

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34931

ALBEMARLE CORPORATION – ALTERNATIVE RAIL SERVICE –
LINE OF THE LOUISIANA AND NORTH WEST RAILROAD COMPANY

Decided: October 6, 2006

On August 18, 2006, Albemarle Corporation (Albemarle) filed a petition under 49 U.S.C. 11123 and 49 CFR part 1146 seeking an emergency service order and authorization for Ouachita Railroad Company to provide alternative rail switching services at Albemarle's plant at Magnolia, AR, by operating over the lines of The Louisiana and North West Railroad Company (LNW). In an accompanying petition, Albemarle asked for immediate relief under 49 U.S.C. 721(b)(4).¹

On August 21, 2006, LNW submitted a letter "[notifying] Albemarle and the Board" that it will perform the requested switching services if Albemarle agrees to pay certain charges for the service. Albemarle replied to the letter on August 22, 2006. LNW filed a reply in opposition to the petitions on August 25, 2006. In a pleading filed on August 30, 2006, Albemarle submitted a rebuttal and also moved to strike: (1) LNW's August 25 reply and (2) any references in the pleadings to settlement discussions and offers. On September 6, 2006, LNW submitted a response to Albemarle's August 30 rebuttal. On September 7, 2006, Albemarle submitted a letter and a separate motion to strike LNW's September 6 response. LNW replied to Albemarle's letter on September 8, 2006, and to Albemarle's motion to strike on September 11, 2006.

PRELIMINARY MATTERS

Albemarle asks us to strike three items from the record. We discuss each request in turn.

Albemarle moved to strike LNW's August 25 reply on the ground that it constitutes a second reply to Albemarle's petition. Although Albemarle labels LNW's August 21 letter a "reply," the letter essentially provided an approach to resolve both this petition and the parties'

¹ Under 49 U.S.C. 721(b)(4), the Board may, when necessary to prevent irreparable harm, issue an appropriate order without regard to the provisions of subchapter II of chapter 5 of title 5 of the United States Code (governing administrative procedure).

existing dispute over LNW's switching charges and practices.² Moreover, in the August 21 letter, LNW expressly reserved the right to file a substantive reply to Albemarle's petition. For these reasons, we will not strike LNW's August 25 reply.

Albemarle also seeks to strike from the record any reference to settlement discussions or offers, on the ground that settlement discussions are privileged and excluded from evidence under Rule 408 of the Federal Rules of Evidence. However, the alternative service regulation, at 49 CFR 1146.1(b)(ii), specifically requires that the petition include a "summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service . . . within a reasonable period of time." Thus, the regulation invites a recitation of the parties' discussions, which may include evidence intended to show that LNW has discussed with Albemarle the terms on which it would continue to provide all of Albemarle's switching service.³ Accordingly, we will deny the motion to strike.

Finally, Albemarle moved to strike LNW's September 6 response, contending that it constituted an impermissible third reply to the petition. In fact, LNW entitled that pleading a response to Albemarle's rebuttal. Under the regulation at 49 CFR 1146.1(b), the final authorized pleading is the petitioner's rebuttal. Accordingly, we will strike LNW's response from the record.

BACKGROUND

Albemarle operates a chemical plant at Magnolia, AR, at which it receives shipments of chlorine for use in producing bromine and bromine-related products. All of these substances are hazardous materials. Albemarle both receives and ships products by rail, using LNW, the only rail carrier serving the Magnolia plant.

At Magnolia, LNW's main line runs in a north-south direction between Albemarle's plant, to the east of the main line, and storage tracks used by Albemarle, to the west of the main line. In addition to linehaul service, LNW traditionally has provided Albemarle with intra-plant

² Acting pursuant to an order of referral of the United States District Court for the Western District of Arkansas, Albemarle filed, on February 1, 2006, a petition for a declaratory order to determine the reasonableness of LNW's rates and practices for switching services. In Albemarle Corporation—Petition for Declaratory Order—Certain Rates and Practices of The Louisiana and North West Railroad Company, STB Docket No. 42096 (STB served Apr. 6, 2006), Albemarle's request to hold the petition for declaratory order proceeding in abeyance, pending completion of mediation, was granted. Mediation was unsuccessful. The petition for declaratory order remains pending.

³ This information submitted by LNW does not include any confidential information about Albemarle.

switching, weighing services, and switching between Albemarle's plant and the storage tracks.⁴ The latter type of switching is conducted over the LNW main line.

THE PARTIES' CONTENTIONS

According to Albemarle, after LNW increased its switching fees,⁵ Albemarle made other arrangements to handle its intra-plant switching, which does not require crossing LNW's main line. Albemarle continued to use LNW for the other type of switching (between plant and storage tracks) and for linehaul service. Albemarle states that, on three occasions, LNW has threatened to immediately stop providing any switching services at Albemarle's plant. In its petition for alternative switching service, Albemarle includes a copy of an August 17, 2006 e-mail informing Albemarle that LNW would not provide any switching at Albemarle's plant unless Albemarle used LNW for all of its switching services.

Albemarle posits that the switching of rail cars from its storage track to its plant and vice versa is critical to its operations. Albemarle explains that it cannot practically divert its inbound and outbound linehaul movements to truck in light of the large number of trucks that would be required and the danger of trucks carrying hazardous materials over two-lane roads through Arkansas towns. Albemarle's plant layout and operations apparently also require switching of rail cars between the storage tracks and its plant, and also between locations within its plant. In requesting an authorization for alternative rail switching service, Albemarle asserts that LNW has imposed an unlawful embargo on switching services, leading to an imminent failure to transport Albemarle's traffic.

In its August 25 reply, LNW contends that it is ready, willing, and able to meet all of Albemarle's needs for switching services if Albemarle will agree to pay the new charges, which LNW contends are necessitated by the significant risks inherent in storing and switching hazardous materials. LNW argues that Albemarle's petitions should be denied because LNW does not have a common carrier obligation to provide these ancillary switching services and the Board may not authorize an alternative service provider to conduct operations that the incumbent carrier is not obligated to provide. In addition, LNW contends that, in reality, this proceeding is a rate dispute, not an emergency service problem.

⁴ For ease of reference in this decision, the term "switching" will also refer to weighing services.

⁵ Albemarle included in its petition in STB Docket No. 42096 a copy of LNW's new Freight Tariff LNW 8022-E (effective December 21, 2005), which establishes higher charges than previously applied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11123(a), the Board may authorize alternative rail service when we determine that any “failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States” The alleged “service inadequacy” at issue here, however, arises from Albemarle’s disagreement with the level of LNW’s charges for switching services and is not a failure to move traffic. As the Board stated in Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003), rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123. The reasonableness of LNW’s switching charges and practices is pending in the STB Docket No. 42096 declaratory order proceeding. Accordingly, we will deny Albemarle’s request for an order authorizing alternative rail switching service under 49 CFR part 1146.⁶ In light of our denial of an authorization of alternative service, we also will deny Albemarle’s petition for immediate relief under 49 U.S.C. 721(b)(4).⁷

It is ordered:

1. The requests to strike (1) LNW’s August 25, 2006 reply and (2) any reference in the pleadings to settlement discussions and offers are denied.
2. Albemarle’s request to strike LNW’s September 6, 2006 response is granted.
3. The petitions for an emergency service order and authorization of alternative rail service and for immediate relief are denied.

⁶ Given the basis for our decision, we need not address the other arguments raised by the parties.

⁷ Our decision in this proceeding addresses Albemarle’s request for an emergency service order and for authorization of alternative service by another rail carrier and not the matters at issue in STB Docket No. 42096 or in the rate reasonableness complaint proceeding in Albemarle Corporation v. The Louisiana and North West Railroad Company, STB Docket No. 42097 (STB served May 2, 2006).

4. This decision is effective on its service date.

By the Board, Chariman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary