

**VanNess
Feldman**
ATTORNEYS AT LAW

209035
ENTERED
Office of Proceedings

A PROFESSIONAL CORPORATION
1050 Thomas Jefferson Street N.W.
Washington, D.C. 20007-3877
(202) 298-1800 Telephone
(202) 338-2416 Facsimile
www.vnf.com

Seattle, Washington
(206) 623-9372

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Public Record

Kathrine L. Henry
(202) 298-1824
klh@vnf.com

October 2, 2003

VIA HAND DELIVERY

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



Re: STB Docket No. 42081
Dyno Nobel Inc. v. Kaneb Pipe Line Partners, L.P.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of Kaneb's Response to Dyno Nobel's Reply in Opposition to Defendants' Motion of Dismissal of Count I of the Complaint, and Counter-Motion for Summary Disposition on Count I Directing Compliance with Rate Agreement. A diskette containing the text of the Response in Microsoft Word is also enclosed.

Please acknowledge receipt of the enclosed by stamping and returning to our Paralegal the enclosed duplicates of this filing.

Sincerely,

Kathrine L. Henry
Kathrine L. Henry

Enclosures

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

DYNO NOBEL INC.,

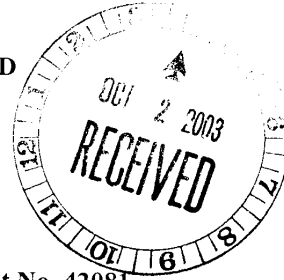
Complainant,

v.

KANEB PIPE LINE PARTNERS, L.P.

Defendant

Docket No. 42081



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**RESPONSE OF KANEB PIPE LINE PARTNERS, L.P. AND
KANEB PIPE LINE OPERATING PARTNERSHIP, L.P. TO
REPLY IN OPPOSITION TO MOTION TO DISMISS AND
COUNTER-MOTION FOR SUMMARY DISPOSITION**

Pursuant to 49 C.F.R. § 1104.13 of the Surface Transportation Board's ("Board") Rules of Practice, Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P.¹ (collectively, "Kaneb" or "Defendant"), by and through their counsel, submit this Response ("Response") to the Reply in Opposition to Defendants' Motion for Dismissal of Count I of the Complaint, and Counter-Motion for Summary Disposition for Count I Directing Compliance with Rate Agreement ("Counter-Motion") filed by Dyno Nobel Inc. ("Dyno Nobel" or "Complainant") on September 12, 2003, in this proceeding.²

Dyno Nobel requests that the Board prescribe maximum lawful rates for the transportation of anhydrous ammonia ("AH") through Kaneb's pipeline to Dyno Nobel's

¹ Complainant and Defendant have stipulated that Kaneb Pipe Line Operating Partnership, L.P. is included as a defendant in this proceeding.

² To the extent this pleading constitutes a response to Dyno Nobel's reply to Kaneb's motion to dismiss, Kaneb seeks a waiver to file a response to the extent necessary under the Board's rules. The response will clarify the record and respond to certain incorrect allegations in Dyno Nobel's response.

facilities at Louisiana, Missouri (“LOMO”) that would purportedly comply with an October 25, 2000 sidebar Letter Agreement (“Letter Agreement”) between Dyno Nobel and the Koch Pipeline Company (“Koch”), which Dyno Nobel has inexplicably recast as a “Settlement Agreement.”³ In Count I of its Complaint, Dyno Nobel alleges that Kaneb increased Dyno Nobel’s rates in violation of the Board’s Contract Rate Policy (“CRP”) and the Letter Agreement.

Kaneb respectfully requests that the Board consider the following arguments in denying the requested relief Dyno Nobel seeks in its Counter-Motion:

ARGUMENT

A. Neither CRP nor the Letter Agreement is Relevant to Kaneb’s Rate Design Change to Eliminate Dyno Nobel’s Preferential Rate Classification.

Careful examination of Dyno Nobel’s Complaint, compared with Kaneb’s April 1, 2003 rate issuance, clearly demonstrates that Dyno Nobel’s primary concern is with Kaneb’s elimination of Dyno Nobel’s preferential industrial user rate classification. Dyno Nobel alleges that Kaneb imposed a 60-68% increase in Dyno Nobel’s AH shipments. By contrast, Dyno Nobel alleged that Kaneb posted increases for its competitor EDC’s shipments of less than 22% and rate decreases for two origins.⁴ Even assuming these percentages are correct, the comparison is misleading.

For at least 15 years, Dyno Nobel had received a preferential, incentive “industrial user” rate, presumably designed to encourage shipments by Dyno Nobel on the AH

³ See Counter-Motion at 2. In its Complaint, Dyno Nobel refers to this same agreement as a “rate parity agreement” or “parity-maintenance agreement.” See Complaint at ¶¶ 12, 18. In the title of its September 12 pleading, Dyno Nobel refers to the agreement as a “rate agreement,” presumably in an attempt to bolster its claim that CRP applies to the agreement. Dyno Nobel now claims that this agreement was entered into “in settlement of impending litigation.” Counter-Motion at 2.

⁴ Complaint at ¶ 14.

pipeline when it was undersubscribed. Dyno Nobel was the only shipper that qualified for the industrial user rate. As stated on the first page of Kaneb's April 1, 2003 tariff publication, the tariff rates therein were issued for several purposes. One of those purposes was to reflect application of a general 7% tariff increase. In addition, Kaneb stated that the tariff eliminated the "industrial user" classification of shippers and moved their respective tariff rates into a "miles moved" basis similar to the other tariff rates. Kaneb explained that this change in rate design would cause either an increased or decreased rate prior to the application of a general 7% tariff increase.⁵ Kaneb's March 10, 2003 transmittal letter to the Board further explained that the elimination of the "industrial user" classification was designed to put all shippers on an equal basis. Kaneb also explained to Dyno Nobel in its April 24, 2003 letter that the industrial user classification resulted in a subsidy for industrial customers by non-industrial customers and that the new tariff was designed to correct this inequity.⁶

Thus, it is clear that Dyno Nobel's real concern is not with Kaneb's general 7% tariff increase, but with the elimination of Dyno Nobel's preferential rate. Had Dyno Nobel received only the general 7% increase, it would likely have not filed a complaint. Most of the 60-68% percentage increase claimed by Dyno Nobel is attributable to Kaneb's elimination of the industrial user rate classification. However, if Kaneb had retained the industrial user rate at LOMO, Dyno Nobel would have continued to receive a subsidized, competitive advantage over other shippers.

The Letter Agreement did not address Dyno Nobel's industrial user rate classification. Dyno Nobel and Koch's agreement concerned only the rate increase Koch

⁵ Complaint, Exhibit D.

⁶ Defendant's Motion to Dismiss, Exhibit B.

published over and above the industrial user rate Dyno Nobel was receiving. Thus, even assuming, arguendo, that Dyno Nobel's assertions concerning the Letter Agreement and CRP were correct, they are completely irrelevant to the elimination of the industrial user rate classification. That classification was not at issue in the Koch proceeding, nor was it prescribed by the Board. Thus, Kaneb was entitled, and indeed was obligated in order to eliminate any rate discrimination, to make this rate design change in order to create a level playing field for all shippers.

Kaneb addresses below the various assertions in Dyno Nobel's Counter-Motion. However, it is important for the Board to keep in mind that, despite Dyno Nobel's attempts to distract the Board from the real issue in this proceeding, *i.e.* Kaneb's modification of its rate design, Dyno Nobel should not be allowed to retain a competitive advantage over and continue to be subsidized by other shippers under the guise of "rate parity."

B. CRP Does Not Apply to the October 25, 2000 Letter Agreement Between Dyno Nobel and Koch.

Dyno Nobel devotes almost one-half of its argument to a discussion of the history of the Contract Rate Policy ("CRP") and Congress' enactment of the Staggers Act of 1980.⁷ Dyno Nobel apparently believes that if it explains this history in exhaustive depth and detail, the Board will somehow be persuaded that these policies must apply to the facts in this proceeding. Dyno Nobel's efforts are wasted on this tactic.

The Board established in the CRP decision that rate changes in excess of the rates previously established in railroad contracts between rail carriers and shippers would be presumed unreasonable, unless there were unusual or compelling circumstances that

⁷ Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (Oct. 14, 1980) ("Staggers Act").

could rebut this presumption. However, as Dyno Nobel acknowledges, once Congress passed the Staggers Act in 1980, CRP became inapplicable. Yet, Dyno Nobel insists that CRP somehow applies to Kaneb's pipeline rates despite the fact that CRP became inapplicable to railroad contracts more than twenty years ago.⁸

Dyno Nobel claims that CRP has "lain dormant" for the past twenty years and that the applicability of CRP to pipeline rates is a matter of first impression before the Board.⁹ There is no basis for this claim. However, even assuming, arguendo, that Dyno Nobel is correct, the sidebar Letter Agreement between Koch and Dyno Nobel is not the type of agreement that is entitled to the CRP presumption. According to the ICC, CRP permitted the filing of "negotiated, mutually agreeable tariff schedules" that were intended to be very flexible as to what terms (e.g. presence or absence of an escalation clause, time-volume provisions) were included in the filing.¹⁰ CRP only required that a contract rate tariff identify the railroad shipper in the body of the tariff and specifically refer to an October 9, 1979 ICC order, Special Permission No. 79-3700, governing the filing of contract rates.¹¹

Clearly, the Letter Agreement does not constitute a "rate agreement" of the type that was addressed in CRP. Although the Letter Agreement between Dyno Nobel and Koch identifies Koch as the pipeline shipper, the Letter Agreement is not a tariff schedule, does not refer to the Special Permission Order noted above, nor does it discuss such items as escalation clauses, time-volume provisions or any other items contemplated

⁸ Dyno Nobel appears to selectively argue which rail rate principles apply to this pipeline case according to how it suits its case. In its Complaint, Dyno Nobel asserts that CRP, which applied for a short period in rail cases, also applied to pipelines; in the Counter-Motion, it argues that although CRP no longer applies to rail cases, it nevertheless still applies to pipelines. Dyno Nobel cannot have it both ways.

⁹ Counter-Motion at 30.

¹⁰ Aggregate Volume Rate on Coal, Acco, Utah to Moapa, Nevada, 364 I.C.C. 678 (Feb. 6, 1981).

¹¹ Id.

in CRP contracts. The Letter Agreement was simply a negotiated side deal that was drafted to reduce Dyno Nobel's rates to their previous level during the appeal of the Koch decision, since Dyno Nobel had failed to become a party to the proceeding.¹² Once the appeal regarding the Koch decision was finalized, the Letter Agreement ended by its terms. As such, Dyno Nobel's claim to the rate reductions set by the Letter Agreement ended as well. Thus, the sidebar Letter Agreement is not the sort of agreement that was contemplated under CRP.

Moreover, even assuming, arguendo, the Letter Agreement could somehow be interpreted as the type of "rate agreement" that CRP was intended to address, the Letter Agreement terminated by its own terms more than two years ago, when the court affirmed the Board's May 9, 2000 Koch decision. Pursuant to the Letter Agreement, Koch agreed that it would reduce its rates for delivery to LOMO pursuant to Dyno Nobel's request to bring those rates into parity with the rates as reduced in the Koch decision.¹³ If Koch lost its case on appeal, the Letter Agreement stipulated that the two-year limitation for filing a complaint based on rate reasonableness and/or discrimination would be tolled from the effective date of the Letter Agreement (i.e., October 25, 2000) to sixty days after a final order on the Koch decision had been issued.¹⁴ Thus, the Letter Agreement required Dyno Nobel to file a complaint with the Board against Koch within sixty days following the issuance of a final decision on appeal of the May 9 Koch decision if Dyno Nobel wanted to receive prospective rate relief at LOMO. Since Dyno Nobel did not file such a complaint, it chose to forego any claim under the Letter Agreement that it was entitled to a prospective rate reduction.

¹² C.F. Industries, Inc. v. Koch Pipeline Co., L.P., STB Docket No. 41685 (May 9, 2000) ("Koch").

¹³ Letter Agreement ¶ 2.

¹⁴ Letter Agreement ¶ 4.

The Letter Agreement did not state that Dyno Nobel's rates would be reduced indefinitely. Instead, it was executed for the sole purpose of reducing those rates for a limited period of time – through the outcome of the appeal and any subsequent appellate proceedings related to the Board's May 9 Koch decision.¹⁵ Dyno Nobel claims that the parties intended for the rate reduction to remain in effect following the appeal and that the two-year statute of limitations, which was tolled in the Letter Agreement, applies only to claims for reparations, not to requests for rate prescriptions on future movements, which may be filed at any time.¹⁶ However, the plain language of the Letter Agreement states that if Koch was unsuccessful in its appeal of the Board's order, Dyno Nobel was required to file a complaint within sixty days based on rate reasonableness and/or discrimination, not reparations. Moreover, even if Dyno Nobel were correct that the two-year statute of limitations applies to a claim for reparations, Dyno Nobel would still have had to file a complaint and receive a decision from the Board that Koch's rates to Dyno Nobel violated the statutory rate reasonableness or discrimination standards in order to claim that it was entitled to reparations. In any event, Dyno Nobel did not file a complaint with the Board within sixty days as provided in the Letter Agreement, but continues to try to preserve the rate reductions agreed to in the Letter Agreement more than two years after the court affirmed the Koch decision on July 27, 2001.

C. Dyno Nobel Cannot Legitimately Claim Any Entitlement to the Relief Awarded to the Parties in the Koch Proceeding.

¹⁵ Dyno Nobel claims that the reference to "subsequent proceedings" in Note 195 of Koch's tariff "could only mean proceedings before the Board." Reply at 15 n. 13. This interpretation is contrary to the plain meaning of the tariff language and cannot be read to bind Koch to provide a rate reduction to Dyno Nobel after the appeal proceedings were concluded. Otherwise, there would have been no reason to specify a time period in the Letter Agreement for Dyno Nobel to file a complaint on the basis of rate reasonableness and/or discrimination.

¹⁶ Counter-Motion at 16.

In 1996, CF Industries Inc. (“CFI”) and Farmland Industries (“Farmland”) challenged certain rate increases by Koch on its AH pipeline. Dyno Nobel neither filed a complaint nor intervened in the Koch proceeding. The Board subsequently found the rate increases to be unreasonable and ordered Koch to roll back CFI’s and Farmland’s rates. Only when it determined that its competitive position would be adversely affected by the Koch decision did Dyno Nobel, by its own admission, “belatedly” approach Koch requesting the same rate treatment as CFI and Farmland.¹⁷

The resulting sidebar Letter Agreement between Koch and Dyno Nobel kept Dyno Nobel’s rates in parity with the rate rollback in the Koch decision, but only until the conclusion of the appeal process related to the Koch decision. However, Dyno Nobel continues to assert erroneously that as long as CFI’s and Farmland’s rates in the Koch decision are prescribed, Dyno Nobel’s rates at LOMO, presumably including its preferential industrial plant rate, must remain at the rates established in the Letter Agreement.

Because Dyno Nobel was never a party to the Koch decision, it cannot legitimately assert that it is entitled to any prospective relief as a result of that decision. Dyno Nobel’s rates at LOMO were adjusted downward for a limited period of time by a simple sidebar Letter Agreement and implementing tariff adjustment. The Letter Agreement was executed more than five months after the Koch decision was issued by the Board, and, as demonstrated above and in Kaneb’s motion to dismiss Count I of the complaint, was valid only for the duration of the appeals process associated with the Koch decision. It was never intended to give Dyno Nobel any prospective rights associated with the prescriptions in Docket No. 41685. Thus, Dyno Nobel’s attempt to

¹⁷ Barton VS at 9.

“bootstrap” the Letter Agreement, regardless of Dyno Nobel’s nomenclature, onto the rate prescriptions in Docket No. 41685 in order to reap the privileges associated with filing and winning a rate case must fail.¹⁸

Dyno Nobel further claims that because Koch never adjusted its rates after the Court of Appeals decision, the Letter Agreement was intended to continue to apply.¹⁹ However, as demonstrated above, the plain language of the Letter Agreement provides that it ended following the appeal of the Koch decision. Dyno Nobel’s assertion that Koch took no action to increase Dyno Nobel’s rates because the Letter Agreement was still in effect is wrong.

Furthermore, Dyno Nobel tries to persuade the Board that the Asset Purchase and Sale Agreement (“Purchase Agreement”) between Koch and Kaneb was intended to include the Letter Agreement in those contracts that Kaneb assumed in connection with its purchase of the pipeline. As discussed in its Motion to Dismiss, Kaneb did not assume the Letter Agreement under Sections 2.02(f) and 2.04 of the Purchase Agreement, both because the Letter Agreement had terminated and because it did not relate “exclusively to” nor was it “reasonably necessary” for Kaneb’s use of the AH pipeline assets. The Letter Agreement does not relate to Kaneb’s management of the AH pipeline, as do the contracts listed in Exhibit F, which Kaneb specifically assumed when it purchased the pipeline. Dyno Nobel’s interpretation of the provisions in the Purchase and Sale Agreement regarding the contracts assumed by Kaneb to include all contracts that in any way related to the ammonia pipeline, as distinct from Koch’s other business activities, is

¹⁸ Kaneb will not repeat all of its previous arguments with respect to the effect of the rate prescription in the Koch decision, but incorporates them by reference herein. Even assuming, arguendo, that Dyno Nobel’s interpretation of the statute and caselaw is correct, it is irrelevant, since Koch’s rates to Dyno Nobel were not prescribed.

¹⁹ Counter-Motion at 16.

strained. The Letter Agreement was not related to the operation of the pipeline nor necessary to Kaneb's use of the pipeline assets and, therefore, it would not have been assumed by Kaneb, even if it had not already terminated.

D. The Board Should Strike the Exhibits Attached to Dyno Nobel's Reply and Counter-Motion for Summary Disposition.

Dyno Nobel attaches several exhibits to its Counter-motion. These exhibits, as well as any references to those exhibits in the pleading, should be struck by the Board. For example, Appendix A is a document entitled "Kaneb Pipeline's Market Dominance over Anhydrous Ammonia Deliveries to Dyno Nobel's LOMO Facilities." Dyno Nobel has not explained what the document is or who prepared it. In any event, this document is completely irrelevant to the issues in either Kaneb's motion to dismiss Count I of Dyno Nobel's complaint or Dyno Nobel's Counter-motion for summary disposition on Count I, which concern whether Kaneb violated CRP or the Letter Agreement between Dyno Nobel and Koch.

This holds true for the verified statement of Curtis C. Barton and its exhibits (collectively, "Barton VS"). Dyno Nobel's discussion of Kaneb's alleged market dominance,²⁰ as well as the discussion of Dyno Nobel's past business decisions with respect to transportation and resulting dependence on Kaneb's AH pipeline in the Barton VS are irrelevant to the issues immediately before the Board for determination and should be disregarded. Evidence regarding market dominance should be reserved for the parties' evidentiary cases with respect to Counts II and III of the complaint concerning rate reasonableness and discrimination.

²⁰ Counter-Motion at 2-4, 12-13.

In addition, the Barton VS and any references thereto should be struck to the extent they attempt to explain the intent of Koch and Dyno Nobel as to the duration of the Letter Agreement. There is no evidence that Mr. Barton was part of the negotiations that led to the Letter Agreement. Therefore, his verified statement is of no probative value. More importantly, both Dyno Nobel and Kaneb assert that the Letter Agreement is plain on its face. Thus, any attempt by Dyno Nobel to introduce evidence to support its interpretation of the agreement and the intent of the parties violates the parole evidence rule and should be rejected by the Board.

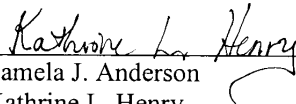
Finally, Exhibit 4 to the Barton VS, which attempts to introduce an entirely new agreement executed in February 2002 by Dyno Nobel and Koch to resolve the issue of reparations related to the period preceding the Letter Agreement, is totally irrelevant to this issues in this proceeding, which concern Dyno Nobel's current rates and the effect of the Letter Agreement on its rates after the Koch appeals decision. Therefore, the Barton VS and any references thereto should be struck by the Board.

CONCLUSION

WHEREFORE, in consideration of the above and foregoing, Kaneb respectfully requests that the Board:

1. Deny Dyno Nobel's Counter-Motion for Summary Disposition on Count I Directing Compliance With Rate Agreement;
2. Award Kaneb its costs and fees incurred in defense of this action; and
3. Grant Kaneb such additional relief as it deems proper.

Respectfully submitted,



Pamela J. Anderson
Kathrine L. Henry
Angela Addison Freeman
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
7th Floor
Washington, D.C. 20007-3877
Phone: (202) 298-1800
Fax No.: (202) 338-2416

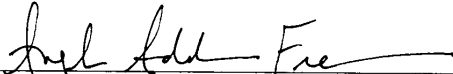
Attorneys for Kaneb Pipe Line Partners, L.P. and
Kaneb Pipe Line Operating Partnership, L.P.

Dated: October 2, 2003

CERTIFICATE OF SERVICE

Pursuant to Rule 1104.12 of the Surface Transportation Board's Rule on Service of Pleadings and Papers, I hereby certify that I have this day served a copy of the foregoing document by first-class U.S. mail, postage prepaid, on all parties of record in this proceeding, Docket No. 42081.

Dated at Washington, D.C., this 2nd day of October 2003.


Angela Addison Freeman

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.