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August 30, 2006

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

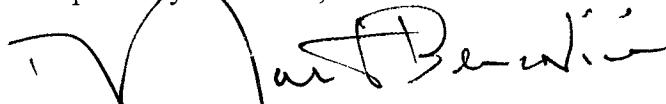
Re: The Louisiana and North West Railroad Company, Discontinuation of Service at
Magnolia, Arkansas; Petition of Albemarle Corporation for Emergency Service
Order and Petition of Albemarle Corporation for Immediate Relief under 49
U.S.C. § 721(b)(4); S.O. No. 1526

Dear Secretary Williams:

On behalf of Albemarle Corporation, we are submitting herewith a Rebuttal to the second
Reply filed by The Louisiana and North West Railroad Company ("LNW") on August 25, 2006
to Albemarle's Petitions identified above, filed on Friday, August 18, 2006.

Your attention to the foregoing is appreciated.

Respectfully submitted,



Martin W. Bercovici

cc: Edward J. Fishman, Esq. (via hand delivery)
Ouachita Railroad Company (via electronic mail)
Federal Railroad Administration (via hand delivery)

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

In the Matter of: The Louisiana and North West	)	
Railroad Company, Discontinuation of Service	)	S. O. No. 1526
At Magnolia, Arkansas; Petition of Albemarle	)	
Corporation for Emergency Service Order	)	

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

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BEFORE THE
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WASHINGTON, DC 20423

In the Matter of: The Louisiana and North West	)	
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Albemarle Corporation ("Albemarle"), by its attorneys, pursuant to 49 C.F.R. § 1146.1(b)(3), respectfully submits this Rebuttal to the second Reply of The Louisiana and North West Railroad Company ("LNW") submitted to the Board on August 25, 2006 ("Second Reply") in the above-captioned matter.

I. Procedural Matters

A. LNW's Pleading Constitutes a Second Reply And Should Be Rejected: LNW replied to Albemarle's initiating Petition for Emergency Service Order ("ESO Petition") by letter dated August 21, 2006 ("First Reply"). LNW's First Reply was not simply procedural in nature; rather, it addressed substantive issues between LNW and Albemarle. Now, LNW has filed a Second Reply. The Board's rules, however, provide that "the incumbent carrier must file a reply to a petition under this paragraph within five (5) business days." 49 C.F.R. § 1146.1(b)(2). The rules do not provide for multiple replies, or for serial replies. A party may file only one reply. Albemarle having submitted a Rebuttal

on August 22, 2006, as permitted by 49 C.F.R. § 1146.1(b)(3), LNW is not entitled to submit either a further reply or a reply to Albemarle's Rebuttal. *See* 49 C.F.R. § 1104.13(c).

If the Board chooses to accept the LNW's Second Reply, Albemarle respectfully requests the Board to accept this further Rebuttal, consistent with 49 C.F.R. § 1146.1(b)(3) which allows the party seeking an emergency service order to rebut the incumbent carrier's reply.

B. The Board Should Strike All Reference to Settlement Discussions or Offers:

Both LNW's First Reply and its Second Reply are replete with references to settlement discussions and offers. Settlement discussions are privileged and confidential, and are to occur privately between the parties. Settlement discussions are not conducted before the Board and on the public record. Settlement discussions are excluded from evidence by the Federal Rules of Evidence, *see* Federal Rules of Evidence at Rule 408; and the Board's rules follow the evidentiary rules in judicial proceedings. 49 C.F.R. § 1114.1. The Board should strike all substantive discussion of settlement terms from the record in this proceeding.¹

II. Facts Not in Issue

LNW's Second Reply does not attempt to refute any of the essential facts alleged by Albemarle in its ESO Petition, nor did LNW attempt to do so in its First Reply. The operative facts relevant to the ESO Petition are, as follows:

¹ Albemarle is offering certain limited facts concerning its settlement offer solely in demonstration that LNW has misrepresented Albemarle's commitments and actions without waiving Albemarle's objection to admissibility. To the extent the Board strikes all settlement discussions from this proceeding, said action would include the matter submitted herein by Albemarle.

- (i) LNW provides switching to Albemarle between Albemarle's chemical plant at Magnolia (a/k/a Ethyl), Arkansas, which is located west of LNW's main line track and Albemarle's storage tracks which lie east of LNW's main line track.²
- (ii) Switching of cars between the plant and the Albemarle storage tracks requires operation over LNW's main line track.
- (iii) LNW maintains a tariff which contains rates and terms for the provision of switching service, LNW Freight Tariff 8002-E.³
- (iv) LNW threatened Albemarle with immediate termination of switching service in December, 2005 and again in February, 2006.⁴
- (v) LNW was precluded from terminating switching by the judicial proceedings initiated by Albemarle in December, 2005; and LNW withdrew its threat made in February, 2006 as Albemarle sought assistance from the Board's Office of Compliance and Enforcement ("OCE").
- (vi) Following LNW's withdrawal of its threat to immediately terminate service in February, 2006, LNW's then Vice-President and General Manager committed to provide Albemarle at least 20 days notice before effecting any change of service;⁵ and a similar representation was made by LNW's counsel in a meeting with the Board's OCE staff, as conceded by LNW in its Second Reply.⁶

² See track diagram associated as Exhibit 1 to this Rebuttal, which also is associated as Exhibit A to Declaration of Danny Wood, Exhibit 7 to Rebuttal of Albemarle Corporation to Reply of The Louisiana and North West Railroad Company, Docket No. 42096 (April 10, 2006) ("Docket No. 42096 Rebuttal").

³ See Exhibit 4 to Petition for Declaratory Order, Docket No. 42096 (Feb. 1, 2006).

⁴ See Petition for Declaratory Order, Docket No. 42096 (Feb. 1, 2006) and First Amendment to Petition for Declaratory Order, Docket No. 42096 (Feb. 23, 2006).

⁵ See Exhibit 2 to this Rebuttal.

⁶ See Second Reply at p. 7. Therein, LNW is retracting its commitment to abide by the statutory 20-day notice provision regarding increases in rates and changes in service. *Id.* As a matter of candor to the Board,

(vii) On August 17, 2006, LNW notified Albemarle that it would terminate switching service effective August 21, 2006, unless Albemarle committed to use LNW for all switching, i.e., not only the switching between the plant and the storage track but also the switching of cars conducted wholly on Albemarle's plant lead lines which Albemarle then was conducting itself

(viii) LNW renewed its threat to terminate switching service in its First Reply and again in its Second Reply, and set a new termination date of September 14, 2006.⁷

III. Reply to LNW

LNW's Second Reply is filled with misdirection and erroneous and misleading arguments. Rather than focus on the merits, LNW submits the statements of its counsel about rates, storage, the handling of hazardous materials and other extraneous matters. The one item missing is evidentiary facts. LNW has not submitted a single declaration attesting to the truth of the representations contained in its pleading or a single document of probative evidentiary value. There is good reason there is no verification of the truth of the allegations made in the Second Reply: many are false, either in and of themselves or by omission. LNW's lack of candor to the Board should illuminate for the Board the reason this controversy is pending and has manifested itself in multiple dimensions.

not to mention ethical dealings with its customer, if LNW had made a determination it was not bound by those commitments and material representations made to the OCE and to Albemarle, LNW was under an obligation to so inform the Board and Albemarle, rather than precipitously notifying Albemarle that service would be terminated immediately and notifying Albemarle and the Board after the fact that LNW had changed its position and that its prior representations no longer were true and correct.

⁷ See Second Reply at p. 7.

A. Albemarle's Petition for Emergency Service Order Is Not About Rates:

Albemarle did not raise the issue of charges in its ESO Petition or in its original Rebuttal. And LNW did not threaten to raise rates: LNW notified Albemarle it was terminating service. It is LNW that has used its pleadings to discuss rates and charges. LNW's argument that that it "is shocked by Albemarle's assertion that it is 'willing to receive service' under the existing tariff and 'sort out the level of charges and minimums through the pending litigation' before the Board and the courts. This calls into question all of the settlement proposals discussed between the parties . . ."⁸ is incomprehensible. This is the third time LNW has notified Albemarle that it would wrongfully terminate service, and each time Albemarle sought governmental intervention to maintain service. As stated in Albemarle's Rebuttal of August 22, 2006, this proceeding is intended to preserve switching services while the rates and terms are sorted out in the pending Board and court proceedings, if they cannot be settled.

LNW conveniently fails to mention that Albemarle is following the direction of the Federal District Court for the Western District of Arkansas pursuant to which Albemarle is to continue to pay the prior rates and charges, subject to a bond and an accounting order pending the Board's decision concerning the reasonableness of LNW's Tariff 8002-E, at which time the Federal Court will resolve the issue of money owed, if any. LNW never objected to that Order.⁹ LNW's only action regarding that court order is that it subsequently asked the court to increase the bond amount, which motion was

⁸ Second Reply at p. 10.

⁹ Considering the bond and the accounting order, LNW's allegation that Albemarle's "true motive is to avoid paying the rate or charge assessed by LNW", *id.* at 4, is another baseless contention designed to deflect attention from the one true issue in this proceeding—LNW's termination of switching services.

denied.¹⁰ LNW also conveniently fails to mention that counsel attending the court hearing on behalf of LNW represented to the court, in a meeting with Judge Barnes concerning the preliminary injunction, that LNW's remedy to collect charges it contends are due is through a law suit for collection, not through the termination of service.

B. The Provision of Storage Has Nothing to Do With This Proceeding: LNW repeatedly refers to storage in its Second Reply. For example, it alleges that the "root causes of this dispute—Albemarle's refusal to invest in adequate storage track and weight facilities within its plant . . .",¹¹ and it refers to "a Board ruling on whether it must store . . . hazardous materials for Albemarle."¹² While the ESO Petition refers to Albemarle's storage tracks—as one terminus of the switching service, this proceeding does not deal with the provision of storage. Albemarle's ESO Petition solely seeks a remedy with regard to car movement between the plant and Albemarle's storage tracks. While LNW admits that the storage tracks (Tracks D and E) belong to Albemarle,¹³ it repeatedly refers to storage "on LNW property"¹⁴ in a further apparent effort to divert the Board's attention from the matter actually in dispute—LNW's unilateral and improper termination of switching services on and across LNW's main line track. Albemarle further submits that any matter relating to Albemarle's storage tracks entails an issue of property law that must be addressed by the appropriate court of competent jurisdiction (presumably the Federal District Court where the proceeding underlying Docket No. 42096 is being held

¹⁰ See Exhibit 3 hereto, a copy of the Court's Order of June 16, 2006 denying the request to reopen and to increase the bond amount.

¹¹ Second Reply at p. 3.

¹² *Id.* at p. 4.

¹³ *Id.* at p. 8. See also Verified Statement of Aaron Clark at p. 1, Exhibit B to Reply of The Louisiana and North West Railroad Company to Albemarle's Petition for Declaratory Order, Docket No. 42096 (Feb. 28, 2006), in which LNW recognizes that the storage track and also the track scale belong to Albemarle.

¹⁴ *Id.* at pp. 2, 3, 4, 7 and 13.

in abeyance). In any event, the issue of storage is not before the Board in this proceeding.

C. Albemarle Did Not Breach a Commitment to LNW to Provide Notice of Resumption of Plant Switching: LNW alleges—again without any supporting evidence—that Albemarle breached an agreement to provide 20 days notice prior to resuming plant switching itself.¹⁵ Albemarle offered a preliminary step to full settlement to LNW, provided that LNW met certain conditions. LNW did not fulfill any of those conditions. Representing this conditional offer made as part of the settlement process as a commitment and omitting the fact that LNW did not meet the required conditions constitutes a gross misrepresentation of the facts to the Board. Moreover, such allegations, in addition to being misleading, simply do not justify LNW’s non-compliance with the law. This is just another effort by LNW to generate more smoke to distract the Board from the matter actually in dispute—LNW’s unilateral and improper termination of switching services on and across LNW’s line.

D. LNW’s Hazardous Materials Concern Is Grossly Exaggerated: LNW continues to make much of its concern over the movement of hazardous materials. It states, for example, that it “is prevented from implementing liability protections . . . to a level commensurate with the significant risks that it continues to bear on Albemarle’s behalf.”¹⁶ The nature of this complaint is not explained. Nothing Albemarle has done has precluded LNW from obtaining additional liability protection. For example, the level of liability insurance LNW currently carries, and the amount of increase it implies it seeks, are not disclosed. Certainly, Albemarle is not prohibiting LNW from securing

¹⁵ Second Reply at pp. 5-6.

¹⁶ Second Reply at pp. 3-4, 7, 13.

whatever insurance LNW desires. Moreover, as previously explained, the storage takes place on Albemarle's storage tracks, located on Albemarle's property, at Albemarle's plant. The switching entails movement of the cars between the plant and Albemarle's storage tracks, using the LNW mainline as a "bridge" for the movement.¹⁷ The fact that the track is "very light weight 75 pound rail"¹⁸ is a factor of LNW's choosing and in no case justifies LNW's unilateral termination of switching service. This is the very same track LNW uses to handle the inbound and outbound movements of the same chemicals to and from Albemarle, as well as through trains moving from and to the junction with the Union Pacific Railroad at McNeil, Arkansas for LNW's other customers. The allegation that "hilly terrain" presents a risk factor is another fallacious representation of LNW—the terrain is not hilly in the vicinity of the plant and the storage track.¹⁹ While hazardous materials must be handled in a safe manner, in accordance with Department of Transportation safety standards, there is no extraordinary risk presented by the switch movement at issue before the Board. Rather, considering that switching entails movement of a limited number of cars,²⁰ the switching movement should be less risky than the line haul movements on the very same track.

Nor is there an issue regarding the Ouachita Railroad. As a Class III rail carrier, Ouachita must comply with all Federal Railroad Administration ("FRA") operating and safety standards. It is not a question of whether Ouachita was licensed under an exemption or by certificate, but rather whether it is subject to, and complies

¹⁷ See Exhibit 1 and the relationship of tracks D and E, Albemarle's storage tracks, with the plant lead tracks, 0, 00 and 1-9.

¹⁸ Second Reply at p. 13; *see also id.* at p. 14.

¹⁹ See Declaration of Danny White, Exhibit 4 hereto.

²⁰ LNW refers to a recent week when it performed 2 to 6 switches per day between the plant and Albemarle's storage tracks. Second Reply at p. 7.

with, the relevant FRA regulations. LNW makes no showing that Ouachita is not a responsible carrier.²¹ As to the equipment to be used in the switch service, Ouachita plans to use a switch engine, not a car mover.²²

E. LNW's Switching Service Is Common Carriage Subject to Regulation:

LNW again argues that its switching service rendered by means of operation over its main line track is not subject to STB jurisdiction.²³ Albemarle will not belabor this issue. The Board's jurisdiction is thoroughly discussed in the Docket No. 42096 proceeding,²⁴ and Albemarle incorporates that discussion by reference herein.

F. Albemarle Is Subject To Irreparable Harm: The LNW Second Reply constitutes the fourth time LNW has threatened to terminate the provision of switching service to Albemarle.²⁵ LNW has made no equivocation with regard to its intent to terminate switching services unless it is successful in leveraging its switching of the storage tracks to secure the plant lead switching on an "all or nothing" basis.²⁶ This is in violation of LNW's statutory duty to provide service to Albemarle on reasonable request. The harm to Albemarle is detailed in the Declaration of Danny Wood associated with the

²¹ Nor is it true that Albemarle is dissatisfied with Ouachita. *See* Exhibit 4.

²² *Id.*

²³ Second Reply at pp. 10-12. LNW also argues that the 20-day notice requirement of Section 11101(c) of the Act is inapplicable inasmuch as the change in its switching charge is a reduction, not an increase. *Id.* at p. 12. While LNW need not provide notice to reduce rates, it has not changed its tariff; and in any event, no agreement by Albemarle is required. The terms of its demand can only be interpreted as a demand for a contract; and failing Albemarle's agreement, LNW will terminate service. Such termination of service does require notice under 49 U.S.C. § 11101(c).

²⁴ *See* Rebuttal of Albemarle Corporation to Reply of The Louisiana and North West Railroad Company at pp. 2-5 (April 10, 2006), which also discusses LNW's representation to the Federal District Court that LNW's service is subject to STB jurisdiction.

²⁵ Second Reply at p. 7.

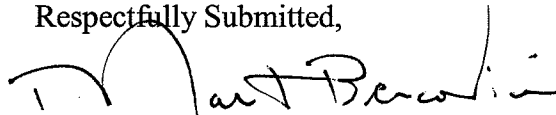
²⁶ *See id.* at p. 6, confirming LNW's position. Moreover, LNW tacitly agrees that it is seeking to leverage LNW's provision of this regulated service to force Albemarle into a contract, *see also id.* at p. 10, which would have the effect of taking this matter outside of the STB's jurisdiction.

ESO Petition. LNW has offered neither fact nor argument to refute that such harm will occur.

IV. Request for Relief

LNW's renewed threat to terminate switching services is effective September 14, 2006. Clearly, LNW does not want to perform its common carrier duty to provide switching of the storage tracks on behalf of Albemarle. Albemarle respectfully requests that the Surface Transportation Board issue an Emergency Service Order as set forth in its Petition filed August 18, 2006. Albemarle further requests that the Board act no later than September 8, 2006, to afford the Ouachita Railroad sufficient time to move its equipment in order to provide switching services to Albemarle without interruption of plant operations.

Respectfully Submitted,



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ALBEMARLE CORPORATION

August 30, 2006

CERTIFICATE OF SERVICE

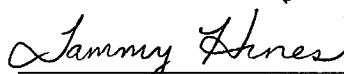
I, Tammy Hines, a secretary at the law firm of Keller and Heckman LLP hereby certify that on this 30th day of August, 2006 have served the foregoing Rebuttal of Albemarle Corporation to Second Reply of The Louisiana and North West Railroad Company on the following by hand delivery, unless otherwise indicated:

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Kirkpatrick & Lockhart Nicholson Graham LLP
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Washington, DC 20006-1600
Attorney for The Louisiana and North West Railroad Company

Ouachita Railroad Company
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Via electronic mail at: ouachitarailroad@sbcglobal.net

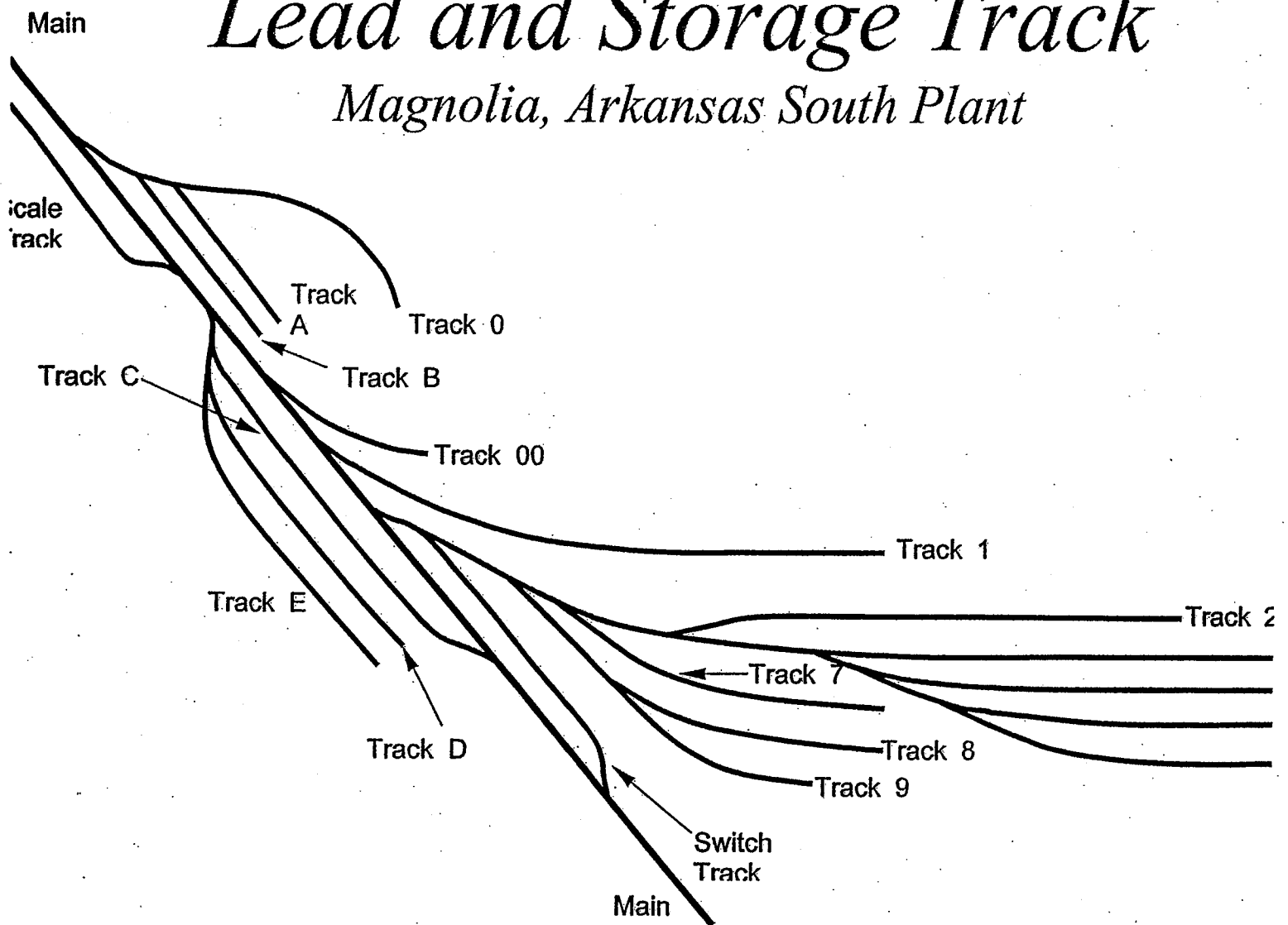
Federal Railroad Administration
U.S. Department of Transportation
1120 Vermont Avenue, N.W.
Washington, DC 20590



Tammy Hines

Lead and Storage Track

Magnolia, Arkansas South Plant



"Aaron Clark"

<alclarklnw@bellsouth.net>

To: <Danny_wood@albemarle.com>

cc:

Subject: Switching at Albemarle

02/28/2006 08:47

AM

Danny,
We will continue to provide switching services to Albemarle, and in the event that we decide in the future to stop providing such switching services, we will provide Albemarle with at least 20 days advance notice.

Aaron

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

ALBEMARLE CORPORATION

PLAINTIFF

VS.

CASE NO. 06-CV-1002

LOUISIANA & NORTHWEST
RAILROAD COMPANY

DEFENDANT

ORDER

Before the Court is Defendant's Motion to Reopen and to Set a Hearing Date. (Doc. No. 22). Plaintiff has filed its response. (Doc. No. 23). Defendant has filed a reply to Plaintiff's response. (Doc. No. 24). The Court finds the matter ripe for consideration.

On January 19, 2006, a hearing was held before this Court on the parties pending motions in this matter including Defendant's motion to dissolve or modify the temporary restraining order issued against it in the Circuit Court of Columbia County, Arkansas. On January 23, 2006, the Court entered a preliminary injunction with respect to certain pipeline agreements between the parties, ordered the Plaintiff to post a one million dollar bond, and administratively stayed this lawsuit pending resolution of certain tariff issues that the Court referred to the Surface Transportation Board ("STB"). Defendant now requests that the Court lift its stay and reopen the claims not pending before the STB. Defendant argues that a ruling from the STB may be several months away, therefore, the Court should reopen that portion of the litigation that is not pending before the board. It contends that such would prevent further delay of the resolution of this case, which will inevitably happen if the Court waits on a ruling

from the STB. It also contends that the one million dollar bond is adequate to cover the tariff charges owed by the Plaintiff if such charges are held effective by the STB.

When the Court administratively stayed this lawsuit pending the STB's ruling, it was of the belief that such a stay would avoid piecemeal litigation of this matter and would conserve the judicial resources of this Court. The Court is still of this belief. Once the STB makes its ruling regarding the parties' tariff dispute, the case will be reopened, and as outlined in FRCP 65, the trial of this matter will be advanced and consolidated with the final hearing on the preliminary injunction in this case. Fed.R.Civ.P. 65(a)(2). The Court also believes that the one million dollar security bond posted by the Plaintiff is proper. Therefore, upon consideration of the Defendant's motion and the arguments presented, the Court finds that the Defendant's motion to reopen and set a hearing date should be and hereby is **denied**.

IT IS SO ORDERED, this 16th day of June, 2006.

/s/Harry F. Barnes
Hon. Harry F. Barnes
United States District Judge

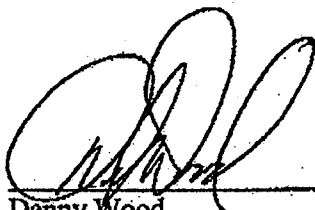
DECLARATION OF DANNY WOOD

I, Danny Wood, am the Supply Chain Manager of Albemarle Corporation, located at Albemarle's Magnolia, Arkansas production plant.

This Declaration is submitted to address three statements in LNW's reply of August 25, 2006: (1) Concerning LNW's claimed "belief" that our willingness to return 100% of switching to LNW was based on Albemarle's dissatisfaction with either Ouachita or the car mover we employ (p. 14), this is absolutely false. Albemarle is very satisfied with the service provided by Ouachita Railroad. (2) The terrain around Albemarle's South Plant, where Albemarle's storage tracks lie and the switching occurs, is not "hilly." (p. 13.) Rather, it is best described as flat. (3) If the Board allows Ouachita to perform the switching between the plant and the storage tracks which LNW is threatening to terminate, Ouachita intends to use a regular switch engine, not the car mover we currently are using within our plant. (p. 14.)

I declare that the foregoing is true and correct. I am authorized to file this statement.

Executed this 30th day of August, 2006



Danny Wood