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May 24, 2006

Via Electronic Filing

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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is **The Louisiana and North West Railroad Company's Motion to Strike Or In The Alternative Reply To Albemarle's Surreply.**

Please contact me if you have any questions regarding this matter. Thank you.

Respectfully submitted,

Edward J. Fishman
Attorney for Louisiana and North West Railroad
Company

cc: Martin W. Bercovici, Esq. (via e-mail)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. NOR-42096

**ALBEMARLE CORPORATION
-- PETITION FOR DECLARATORY ORDER --
CERTAIN RATES AND PRACTICES OF THE LOUISIANA
AND NORTH WEST RAILROAD COMPANY**

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

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**ATTORNEYS FOR THE LOUISIANA AND
NORTH WEST RAILROAD COMPANY**

Dated: May 24, 2006

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The Louisiana and North West Railroad Company ("LNW") respectfully submits this Motion to Strike the impermissible surreply (the "Surreply") that Albemarle Corporation ("Albemarle") filed in this proceeding on April 10, 2006. Although Albemarle denominated its pleading as a "Rebuttal" to LNW's Reply, the Board's rules prohibit the filing of any such responsive pleading by Albemarle. Alternatively, LNW respectfully requests that the Board accept this response to the Surreply in order to clarify LNW's position in this matter in light of certain misstatements by Albemarle. The Board's acceptance of this response will further the Board's interest in developing a complete record at this stage of the proceeding and will not prejudice either party.

I. MOTION TO STRIKE

The Board's regulations do not permit Albemarle to file a reply to a reply, as it has done

in this proceeding. 49 C.F.R. § 1104.13(c). Albemarle claims that it was entitled to file its Surreply because it was unsure of the “nature” of LNW’s Reply and because of certain alleged “inaccuracies” and supposedly “irrelevant” facts set forth in LNW’s Reply. See Albemarle Motion for Leave at 2. Albemarle’s lack of clarity about the status of LNW’s Reply and its difference of opinion with LNW about certain factual issues did not give Albemarle any right under the Board’s rules to file a Surreply, and therefore its April 10, 2006 filing in this proceeding should be stricken from the record.

LNW notes that Albemarle waited forty-one (41) days before filing its Surreply, which is well beyond the 20-day time period set forth in the Board’s rules for filing a responsive pleading. 49 C.F.R. § 1104.13(a). Albemarle submitted a Motion for Leave to file its Surreply, but did not provide any justification therein for its failure to comply with the Board’s timing rules. For this additional reason, Albemarle’s Surreply should be rejected by the Board.¹

II. RESPONSE TO ALBEMARLE SURREPLY

In the event that the Board decides to accept Albemarle’s Surreply into the record, LNW respectfully requests that the Board accept this response to certain factual and legal misstatements made by Albemarle about LNW’s position in this matter. LNW recognizes that the parties have different views about various factual issues, and LNW does not intend to reiterate its view on all those issues here. However, the Board needs to have a clear understanding of LNW’s position on the threshold jurisdictional issues that the Board must address in this matter.

¹ Moreover, Albemarle filed its Surreply after the parties asked the Board to hold this proceeding in abeyance so they could pursue settlement discussions. This is inconsistent with the position taken by Albemarle in STB Docket No. 42097, where it seeks to delay filing a responsive pleading for at least six (6) months because the Board has held that proceeding in abeyance. LNW elected not to expend the resources necessary to prepare this pleading until after the mediation and subsequent discussions confirmed that a settlement is unlikely at this point.

A. Albemarle Miscontrues LNW's Jurisdictional Argument

Albemarle's Surreply simply misses the point of LNW's argument that the Board does not have jurisdiction to regulate the reasonableness of the charges established by LNW for intraplant switching, storage and weighing services at Albemarle's South Plant. These services are provided on a voluntary basis by LNW, and not as part of LNW's common carrier obligation to provide linehaul service to and from the South Plant.

Albemarle fails to provide any factual or legal support for its far-reaching claim that LNW is required to provide such intraplant switching, weighing and storage services as part of its common carrier obligation. See Surreply at 3-4. Some railroads elect to provide such services on a voluntary basis, but they are not required to do so under the Interstate Commerce Act. Albemarle's argument ignores the distinction between "transportation by rail carrier" subject to exclusive Board jurisdiction under 49 U.S.C. § 10501(b), which is a broad category of activities that includes car storage and the construction and operation of switch tracks, and those limited and narrow areas where the Board has specific statutory jurisdiction to affirmatively regulate the reasonableness of rates and practices (including linehaul rates to captive shippers under 49 U.S.C. § 10702 and the reasonableness of demurrage practices under 49 U.S.C. § 10746).

Contrary to Albemarle's claim (see Surreply at 2), LNW's position with respect to the Board's general jurisdiction over LNW's activities under § 10501(b) is not inconsistent with LNW's position that the Board does not have rate reasonableness jurisdiction over LNW's intraplant switching, storage and weighing services at the South Plant. The Board has exclusive jurisdiction under 49 U.S.C. § 10501(b) over transportation provided by LNW and activities integral to that transportation, and such jurisdiction preempts other state and federal remedies.

Therefore, a state or federal court would not have jurisdiction under state or other federal laws to regulate LNW's charges with respect to intraplant switching, storage and weighing.² However, this does not mean that the STB has jurisdiction to regulate the reasonableness of those same charges for services that LNW is not required to provide as part of its common carrier obligation to transport goods in linehaul service between its interchanges and the South Plant.³

Albemarle also mischaracterizes LNW's reliance on 49 U.S.C. § 10906. See Surreply at 2. LNW recognizes that § 10906 is an exception to the licensing provisions of the Interstate Commerce Act, and that § 10906 by itself may not necessarily mean in all cases that the Board does not have jurisdiction over services provided over switching, storage or yard tracks that may be part of the common carrier obligation. But see Union Pacific Railroad Co. v. Coast Packing Co., 236 F.Supp.2d 1130, 1135 (C.D. Cal. 2002) (holding that § 10906 prohibits STB from requiring a rail carrier to provide service over exempt sidetracks). However, Albemarle fails to cite to any provision of the Interstate Commerce Act or any precedent which affirmatively gives the STB jurisdiction to regulate the reasonableness of intraplant switching, storage and weighing charges merely because such services are provided by a common carrier railroad.⁴

² The only exception would be a court's jurisdiction over a breach of contract claim if those intraplant switching, storage and weighing services are provided under a private contract, which is discussed further below.

³ See, e.g., Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served August 15, 2001)(state and local laws preempted by Board's exclusive jurisdiction over railroad construction of refueling facility even though Board did not have specific authority to approve or otherwise regulate the construction).

⁴ The cases cited by Albemarle in footnote 6 and on pages 4-5 of its Surreply do not support its expansive position here. See, e.g., SMS Rail Service Inc. – Petition for Declaratory Order, F.D. 34483 (STB served Jan. 24, 2005); Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company, F.D. 34509 (STB served May 3, 2005). Both of these cases involved new carriers that obtained STB authority to operate over trackage formerly used in an exempt manner and that held themselves out to provide common carrier service to the general public over that trackage, which constituted their entire system. LNW is not holding itself out to the general public to provide intraplant switching, storage and

Albemarle's assertion that LNW could not, without Board authority, abandon the storage and scale tracks over which it provides the services at issue (see Surreply at 4) is legally incorrect and illustrates the fallacy of its position. Although LNW could not abandon its main line track without Board authority, it has every right to pull up the storage tracks that it owns and the other switching and weighing tracks located on its property without Board authority or intervention. LNW is not compelled to retain such tracks for Albemarle's use, and Albemarle has cited no authority to the contrary. If LNW were to pull up such tracks and stop providing intraplant switching, storage and weighing services at the South Plant, Albemarle (like all other shippers and receivers that use the services of common carrier railroads to move goods from point A to point B on the interstate rail network) would need to make alternative arrangements for storing, weighing and moving cars within its own facility.

B. Albemarle Misconstrues The Significance of LNW's Tariff

Albemarle claims that the Board has jurisdiction over the reasonableness of LNW's intraplant switching, storage and weighing charges because those charges are set forth in Freight Tariff LNW 8002-E. Albemarle claims that, to the extent such services are set forth in a "federal tariff", this automatically constitutes "a holding out of service pursuant to common carrier authority and therefore subjects the services to STB rate reasonableness jurisdiction." Surreply at 2-3. Albemarle provides no specific legal support for this argument, which is unfounded and would have far-reaching consequences if accepted by the Board.

The Board's decision in H.B. Fuller Company v. Southern Pacific Transportation Company, Docket No. 41510 (STB served August 22, 1997)("H.B. Fuller") is particularly instructive here. In that complaint proceeding, H.B. Fuller alleged that the level of charges

weighing on its South Plant tracks. The other cases cited by Albemarle are not on point.

assessed by the Southern Pacific Transportation Company (“SP”) for the storage of loaded tankcars of vinyl acetate (a hazardous chemical) on SP’s tracks was unreasonable. Similar to the facts here, SP transported private tankcars of hazardous chemicals to the H.B. Fuller facility under private contracts and imposed a car storage charge on H.B. Fuller through a separate tariff. SP maintained that “the risks of holding cars containing hazardous materials such as vinyl acetate on its operating property are both real and substantial, and that the hazardous storage fee provides some compensation to the railroad against potentially astronomical costs in case of a spill and serves as a constant reminder to receivers to bring these commodities under receiver supervision as quickly as possible.” H.B. Fuller, slip op. at 2.

SP urged the Board to dismiss the complaint because the transportation was performed under private contract not subject to Board jurisdiction under the predecessor provision to 49 U.S.C. § 10709, and the contract incorporated the terms of the storage tariff by reference. The Board agreed with SP’s position, holding that it did not have jurisdiction to consider the reasonableness of the storage charges because the shipments at issue moved under contract. The Board explained the rationale of its holding as follows:

In this case, the transportation was performed under contract, even though the terms of the contract refer to the carrier’s tariff. Thus, even if, as SP alleges, the referenced tariffs would have applied generally to storage and demurrage charges, the Board would not have jurisdiction over services provided under contracts incorporating those tariffs. The contract, even though it may rely on the tariff for certain terms, reflects the bargain of the parties. The fact that the parties may have chosen to incorporate tariff terms into their contract does not make transportation under the contract subject to regulation. Rather, the referenced tariffs became contract terms for purposes of transportation performed under the contract. As such, issues regarding the breach, or precise construction of those terms, will have to be resolved in an appropriate court of law.

H.B. Fuller, slip op. at 2; see also Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Company, Finance Docket No. 33582 (STB served October 27, 1998).

The Board's decision in H.B. Fuller is significant for two reasons. First, the decision establishes that any intraplant switching, storage or weighing services performed by LNW under its current tariff, with respect to carloads at the South Plant that are moved under private contracts which specifically or by implication incorporate those tariffs into their terms, would be outside the Board's jurisdiction to regulate. In this case, all of the linehaul traffic moving to or from the South Plant (with the exception of one or two recent carloads) has moved under private contracts.⁵ Second, the decision establishes that Albemarle's legal theory here is flawed. Albemarle argues, without citation, that services provided under a tariff are by definition common carrier services subject to STB jurisdiction. Surreply at 2-3. The Board's holding in H.B. Fuller shows that there is no legal support for Albemarle's theory. Railroads are not required to provide their customers with quotes for intraplant switching, storage or weighing charges under 49 U.S.C. § 11101(c), and the fact that LNW set forth its South Plant charges in a document entitled a "tariff" does not magically transform these services into required common carrier services subject to STB rate reasonableness jurisdiction.

C. Albemarle Obscures The Relevant Market Dominance Inquiry

Even assuming the Board makes a threshold determination that it might have jurisdiction in certain circumstances under 49 U.S.C. § 10702 to regulate the reasonableness of LNW's intraplant switching, storage and weighing charges, Albemarle cannot proceed with its rate reasonableness challenge unless it proves that LNW has "market dominance" over the provision of these services at the South Plant. See 49 U.S.C. § 10707(b). Albemarle states in its Surreply that it will address market dominance "in substantive depth in its evidentiary filings" and then

⁵ Although LNW has not performed a complete survey of the private contracts under which virtually all traffic moves to and from the South Plant, LNW believes that many of these contracts specifically incorporate its tariff terms by reference and the remainder incorporate those tariff terms by implication or historical practice.

accuses LNW of making “gross misrepresentations” and “superficial generalizations” to support its arguments. Surreply at 9. However, Albemarle itself is guilty of trying to obscure the relevant inquiry.

Albemarle claims that LNW has market dominance because Albemarle currently relies on LNW to provide these services. See Surreply at 9-11. This argument is not relevant to the appropriate market dominance inquiry, which is whether there would be “effective competition” for providing the services at issue (*i.e.*, intraplant switching, storage and weighing) “from other rail carriers or modes of transportation.” 49 U.S.C. § 10707(a).⁶ The existence of competition necessarily implies a change in the status quo arrangements, even if that requires the expenditure of some modest costs to change providers. The relevant inquiry focuses on both actual and potential competition, and whether an alternative is feasible (rather than whether that alternative is being used or has been used in the past). See Market Dominance Guidelines, 365 I.C.C. 118, 131 (1981).

1. Albemarle Has Competitive Alternatives For Intraplant Switching

Albemarle has demonstrated by its own actions that it can perform intraplant switching itself on plant lead tracks 2-9. Although Albemarle characterizes this activity as “limited” switching (see Surreply at 8), it accounts for a large proportion of the intraplant switching that occurs at the South Plant because plant lead tracks 2-9 are used by Albemarle to facilitate the loading and unloading of chemicals from the tankcars. See Surreply at 9 (noting that tracks 0, 00, and 1-9 terminate at plant loading and/or unloading stations); Verified Statement of David Davila (“Davila VS”), attached hereto as Exhibit A, at paragraph 3 (confirming that LNW

⁶ There is also the separate question of whether intraplant switching, storage and weighing qualify as “transportation” services which are “subject to the jurisdiction of the Board” as those terms are used in 49 U.S.C. § 10702(b). LNW believes that such services are not subject to the Board’s rate reasonableness jurisdiction for the reasons described above.

intraplant switching has decreased by more than 50% since late 2005 as a result of actions by Albemarle). There is no doubt that, with respect to intraplant switching on plant lead tracks 2-9, LNW does not have market dominance.

Albemarle claims that LNW has market dominance over the remainder of the intraplant switching because of the alleged necessity of using the LNW mainline track to complete such switch movements. LNW is not convinced that all such switching requires use of the LNW mainline, particularly if Albemarle used its own tracks on the east side of the LNW right-of-way for storage and weighing (which would eliminate the need to perform the switching that crosses over the LNW mainline). We understand that Albemarle has already taken steps to reduce its reliance on LNW for storage (see Davila VS at paragraph 2), and Albemarle could easily spend the modest sum necessary to install a track scale on its own tracks to perform weighing. However, even assuming that the LNW mainline must be used to complete a limited number of intraplant switch movements, Albemarle has provided no reason why it could not hire a qualified third party contractor to perform such intraplant switching services on its behalf.

2. LNW Has Competitive Alternatives For Storage and Weighing

Albemarle accuses LNW of making “gross” misrepresentations and “superficial” generalizations about the storage and weighing issues, and claims that LNW’s own evidentiary admissions refute its position on the lack of market dominance. Surreply at 10-11. Stripped of this inflammatory rhetoric, however, Albemarle essentially argues that LNW has market dominance over these services because Albemarle currently relies on LNW to provide these services. This makes no sense.

Albemarle can and in fact has already begun taking steps to avoid storing its chemicals on LNW’s tracks and property. Albemarle has taken steps to minimize the number of cars that it

is storing on LNW tracks or property. See Davila VS at paragraph 2 (confirming that Albemarle already has demonstrated that it can reduce its reliance on LNW for car storage by approximately 67% without investing in any additional tracks). This is exactly the type of economic self-help that proves LNW does not have market dominance over storage. The same holds true for weighing. Albemarle could, at a modest cost, install a scale on its own plant trackage and perform weighing services itself or through a third party switch contractor. Albemarle is not captive to LNW for these services.

D. Albemarle Has Not Justified Its Failure to Submit The Appropriate Filing Fee

LNW does not believe that Albemarle's failure to pay the required filing fee in this stand-alone cost (SAC) rate reasonableness challenge is of "no consequence" to LNW. See Surreply at 11. Albemarle must pay the fee specified in 49 C.F.R. § 1002(2)(f)(56)(i) if Albemarle wants to invoke the Board's rate reasonableness jurisdiction. Albemarle does not cite to any applicable precedent for its attempt to litigate a SAC rate complaint through a declaratory order proceeding, a maneuver which if permitted by the Board would have negative consequences for the Board and other railroad defendants in these types of proceedings.⁷ Albemarle asserts that it paid the proper filing fee in this proceeding based on its speculation that the Board resources required to adjudicate this proceeding will be a "small fraction of those consumed by a challenge to a utility coal rate." Surreply at 13. Based on the pleadings filed to date and the divergent position of the parties, LNW doubts that Albemarle's "small fraction" prediction will bear out. Moreover, there is no such "de minimis" cost exception to the filing fee rules.

⁷ The fact that Albemarle has paid the appropriate filing fee in its separate linehaul rate complaint against LNW in Docket No. 42097 is no consequence here, for those two proceedings involve different facts and issues.

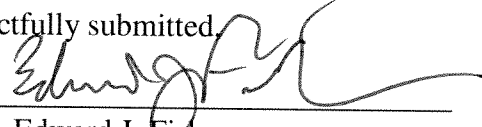
E. Albemarle Overstates The Board's Jurisdiction Over Unreasonable Practices

Albemarle separately argues, perhaps sensing the lack of jurisdiction over its SAC claims, that the Board has jurisdiction to review the reasonableness of LNW's car spotting and other unspecified practices. See Surreply at 14. LNW believes that its car spotting and other practices are outside the Board's jurisdiction because those practices are provided for traffic moving under private contracts. See 49 U.S.C. § 10709; H.B. Fuller, *supra*. In addition, the Board cannot use its authority over the reasonableness of a rail carrier's practices under 49 U.S.C. § 10702(2) to regulate the level of a rail carrier's rates. See Union Pacific Railroad Co. v. ICC, 867 F.2d 646 (D.C. Cir. 1989). 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. Therefore, Albemarle has no jurisdictional basis to pursue its practice claims under § 10702(2).

III. CONCLUSION

For the foregoing reasons, LNW respectfully requests that the Board strike Albemarle's Surreply from the record as an impermissible reply to a reply. Alternatively, LNW asks the Board to accept this response to Albemarle's Surreply in the interest of developing a complete record at this stage of the proceeding and because neither party will be prejudiced.

Respectfully submitted,

By: 

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EXHIBIT A

VERIFIED STATEMENT

OF

DAVID DAVILA

My name is David Davila. I am the Freight Agent and Dispatcher for the Louisiana and North West Railroad Company ("LNW"). My current responsibilities include, among other things, keeping track of (i) the number of cars that Albemarle stores on LNW tracks at the South Plant, and (2) the number of intraplant switches that LNW provides for Albemarle at the South Plant.

Since December 21 2005, when LNW terminated its storage track lease agreements with Albemarle and began charging Albemarle a per car fee for storing cars on LNW tracks, Albemarle has shown it has the ability to significantly reduce the number of cars that it stores on LNW tracks. In late December 2005, Albemarle was storing around 75 cars per day on LNW tracks. By February 2006, Albemarle's storage rate had dropped to around 25 cars per day on LNW tracks, which is a sixty-seven percent (67%) reduction from the December 2005 rate. During this time period, it is my understanding that Albemarle has used its own tracks at the South Plant for storage, has stored additional cars at its West Plant, and has taken preliminary steps to build additional track capacity at the South Plant.

Albemarle's use of LNW's intraplant switching services at the South Plant has dropped significantly over the same period. LNW performed 386 intraplant switches in January 2006, 207 intraplant switches in February 2006, 228 intraplant switches in March 2006, and 184 intraplant switches in April 2006. Therefore, LNW's intraplant switching at the South Plant has decreased by more than fifty percent (50%). During this time period, Albemarle has performed

some of its own switching at the South Plant and has taken other steps to reduce its reliance on LNW switching.

VERIFICATION

STATE OF LOUISIANA)
) SS
PARISH OF CLAIBORNE)

David Davila, being duly sworn, deposes and says that he is the Freight Agent and Dispatcher of The Louisiana and North West Railroad Company, that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.

David Davila
David Davila

Subscribed and sworn to before by David Davila this 24th day of May, 2006.

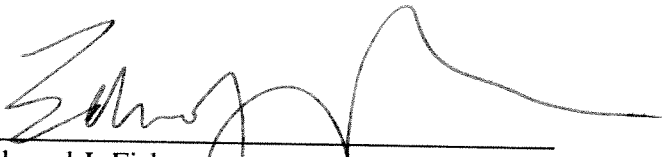

Notary Public
Elizabeth FRIAR, # 5070

My Commission Expires:
At death

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2006 a copy of the foregoing Motion to Strike Or In The Alternative Reply was served by electronic mail on:

Martin W. Bercovici, Esq.
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Edward J. Fishman