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June 13, 2006

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Albemarle Corporation--Petition for Declaratory Order--Certain Rates and
Practices of The Louisiana and North West Railroad Company, STB Docket No.
42096

Dear Secretary Williams:

On behalf of Albemarle Corporation we are submitting herewith a Reply to the Motion to
Strike Or In The Alternative Reply to Albemarle's Surreply filed by The Louisiana and North
West Railroad Company on May 24, 2006.

Your attention to this matter is appreciated.

Sincerely,

Martin W. Bercovici

Enclosure

cc: Edward J. Fishman, Esq. (via electronic mail)

**Before the
SURFACE TRANSPORTATION BOARD
Washington, DC 20423**

ALBEMARLE CORPORATION—PETITION	)	
FOR DECLARATORY ORDER—CERTAIN	)	Docket No.
RATES AND PRACTICES OF THE LOUISIANA	)	NOR-42096
AND NORTH WEST RAILROAD COMPANY	)	

**REPLY OF ALBEMARLE CORPORATION TO THE NORTH WEST AND
LOUISIANA RAILROAD COMPANY'S MOTION TO STRIKE OR IN THE
ALTERNATIVE REPLY TO ALBEMARLE'S SURREPLY**

Albemarle Corporation ("Albemarle"), pursuant to 49 C.F.R. § 1104.13(a), respectfully submits its Reply to the Motion to Strike Or In The Alternative Reply of The Louisiana and North West Railroad Company ("LNW") filed on May 24, 2006 ("May 24 Motion") in response to Albemarle's Rebuttal submitted on April 10, 2006 ("Rebuttal").

I. LNW Has Given No Reason to Strike Albemarle's Rebuttal

Albemarle filed its Rebuttal to the Reply filed by LNW on February 28, 2006 ("February 28 Reply") to Albemarle's Petition for Declaratory Order. The Rebuttal was accompanied by a Motion seeking leave to file the Rebuttal, which explained that Albemarle was making the filing inasmuch as the LNW reply was in the nature of a motion to dismiss or for summary judgment, supported by affidavits of three (3) LNW representatives. Had the LNW pleading been styled as a motion to dismiss or as a motion for summary judgment, there is no question but that Albemarle would have had the right

to reply. LNW's pleading having been styled as a "Reply," Albemarle sought leave to submit its responsive pleading.

LNW does not dispute that its February 28 Reply was in the nature of a motion to dismiss or a motion for summary judgment. Rather, LNW refers to Section 1104.13(c) of the Board's rules, from which Albemarle's Motion for Leave had sought relief. LNW having failed to refute Albemarle's basis for its Motion for Leave, the Rebuttal should be accepted by the Board for the reasons previously submitted.¹

II. LNW Has Not Justified a Reply to Albemarle's Rebuttal

As set forth above, Albemarle's rebuttal was in the nature of a "reply" to LNW's *de facto* "motion for summary judgment." Had the LNW pleading been properly styled as a motion, Albemarle would not have needed to protect its submission with a request for leave to file. Being that Albemarle's Rebuttal was consistent with the Board's procedures, there should be no further reply by LNW. 49 C.F.R. § 1104.13(c).

LNW's May 24 Motion further should be rejected inasmuch as LNW seeks to advance new arguments, introduce evidence previously available, and advance arguments

¹ LNW also argues that Albemarle's Rebuttal should be rejected due to the timing of Albemarle's filing of the pleading. Its argument lacks cogency in that it ignores (i) the substance of the Albemarle-LNW consent agreement to ask the Board to hold the proceeding in abeyance pending mediation, filed on March 3, 2006, (ii) Albemarle's notice in the March 3 request of its intent to file the rebuttal (well within the 20 days allowed under Section 1104.13(a) of the Board's rules), and (iii) Albemarle's explanation of filing the Rebuttal on April 10 notwithstanding asking to hold the proceeding in abeyance in order to formally inform LNW of Albemarle's position on the February 28 Reply for purposes of the mediation. Moreover, had LNW truly been concerned about Albemarle's submission of a responsive pleading "beyond the 20-day time period set forth in the Board's rules," May 24 Motion at p. 3, its remedy was to decline to join in the March 3, 2006 request to hold the proceeding in abeyance inasmuch as it was informed of Albemarle's intention at that time. Sandbagging is not a sanctioned pleading practice before the Board. Also, there is no relevance to Albemarle's position on replying to LNW's motion to dismiss in Docket No. 42097, where Albemarle was adhering to the Board's order holding that proceeding in abeyance—an order which was issued before LNW's motion was submitted and which did not make provision for such a motion.

with no evidentiary foundation. Moreover, while disclaiming an intent to “reiterate its views on all [the various factual] issues here,”² LNW effectively does just that.

Albemarle does not intend to engage in an item-by-item rebuttal to the LNW pleading. The Board’s procedural rules are designed to frame issues for an evidentiary proceeding; and absent an absolute bar to granting relief, to allow the parties to present their cases under normal evidentiary processes and standards. *See* 49 C.F.R. § 1111.4(a); *North America Freight Car Ass’n—Protest and Petition for Investigation—Tariff Publications of the Burlington Northern and Santa Fe Railway Co.*,” STB Doc. No. 42060, slip op. at 9 (STB served Aug. 13, 2004). As reflected in Albemarle’s initiating pleading, LNW’s February 28 Reply and Albemarle’s Rebuttal, there are numerous factual issues; and those cannot be resolved on the basis of summary and incomplete affidavits and pleadings.³

With particular reference to market dominance, the place to introduce evidence and to argue about market dominance is in the evidentiary filings, not in the framing pleadings. *See* 49 C.F.R. 1111.8(a). With the issue of market dominance having been placed into contention, no further purpose is served by allowing further pleading on market dominance at this time. In addition, LNW seeks to introduce evidence through the verified statement of David Davila that was available to LNW, at least in substantial part (i.e., information about matters occurring in January and February, 2006), at the time

² May 24 Motion at p. 3.

³ For example, one such issue concerns track use and ownership, factors which bear upon LNW’s claim of a right to discontinue service. In response to LNW’s argument in its February 28 Reply that the Board lacks jurisdiction under 49 U.S.C. § 10906, Albemarle noted that service is performed over mainline track, lead track and track belonging to Albemarle—none of which is subject to Section 10906. Rebuttal at 4. In its May 24 Motion, LNW ignores the ownership and lead track issues and seeks to obfuscate the issue by reference to storage track it owns and track on its property. May 24 Motion at 6. Even if accepted into the record, such a cursory and incomplete treatment of the issues does not provide a basis for a determination on jurisdiction or otherwise on the merits.

of its February 28 Reply. There is no reason to allow LNW to supplement its February 28 Reply, or for the Board to consider such information without the opportunity for testing and verification through the discovery process and by the submission of rebuttal evidence.

LNW's May 24 Motion is significantly flawed as a "reply" in two other significant respects. First, LNW seeks to advance a new argument concerning service contracts;⁴ however, no such contracts have been introduced into evidence. This, too, could have and should have been raised in the February 28 Reply if LNW intended to argue this point. And absent proof of contracts which incorporate tariff terms, LNW's extensive argument about the Board's decision in *H.B. Fuller Co. v. Southern Pac. Transp. Co.*, 2 S.T.B. 550 (1997),⁵ simply is irrelevant to this proceeding. Second, LNW offers various allegations, including those in the form of questions and conclusions, with absolutely no factual predicate. The time for submission of proof is in the evidentiary phase, and a complainant or petitioner need not offer its evidence in the initiating pleading. If LNW wishes to raise factual issues at the motions stage, it is responsible to introduce facts and not simply to question a lack of proof or make arguments based on mere surmise.⁶ The unsubstantiated rhetoric of counsel provides no basis for the Board

⁴ In its February 28 Reply, LNW discussed termination of the prior contracts dealing with storage and intraplant switching, which were "superseded" by LNW's tariff 8002-E. February 28 Reply at p. 11. Now, LNW refers to "private contracts" which incorporate tariff terms. May 24 Motion at pp. 7-8. While the linehaul movements may have been conducted under contract, the switching and storage were then and are now independent of the linehaul service. If that is not the case, LNW's tariff at issue in this proceeding would be of no force and effect. See *Parrish & Heinbecker, Inc. -Petition for Declaratory Order*, 4 S.T.B. 866 (2000), *recon. denied*, 5 S.T.B. 534 (2001).

⁵ May 24 Motion at pp. 6-8.

⁶ For example, LNW asserts that "... Albemarle has provided no reason why it could not ... perform such intraplant switching [over the LNW mainline] on its behalf." May 24 Motion at p. 10. Notably, there is no evidentiary foundation that LNW would permit such operations and, if so, whether the terms thereof would support the conclusion suggested by LNW or whether LNW would retain a right to terminate at will. If the latter prevailed, market dominance would still exist since the option for Albemarle to perform switching for

to make any findings or reach any conclusions, on market dominance or otherwise. The only way to address and resolve factual issues is through an evidentiary proceeding as provided by the Board's rules, and not through opinions, rhetorical statements, statements of alleged facts which are incomplete and misleading, and unsubstantiated argument of counsel.

Finally, LNW argues that "Albemarle's complaint about LNW's intraplant switching, storage and weighing practices is limited to the charges applicable to such services, not the manner in which LNW is or has been providing such services."⁷ This overly misrepresents the clear statement of Albemarle's initiating pleading in which Albemarle raised the issue of the manner the charges are applied, in addition to the level of the charges themselves.⁸ The question of LNW's "practices" was raised in the order of referral from the Federal District Court for the Western District of Arkansas which served as the genesis of this proceeding.⁹

LNW's effort to interject additional facts in an untimely manner, unsupported assertions, and further argument adds no substance to the record before the Board. The proper manner for the Board to obtain the facts necessary to adjudicate the issues in this

itself would be illusory inasmuch as the option would exist at the whim of LNW. Indeed, LNW's insinuation that such an option is available to Albemarle is highly misleading in light of LNW having strenuously objected to an Albemarle contractor having encroached approximately 18-24" over the edge of LNW's 100 foot right-of-way while doing work inside Albemarle's plant boundaries at a distance of some 45 feet from LNW's rail line, citing "safety and other important concerns." See Exhibit 1 to this Reply. Similarly, the May 24 Motion argues that "Albemarle could, at a modest cost, install a scale on its own plant trackage . . .", May 24 Motion at p. 11, again without any evidence of cost or feasibility. Also, LNW offers the self-serving conclusion that it "is not convinced that all such switching requires use of the LNW right-of-way . . .", May 24 Motion at p. 10. Not only does LNW ignore the Declaration of Danny Wood, Exhibit 7 to Rebuttal (including the schematic attached as Exhibit A thereto), but also it offers no evidence about track operations or otherwise to support its opinion. LNW's opinion is of no relevance.

⁷ May 24 Motion at p. 12.

⁸ See Petition for Declaratory Order at pp. 6-8 (Feb. 1, 2006) and First Amendment to Petition for Declaratory Order (Feb. 23, 2006).

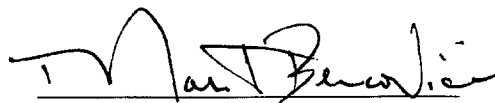
⁹ See Ex. 1 to Petition for Declaratory Order.

proceeding is through the evidentiary process. Only in that fashion can the facts be properly ascertained and the issues clearly articulated for the Board's consideration. LNW's "Reply" contained in its May 24 Motion has no place in the record in this proceeding.

Wherefore, the premises considered, Albemarle Corporation respectfully requests the Surface Transportation Board to DENY the Motion of The Louisiana and North West Railroad Company to Strike Or In The Alternative Reply to Albemarle's Surreply, said Motion having been filed on May 24, 2006.

Respectfully Submitted,

ALBEMARLE CORPORATION



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June 13, 2006

Exhibit 1

Reply to the Motion to Strike
Or In The Alternative Reply to
Albemarle's Surreply

"David Davila"
<ddavila@bellsouth.net> To: <Kenny_Kendrick@Albemarle.com>
cc:
Subject: Albemarle workers/machines on LNW property
04/28/2006 10:38
AM

Kenny Kendrick,

At approximately 1040 am on April 27, 2006, our Track Foreman/Inspector, John Ramey observed and documented that Albemarle workers and machinery were working and running machines on and within the LNW right of way which in this case was in the right away where the lead track comes off the LNW main line. Be reminded that our right away is 50 feet from the center of the LNW main line on either side of the LNW main line. The foreman and or workers were notified by our Track Foreman, Mr. Ramey that it was not permissible for the latter workers and machinery to be on our right of way and property. Parties that would come unto LNW property must have LNW permission and clearance at all times. No such permission and or clearance were granted to Albemarle Corporation and or concerned parties in regards to the above infraction of working on our property and LNW right of way.

This incident has raised both safety and other important concerns. Please inform myself and the LNW R.R. why such inappropriate and unsafe actions were taken by the Albemarle work group as stated above. Your timely response to these concerns would be greatly appreciated.

Sincerely,

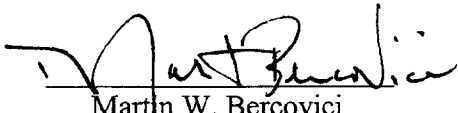
David Davila
LNW R.R. Dispatcher/Agent

CERTIFICATE OF SERVICE

I, Martin W. Bercovici, hereby certify that on this 13th day of June, 2006, I have served the foregoing Reply of Albemarle Corporation to The North West and Louisiana Railroad Company's Motion to Strike Or In The Alternative Reply to Albemarle's Surreply on the following by electronic mail:

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Attorney for The Louisiana and North West Railroad Company



Martin W. Bercovici