

SERVICE DATE – OCTOBER 18, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42097

ALBEMARLE CORPORATION

v.

THE LOUISIANA AND NORTH WEST RAILROAD COMPANY

Decided: October 17, 2006

Motion to Dismiss

On May 8, 2006, The Louisiana and North West Railroad Company (LNW) filed a motion to dismiss the rate reasonableness complaint of Albemarle Corporation (Albemarle), arguing that Albemarle is improperly seeking review of a proportional local rate and contending that it must instead challenge the through rate under Central Power & Light Co. v. Southern Pac. Transp. Co., 1 S.T.B. 1059 (1996) (Bottleneck I), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999). In a reply filed June 19, 2006, Albemarle, also citing Bottleneck I and Bottleneck II, argues that, because it has entered into service contracts with Union Pacific Railroad Company (UP) and The Kansas City Southern Railway Company (KCS) providing contract rates for movements of both inbound and outbound shipments to and from the junctions with LNW, it may properly challenge LNW's local rate. By decision served on August 1, 2006, the existence of such contracts was identified as a threshold jurisdictional issue in this case and Albemarle was directed to submit copies of its alleged transportation contracts.¹ Albemarle did so on August 21, 2006.

Applying the Board's reasoning in Bottleneck I and Bottleneck II here, the Board must ascertain the existence of transportation contracts for the non-local portion of through movements before it can review a challenge to a proportional local rate separate from the through rate. In its motion to dismiss, LNW is challenging whether Albemarle has such

¹ In the August 1, 2006 decision, the Board explained that, citing Bottleneck I, 1 S.T.B. at 1074-75 and Bottleneck II, 2 S.T.B. at 242-45, the Board has jurisdiction only over that portion of the total rate not covered by a contract, and, therefore, if a shipper has an existing rail transportation contract with a carrier for the non-bottleneck portion of a line-haul, a shipper may separately challenge the bottleneck portion independent of the contract rate for the remainder of the through movement.

transportation contracts in place.² Granting a motion to dismiss, however, requires that all factors be viewed in the light most favorable to complainant. See generally National Grain and Feed Association v. Burlington Northern Railroad Company, et al., Docket No. 40169, slip op. at 4 (ICC served June 1, 1990) Based on the filing of what appear to be, on their face, transportation contracts covering the non-local portion of through movements at issue here, it cannot be said that Albemarle may not make its case to challenge LNW's proportional local rate. Accordingly, LNW's motion to dismiss will be denied.

Protective Order

In their conference report filed pursuant to 49 CFR 1111.10(b) on April 27, 2006, the parties agreed upon a protective order, submitted a draft protective order to the Board, and requested its adoption. Because this proceeding was held in abeyance shortly after the filing of the conference report, a protective order was not issued. However, with Albemarle's submission of highly confidential versions of transportation contracts at issue, as discussed above, a protective order is necessary. The proposed order, as modified and set out in the appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.³ It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904. Further, to avoid the need for routine, unopposed motions to compel the disclosure of confidential contracts related to the dispute, the protective order (at paragraph 7) specifically provides for the production of such contracts as a measure toward a more efficient discovery process. Although not mentioned in the protective order, the parties must simultaneously file with the Board a public version of any highly confidential or confidential submission in these cases.

Good cause exists to issue the requested protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. Issuance of the requested protective order will ensure that the material, produced in

² LNW also argues that Albemarle has artificially generated this controversy. It contends that only one carload of traffic originating or terminating at its plant has moved under the Rule 11 local tariff followed by a movement with another railroad. The Board has found, however, that the movement of at least one trainload and the intent to acquire additional movements is enough to support a rate reasonableness complaint. See Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, slip op. at 2 (STB served Dec. 31, 2001). LNW concedes that Albemarle has made one movement under its local rate, and Albemarle states that it intends to continue to make the same movements in the future for both inbound and outbound traffic.

³ See Western Fuels Association, Inc., and Basin Electric Power Cooperative v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42088 (STB served Nov. 10, 2004).

response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. While the parties' request for a protective order in its conference report was not clearly headed "Motion for protective order," as required under 49 CFR 1104.14, it otherwise conforms with the intent of the Board's rules governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the request for a protective order will be granted.

This proceeding remains held in abeyance until the completion of the rulemaking in Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), et al. (STB served Feb. 27, 2006).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss is denied.
2. The request for a protective over is granted.
3. The parties are directed to comply with the protective order in the appendix to this decision.
4. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.
 - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any Administrative Law Judge presiding over this proceeding. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under

this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Administrative Law Judge, the Board, or the court, as appropriate, with a written request that the Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other party rail transportation contracts and other contracts which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts are relevant in preparing their evidence in this proceeding. Any such contracts shall be treated as “HIGHLY CONFIDENTIAL” and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party to the opportunity contest the release.
9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, warrants suspension of any of the provisions herein.
10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
11. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing the filing party’s “HIGHLY CONFIDENTIAL” material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a “CONFIDENTIAL” version of the pleading or evidence from which the filing party’s “HIGHLY CONFIDENTIAL” material has been redacted. The “CONFIDENTIAL” version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (“In-house Personnel”). Alternatively, in lieu of

preparing and serving a “CONFIDENTIAL” version of any such pleading or evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party’s own “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by the reviewing party’s In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the “HIGHLY CONFIDENTIAL” version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party’s In-house Personnel.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on October 18, 2006, governing the production of confidential documents in STB Docket No. 42097, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42097 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated:

UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on October 18, 2006, governing the production of confidential documents in STB Docket No. 42097, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL][CONSULTANT]

Dated: