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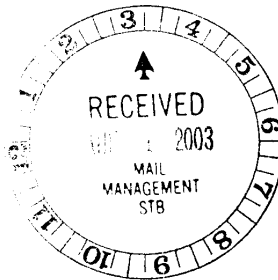
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August 1, 2003

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



Not 42084

Re: Docket No. ~~FD-34389~~, *CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P.*

Dear Secretary Williams:

Enclosed for filing please find an original and ten copies of the CF Industries, Inc.'s Complaint against Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P.

Also enclosed is a check in the amount of \$6,000 made out to the Board to cover the required filing fees for the processing of formal complaints against pipelines.

Please date stamp the extra copies of this cover letter and the filing and return them to our messenger. Thank you for your assistance in this matter.

FEE RECEIVED

AUG 1 2003

Sincerely,

**SURFACE
TRANSPORTATION BOARD**

Jeffrey J. Williamson

ENTERED
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AUG 01 2003

Part of
Public Record

FILED

AUG 1 2003

**SURFACE
TRANSPORTATION BOARD**

Chicago

London

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**UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CF INDUSTRIES, INC.,
Complainant**

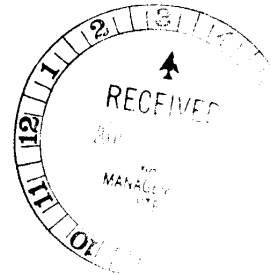
v.

KANEB PIPE LINE PARTNERS, L.P.,

and

**KANEB PIPE LINE OPERATING
PARTNERSHIP, L.P.,
Defendants.**

Docket No. FD 34389



COMPLAINT

1. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. (collectively, "Kaneb") are violating 49 U.S.C. § 15503(a) (1996) by charging CF Industries, Inc. ("CF Industries") illegal rates in excess of the prescribed rates for its pipeline. The Surface Transportation Board ("Board") should direct Kaneb to (a) cease charging CF Industries these illegal rates and (b) pay restitution for past overcharges.

Background

2. CF Industries is an interregional cooperative that is owned by eight regional farm cooperatives. It serves the needs of these regional cooperatives (and more than 1,000,000 of their farmer-members) through the manufacture, distribution, and sale of various forms of fertilizer. CF Industries owns and operates a manufacturing complex in Donaldsonville, Louisiana that produces more than 2,000,000 tons of anhydrous ammonia per year for use as

both a direct application fertilizer and as a chemical building-block for other nitrogen fertilizer products. In order to move this ammonia to its marketing terminals in the five major "Corn Belt" states (Iowa, Illinois, Missouri, Indiana, and Nebraska), CF Industries relies on Kaneb's pipeline system. CF Industries maintains its corporate headquarters at One Salem Lake Drive, Long Grove, Illinois 60047.

3. Kaneb Pipe Line Partners, L.P. is the owner of an anhydrous ammonia pipeline running from Louisiana to the Midwest. Kaneb Pipe Line Operating Partnership, L.P. operates the ammonia pipeline. The 1,943 mile ammonia pipeline originates in southern Louisiana, runs north to Hermann, Missouri, and then splits into an eastern and a western leg; the eastern leg serves terminals in Illinois and Indiana, while the western leg serves one additional terminal in Missouri before running further north to terminals in Iowa and Nebraska. Kaneb maintains its corporate headquarters at 7340 West 21st Street N, Suite 200, Wichita, Kansas 67205.

The Existing Rate Prescription

4. On May 9, 2000, in response to a complaint by CF Industries, the Board prescribed rates for Kaneb's pipeline, which was then owned by Koch Pipeline Company, L.P. ("Koch").¹

5. As described in more detail in the May 9th Order, on March 27, 1996, CF Industries filed a complaint against Koch challenging rate increases for pipeline transportation of anhydrous ammonia from the Louisiana Gulf Coast to the Midwest. CF Industries asserted that those rate increases were unreasonable under 49 U.S.C. § 15501(a) and discriminatory under 49 U.S.C. § 15505.

¹ See *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, STB Docket No. 41685 (unpublished decision May 9, 2000) ("May 9th Order"), *aff'd*, *CF Indus., Inc. v. Surface Transp. Bd.*, 255 F.3d 816 (D.C. Cir. 2001).

6. On May 14, 1997, the Board instituted an investigation into the complaint, and the parties filed evidence and briefs. Upon review, the Board found that, with two exceptions, CF Industries lacked effective competitive alternatives to the pipeline transportation provided by Koch to the terminal locations at issue, and that Koch's rate increases to these locations were unreasonable. The Board prescribed rates at their pre-increase levels and ordered Koch to pay reparations. The D.C. Circuit upheld the Board's decision.

7. In the fall of 2002, Kaneb purchased the pipeline from Koch, and subsequently sought to increase the rates for all customers, including CF Industries, above the prescribed rates without first seeking Board approval. Another shipper, Dyno Nobel Inc., filed a complaint against Kaneb (Docket No. 42081) seeking relief from Kaneb's increased rates. CF Industries now files this complaint seeking to enforce the Board's rate prescription.

Legal Issue and Analysis

8. 49 U.S.C. § 15503(a) authorizes the Board to prescribe rates and precludes unilateral changes of prescribed rates:

[T]he Board may prescribe the rate, classification, rule, or practice to be followed. . . . *When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Board.*²

9. This prohibition on changes to prescribed rates is identical to the language in 49 U.S.C. § 10704(a)(1), which deals with railroads, and for which there is a wealth of interpretative precedent. A substantial body of case law, including Supreme Court decisions

² 49 U.S.C. § 15503(a) (emphasis added).

dating back to 1932, makes clear that once a rate is prescribed by the Board, a carrier cannot charge a different rate without prior Board approval.

10. In the landmark 1932 decision, *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, the Supreme Court stated that a “carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing. . . .”³ Neither the Board, nor its predecessor, the Interstate Commerce Commission (“ICC”), has wavered from this holding.

11. For example, in a recent decision, the Board noted that “[a] carrier cannot change a prescribed rate without receiving permission from the Board. A rate prescription bars a carrier from ‘publishing, charging, or collecting a different rate.’”⁴ Or as the ICC succinctly put it in another case, “[t]o modify a prescribed rate a carrier must first petition for permission to change the rate level.”⁵ The Board prescribed rates for Kaneb’s pipeline in 2000. Kaneb did not petition the Board to change the prescribed rates. Therefore, Kaneb’s rates are illegal. That is the end of the matter.

12. The fact that Kaneb is a successor-in-interest to Koch is of no consequence. Indeed, the statutory language indicates that the prescribed rate applies to successors-in-interest. 49 U.S.C. § 15503(a) applies to a “pipeline carrier.” 49 U.S.C. § 15102(2) defines “pipeline carrier” as “a person providing pipeline transportation for compensation.” “Person” is defined in

³ *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 at 387-88 (1932).

⁴ *See West Tex. Util. Co. v. Burlington N. R.R. Co.*, 2000 WL 1665124, STB Docket No. 41191 (Nov. 3, 2000).

⁵ *Wheat, Okla. And Kan. To Tex. Gulf Ports*, 359 ICC 592 (1979); *see also San Antonio, Tex. v. Burlington N., et al.*, 364 ICC 887 (1981) (quoting *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 at 387-88 (1932)).

49 U.S.C. § 10102(4) to include “a trustee, receiver, *assignee*, or personal representative of a person.”⁶ Thus, the statute requires that a prescribed rate apply to an assignee (*i.e.*, new owner) of a pipeline, as well as the original owner.

13. Binding a successor to a rate prescription comports with past practice. For example, in 1977 the ICC prescribed a rate for the Baltimore and Ohio Railroad Company (“B&O Railroad”). CSX Transportation (“CSX”) subsequently acquired control over the B&O Railroad’s assets. In 1987, Potomac Electric Power Company (“PEPCO”) filed a complaint against CSX for violating B&O Railroad’s 1977 prescribed rate, and the ICC ruled in PEPCO’s favor. It is noteworthy that no party, commission, or court distinguished between B&O Railroad and CSX. Instead, all parties understood that any prescribed rate would apply to a successor-in-interest.⁷

14. And there is good reason to assume that the prescribed rate applies to a new owner. If it did not, then the transfer of common carrier assets could weaken effective regulatory oversight of the assets and impair regulatory continuity. That is why the Board has repeatedly made clear that when there is a transfer in the ownership of common carrier railroads, there

⁶ 49 U.S.C. § 10102(4) (emphasis added). While “person” is defined in the section of the code discussing railroads, not pipelines, the Board often looks to its railroad precedent when deciding pipeline cases because (a) the statutory provisions governing pipelines and railroads are similar (and in the case of prescribed rates, identical) and (b) there is much more case law interpreting the railroad provisions. Thus, the Board’s regulations, 49 C.F.R. § 1101.1 (2003), adopt the definitions in 49 U.S.C. § 10102 as the definitions for all of the Board’s regulations, whether dealing with pipelines or railroads.

⁷ See *Potomac Elec. Power Co. v. Consolidated Rail Corp., et al.*, 1987 WL 99645, ICC Decision No. 36114 (Oct. 9, 1987); *CSX Transp. v. U.S.*, 867 F.2d 1439 (D.C. Cir. 1989) (reversing ICC on grounds not related to whether the prescribed rate applied to CSX as a result of it being the successor-in-interest to the B&O Railroad). For a similar case, where the Burlington Northern and Santa Fe Railway Company succeeded the Burlington Northern Railroad Company and the parties did not argue that a prescribed rate was no longer effective due to a change in the ownership structure, see *West Tex. Utils. Co. v. Burlington N. R.R. Co.*, 2001 WL 283509, STB Docket No. 41191 (Mar. 21, 2001).

should be a corresponding transfer of the common carrier obligations.⁸ This ensures that the Board retains effective regulatory control over the common carrier assets and the shippers retain the associated protections from unreasonable rates. Kaneb recognized the importance of regulatory continuity because its contract to acquire the pipeline required it to assume all contracts and permits (which were defined as “governmental permits, licenses, *Orders*, franchises and related instruments or rights related to the ownership or operation of the Assets”).⁹ One of those orders was the 2000 rate prescription.

15. In addition to the statutory language, Board precedents, and contractual language, there are good policy reasons to apply a rate prescription to the new owner of a pipeline. First, a prescribed rate applies to a particular pipeline at particular points. In other words, it is tied to the *assets*, not the *ownership structure*. For example, the Board’s rate prescription did not apply to all terminals or points on the Koch pipeline system, but only those points that the Board found lacked effective competition. Absent an affirmative demonstration to the contrary, changing the ownership of the pipeline does not change the facts the Board relied on to prescribe the rates for particular delivery points on the pipeline. Second, if the new owner feels that the prescribed rate is too low, it always has the option of petitioning the Board for new rates if it can show that circumstances have materially changed in such a way as to warrant a higher rate prescription or, alternatively, revocation of the rate prescription. Third, allowing new owners to circumvent the

⁸ See, e.g., 49 C.F.R. § 1180.1(a) (2002); see also *Southern Pacific Transportation Co.*, 8 I.C.C.2d 495 at 505 (1992) (“[T]his agency has made it clear that any party that acquires an active line of railroad acquires the common carrier obligation to provide service over it, even if the purchaser disavows that duty. . .”); *Hanson Natural Resources Co. – Non-Common Carrier Status – Petition For a Declaratory Order* (Dec. 5, 1994).

⁹ See Asset Purchase and Sale Agreement between Koch Pipeline Company, L.P. (“KPL”), Koch Fertilizer Storage and Terminal Company (“KFS&T”) (together, “Seller”) and Kaneb Pipe Line Operating Partnership, L.P. (“Buyer”) at Sections 2.02(e) and 2.04 (contract can be found on the Securities and Exchange Commission website at <http://www.sec.gov/Archives/edgar/data/853890/000085389002000013/exh102.txt>) (emphasis added).

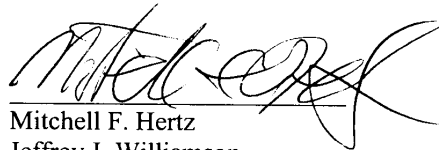
rate prescription would create perverse incentives. It could result, for example, in faux-transactions designed solely to circumvent rate prescriptions for pipelines, or, alternatively, it could result in transactions that effectively nullify Board decisions with regard to particular common carrier assets.

16. The case law is clear that a pipeline carrier cannot change its prescribed rates without prior approval from the Board. Indeed, the statutory language, the Supreme Court and ICC/Board precedent, and the policy justifications argue against Kaneb's illegal rate increase and demand that Kaneb seek prior approval for its increased rates.

Requested Relief

17. This case presents a narrow legal issue and is therefore suitable for summary judgment. CF Industries requests that the Board order Kaneb to (a) abide by the existing rate prescription and (b) refund any amounts collected over the rate prescription in accordance with 49 U.S.C. § 15904(b)(2).

CF Industries, Inc.



Mitchell F. Hertz
Jeffrey J. Williamson
Kirkland & Ellis LLP
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Suite 1200
Washington, D.C. 20005
Tel: (202) 879-5270

Dated: August 1, 2003

VERIFICATION

State of Illinois)
) ss:
County of Lake)

Fernando A. Mugica, being duly sworn, deposes and says that he has read the foregoing Complaint, knows the contents thereof, and that the facts stated therein are true and correct to the best of his knowledge, information, and belief.

F. A. Mugica
Fernando A. Mugica

Subscribed and sworn to before me

This 28th day of July, 2003.

Helen A. Conrad
Notary Public

My Commission expires 6-26-2006.



CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of August, 2003, caused a copy of the foregoing Verified Complaint to be served upon Defendants Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P., by overnight express, addressed as follows:

J. Curtis Moffatt
Pamela J. Anderson
Kathrine L. Henry
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
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Washington, D.C. 20007-3877
*Counsel for Defendants
Kaneb Pipe Line Partners, L.P.
Kaneb Pipe Line Operating Partnership, L.P.*

In addition, a copy has been served on Dyno Noble Inc.'s counsel, addressed as follows:

C. Michael Loftus, Esq.
Donald G. Avery, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036-3003
Counsel for Dyno Nobel Inc.


Mitchell F. Hertz