

20 February 2007
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Memorandum to Mr. Vernon Williams
Secretary
Surface Transportation Board

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

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

Enclosed for e-filing in "pdf" and (if possible) "Word Perfect 12" formats per STB's e-filing instructions please find an Opposition on behalf of PYCO Industries to the "Emergency" Petition filed by incumbent railroad South Plains Switching in the above docket on February 15, 2007. SAW's Petition had two parts: one directed at an operating protocol in place since February 2006, and the other directed against this Board's Decision authorizing Part 1147 service served November 21, 2006, in this docket.

As indicated in the attached certificate of service, and in accordance with the e-filing instructions, PYCO is serving the other parties by express service, next business day delivery.

Thank you for your assistance in this matter.

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
ALTERNATIVE RAIL SERVICE --) F.D. 34889
SOUTH PLAINS SWITCHING LTD.)

PYCO INDUSTRIES, INC.'s
NOTICE of INTENT to RESPOND
to SAW's PART 1117 PETITION
(Operating Protocol, Track 5)
and
PYCO's OPPOSITION to SAW's
LATEST EFFORT to TERMINATE ALTERNATIVE SERVICE

I. Sorting Out SAW's "Emergency" Petition

Under this Board's applicable regulations, PYCO Industries, Inc. (PYCO) has twenty days to respond to general petitions (49 C.F.R. § 1104.13(a)) such as those under 49 C.F.R. Part 1117, and five days to respond to petitions to terminate Part 1147 alternative service. See 49 C.F.R. § 1147.1(c)(2).

On February 15, 2006, incumbent railroad South Plains Switching, Ltd. (SAW) filed an "Emergency Petition for Partial Modification of Operating Protocols." The "petition," ostensibly filed under 49 C.F.R. Part 1117, seeks to deprive PYCO Industries of use of Track Five immediately adjacent to PYCO's plant no. 1 in Lubbock for staging cars for that plant. Per section 1104.13(a), PYCO has twenty days for response to this "emergency" petition.

As indicated in Part II below, there is no emergency justifying precipitous alteration of the operating protocol as to Track 5.

PYCO intends to prepare a full response along with verified statements to file in that connection by March 7 (i.e., 20 days from the e-filing by SAW), unless the Board requests PYCO to respond sooner).

The second part of SAW's February 15 Part 1117 petition is labelled "Continuing Objection to Alternative Rail Service under 49 C.F.R. Part 1147." SAW filed a Petition to Terminate PYCO's Part 1147 service from West Texas & Lubbock (WTL) the day after STB authorized such service. PYCO responded in opposition, and this Board has not yet ruled on SAW's first petition to terminate.

Insofar as it bears on termination of the Part 1147 alternative service, SAW's latest pleading is either

-- a very tardy reply to PYCO's reply (in which case it should be stricken from the record as a violation of 49 C.F.R. § 1104.13(c)),¹

-- or a new or supplemental petition (in which case PYCO makes the response as provided herein in compliance with the five day rule set forth in 49 C.F.R. § 1147.1(c)(2)).

In either event, the portion of SAW's pleading dealing with termination of PYCO's alternative statement does not even begin to state an emergency. However, because if construed as a

¹ This pleading should be treated as a motion to strike the material in SAW's February 15 pleading under the heading "Continuing Objection..." at pp. 4-5 as a violation of section 1104.13(c).

supplemental petition, SAW perhaps will argue PYCO must respond today (Tuesday, February 20), PYCO tenders this response.

II. Preliminary Statement on Track 5

SAW's issue in connection with Track 5 involves the operating protocol for alternative service to PYCO. SAW originally proposed that SAW's alternative service provider (WTL) have control over Track 5 as well as Track 1 for purposes of service to PYCO in a protocol set forth on SAW's attorney's letterhead dated Feb. 1, 2006, as filed with this Board on February 6, 2006 in F.D. 34802 Part 1146 Alternative Service). This Board modified the protocol to allocate Track 9200 to WTL use as well in a Decision served February 16, 2006, in F.D. 34802. This Board's Decision in F.D. 34889, served November 21, 2006, authorizing alternative service under Part 1147 provided that the already existing protocol would continue to apply. Decision at p. 6, ordering paragraph number 4.

Although SAW's pleading asserts there is some kind of "emergency" justifying alteration of the protocol, SAW supplies no evidence of any emergency. PYCO is unaware of any emergency. On inquiry to WTL, WTL management informs PYCO that neither SAW nor any shipper has indicated any emergency, with the exception of Hanson Aggregates. But Hanson's problems have nothing to do with Track 5. Hanson's problems arise because Hanson supported PYCO's feeder line application and SAW is retaliating by refusing Hanson service and terminating Hanson's track lease. (Hanson brought

these issues to this Board's attention, which this Board has initially addressed by granting Hanson relief against SAW in the Decision served January 24, 2007 in F.D. 34890.)

In response to problems arising under the original SAW-dictated protocol, this Board modified the protocol to require SAW to keep clear of Track 9200, in effect allocating same to alternative service for PYCO. Decision in F.D. 34802, served Feb. 16, 2006, at p. 4. PYCO had not understood SAW to have contested this allocation at STB. However, PYCO observed that in this Board's Decision served January 24, 2007, in F.D. 34890 (PYCO's feeder line application docket), the Board indicated that it intended to issue a decision on a SAW request that it be allowed to use track 9200. Decision in F.D. 34890, served Jan. 24, 2007, slip op. p.5 n.11. So far as PYCO can tell, SAW's request as to Track 9200 is embodied in a letter from Ms. Delilah Wisener to Mr. Mel Clemons (STB), which was attached to a letter filed by SAW's counsel in docket F.D. 34890 on another subject. In all events, as PYCO pointed out in our "Status Report" (at pp. 2-3) in F.D. 34890 filed in F.D. 34890 and this docket (F.D. 34889) on January 31, 2007, WTL still employs Track 9200 (and 9298) to stage cars for PYCO. This use is the historic use of the track.

Although SAW's new Part 1117 petition makes no mention of SAW's run on Track 9200, the attack on Track 5 must be viewed in conjunction with SAW's desire for Track 9200 as well. PYCO's

alternative service provider has used, and continues to use, both tracks to stage cars for PYCO under the alternative service order. SAW's pleadings to date establishes no need for either of these tracks, either to discharge its common carrier obligations, or even to store railcars for non-shippers for extra revenue, even if one were to assume arguendo that this might trump actual common carrier need for a track. Absent any showing of need, there is no emergency. There certainly are no shipper complaints traceable to the protocol use of either Track 5 or Track 9200. In contrast, there would be shipper complaints (by PYCO) if Track 5 or Track 9200 were diverted to whatever contrived and unsubstantiated purpose SAW purports to conjure up.

The only actual "evidence" supplied by SAW to support its request to modify the protocol to confine PYCO's use to one yard track at Plant No. 1 is a letter dated November 15, 2006, from Mr. Heffner to the attention of Mr. Clemmons at STB indicating that BNSF and WTL were terminating the daily telephone conference provided in the protocol because (a) WTL and BNSF were working well together, (b) SAW never participated anyway, and (c) PYCO traffic was declining to normal levels. However, nothing in that letter indicates that Track 5 (much less Track 9200) is no longer needed to provide service to PYCO.

In PYCO's valuation case filed in F.D. 34890, PYCO indicated its rail shipments would be substantially lower in 2007 in

comparison to PYCO's shipment levels in 2005 and 2006. However, PYCO still remains rail dependent, cars for PYCO are staged from Track No. 5, and cars for PYCO Plants 1 and 2 are staged from Track 9200. Based on data from WTL (which interchanges all SAW cars from the BNSF yard to the SAW yard where Track 5 is located, as provided by the applicable operating protocol as filed Feb. 6, 2006, in F.D. 34802 at p. 2), SAW traffic (exclusive of PYCO) is also down in 2007 in comparison to average monthly SAW shipments (exclusive of PYCO) in 2006. Since SAW did not claim impairment in 2006 when it had substantially more traffic than it currently does, it can hardly profess impairment now.

In the end, as PYCO intends to show with verified statements, SAW's pleading does not show an emergency requiring modification of the protocol; it instead shows that SAW's projections (of traffic growth) in its valuation case filed in F.D. 34890 were grossly in error.

III. Opposition to Termination of Part 1147 Alternative Service

This Board should strike SAW's new argument for termination of Part 1147 alternative service for PYCO, as set forth at pp. 4-5 of SAW's pleading as a very tardy reply to a reply (49 C.F.R. § 1104.13©). This Board in any event should reject the argument as wrong at law and in fact.

SAW argues that "[n]o compensation was paid to SAW, nor was compensation secured" before WTL began serving PYCO over SAW's

facilities. SAW claims this violates the statute (section 11102) which states that compensation must be secured or paid before service may begin. The statute also provides that the Board will establish compensation if the parties cannot agree. As explained below, PYCO and WTL understood SAW to have conceded that SAW in the circumstances here was not entitled to any compensation. Any failure to bring a dispute as to compensation to the Board's attention for resolution prior to the inception of Part 1147 service is the fault of SAW, not PYCO or WTL. In other words, SAW either conceded that no compensation was due under the statute, or waived the matter. In any event, there is no violation of the statute.

This Board addressed the issue of compensation in the preamble to its Part 1146 and Part 1147 regulations. In response to comments, the Board stated that it agreed that the incumbent carrier was not entitled to any lost profits, but instead only to compensation use of its facilities and for any services it provided. Expedited Relief for Service Inadequacies, Ex Parted No. 628, served Dec. 21, 1998, slip op. at p. 14. The Board declined "to prescribe an abstract formula" applicable to all the possible situations. Id. at p. 15. In essence the matter of compensation was to be worked out by the parties, with disputes brought to the Board for resolution. This approach certainly does not conflict with the statute; it merely encourages private resolution in accordance with national transportation policy.

On behalf of SAW, Mr. McFarland demanded a hefty per carload payment from WTL at the inception of Part 1146 alternative service. Based on the facilities (rail and ties) identified by Mr. McFarland that SAW was providing (SAW provides no services to either WTL or PYCO), PYCO prepared an analysis of compensation due in conformity to this Board's preamble statement. A copy of that memorandum, dated 11 March 2006, is attached as Exhibit A to PYCO's Status Report filed January 31 in this docket, and in dockets F.D. 34802 and 34890. PYCO's approach conforms to the Board's "principles controlling compensation in condemnation proceedings" as provided in 49 U.S.C. 11102(a). For the Board's convenience, we reattach the PYCO memorandum as Exhibit A to this pleading. The memorandum calculated compensation to be \$2.90 per carload.

In an e-mail to Mr. McFarland dated March 13, 2006, Mr. Heffner of WTL in writing advised that WTL would agree to \$2.90 compensation to SAW subject to several understandings, including the understanding that repairs to trackage would be at SAW's cost. A copy of that email is included as received from Mr. Heffner in Exhibit B. Neither WTL nor PYCO received a response. As Mr. Heffner indicates in his cover email of February 15, 2007, SAW did not again raise the issue until this past December. SAW certainly never heretofore raised the compensation issue in connection with its pleadings in the Part 1147 proceeding (or the Part 1146 proceeding for that matter). PYCO thought that SAW had waived the

matter in light of all the costs SAW had caused WTL, and all the services WTL provided to SAW. However, Mrs. Wisener of SAW evidently by telephone suggested to STB's Director of Enforcement (Mr. Clemens) in December 2006 that WTL should pay \$75 per carload, and followed that up with a letter to him.² SAW nowhere shows how this demand conforms to "principle[s] controlling compensation in condemnation proceedings." So far as PYCO can make out, it is simply an arbitrary demand by SAW for profit in the amount of \$75 per car.

In her communications with Mr. Clemens and this Board, Mrs. Wisener did not disclose the WTL/PYCO offer concerning compensation from last March. Moreover, SAW continues to ignore it in its Part 1117 Petition filed February 15 in this proceeding. This is all the more alarming since PYCO alerted SAW's counsel to the prior communications (along with a copy of our March 11, 2006 memorandum) by way of our January 31, 2007, Status Report filed approximately two weeks before.

Since WTL tendered the compensation offer on March 13, 2006, WTL has incurred substantial costs for repairing SAW trackage. Exhibit B to PYCO's Status Report filed on January 31, 2007, provides invoices for \$23,134.50 for track repair and \$4,625.00 for

² This figure is contained in a letter from Delilah Wisener to STB's Melvin Clemens, dated Dec. 26, 2006, and attached as exhibit E to SAW's Dec. 27, 2006 letter responding to Hanson's request for emergency relief in F.D. 34890, et al.

re-railing expenditures by WTL on SAW trackage. WTL billed SAW for this amount (Exhibit C to PYCO's Status Report) but was never paid. WTL's expenses were caused by SAW's failure to maintain trackage. Exhibit G to PYCO's Status Report (Eldon Martin Verified Statement). The costs incurred by WTL are at least a set-off to any amount which would be owed by WTL or PYCO to SAW.

As previously noted, SAW sets forth absolutely no basis for any demand for \$75/carload. The only evidence in the record, and the only analysis conforming to this Board's applicable regulatory preamble and the applicable statute, concerning the amount of compensation appropriate for SAW is the data and analysis supplied by PYCO in its Status Report filed January 31, 2007, and in this Reply. SAW has made no effort to present a rebuttal to this data and analysis, nor has SAW offered any justification, let alone a justification responsive to the statute, for any alternative figure.

In order to be done with the matter, PYCO has no objection if this Board order the payment of \$2.90 per carload by WTL to SAW for use of its facilities to provide service to PYCO under the Part 1147 order, provided this Board also order that WTL is entitled to a set off for the uncontested amount (\$27,759.50) expended by WTL for track repair, as set forth in the exhibits to PYCO's previously filed Status Report. Again SAW, despite a year to ponder the situation, has not raised any cogent objection to this solution,

let alone to the reasoning behind this solution.

Nothing herein should be viewed as prejudice to any other claim by WTL against SAW, including a claim against SAW for compensation to WTL (a) for providing interchange services for SAW per the protocol or (b) for any other track repairs which WTL has made or in the future must make to SAW track in order to provide rail service to PYCO.

As demonstrated above, any tardiness in resolving the compensation issue is wholly chargeable to SAW and there has been no statutory violation.³ The only compensation for which justification exists in the record is that explained in PYCO's memorandum of March 11, 2006, as offered to SAW by WTL on March 13, 2006, subject to set-offs for expenses incurred by WTL for repairs and also for providing services to SAW.

The broader goal of SAW's motion is to terminate alterantive service to PYCO. The record since this Board authorized Part 1147

³ According to preliminary figures from WTL, WTL handled about 4950 cars for PYCO in 2006, and also interchanged 2116 cars for SAW during the period (SAW did not compensate WTL for this service). PYCO traffic is expected to be less in 2007, and as SAW admits, appears so far to be substantially less, but so is SAW traffic, on a monthly-average basis.

While SAW has waived claims for compensation under Part 1146, PYCO does note that 4950 cars (WTL service to PYCO in 2006) times \$2.90 equals \$14,355. \$27,759.50 (track repair expenses owed WTL by SAW) minus \$14,355 equals \$13,424.50. Thus even if compensation under Part 1146 were not waived, \$13,424.50 would still be the minimum remaining set-off for any claim by SAW for compensation for WTL use of SAW trackage to serve PYCO in 2007 under Part 1147.

alternative service does not justify termination of that service. Although PYCO's loadings are down (as PYCO predicted in the feeder line proceeding), SAW's retaliatory conduct continues. Most recently, SAW has retaliated against Hanson Aggregates, which had supported PYCO's feeder line application. This Board responded with relief against SAW's denial of service and lease termination in a decision issued January 24, 2006, in F.D. 34890. SAW and Choo Choo continue to seek to enforce against PYCO in state court alleged property transfers which this Board has voided. PYCO remains rail dependent, and SAW remains resolute in its determination to abuse its local market power.

Conclusion

PYCO will respond further to the protocol change requested by SAW on the due date (March 7), unless this Board directs a different time. SAW cites no emergency justifying the relief it seeks, let alone anything requiring an earlier response date.

SAW's supplemental arguments to terminate Part 1147 alternative service should be rejected as a reply to a reply barred by this Board's regulations. If the Board reaches the merits on SAW's termination argument, the supplemental SAW arguments have none. WTL and PYCO offered SAW compensation per this Board's directives of \$2.90 per carload, subject to set-offs for track repair by WTL to SAW track. SAW in effect waived compensation by not objecting to this approach for the past year. To be done with

the issue, PYCO has no objection to this Board ordering compensation at the rate of \$2.90 per carload, which is the only result as to compensation that is supported by the record, subject to a set-off for repairs to date by WTL to SAW lines, but this is without prejudice to other claims WTL may have for compensation from SAW for the interchange services WTL is providing SAW or for other matters.

Respectfully submitted,

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Of counsel:

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for PYCO Industries, Inc.

Exhibit A -- March 11, 2006 memorandum

Exhibit B -- Heffner to Montange email, Feb. 15, 2007, setting forth Heffner to McFarland email, March 13, 2006.

Certificate of Service

I hereby certify service of the foregoing Notice and Opposition to SAW's Part 1117 Petition upon the following counsel of record by express service, next business day delivery, this 20th day of February 2007:

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

William Sippel, Esq.
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2832 (for US Rail Partners)

John Heffner, Esq.
1920 N Street, N.W., Suite 800
Washington, D.C. 20036 (for WTL)

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2401 Pennsylvania Ave. NW, Suite 300
Washington, D.C. 20037 (for Pioneer/KJRY)

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s: _____

Exhibit A

11 March 2006

Memorandum to John Heffner, Esq.
counsel for West Texas and Lubbock

Re: reimbursement for services and facilities furnished
by SAW in connection with WTL alternative rail
service to PYCO

From: Chas. Montange,
counsel for PYCO Industries

Summary

Based on the methodology indicated in the preamble to STB's Part 1146 regulations, SAW is entitled to compensation for facilities or services provided in connection with alternative rail service, but not for lost profits. The only facility or service provided by SAW to WTL for alternative service to PYCO Industries is certain trackage. In order to avoid controversy but without admission, we have made the following conservative assumptions (i.e., favoring SAW): that the rail is 90# reroll, that the ties are a wash, that SAW owns the fee in the underlying property, and that SAW owns an average of 6 acres per track mile (i.e., a 50 foot right of way for each track mile). We have further assumed a 10.1% rate of return (STB's most recent cost of capital calculation for railroads), and 7000 PYCO carloadings per year. Under these assumptions, SAW would be entitled to \$2.90/carload. All other demands by SAW are simply veiled attempts to obtain profit from the alternative rail service.

Reservation

In making the computations herein, PYCO has employed a series of assumptions favoring SAW. PYCO reserves the right to recalculate all values herein based on information which may be developed in subsequent research or discovery.

Discussion

Thank you for the opportunity to review Mr. McFarland's proposed compensation for SAW during the period of alternative service. Mr. McFarland's methodology appears designed to score as high a level of profit for SAW as possible. STB rejected this approach. The preamble to the relevant regulations make it clear that compensation is to be based on costs incurred by the incumbent

carrier, including return on investment with respect to facilities used to provide alternative rail service. Mr. McFarland's approach is clearly not based on such methodology.

The relevant preamble statement concerning compensation is as follows:

Various parties address the need for the incumbent carrier to be fairly compensated if it is required to provide services and/or facilities to the alternative carrier. NITL et al. argue that any payment to the incumbent carrier should be limited to costs incurred by the incumbent, including a return on investment, and not include compensation for lost profits. They suggest that fair compensation can be developed from our railroad cost accounting system, known as URCS. We agree that the incumbent railroad is entitled to fair compensation for whatever services and facilities it provides, but not for lost profits for service it is not providing. Because the type of access to an incumbent carrier's facilities and the services the incumbent will be required to provide to an alternative carrier will vary widely, depending on the service inadequacy and the relief that is fashioned, we will not attempt to prescribe in the abstract a compensation formula applicable to all situations. Rather, where appropriate we will be guided by established precedent, taking into account the circumstances of the particular case.

It is PYCO's understanding that WTL receives no services from SAW (indeed, we understand that WTL provides services to SAW). That being the case, the only compensation required is that for SAW facilities employed by WTL to serve PYCO.

Fortunately, Mr. McFarland identifies the facilities which SAW claims are provided to WTL. In order to move the alternative service compensation issue along (but without admitting that Mr. McFarland's statements are accurate for any other purpose), we will assume arguendo that they are correct here. There are two possible costs for SAW associated with those facilities: (a) maintenance and (b) return on investment.

As to maintenance, it is our understanding that SAW employs a deferred maintenance program, replacing ties and fixing switches only when broken. It is our understanding that WTL is paying SAW the full cost of all repairs necessary when a tie or switch breaks during use by WTL. It seems to us that adequately reimburses SAW for maintenance under SAW's deferred maintenance program.

Return on investment is straightforward to calculate. SAW,

of course, paid nothing for the property: it was transferred to SAW by BNSF for no consideration. Although one could argue that the true investment, we will assume arguendo (solely for purposes here) that SAW nonetheless is entitled to a return on the current value of the assets donated to SAW by BNSF.

According to Mr. McFarland, WTL is using the following facilities of SAW: 2.41 miles of track, exclusively, and 1.69 miles of track, shared 50/50 between SAW and WTL. As indicated, we will assume arguendo for alternative service compensation purposes only that Mr. McFarland's representations are correct.⁴

SAW's track is comprised of 90 pound and 85 pound rail. We are advised by former SF employees that the track was worn out before SAW purchased it, and that SAW only repairs track on a deferred maintenance (i.e., when broken) bases. Most of the track is in the dirt, essentially no longer balances, and the ties are essentially a wash (so many are scrap that they offset any value associated with ties that might be useful for some economic purpose). We will nonetheless assume arguendo that all the track is 90 pound and in good enough shape to be marketable as reroll quality. The following tables compute the relevant track/tie/other track material values:

2.41 miles which SAW says are used exclusively
by WTL

	Net Tons	Price/ton	Total
90# reroll	381.6	285.00	\$108,756
OTM	76.32	220.00	\$ 16,790
Less take up costs, freight		100/ton	(45,792)
Net sale price in the ground:			\$ 79,754.40

1.69 miles which SAW says are shared 50/50:

90# reroll	267.60	285.00	\$ 76,266.00
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⁴ We do not believe Mr. McFarland's representations are correct. For example, it is our understanding that BNSF retains certain rights to use tracks 9200 and/or 9298. Thus to say these tracks are exclusively in use by WTL to provide service to PYCO is incorrect.

OTM	53.52	220.00	\$ 11,774.40
Less take up costs, freight		100/ton	(32,112.00)
Net sale price in the ground:			\$ 55,928.40

PYCO currently anticipates approximately 7000 carloadings in 2006. The most recent cost of capital computed by STB is 10.1%/ The formula for computing a return on the current value of the rail assets donated to SAW as used to provide alternative service to BNSF is as follows:

$(\text{NLV exclusive assets}) (10.1\%) / 7000 +$
 $1/2 (\text{NLV shared assets}) (10.1\%) / 7000$

or

$79,754.40 (.101) \text{ divided by } 7000 = \1.15 plus
 $1/2 (55,928.40) (.101) \text{ divided by } 7000 = \0.40

For a total of \$1.55/car for the track, ties, and OTM.

In addition, SAW holds interests in land under some of its track and tie. If we assume arguendo each right of way involved here is 50 feet wide, this totals approximately 6 acres per mile. Some of this right of way is likely easement. The NLV of easement property is zero. Assuming arguendo (only for purposes here) that SAW owns all the underlying rights of way involved here in fee, we would have

$2.41 \times 6 = 14.46$ acres exclusive use
and

$1.69 \times 6 = 10.14$ acres for shared use. On a 50/50 basis, this would be the same as 5.07 acres for use to provide service to PYCO. The total acreage for purposes of an NLV calculation is thus 19.53 acres.

While we have not attempted to calculate an appraisal, the upper bounds are indicated by the asking price of comparable property being offered through Westmark Realty for property at Elm and 56th. That price is \$200,000 for 42 acres, or \$4800/acre. 19.53 acres multiplied by 4800 = \$93,744.00. Multiplying this amount by 10.1% (STB's most recent cost of capital for railroads) yields \$9468.14, and dividing this by 7000 results in a per car charge of \$1.35.

The maximum return on investment to which SAW may be entitled is thus \$1.55/carload on track, ties and OTM, and \$1.35/carload on land, or \$2.90/carload total.

PYCO can think of no other service provided by SAW, nor cost of SAW in connection with the alternative rail service being provided by WTL. If WTL is providing services to SAW that are not reimbursed by BNSF, then WTL would appear entitled to an offset for those services.

Exhibit B

----- Original Message -----

1. **From:** [john heffner](#)

To: [c.montange](#)

Cc: [Ed Ellis](#) ; [Steve Gregory](#)

Sent: Thursday, February 15, 2007 1:22 PM

Subject: Fw: wtl interchange agreement

Charles your memory is better than mine. Looks like I told Tom on March 13 that compensation would be at \$2.90 per car and I didn't hear from him on this subject until he started banging away at it again in late December 2006. John

----- Original Message -----

From: [john heffner](#)

To: [Tom McFarland](#)

Cc: [c.montange](#) ; [Ed Ellis](#) ; [Steve Gregory](#)

Sent: Monday, March 13, 2006 3:50 PM

Subject: wtl interchange agreement

Tom, I wanted to give you a "heads up" that I would soon be responding in writing to the "interchange and joint use agreement" you had sent me on March 1. Rather than prepare a new agreement, I will redo your agreement with the changes "redlined." Compensation will be at \$2.90 per car. This compensation is based upon the value of SAW's track and right of way and is, we believe, very favorable to SAW. Liability provisions will be allocated based upon fault or upon whose employees or equipment was involved. Otherwise split 50/50. All repairs required (like for track) and wrecks will be at your cost with costs for material and labor fully documented and all records available for inspection. I'm sure you would do just the same if our roles were reversed. John