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April 10, 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, Docket No. NOR-
42096

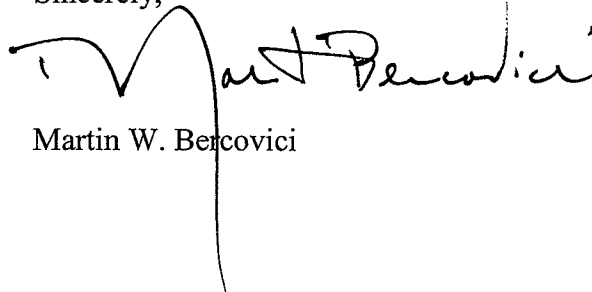
Dear Secretary Williams:

On behalf of Albemarle Corporation we are submitting herewith (i) a Motion for Leave to File Rebuttal to Reply of the Louisiana and North West Railroad Company ("LNW"), and (ii) Rebuttal of Albemarle Corporation to Reply of the Louisiana and North West Rail Company.

Albemarle's intention to respond to the LNW Reply was noted in our letter of March 3, 2006, asking the Board to hold this proceeding in abeyance pending mediation scheduled for April 24 and 25, 2006. Albemarle is submitting the Rebuttal at this time in order to assure a complete record exists for the mediation. Albemarle is amenable to tolling of the period allowed for LNW to reply to the Motion for Leave until the mediation is concluded, if LNW chooses to reply to the Motion.

Your attention to this matter is appreciated.

Sincerely,



Martin W. Bercovici

Enclosures (2)
cc: Edward J. Fishman, Esq.

**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	)	

**MOTION OF ALBEMARLE CORPORATION FOR LEAVE TO FILE A
REBUTTAL TO REPLY OF THE LOUISIANA AND NORTH WEST
RAILROAD COMPANY**

Albemarle Corporation (“Albemarle”) respectfully requests that the Surface Transportation Board accept into the record the associated Rebuttal to the Reply of The Louisiana and North West Railroad Company (“LNW”) to Albemarle’s Petition for Declaratory Order, said Reply filed on February 28, 2006.

Customarily, the initiating complaint/petition¹ and the answer frame the issues for a hearing proceeding;² and evidence is filed following completion of discovery.³ Motions to dismiss also may be filed,⁴ to which the other party may file a reply.⁵

¹ Albemarle filed its initiating pleading as a Petition for Declaratory Order in the nature of a complaint. This was in accordance with the Board’s decisions and rulings that “petitions for issuance of a declaratory order premised on referral from a court are routinely accepted and treated procedurally in the same manner as a complaint.” *Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 676 (1989), cited in *Martin Gas Sales, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Union Pacific Railroad Company*, STB Docket No. 43082 (Office of Proceedings, served Nov. 14, 2003).

² See 49 C.F.R. §§ 1111.1(a) and 1111.4(a).

³ *Id.* at § 1111.8(a).

⁴ *Id.* at § 1111.5.

⁵ *Id.* at § 1104.13(a).

The Reply of LNW is only partially responsive to the initiating petition/complaint, contains three verified statements and assorted documentary evidence, and requests a decision “rejecting” the petition, “confirming” that LNW’s Tariff LNW-8002-E became effective on December 21, 2005,⁶ and for other relief.⁷

Not being quite sure of the nature of the LNW Reply, as to whether it is an answer or seeks affirmative relief, LNW submits the associated Rebuttal. The rebuttal also is submitted to correct certain inaccuracies in the LNW Reply in order to assure that the Board has an accurate factual record and, in the proper function of initiating pleadings, to place certain of the background information recited by LNW in its proper context as irrelevant to the Board’s consideration of the reasonableness of LNW’s rates and practices under its tariff, as requested in the referral order of Judge Barnes.

The Board frequently permits a party to file a rebuttal in the interest of compiling a full and complete record. *See, Union Pacific Railroad Company – Abandonment Exemption – In Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33, Sub-No. 132X (Served June 22, 2004) (accepting a rebuttal based on 49 CFR 1100.3, “to ensure a just determination of the issues presented” and “in the interest of compiling a full and complete record”). *See also, San Pedro Railroad Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, STB Docket No. AB-441, Sub. No. 4X (served July 28, 2005); *SMS Rail Service, Inc.–Petition for Declaratory Order*, STB

⁶ LNW Reply at p. 20. Albemarle notes that there is no evidentiary support for the requested ruling concerning the tariff, such as demonstration of notice of said tariff having been timely provided to Albemarle as required by 49 U.S.C. § 11101(c).

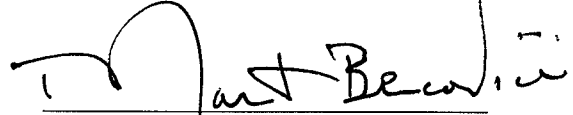
⁷ LNW also asks the Board to “direct Albemarle to pay the charges [according to] LNW’s existing tariff LNW 8002-E.” LNW Reply at 3. This request, appearing in the Summary of Argument, is not subsequently repeated or documented.

Finance Docket No. 34483 (STB served Jan. 24, 2005). Such circumstances warrant acceptance of the associated Rebuttal in the instant proceeding.

WHEREFORE, THE PREMISES CONSIDERED, Albemarle Corporation respectfully requests that the Surface Transportation Board accept the associated Rebuttal to Reply of The Louisiana and Northwest Railroad Company.

Respectfully submitted,

ALBEMARLE CORPORATION

A handwritten signature in black ink, appearing to read "Martin W. Bercovici", is written over a horizontal line.

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April 10, 2006

**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	)	

**REBUTTAL OF ALBEMARLE CORPORATION TO REPLY OF THE NORTH
WEST AND LOUISIANA RAILROAD COMPANY**

Albemarle Corporation (“Albemarle”) respectfully submits its Rebuttal to the Reply of The Louisiana and North West Railroad Company (“LNW”) to Albemarle’s Petition for Declaratory Order and First Amendment to said petition, filed on February 1, 2006 and February 23, 2006, respectively (Albemarle’s pleadings hereinafter referred to collectively as “Petition”, and LNW’s pleading as “Reply”).¹

LNW advances three grounds in its Reply as basis for its argument that LNW’s petition should be rejected, namely (i) that the STB lacks jurisdiction over the rates and practices at issue, (ii) that Albemarle cannot establish that LNW has market dominance, and (iii) that the petition should be rejected as an improperly filed formal complaint. Albemarle addresses, and refutes, each of these contentions in this Rebuttal, and further addresses certain of the background information recited by LNW, some of which is

¹ Contemporaneously, Albemarle is filing a Motion for Leave to File this Rebuttal, and the basis for filing the Rebuttal is set forth in said Motion.

factual, but much of which is incomplete (and consequently misleading) or simply inaccurate, and a substantial portion of which is irrelevant.²

I. The STB Has Jurisdiction Over the Charges and Practices in Controversy.

a. Section 10906 Does Not Bar the STB From Reviewing LNW's Rates and Practices

LNW argues that the Board lacks jurisdiction over LNW's rates, charges and practices pursuant to 49 U.S.C. § 10906 because the lines are not subject to licensing to construct, to operate over or to abandon, and hence are not subject to regulation. This argument is based on flawed legal analysis as well as an erroneous factual predicate.

Until now, LNW has contended that the switching, weighing and hold charges are common carrier services subject to STB jurisdiction. LNW asserted to Albemarle that the hold charges are subject to LNW's "federal tariff,"³ which can only mean that this is a common carrier service subject to STB jurisdiction. Moreover, LNW took the position that these services are subject to STB jurisdiction in its Motion to Dissolve the Temporary Restraining Order before the U.S. District Court for the Western District of Arkansas, which LNW conveniently fails to mention in its Reply. LNW advised the court that "under the applicable federal statutes, rules, regulations, and procedures governing freight tariffs, [Freight Tariff LNW 8002-E] became and currently is the applicable tariff for all charges by Defendant L&NWRR to Plaintiff Albemarle for

² It is neither relevant nor appropriate to address the substance of commercial negotiations over rail and non-rail matters. The substance of commercial negotiations have no place in the Board's adjudicatory processes. Not only are such negotiations not admissible, *see* Rule 408, Federal Rules of Evidence and 49 C.F.R. § 1114.1, but also if agreement is reached, the resulting contract is beyond the Board's jurisdiction, 49 U.S.C. § 10709(c); and if no agreement is reached, the tariffs must be examined on their merits and not on the basis of negotiations for an exempt contract. For the record, whatever LNW thinks about having "agreed in principle" to certain terms (Reply at p. 10), use of the term "principle" is highly inappropriate since the discussions took place in the face of LNW's extortionate demands initiated by the ambush meeting on the eve of the Thanksgiving holiday weekend and the threat that Albemarle must either capitulate or suffer closure of the plant in 20 days.

³ *See* Exhibit 3 to Petition.

switching, switching to and from hold tracks, hold charges, weighing and reweighing, and other charges.”⁴ To the extent the services are in a “tariff,” this constitutes a holding out of service pursuant to the railroad’s common carrier authority;⁵ and common carrier services are subject to the Board’s jurisdiction.⁶

LNW misconstrues the scope and extent of Section 10906. Section 10906 is an exception to the licensing provisions of the statute; it does not limit the Board’s regulatory powers over the services provided. The fact that a railroad may not need authority to construct and to “operate” over certain types of rail lines otherwise required under 49 U.S.C. § 10901 does not mean that the transportation services provided over those lines are beyond the Board’s jurisdiction.⁷ “Transportation,” which includes yard, property, instrumentalities of any kind related to the movement of property, services related to that movement, storage and handling,⁸ is subject to the Board’s jurisdiction and to the Board’s regulatory powers, including Sections 10701 and 10702 of the Act. 49

⁴ See LNW Brief in Support of Defendant’s Motion to Dissolve or Modify Temporary Restraining Order, 06-CV-1002, filed January 6, 2006, United States District Court for the Western District of Arkansas, attached in pertinent part as Exhibit 6 to this Rebuttal. (Albemarle is continuing its practice of consecutive numbering of exhibits beginning with its Petition.)

⁵ In its pleadings before the Federal District Court, LNW claimed that the tariffs were “filed,” and that “no objection was filed.” See LNW Brief, *supra*, attached as Exhibit 6. LNW has never explained where the tariff was filed, or what process was available to object to the tariff. Whether LNW was seeking to mislead the court in support of its position, or whether LNW fails to understand the common carrier process and duties (as perhaps indicated by its threats to arbitrarily terminate service), is unknown. Albemarle recognizes that tariffs no longer are filed, but rather now generally constitute the manner by which railroads publish their rates as required by 49 U.S.C. § 11101.

⁶ Holding out by tariff to provide service is strong evidence of a common carriage offering. See *Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927); *SMS Rail Service, Inc.—Petition for Declaratory Order*, F.D. 34483 (STB, served Jan. 24, 2005). See also *Brotherhood of Maintenance of Way Employees v. CP Rail System*, F.D. 32835 (served June 10, 1997); *Kaw River Railroad, Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company*, F.D. 34509 (STB served May 3, 2005) (“Merely characterizing the proposed operation as switching does not relieve a rail operator of the obligation to obtain a Board license if the operator is holding out common carrier service to the public over a line of railroad,” a condition which exists in this case as discussed *infra*.).

⁷ The cases cited by LNW at page 16 of its Reply all concern authority under Chapter 109 of the ICCTA, not service rendered on lines which have been constructed and the regulation of said services.

⁸ 49 U.S.C. § 10102 (9).

U.S.C. §§ 10501, 10701 and 10702. The Board clearly so stated in *The Burlington Northern and Santa Fe Railway Company—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, F. D. No. 33740 (served June 22, 2001), where the Board held in response to an argument that the Board could not grant crossing authority over track excepted under Section 10906:

But it does not matter whether the track to be crossed is excepted or not, because excepted track, while it may not require a license for construction, operation, or abandonment, is not otherwise beyond our regulatory reach. It may be that there is no Federal interest in whether a spur is constructed or abandoned, but there is a Federal interest in the actions of the owner of a spur to block an interstate carrier from conducting interstate operations to meet its common carrier obligations. Thus, we conclude that the status of KJRY's track does not divest us of authority to require a crossing.

Id. at p. 8. The Board's authority over the service provided over a rail line thus is distinct from the Board's authority over the licensing of that line of railroad.

Moreover, LNW could not simply abandon the track over which the services at issue are being performed. For the most part, the switching occurs over the mainline track of LNW, to and from plant lead tracks, storage tracks, and the scale track; and the main line track certainly is not subject to the Section 10906 exception. Certain of the storage tracks, as well as the scale track and scale, are Albemarle's property,⁹ and accordingly are not subject to abandonment by LNW, or to Section 10906 of the Act. To the contrary, LNW has a duty to provide service to Albermarle,¹⁰ and it cannot abandon said service (including its main line track) without Board authorization.¹¹

Furthermore, LNW dismisses, without citation to authority, the necessity to operate over the its mainline for switching purposes as relevant to the issue of the

⁹ Verified Statement of Aaron Clark at p. 1, Ex. B to Reply ("Clark V.S.").

¹⁰ 49 U.S.C. § 11103.

¹¹ *Id.* at § 10903.

Board's jurisdiction.¹² This contention flies in the face of precedent. *See Utah Fuel Co. v. Director General*, 102 I.C.C. 493 (1925) (switching held subject to agency jurisdiction where switching performed between facilities over railroad's operating tracks); *accord, Kaw River Railroad, Inc., supra*. LNW also attributes the need for service over the mainline as due to a "lack of investment in adequate track capacity within [Albemarle's] plant."¹³ LNW fails, however, to provide any evidence to support its contention, and its implication, that capacity exists within the plant for all of these functions.¹⁴ To the contrary, LNW admits that the storage and switching operations are integral to, and integrated with, the receipt and outbound shipment of materials.¹⁵ As such, these operations are part and parcel of the transportation services subject to the Board's jurisdiction.¹⁶

b. LNW's Charges and Practices are Within Its Common Carrier Obligation

LNW admits that as a railroad common carrier it has a duty is to deliver inbound cars to a position reasonably convenient to Albemarle for unloading.¹⁷ Among the issues presented in the Petition are those which concern LNW's practices with regard to spotting cars.¹⁸ LNW does not address how it is rendering service to Albemarle, and whether it has changes its practices. These are factual determinations that only can be

¹² Reply at 16.

¹³ *Id.*

¹⁴ Regardless of how the layout of the plant was configured when it was constructed in the 1970's in relation to LNW's rail lines, said construction and expansion having been facilitated by LNW (Verified Statement of Gerald Hausman at p. 1, Ex. A to Reply), the plant layout is not subject to examination at this time as to whether had an alternative configuration been employed 4 decades ago certain of the LNW service issues now presented may have been avoided.

¹⁵ *See Clark V.S.* at p. 1.

¹⁶ *See also, Carrier Switching at Industrial Plants in the East*, 294 I.C.C. 159 (1955).

¹⁷ Reply at p. 17.

¹⁸ *See* Petition at pp. 7-8, Issues 2, 3, 4, 5, 9, and First Amendment to Petition at p. 3, Issues 11 and 12.

made on a complete evidentiary records, and a hearing is required to develop such a record.

II. Market Dominance is a Factual Determination To Be Made on a Full Record and LNW Has Not Demonstrated a Lack of Market Dominance.

LNW argues that Albemarle cannot establish market dominance, citing to a shift in caustic soda traffic from rail to truck, provision itself of some intraplant switching, and allegations that Albemarle can provide its own storage and itself can “weigh railcars on its weighing track.”¹⁹ LNW errs in certain of its factual allegations, and improperly seeks to generalize from particular, limited circumstances to a finding that Albemarle does not require service from LNW in all cases.

Market dominance is the “absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.”²⁰ This is a factually intensive examination, and forms part of the evidentiary case of each of the parties.²¹ Albemarle will address market dominance in substantive depth in its evidentiary filings, and will limit this Rebuttal to demonstrating that the superficial showing of LNW does not demonstrate that Albemarle “cannot establish market dominance.”

Shifting of caustic soda traffic: Albemarle did not shift its inbound caustic soda traffic from rail to truck in retaliation for LNW refusing to cancel a 10% increase in switching rates as alleged by LNW.²² This allegation by LNW is demonstrably false. With the approach of the expiration of the supply contract for the caustic in 2004,

¹⁹ Reply at 18-19.

²⁰ 49 U.S.C. § 10707(a) (emphasis added).

²¹ See 49 C.F.R. § 1111.8(a).

²² Verified Statement of Galen White at p. 1, Reply at Ex. C.

Albemarle selected a new supplier which proposed delivery using a barge-rail combination. That supplier owns its own trucking fleet, and it handles unloading at Albemarle's plant. There was no relation between the increase in the switching charges and the shift in the inbound movement of caustic soda.²³ Furthermore, Albemarle did not ask LNW to cancel its switching fee increase. Rather, Albemarle requested an explanation for the increase; and when that was provided, Albemarle accepted the increase without objection.²⁴ Finally, as to the change in the caustic soda delivery being predictive of Albemarle's ability to shift all other inbound movements to truck, caustic soda accounted for only 16% of the inbound materials then received at the plant.²⁵ The general is not necessarily implied from the specific.

Albemarle ability to shift all inbound traffic from rail: The practical ability to shift all inbound traffic from rail to truck is dependent on a number of factors, including (but not limited to) the nature of the material and its handling characteristics (including hazardous or non-hazardous—approximately 80% of Albemarle's inbound shipments consist of hazardous materials, including in excess of 500 chlorine cars received annually²⁶), the plant loading/unloading configuration, the plant capacity to handle a large volume of trucks (e.g., 5200+ trucks to replace use of 1300 railcars), availability of trucks suitable to handle hazardous materials, availability of drivers (including those qualified to handle hazardous materials), and the ability of the roads in and around Magnolia, Arkansas (estimated population of less than 11,000) to absorb increased truck

²³ Declaration of Danny Wood at pp. 2, 4-5, Exhibit 7 to this Rebuttal.

²⁴ *Id.* at p. 5.

²⁵ See Hausman Verified Statement at p. 2; Clark V.S. at p. 1, $(250 \div (250 + 1300)) = 0.161$.

²⁶ Wood Declaration at p.2; Hausman Verified Statement at p. 1.

traffic involving predominantly hazardous materials.²⁷ Moreover, for the competition to be “effective,” it also must be economical.²⁸ LNW has not presented any evidence on any of these factors. Instead, LNW offers its interpretation of a comment made by the South Plant Supply Chain Manager, in response to LNW’s threat to raise rates, that Albemarle would have to consider use of trucks—for products and quantities thereof which were not specified—if rates were raised to an excessive level.²⁹ Such a general comment in what turned out to be a contentious negotiating session, which was the type of comment typical to carrier/shipper negotiations, neither substantively nor procedurally constitutes an admission; and neither can it serve as the basis for a finding that there is effective competition which could replace all rail service to Albemarle’s South Plant.³⁰

Intraplant switching: As set forth in Albemarle’s First Amendment to Petition for Declaratory Order, Albemarle has initiated some limited intraplant switching itself.³¹

²⁷ The Chairman, President and CEO of Norfolk Southern Railway, Charles Moorman, recently was quoted as stating with regard to the handling of chlorine and the NS accident at Graniteville, SC in 2004: “We can’t [walk away from transporting highly toxic materials], we’re a common carrier. We also shouldn’t, because the rail network is the place this stuff ought to be—you sure don’t want it on the highway. . . .” “A Vision at NS,” *Traffic World*, Mar. 20, 2006 at p. 33.

²⁸ The Interstate Commerce Commission observed that the availability of motor carrier service options can “be taken for granted,” and it identified a number of factors, consistent with those set forth above, for deducing if motor carriage provides effective competition to rail service. *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 133 (1981).

²⁹ Wood Declaration at p. 4.

³⁰ See Rule 408, Federal Rules of Evidence and 49 C.F.R. § 1114.1. Moreover, the statement quoted from Albemarle’s Petition for Temporary Restraining Order at Reply p. 19, n. 26, regarding use of trucks to transport inbound hazardous materials cites to the emergency measures Albemarle would be forced to attempt to employ to avoid a plant closure pending litigation, not a claim that rail service is not needed because there is effective truck competition. Furthermore, LNW conveniently ignores the paragraph immediately following the passage it cites which states: “Even if over-the-road tanker truck transport was a safe and viable method to transport such hazardous materials, it is highly unlikely that Albemarle would be able to secure the use of enough properly equipped tank trucks to meet its ongoing need to transport materials.” Reply at Exhibit G, at ¶ 67. To cite this pleading for the proposition that Albemarle “admitted that it could shift all inbound traffic away from rail” (Reply at pp. 18-19) constitutes a gross misrepresentation.

³¹ Contrary to the allegation that Albemarle is breaching the terms of the Non-Signatory Contract, LNW C-0180, by not paying for switches when it performs the switch itself, *Clark V.S.* at p. 2, the Non-Signatory Contract states: “When a car is switched or reswitched, either empty or loaded, at request of either

Again, one cannot extrapolate from the specific to the generic. Exhibit A to the Wood Declaration is a diagram of the rail lines serving the Albemarle South Plant. As Mr. Wood explains, tracks 0, 00 and 1-9 are plant lead tracks, that terminate at plant loading and/or unloading stations. Tracks A-E are storage tracks. The intraplant switching undertaken by Albemarle occurs only on tracks 2-9, since Albemarle can perform switching without accessing the LNW main line only on those tracks. Switching of tracks 0, 00, 1 and A-E all require access to the LNW main line, as does access to the scale track. While LNW argues that Albemarle can itself, or through a contractor, perform intraplant switching,³² LNW conveniently fails to explain how this can be done without crossing LNW's main line in light of its position that "LNW will not allow Albemarle to access the LNW mainline."³³ Albemarle clearly cannot perform all requisite switching itself, absent a change in LNW's position regarding access to the mainline track.

Storage: In another gross misrepresentation and superficial generalization, LNW asserts in its Reply that Albemarle does not require storage from LNW because

consignor or consignee, or agent thereof, the following charges will be assessed each time a car is switched: . . . " Reply at Exhibit D (emphasis added). Mr. Clark rephrases the terms of the Non-Signatory Contract ("The non-signatory contract requires Albemarle to pay \$121 each time a 'car is switched or reswitched, either empty or loaded.") and so omits the qualifying requirement that there must be a request for service. The Non-Signatory Contract does not in any way prohibit Albemarle from performing these limited number of switches. Albemarle fails to understand why LNW raises this matter before the Board since contract enforcement is exclusively within the domain of the courts, 49 U.S.C. § 10709(c)(2); and if LNW truly believes Albemarle is violating the agreement, it is free to raise this issue before Judge Barnes of the United States District Court for the Western District of Arkansas. The same applies with regard to the allegation that Albemarle is not paying for switching under the Non-Signatory Contract (Reply at p. 14): while this is a contract matter and is under the court's jurisdiction, Albemarle represents that it is paying for services in the same manner as it did before November 23, 2005, consistent with the Court's orders. (Wood Declaration at p. 4.) Moreover, according to Attachment B to the Clark V.S., LNW has invoiced Albemarle at the \$500/car switching rate prior to the purported December 21, 2005 effective date of Tariff LNW 8002-E.

³² LNW Reply at p. 19.

³³ *Id.* at p. 7, n.7. See also Clark V.S. at p. 1.

Albemarle is storing some cars on its plant lead tracks. As with Albemarle's alleged ability to shift all inbound traffic from rail, determination of this issue requires a factually intense analysis of the plant and the ability to absorb all cars on Albemarle owned track.

Again, the words of LNW's Mr. Clark are instructive:

"Albemarle does not have sufficient track capacity of its own at the South Plant to handle the inbound chemicals that it receives by rail and the outbound chemicals that it ships by rail, as each chemical typically must be unloaded on certain dedicated switching tracks within the facility. Therefore, Albemarle leases LNW storage tracks, and also uses Albemarle storage tracks located on LNW property, to store up to 100 loaded or empty railcars owned or leased by Albemarle."³⁴

LNW's own evidence refutes its argument.

Weighing: Finally, LNW makes the same generalized extrapolation from its argument about switching to its weighing service.³⁵ In addition, LNW claims that "Albemarle could use its own employees or a third party to weigh railcars on its weighing track."³⁶ While it is true that Albemarle paid for the scale and the scale track, LNW once again conveniently ignores the facts that the scale track is accessible only via the LNW main line,³⁷ and "LNW will not allow Albemarle to access the LNW mainline."³⁸ Therefore, in the words of Mr. Clark, "Albemarle also relies on LNW to provide weighing services . . .;"³⁹ and it must rely on LNW to provide weighing services since Albemarle cannot reach the scale without access to the LNW main line.

³⁴ Clark V.S. at p. 1.

³⁵ Reply at p. 19.

³⁶ *Id.* at p. 19, n. 27.

³⁷ See Exhibit A to Wood Declaration.

³⁸ Reply at p. 7, n. 7.

³⁹ Clark V.S. at p. 1.

Thus, LNW's own Reply thoroughly refutes its arguments concerning market dominance. Indeed, by LNW's own admissions there probably is enough in the record to make a finding that market dominance exists for switching, weighing and storage services (based on the testimony of LNW's witnesses). There clearly is no basis to conclude that "Albemarle cannot establish market dominance."

III. Albemarle's Petition Was Properly Filed.

LNW asserts that Albemarle should not be allowed to challenge the lawfulness of LNW's charges and practices for switching, storage and weighing under the SAC methodology without payment of the Board's filing fee under 49 C.F.R. § 1002.2(f)(56)(i). LNW's position not only is wrong, it is wholly inappropriate.

The fee applicable to Albemarle's petition is of no consequence to LNW; it is solely a matter between Albemarle and the STB. This is simply another instance of LNW inappropriately seeking to raise the financial stakes to Albemarle, just as LNW ambushed Albemarle's Supply Chain Manager to meet in a parking lot the evening before the onset of the four day Thanksgiving holiday to deliver notice of termination of leases, switching service and pipeline rights-of-way to pressure Albemarle to accept new exorbitant charges upon threat of bringing the plant to closure in 20 days from that date, and 16 days following resumption of normal business operations following the holiday weekend.

The Board has several means of initiating proceedings. On matters referred by judges in judicial proceedings, the appropriate route is through a Petition for Declaratory Ruling. As recited at note 1 to the Petition, "petitions for issuance of a declaratory order premised on referral from a court are routinely accepted and treated procedurally in the same manner as a complaint." *Delegation of Authority—Declaratory Order Proceedings*,

5 I.C.C.2d 675, 676 (1989), cited in *Martin Gas Sales, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Union Pacific Railroad Company*, STB Docket No. 43082 (Office of Proceedings, served Nov. 14, 2003). The Board has made no distinction between referrals on jurisdiction, practices or rate matters—all are to be handled as petitions for declaratory orders in the nature of a complaint proceeding.

Since the complaint procedure is the appropriate means of handling a declaratory order proceeding upon court referral, as prescribed by the Board and its predecessor, it necessarily follows that that the constrained market pricing analysis may be used to inquire into the reasonableness of the carrier's rates. The Board's rules governing complaint procedures state: "In a complaint challenging the reasonableness of a rail rate, the complainant should indicate whether, in its view, the reasonableness of the rate should be examined using constrained market pricing or using the simplified standards adopted pursuant to 49 U.S.C. 10701(d)(3)."⁴⁰ Since the burden is on Albemarle, the election as to the rate procedure to be used belongs to Albemarle. Finally, while the constrained market pricing guidelines also are referred to as "coal rate guidelines" they are not limited to coal cases, either by the Board's rules (e.g., as quoted above) or by application.⁴¹ The Interstate Commerce Commission made clear in adopting the constrained market pricing standards that they apply to a "captive shipper."⁴² The

⁴⁰ 49 C.F.R. § 1111.1(a).

⁴¹ See, e.g., *McCarty Farms, Inc. v. Burlington Northern, Inc.*, 3 S.T.B. 102 (1998); *FMC Wyoming v. Union Pacific Railroad Co.*, No. 42022 (STB, served May 12, 2000).

⁴² *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 521 (1985). ("We believe CMP will provide the necessary protection for captive shippers . . .")

constrained market pricing standards are both appropriate and necessary to a resolution of the issue of the reasonableness of the charges referred by the court.⁴³

As to the fee paid, the Board acts by rules; and its rules prescribe different fees for different types of proceedings. Albemarle filed its petition under the procedure designated by rulemaking and case decision applicable to matters on referral from a court, and paid the appropriate filing fee. Moreover, the fees prescribed for a complaint under 49 C.F.R. § 1002.2(f)(56)(i) were developed using the Board's experience with long haul, unit train coal rate challenges, since those cases constitute the Board's overwhelming experience with adjudication under the constrained market pricing methodology.⁴⁴ The instant proceeding is a far cry from the typical coal rate case: it will entail switching and related services local to the site rather than a 1,000-mile or so railroad, single car movements rather than unit trains, and no issues of cross-over traffic common to the typical coal case. The resources required of the Board to manage this proceeding should be a small fraction of those consumed by a challenge to a utility coal rate. Considering both the size of the case and the referral from a Federal District Court, the 49 C.F.R. § 1002.2(f)(58)(i) fee provision ("A petition for declaratory order involving a dispute over an existing rate or practice which is comparable to a complaint proceeding," (emphasis added)) is appropriate.

IV. LNW's Practices Also Must Be Adjudicated.

The court referred to the Board the determination of the reasonableness of LNW's practices in applying its tariff rates. Market dominance is not a jurisdictional

⁴³ LNW's suggestion that Albemarle acts inappropriately by proceeding under the SAC methodology (Reply at p. 19) is specious.

⁴⁴ The underlying cost calculations are based on "the actual costs of providing a service." *Regulations Governing Fees for Service—1996 Update*, 1 S.T.B. 179, 181 (1996).

qualification to a determination of whether a carrier's practices are reasonable.

Accordingly, independent of the rate issues and the market dominance qualification therefore, Albemarle has raised issues pertaining to LNW's practices which require adjudication on an evidentiary record.⁴⁵ LNW's cursory treatment of the practices issues does not suffice to constitute an evidentiary record.⁴⁶ Nor does LNW's reference to its contract demand for a \$500/car switching rate⁴⁷ suffice to address the issue of when LNW provided Albemarle notice of its new tariff which included the new switching charge, the minimums applicable, the new "hold charge" and the new weighing charge. The statute quite clearly requires notice being provided of changes in "common carrier" rates and services.⁴⁸

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⁴⁵ See, e.g., discussion at p. 5 and n. 18, *supra*.

⁴⁶ Just to cite one example, LNW's apparent defense to the claim it changed its practices without notice to Albemarle is the assertion that it "did not charge Albemarle for every intraplant switch it performed while serving the plant." Reply at p. 7 and Clark V.S. at 2. Taken at face value, Mr. Clark's statement, though cleverly worded and ambiguous, clearly confirms that LNW has changed its practices, for which a notice of change was due Albemarle.

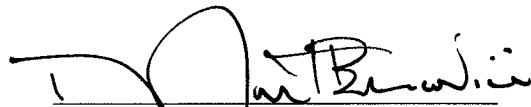
⁴⁷ LNW Reply at p. 11, n. 15.

⁴⁸ 49 U.S.C. § 11101(c).

WHEREFORE, THE PREMISES CONSIDERED, Albemarle Corporation respectfully requests that the Surface Transportation Board initiate a proceeding to adjudicate the matters referred to the Board by the United States District Court for the Western District of Arkansas as requested in its Petition for Declaratory Order and the First Amendment to said Petition.

Respectfully submitted,

ALBEMARLE CORPORATION

A handwritten signature in black ink, appearing to read "Martin W. Bercovici", is written over a horizontal line.

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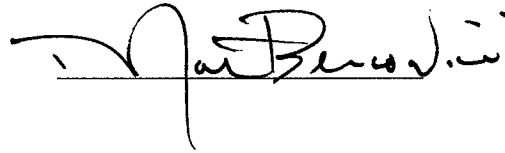
April 10, 2006

CERTIFICATE OF SERVICE

I, Martin W. Bercovici, hereby certify that on this 10th day of April, 2006, I have served the foregoing Motion of Albemarle Corporation For Leave To File A Rebuttal To Reply Of The Louisiana And North West Railroad Company and Rebuttal of Albemarle Corporation To Reply Of The North West and Louisiana Railroad Company on the following by electronic mail:

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Kirkpatrick & Lockhart Nicholson Graham LLP
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Attorney for The Louisiana and North West Railroad Company.

A handwritten signature in black ink, appearing to read "Martin W. Bercovici", written over a horizontal line.

DISTRICT COURT
DISTRICT OF ARKANSAS
FILED

JAN 06 2006

CHRIS R. JOHNSON, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

ALBEMARLE CORPORATION

PLAINTIFF

VS.

NO.

06-1002

THE LOUISIANA & NORTH WEST
RAILROAD COMPANY

DEFENDANT

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISSOLVE
OR MODIFY TEMPORARY RESTRAINING ORDER****The Temporary Restraining Order**

The temporary restraining order (TRO) entered by the Circuit Court of Columbia County, Arkansas, which has been removed to this Court, was entered without notice to the Defendant, does not expire by its terms, and was issued without the requirement of security by the applicant for the payment of such costs and damages as may be incurred or suffered by the Defendant if it is determined that it has been wrongfully restrained. Such an order violates Federal Rule of Civil Procedure 65 and as such should be dissolved.

The TRO stopped the general and ordinary business operation of the Defendant railroad company in violation of the Arkansas Rules of Civil Procedure, Rule 65(a)(2), in that reasonable notice of the time and place of the application therefore was not given to the Defendant, and the Plaintiff did not file a bond with the clerk, together with good and sufficient securities to be approved by the clerk, conditioned that the Plaintiff will pay to the Defendant such damages as it may sustain if it is finally decided that the injunction ought not to have been granted. Thus such a violation of the Arkansas Rule should result in the TRO being dissolved.

The TRO by its terms attempted to control the freight charges that Defendant Louisiana & North West Railroad Company (L&NWRR or Railroad) can charge Plaintiff Albemarle Corporation (Albemarle) in violation of 49 U.S.C. § 10501 and 49 U.S.C. § 11704, which preempts the field concerning the matters alleged in Plaintiff Albemarle's Petition. The Circuit Court of Columbia County, Arkansas, did not have jurisdiction to enter an order pertaining to the tariffs; therefore, the TRO should be dissolved.

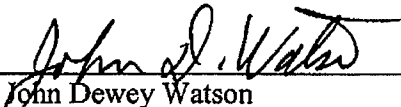
The Tariffs

On December 1, 2005, Defendant L&NWRR filed Freight Tariff LNW 8002-E, which became effective on December 21, 2005. Freight Tariff LNW 8002-E is attached to the Defendant's Answer and Counterclaim as Exhibit 1. The tariff canceled Freight Tariff LNW 8002-D, which was the tariff under which Plaintiff Albemarle was charged by Defendant L&NWRR before its cancellation by Freight Tariff LNW 8002-E. No objection was filed to Freight Tariff LNW 8002-E; therefore, under the applicable federal statutes, rules, regulations, and procedures governing freight tariffs, it became and currently is the applicable tariff for all charges by Defendant L&NWRR to Plaintiff Albemarle for switching, switching to and from hold tracks, hold charges, weighing and reweighing, and other charges.

On December 1, 2005, Defendant L&NWRR filed Freight Tariff LNW 9100-E, which became effective on December 21, 2005. Freight Tariff LNW 9100-E is attached to the Defendant's Answer and Counterclaim as Exhibit 2. The tariff canceled Freight Tariff LNW 9100-D, which was the tariff under which Plaintiff Albemarle was charged by Defendant L&NWRR before its cancellation by Freight Tariff LNW 9100-E. No objection was filed to Freight Tariff LNW 9100-E; therefore, under the applicable federal statutes, rules, regulations, and procedures governing freight tariffs, it became and currently is the applicable tariff for all

Respectfully Submitted,

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Attorneys for Defendant,
The Louisiana & North West Railroad Company

By: 
John Dewey Watson

CERTIFICATE OF SERVICE

I, John Dewey Watson, hereby certify that on January 6, 2006, the foregoing was presented to the Clerk of Court by personal delivery for filing and uploading to the CM/ECF system, and that a copy of the documents were personally served on Jim L. Julian and mailed, via United States Postal Service, to Ronny J. Bell, counsel of record, at their respective addresses below:

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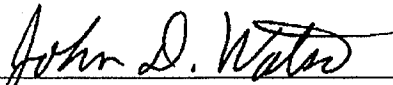

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EXHIBIT 7

Before the
SURFACE TRANSPORTATION BOARD
Washington, DC 20423

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

**DECLARATION
Of
DANNY WOOD**

My name is Danny Wood. I hold the position of Supply Chain Manager of Albemarle Corporation, located at the South Plant, near Magnolia, Arkansas. I have been employed by Albemarle for over 16 years. Currently I am responsible for coordination of all inbound and outbound shipments, including the rail service used by the company in Magnolia, Arkansas.

Attached as Exhibit A to this Declaration is a true and accurate schematic drawing showing the current layout of the rail lines serving Albemarle's South Plant. The plant itself is located on the top right of the drawing, between the words "Magnolia, Arkansas South Plant" and the track numbers 0, 00 and 1-9. Those tracks are plant lead tracks. Tracks A, B, C, D and E are storage tracks. As shown by the schematic, it is necessary to access the LNW Main Line in order to switch tracks 0, 00, 1 and the storage tracks, and particularly to move cars between the plant lead tracks and the storage tracks. Also, the scale track and the scale located on the scale track can only be accessed by operation over the LNW Main Line.

The storage tracks are utilized mainly to store inbound raw materials. We may have as many as 100 cars in storage at any one time. Approximately 80% of our inbound

rail shipments consist of regulated hazardous materials. The largest volume of inbound material we receive by rail is chlorine. All of the storage tracks lie within Albemarle's plant fence line.

The LNW witnesses make a number of statements which are inaccurate, either in and of themselves or in the manner stated, including taking matters out of context. Those include the following:

1. **Mr. Hausman's claims:** Mr. Hausman states that Albemarle has shifted "a significant portion of its transportation needs to truck, threatened to shift all of its remaining inbound to truck, and significantly reduced the amount of switching and weighing it has allowed LNW to perform." He specifically mentions the inbound caustic move.

Response: Albemarle's inbound rail movements are down less than 20% from several years ago. Whether this is significant is a matter of perspective. Albemarle did not make the shift in caustic soda; rather, our supplier shifted delivery modes. This occurred when we changed suppliers for caustic soda. The new supplier proposed delivery by a barge-motor combination. The supplier owns or controls a motor carrier which makes the final delivery, and the carrier's personnel unload the product at Albemarle's plant. We accepted this proposal. This change was procurement driven and had nothing to do with any "retaliation" against LNW over switching charges or other charges Albemarle was paying.

Regarding weighing, Albemarle continues to weigh all empty chlorine, bisphenol-A and toluene diamine rail cars. For other cars, we weigh every other week as a spot check. As to switching, after LNW threatened termination of switching service, increased switching charges from \$121 per switch to \$500 per switch, imposed daily and weekly minimums, and changed the method of charging for switching, Albemarle acquired a trackmobile in order to perform a limited portion of its own switching where possible. We began to perform some of our own switching (moving cars on tracks 2-9) early in 2006.

2. Mr. Clark's claims: Mr. Clark states that LNW did not charge Albemarle for every intraplant switch it performed while serving the plant, and that Albemarle now refuses to pay for switching charges incurred under the prior arrangement, implying that Albemarle is not keeping faith with its commitment in the Federal court proceeding. He also states that at a meeting in October, 2005 I told LNW representatives that "Albemarle did not need LNW because Albemarle could truck all of its chemicals to the South Plant."

Response: LNW unilaterally changed its definition of what constitutes a chargeable switch. After this controversy arose, we were told, for the first time, that any movement beyond the plant gate on an inbound movement is separately chargeable as a switch, and that each car moved is a switch—including each car in a string of cars to get to an empty to remove it or to place a car at a loading/unloading rack. Previously, these were not treated

or charged as switch movements. Accordingly, as understood between the parties in the Federal court proceeding, we are continuing to pay on the basis of our Non-Signatory Contract for all services we use, as service previously was defined, subject to a true-up at the conclusion of the pending litigation.

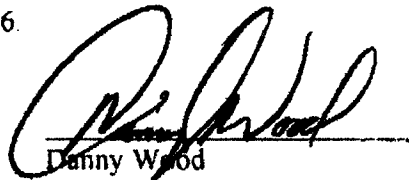
The October, 2005 meeting consisted of Mr. Clark and Mr. White going to Baton Rouge to meet with our corporate distribution staff to discuss increasing LNW's business with Albemarle. I agreed to participate by telephone. When they arrived, they were accompanied by a former LNW employee, Gladney Dillon, who we understand is working as a consultant to LNW; and he quickly began discussion of issues and invoices 2-3 years old that Albemarle believed had been resolved. In response to a threat by Mr. Dillon that LNW would raise its rates, without being specific and without a detailed investigation I responded that Albemarle also had options. I never stated that we could truck our entire volume of inbound chemicals to the South Plant, and in fact we cannot do so. LNW had turned what was intended as a productive meeting into something ugly.

3. Mr. White's claims: Mr. White claims the change in distribution pattern for the caustic soda traffic was "retaliation" for LNW's increase in switching rates, that we had threatened to pull the traffic away previously, and that we had asked LNW to cancel the 10% switching charge increase.

Response: Earlier in this Declaration I addressed the shift of the caustic movement from rail to truck delivery. As I then described, this was solely a purchasing decision and had no relation to LNW's increase in its switching charge. We did ask LNW for justification for the increase. They provided the justification, and the issue went away. We did not ask them to cancel the increase, and to my knowledge we had not previously threatened to take the caustic soda business away from LNW.

I, Danny Wood, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to make this statement.

Executed on this 4th day of April, 2006.



Danny Wood

Lead and Storage Track

Magnolia, Arkansas South Plant

