

208882

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Jeffrey J. Williamson
To Call Writer Directly:
202 879-5985
jwilliamson@kirkland.com

Facsimile:
202 879-5200

September 10, 2003



VIA HAND DELIVERY

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

ENTERED
Office of Proceedings

SEP 10 2003

**Part of
Public Record**

**Re: Docket No. 42084, *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 (10) copies of CF Industries, Inc.'s Response to Kaneb's Motion to Dismiss. 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.

Sincerely,

Jeffrey J. Williamson

Chicago

London

Los Angeles

New York

San Francisco

UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD



Docket No. NOR 42084

CF INDUSTRIES, INC.,)
Complainant)
)
v.)
)
KANEB PIPE LINE PARTNERS, L.P.,)
)
and)
)
KANEB PIPE LINE OPERATING)
PARTNERSHIP, L.P.,)
Defendants.)

CF INDUSTRIES, INC.'S RESPONSE TO KANEB'S MOTION TO DISMISS

Without citing a single case in support of their position, Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. ("Kaneb") claim that 49 U.S.C. § 15503(a)'s prohibition against unilateral changes to rate prescriptions does not apply to its anhydrous ammonia pipeline. Kaneb is wrong. Both the statute and more than 70 years of case law require a pipeline to seek the Surface Transportation Board's ("Board") approval **before** modifying a prescribed rate. The Board should deny Kaneb's Motion to Dismiss/Request for Summary Judgment ("Motion") and summarily rule that Kaneb's unilateral change to prescribed rates violates the existing rate prescription of CF Industries, Inc. ("CF Industries"). CF Industries respectfully submits this response to Kaneb's Motion pursuant to 49 C.F.R. § 1104.13 (2002).

A. Kaneb May Not Change Prescribed Rates Without Prior Board Approval.

In *CF Industries v. Koch*, the Board prescribed rates for transportation on Kaneb's ammonia pipeline, which was formerly owned by Koch Pipeline Company, L.P.: "[W]e will award reparations for past pipeline movements to those points, and **prescribe maximum reasonable rates**. . . ."¹ Under 49 U.S.C. § 15503(a), Kaneb may not change those prescribed rates without prior Board approval:

[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

The Supreme Court explained the prohibition against unilateral rate changes to prescribed rates more than 70 years ago in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*: 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 Both the Board and the Interstate Commerce Commission ("ICC") have consistently followed this rule for more than seven decades. In *West Texas*, for example, the Board noted that "[a] carrier cannot change a prescribed rate without receiving permission from the Board. A rate prescription bars a carrier

¹ See *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, STB Docket No. 41685, slip op. at 27 (unpublished decision May 9, 2000) (emphasis added) ("*CF Industries v. Koch*").

² 49 U.S.C. § 15503(a) (1996) (emphasis added).

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

from ‘publishing, charging, or collecting a different rate.’”⁴ Similarly, the ICC stated that “[t]o modify a prescribed rate a carrier must first petition for permission to change the rate level.”⁵

Despite the clear statutory language and more than 70 years of consistent precedent, Kaneb refuses to recognize that carriers cannot unilaterally change rates prescribed by the Board -- they are treated differently from initial rates that are established by the pipeline. Tellingly, Kaneb does not cite a single case in support of its unilateral rate change position; it merely attempts (and fails) to distinguish cases cited by CF Industries.

For example, Kaneb argues that *Arizona Grocery* stands only for the proposition that a regulatory agency cannot require reparations if the agency decides that a previously-established prescribed rate was too high and should have been lower. This argument ignores the plain language of the opinion, which, as noted above, states 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.” *Arizona Grocery* at 387-88. While it is true, as Kaneb explains, that the Filed Rate Doctrine is an important part of the *Arizona Grocery* decision, the Court’s reasoning shows how that doctrine flows from the requirement that the carrier charge only the rate that has been established by the regulatory agency, and that it cannot change that rate without prior approval. Therefore, Kaneb is incorrect in claiming that the “decision does not stand for the proposition advanced by CF Industries, that is, once the Board has prescribed a rate, the carrier (or its successor) cannot change that rate at a later time without further order.” Motion at 7.

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

⁵ *Wheat, Okla. & Kan. To Tex. Gulf Ports*, 359 ICC 592 at 599, n.9 (1979) (“*Wheat*”); see also *San Antonio, Tex. v. Burlington N., et al.*, 364 ICC 887 at 894-95 (1981) (quoting *Arizona Grocery* at 387-88).

Kaneb's attempts to distinguish the other cases cited by CF Industries are also unconvincing. For example, Kaneb admits that the Board's *West Texas* decision "states that a rail carrier cannot change a prescribed rate without receiving permission from the Board." *Id.* at 8. Kaneb goes on to claim "[h]owever, in that decision, in which the shippers and the carrier determined which rates were prescribed, the Board determined that the carrier was not precluded from increasing its rates." *Id.* In fact, the Board's decision in *West Texas* explicitly stated that a shipper may not change a prescribed rate without prior Board approval. *See West Texas* at *3. The Board then noted that the points at issue in that proceeding were not governed by a rate prescription, and therefore the rules governing prescribed rates did not apply to the points in question. *Id.* *West Texas* in no way stands for the proposition that a carrier can unilaterally increase prescribed rates without prior Board approval.

Kaneb's attempt to distinguish *Wheat* also fails. Kaneb ignores the ICC's actual finding, quotes from a footnote in the *Wheat* decision (quoting only half of the relevant footnote), and notes that the ICC is citing to *Atchison, T. & S.F. Ry. Co. v. U.S.*, 284 U.S. 248 (1932) ("*Atchison*"). It then goes on to analyze the *Atchison* decision (instead of the *Wheat* decision) and reaches the end of this circuitous journey by concluding that the "*Atchison* decision does not support CF Industries' contention that a carrier must petition the Board to change prescribed rates. An entirely different issue was before the Supreme Court in that case." Motion at 9. Kaneb is correct: an entirely different issue was before the Supreme Court in *Atchison*. Apparently, the ICC mistakenly cited to *Atchison, T. & S.F. Ry. Co. v. U.S.* instead of the correct case, *Arizona Grocery v. Atchison, T. & S.F. Ry. Co.* The fact that the ICC made a mistake in a citation in the footnote does not change the validity of the point the ICC was making in the *Wheat* decision because, as described above, *Arizona Grocery* does stand for the proposition that

a carrier must petition the Board to change prescribed rates. Kaneb's circuitous (and disingenuous) discussion of *Atchison*, therefore, does not relate to the issue in this case.

Kaneb also attempts to argue that the fact that the ICC Termination Act of 1995 ("ICCTA") eliminated the requirement that pipelines and other common carriers file their tariffs with the ICC "supports Kaneb's position." *Id.* at 10. However, Kaneb never explains how the repeal of the requirement to file tariffs also repeals the prohibition against unilateral changes to prescribed rates. Indeed, the ICCTA explicitly establishes the Board's authority to prescribe rates. *See* 49 U.S.C. § 15503(a).

Kaneb goes on to state "[i]n addition, the ICCTA eliminated the former ability of the Board to initiate investigations; an investigation may only begin upon complaint. This process has clearly worked to protect the interests of [] shippers. . . ." Motion at 10 (citation omitted). While it is unclear how this point supports Kaneb's unilateral rate change position, it nonetheless provides an interesting insight into Kaneb's view of its rate change discretion. In Kaneb's view, a pipeline should be able to change prescribed rates at will, and a shipper should merely file a procession of complaints to protect itself (even after a finding, such as in *CF Industries v. Koch*, that the carrier was collecting rates in excess of the revenue adequate level⁶). This would lead to a significant (and absurd) waste of resources on never-ending litigation, and would make a mockery of the Board's power to prescribe rates.

Kaneb cannot find a single case that stands for the proposition that a carrier can change a prescribed rate without Board approval. Kaneb's attempts to distinguish the Board's prior holdings do not withstand scrutiny. Therefore, Kaneb's Motion to Dismiss *CF Industries'* complaint should be denied.

⁶ *See CF Industries v. Koch*, slip op. at 26.

B. If Kaneb Wishes To Increase The Prescribed Rates, It Must Initiate Its Own Proceeding.

Recognizing that its Motion to Dismiss is on shaky legal ground, Kaneb seeks an alternative form of relief:

Even assuming, arguendo, that Kaneb was required to seek affirmatively the Board's approval, in this case the Board should lift the rate prescription ordered in the Koch decision and allow Kaneb's complete rate increase to go into effect.

Motion at 11. Kaneb states that CF Industries "does not intend to raise a substantive challenge to the rate increase," *id.*, and that the "factual underpinnings of the Koch decision do not continue to have current validity." *Id.* at 12. Kaneb's allegations are nonsense.

The Board should deny Kaneb's alternative form of relief. If Kaneb wishes to increase its prescribed rates, it may not do so in this proceeding. It must file a complete rate case in a separate proceeding. As Kaneb points out, this proceeding addresses a narrow legal issue – whether a pipeline may change a prescribed rate without prior Board approval. The complaint never addressed the level of the increase or the "factual underpinnings" of the new rates. From this, Kaneb somehow concludes that CF Industries "does not intend to raise a substantive challenge to the rate increase." This is a nonsequitur. It is true that, in this case, CF Industries did not raise substantive challenges to the prescribed rates. Why should it? Kaneb's rate increase is illegal. Kaneb does not provide any support for changing a prescribed rate. Once the Board rejects Kaneb's illegal unilateral rate change, CF Industries will have plenty of opportunity to raise substantive challenges (assuming Kaneb still seeks the Board's permission to raise its rates). The issue in this case is simple, straightforward and does not require an inquiry into the justness of, or the need for, the new rates.

Regardless, Kaneb fails to provide support for its claim that the “factual underpinnings” underlying the prescribed rates have changed. According to Kaneb, it purchased the pipeline at a significantly higher price than its predecessor had (an irrelevant basis for a rate increase); the volumes have changed; the rate increase is modest; and there have been other changes in “economic circumstances.” *Id.* But Kaneb does not attempt to quantify the impact of these changes, even if they are relevant to a rate case. For example, Kaneb does not show that the existing rates are insufficient in light of these changes; it does not justify the need for, or the prudence of, some of its proposed rate changes; and it does not show that the increased rate is specifically designed to accommodate the changes to the “factual underpinnings” of the prescribed rates. Kaneb does not provide data for the purchase cost of the pipeline, the volumes transported on the system, or the proper rate of return on investment. Since the existing rate prescription is based upon a finding that the pipeline is “revenue adequate” – indeed multiples of revenue adequate – the Board must require Kaneb to present a complete analysis of costs and revenues over time to justify a rate increase. This must not be a snapshot, but a multi-year analysis.⁷ Without such a showing, there is no way that the Board can overturn its prior rate prescription.

The proper procedural course is clear: if Kaneb wishes to change its prescribed rates, it should submit a comprehensive rate case to the Board, present the requisite evidence supporting its proposed rates, permit discovery, and give all affected shippers the opportunity to challenge the proposed rates. Kaneb has not done so.

⁷ See, e.g., *CF Industries v. Koch*, slip op. at 20.

CONCLUSION

The Board should deny Kaneb's Motion to Dismiss. Kaneb has not shown that it is exempt from the prohibition against unilateral changes to prescribed rates. Because Kaneb's attempt to convert this complaint proceeding into a rate case is procedurally deficient and prejudicial to CF Industries, the Board should reject Kaneb's request for alternative relief. Instead, the Board should grant summary judgment in favor of CF Industries, as described in CF Industries' complaint, and award CF Industries its costs and fees incurred in prosecuting this complaint.

Respectfully submitted,

CF Industries, Inc.



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

Counsel for **CF Industries, Inc.**

Dated: September 10, 2003

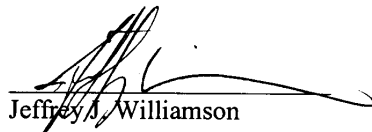
CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 2003, caused a copy of the foregoing CF Industries, Inc.'s Response to Kaneb's Motion to Dismiss to be served upon Defendants Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P., by U.S. Mail, addressed as follows:

J. Curtis Moffatt
Pamela J. Anderson
Kathrine L. Henry
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
7th Floor
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.


Jeffrey A. Williamson