ORDER SETTING HEARING



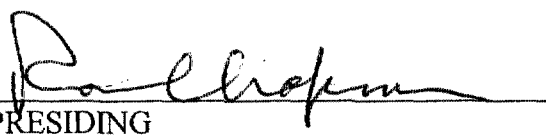
indirectly, individually or through third parties, from trespassing upon the property of **CHOO-CHOO PROPERTIES, INC.**, said property being real estate and rail lines located on the "we" track and located between **PYCO'S** west plant and **PYCO'S** east storage facility from the date of the entry of this order until the fourteenth day after its entry or until further order of the court.

IT IS FURTHER ORDERED that **PYCO INDUSTRIES, INC.**, appear before me, Judge of the above-named court, on the 20th day of July, 2006, at 9:00 A.m., in the courtroom of this court in the Lubbock County courthouse to show cause, if any there be, why a Temporary Injunction should not be issued as requested by **CHOO-CHOO PROPERTIES, INC.** The clerk of this court is hereby directed to issue a show cause notice to **PYCO INDUSTRIES, INC.**, to appear at the Temporary Injunction hearing.

The clerk of the above-entitled court shall forthwith, upon the filing by **CHOO-CHOO PROPERTIES, INC.**, of the bond hereinafter required, and upon approving said bond according to law, issue a Temporary Restraining Order in conformity with law and the terms of this order.

This order shall not be effective unless and until **CHOO-CHOO PROPERTIES, INC.**, executes and files with the clerk a bond, or a cash deposit in lieu of a bond, in conformity with law, in the amount of \$ 5,000⁰⁰ or deposit such amount in cash into the Registry of this court to be held by the clerk during the pendency of this suit or until further orders of the court.

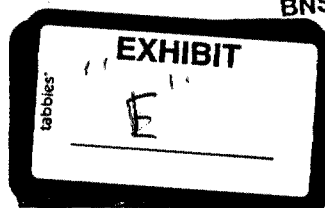
SIGNED this 7 day of July, 2006.


JUDGE PRESIDING

BF 9956

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

BNSF 00992



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

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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

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.