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214124

June 3, 2005

Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

ENTERED
Office of Proceedings

JUN 3 2005

Part of
Public Record



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

Dear Secretary Williams:

Enclosed for filing in the captioned proceeding, in response to the Board's order served May 20, 2005, please find an original and ten (10) copies of Complainant Dyno Nobel Inc.'s Post-Argument Brief.

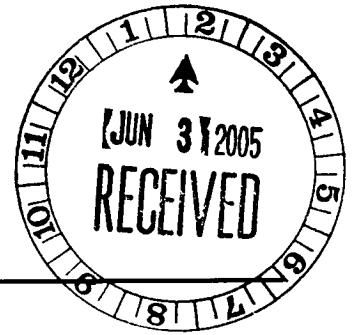
Thank you for your attention to this matter.

Sincerely,

Donald G. Avery
An Attorney for Dyno Nobel Inc.

cc: Counsel for CF Industries Inc.
Counsel for Kaneb Pipe Line Partners L.P., *et al.*

BEFORE THE
SURFACE TRANSPORTATION BOARD



DYNO NOBEL INC.,

Complainant,

v.

KANEB PIPE LINE PARTNERS, L.P.

and

KANEB PIPE LINE OPERATING
PARTNERSHIP, L.P.,

Defendants.

214124
Docket No. 42081

ENTERED
Office of Proceedings

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**POST-ARGUMENT BRIEF
OF DYNO NOBEL INC.**

Dyno Nobel Inc. ("DNI") respectfully submits this Post-Argument Brief in response to the Surface Transportation Board's ("STB's") orders served April 6, 2005 and May 20, 2005 in this docket and Docket No. 42084, *CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P., et al.* (not consolidated).

This brief focuses upon various issues discussed by the Board and/or counsel for the parties during the course of the argument held on May 11, 2005. In particular, we demonstrate that –

- (1) The October 25, 2000 settlement agreement¹ between DNI and the pipeline committed the pipeline to restore rate parity between DNI and the pipeline's other customers by reducing DNI's rates, *and by keeping DNI's rates at the reduced levels until the pipeline could get the rate prescription in Docket No. 41685 lifted*. This commitment is enforceable by the Board, regardless of whether the separate "tolling agreement" clause in the same agreement would have been enforceable if the parties had not settled the reparations claim to which it applied.
- (2) The October 25, 2000 settlement agreement was and is a valid, legally binding contract under applicable principles of contract law.
- (3) DNI's contract enforcement claim is ripe for summary disposition on the basis of the present record, as asserted by both DNI and Kaneb in their filings prior to oral argument.
- (4) There is no need for new rules governing pipeline rate contracts before the Board holds this pipeline to the rate parity commitments it made to DNI in the settlement agreement.
- (5) The un rebutted evidence of record proves that Kaneb enjoys market dominance over the shipment of anhydrous ammonia to DNI's facilities at Louisiana, MO ("LOMO"); and
- (6) STB enforcement of the settlement agreement at issue in this proceeding can have absolutely no effect on the rates paid by other shippers.

¹In the record as Exhibit 2 to the September 12, 2003 verified statement of Curtis Barton.

ARGUMENT

I. The Parties' Agreement to a Prospective Rate Rollback Was and Is Valid and Enforceable Before this Board, Regardless of Whether the Board Could Have Honored the Parties' Separate Agreement to Toll the Two-Year Limitation Applicable to a Potential Reparations Claim.

As discussed in DNI's evidence (Barton VS at 10-12) and during the oral argument, the pipeline made two distinct promises to DNI in the October 25, 2000 settlement agreement: (1) to *restore and maintain rate parity* between DNI and the pipeline's other customers *prospectively*, by rolling back its rates on AH shipments to LOMO to the pre-1996 increase levels until such time as the pipeline could get the Docket No. 41685 rollback prescription overturned; and (2) to toll the two-year statute of limitations applicable to DNI's claim for reparations until 60 days after the Court of Appeals ruled on the pipeline's appeal of the Docket No. 41685 prescription decision. *Only the pipeline's prospective rate parity commitment is before this Board for enforcement in this proceeding.* The parties subsequently settled DNI's reparations claim, and thus the tolling agreement aspect of the October 25, 2000 settlement agreement has never become an issue.

During oral argument, however, a question arose regarding whether parties could, by private agreement, toll a statute of limitations enacted by Congress, and if not, what the effect might be of including a tolling agreement clause in an agreement that also contains other, lawful promises and commitments.

The short answer is that, while it is unclear whether the STB could have honored the parties' tolling agreement if DNI had found it necessary to file a complaint seeking reparations,² the answer to this now-hypothetical question is irrelevant to the enforceability of the balance of the settlement agreement. This is so for two separate but equally compelling reasons:

First, as discussed during oral argument, the tolling clause was included in the settlement agreement solely for DNI's benefit, in order to protect DNI's then-

²Most statutes of limitations applicable to private causes of action can indeed be tolled by private agreement among the involved parties. *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 1365, 1374 (1947); *Aiken v. Burnet*, 282 U.S. 277, 280, 282 (1931); *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 79-80 (D.C. Cir. 1998); *U.S. v. Insurance Company of North America*, 83 F.3d 1507, 1510 (D.C. Cir. 1996); cf. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). However there is a subcategory of limitations provisions that are deemed "jurisdictional" and therefore non-tollable, and former 49 U.S.C. §16(3), the predecessor of 49 U.S.C. §§ 11705(c) and 15905(c), was held to be such a non-tollable limitation in *Midstate Horticultural Co. v. Pennsylvania RR*, 320 U.S. 356 (1943).

It is by no means clear that §§11705(c) and 15905(c) would be construed as jurisdictional, non-tollable limitations today: *Midstate* relied on statutory language that is missing from the current limitations provisions, and also on the then-prevailing regulatory framework that stressed strict adherence to uniform standards and non-discrimination among shippers. That framework is likewise missing from the ICCTA today, having been replaced by policies favoring marketplace resolution over regulatory fiat wherever possible. It is therefore not surprising that in the only recent case to consider the matter, the United States Court of Appeals for the DC Circuit expressed skepticism regarding the continued vitality of *Midstate's* characterization of the § 11705(c) limitation as jurisdictional. See *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 851 F.2d 1432, 1438-39 (D.C. Cir. 1988). The DC Circuit's skepticism would presumably extend as well to the parallel § 15905(c) limitation applicable to actions by and against pipelines.

unresolved reparations claim from the further erosion that would otherwise result from DNI's agreement not to file its complaint right away. As such, the tolling clause was part of the consideration flowing to DNI, not the pipeline. If DNI had later sought to invoke the clause in a reparations action and been turned aside by the STB, it might thereby have suffered a partial failure of consideration under the settlement agreement.³ Conceivably, in such a situation DNI might even have had a basis for seeking avoidance of the contract. In no event would the pipeline have had any basis for avoidance, however, as it would have enjoyed a windfall rather than a loss of consideration. *See, e.g., American Law Institute, Restatement (Second) Contracts* § 237; *Independent Energy Corp. v. Trigen Energy Corp.*, 944 F. Supp. 1184, 1199 (S.D.N.Y. 1996) ("failure of consideration gives *the disappointed party* the right to rescind the contract.... However, partial failure of consideration may not be sufficient to justify rescision.") (emphasis added).

Second, because the parties subsequently settled DNI's reparations claim on the shared assumption that it had been preserved by the tolling clause, DNI in fact suffered no failure of consideration at all. Rather, the tolling clause accomplished

³We say "might" because so long as the STB could still award reparations for at least part of the pre-October 25, 2000 period, DNI might thereafter have had a basis for recovering the balance of its reparations claim in court on the ground that judicial enforcement of the contract right to reparations would not invade the jurisdiction of the STB when the STB had already held that a retroactive rollback was appropriate.

its intended purpose through the mechanism of settlement, whether or not it could have done so in rate litigation before the STB.

II. The October 25, 2000 Settlement Agreement Between DNI and the Pipeline Was and Is a Valid and Mutually Binding Contract Under Applicable Law.

Despite its brevity, the October 25, 2000 settlement agreement was clearly a valid contract, for it was signed by both parties and manifests the parties' agreement to an exchange of promises. *See Restatement (Second), Contracts, supra*, § 17; *Northland Capital Corp. v. Silver*, 735 F.2d 1421, 1427 & n.9 (D.C. Cir. 1984) (stating that a "bedrock requirement" of contract formation is "mutual assent"). Indeed, the October 25, 2000 agreement is similar in appearance to the letter agreements entered into by rail carriers with coal shippers prior to 1980, which were subsequently held to be enforceable contracts in cases such as *Kansas Power and Light Company v. Burlington Northern Railroad Company*, 740 F.2d 780 (10th Cir. 1984).

Elaborate formality and detail are not required for the formation of a binding contract; many business deals are memorialized by nothing more formal than letter agreements – letters that set forth the essential terms of the parties' bargain and are signed by both parties. Courts routinely uphold and enforce such agreements as binding contracts, just as the Tenth Circuit did in *Kansas Power, supra*.

The language of the October 25, 2000 settlement agreement between DNI and the pipeline unmistakably demonstrates that the parties had reached final agreement,

and intended to be bound by their promises to one another. Thus the agreement begins with the statement that “[t]his letter is to *confirm the agreement*” between the parties; it goes on to recite that the pipeline “*has agreed* to reduce its rates” on DNI’s shipments to the specified level, and that “in consideration” for the pipeline’s promised rate reduction, DNI “*has agreed*” to repay the pipeline if the rate prescription in Docket No. 41685 were overturned. And finally, on page 2, *both parties signed the agreement, explicitly indicating that they “accepted” the commitments they made to one another therein.*

In sum, the parties’ agreement to be bound is explicit and incontrovertible, and the commitments they made to one another are spelled out with sufficient clarity to permit enforcement, particularly in light of the commitments’ expressed purpose of restoring rate parity. Nothing more is required for the existence of a binding contract.

III. DNI’s Claim for Enforcement of the Settlement Agreement is Ripe for Summary Disposition on the Basis of the Present Record in this Proceeding.

At pages 11-12 of DNI’s September 12, 2003 submission of evidence and argument, DNI explained in some detail why the legal, policy, and contract interpretation issues presented by the parties’ cross-motions for summary disposition of Count I of DNI’s complaint were indeed ripe for summary judgment. Similarly, in its August 1, 2003 Motion to Dismiss Count I, Kaneb asserted unequivocally that “there are no material issues of fact to be resolved, and the contract issues involved in Count I are essentially legal” and therefore amenable to disposition without further evidentiary

proceedings.⁴ In short, prior to the oral argument, both parties – while disagreeing on the proper interpretation of various contractual documents, and on the answers to the legal issues presented – agreed that there are no issues of material fact and that Count I is ready for summary disposition on the basis of the present record.

At oral argument, counsel for Kaneb for the very first time asserted that Count I is not ripe for disposition. However, counsel failed to identify any material *facts*, as distinct from legal inferences, that are in dispute, and thus Kaneb’s 11th hour change of position regarding ripeness cannot pass muster. Rather, Kaneb was right in August 2003 when it agreed with DNI that the issues in dispute on Count I are essentially legal rather than factual, and therefore amenable to summary disposition. DNI respectfully renews its request that the Board resolve those issues on the basis of the present record, and enforce the pipeline’s rate reduction/parity agreement against Kaneb as prayed in Count I of DNI’s complaint.

IV. The Board Can and Should Hold Kaneb to its Rate Parity Obligations Under the October 25, 2000 Settlement Agreement, Without First Establishing New Rules and Procedures for the Filing and Review of Future Rate Agreements.

At argument, counsel for Kaneb suggested – again, for the first time – that before the Board can consider enforcement of rate contracts between pipelines and their

⁴In view of this unequivocal assertion in Kaneb’s motion to dismiss, counsel’s unsupported assertion at oral argument that the parties’ cross-motions for summary disposition “document the existence of a genuine issue of material fact,” simply cannot be taken seriously.

customers, it must first assure itself that it has the power to enforce such contracts against shippers as well as carriers, and moreover it should first establish procedures for the filing of such contracts and rule on whether they can override published tariffs or whether instead they must be embodied in such tariffs in order to be effective, and on whether they must be offered to all similarly-situated shippers.

Kaneb's newly-articulated "concerns" regarding contract rate enforcement are red herrings, and furnish no basis whatsoever for withholding enforcement of the October 25, 2000 settlement agreement against the pipeline.

At the outset we note that, as discussed at oral argument, the Board's oft-stated preference for privately-negotiated resolutions of disputes that would otherwise require Board intervention, militates strongly in favor of holding litigants to the bargains they make in such settlement agreements, since a failure to do so would likely chill future settlement efforts. This is true, regardless of what policies or procedures the STB might decide to adopt with respect to pipeline rate agreements generally, and it necessarily leads to the conclusion that the October 25, 2000 settlement agreement between DNI and the pipeline must be enforced.

We also note that the same "concerns" expressed by Kaneb's counsel were equally applicable to railroad-shipper rate agreements entered into before the *Staggers*

Act,⁵ but that did not stop the ICC from enforcing such agreements under its *Contract Rates Policy*. In particular, the ICC enforced such agreements even though they had been entered into before promulgation of the *Contract Rates Policy*, had never been filed (there having been no procedures for filing rate agreements with the ICC), and were not incorporated into published tariffs.

In any event, the supposed imbalance between the STB's manifest ability to enforce rate agreements against pipelines and its asserted inability to do the same against shippers, is illusory: where the pipeline and shipper have agreed on rate X, the STB can and presumably will hold both parties to their agreement, by prescribing X as the maximum rate and rejecting appeals from pipeline and shipper alike for higher *or lower* rates under otherwise-applicable maximum rate standards – just as the ICC did with respect to pre-*Staggers* railroad contract rates.⁶

The other issues alluded to by Kaneb's counsel are even more far-fetched, and certainly furnish no basis for delaying enforcement of the pipeline's commitments under the October 25, 2000 settlement. Specifically,

⁵*Staggers Rail Act of 1980*, Pub. L. 96-448, 94 Stat. 1895 (October 1, 1980).

⁶*See Public Service Co. of Indiana v. Consolidated Rail Corporation*, 364 I.C.C. 770, 775-76 (1981).

- counsel’s suggestion that pipelines should be required to file their contracts in tariff form is nonsensical, in view of the fact that pipeline tariffs themselves need not be filed;⁷ and
- issues regarding discriminatory contracting, in the unlikely event that they were to arise notwithstanding *Koch*’s⁸ narrow definition of prohibited discrimination, could be evaluated on a case by case basis just as any other discrimination claims would be.

To summarize, Kaneb has offered no legitimate reason for delaying enforcement of the pipeline’s rate parity commitment to DNI. Accordingly, DNI respectfully renews its request that the Board grant its motion for summary disposition of Count I of its complaint, and prescribe a maximum rate for the future (and award reparations for the period since April 1, 2003) in accordance with the October 25, 2000 settlement agreement.

⁷Nor is there a real issue regarding conflicts between rate agreements and inconsistent tariffs. As DNI explained in its September 12, 2003 filing, the tariff necessarily controls in the face of an inconsistent rate agreement, *until the STB intervenes and prescribes a maximum rate at the agreement level, thereby “enforcing” the agreement*. This was true under the ICC’s Contract Rates Policy as it applied to railroads prior to 1980, and it remains true today with respect to rate agreements of pipelines subject to STB jurisdiction.

⁸STB Docket No. 41685, *CF Industries, Inc. v. Koch PipeLine Company* (unprinted decision served May 9, 2000), at 28.

V. The Unrebutted Evidence of Record Conclusively Establishes that Kaneb Enjoys Total Market Dominance over Shipments of AH to DNI's Facilities at Louisiana, MO.

During the course of the oral argument, DNI counsel was asked whether DNI had demonstrated that Kaneb has market dominance over DNI's traffic. The answer is yes. DNI witness Curtis Barton, in his September 12, 2003 verified statement, described in some detail the obstacles that might well physically prevent, and at a minimum would make prohibitively expensive, DNI's use of rail or barge delivery as substitutes for pipeline service. *Id.* at 14-17. As Mr. Barton summarized the situation,

...[F]or DNI's LOMO facility, pipeline deliveries of AH are the only viable option. If pipeline service became unavailable, the cost of developing substitute transportation options would make LOMO so costly to operate that DNI would have to give careful consideration to shutting it down altogether.

Id. at 17. Additionally, DNI's Argument of Counsel, filed with Mr. Barton's testimony on September 12, 2003, included a separate section ("Appendix A") summarizing the evidence of Kaneb's market dominance.

In its reply filed October 2, 2003, Kaneb contended that market dominance was irrelevant to the issues before the Board on the cross-motions for summary disposition, but did not otherwise challenge DNI's evidence of market dominance or submit contrary evidence of its own.

DNI's complete captivity to Kaneb for deliveries of AH to LOMO stands unchallenged, and DNI respectfully submits that it is incontrovertible. Accordingly, if the

Board deems market dominance to be a prerequisite for enforcement of a pipeline's rate commitments made in the context of a settlement agreement, it should find that requirement satisfied in spades by DNI.

VI. Enforcement of the October 25, 2000 Settlement Agreement's Rate Parity Commitment Will Not Affect the Rates Paid by Other Shippers.

The Board's April 6, 2005 Order scheduling oral argument in this proceeding asked the parties to discuss "how the ability of a carrier to contract with a shipper may affect the rates that the carrier will charge its other shippers."

As DNI noted in its Summary of Argument filed May 4, 2005, this question is not actually implicated by the October 25, 2000 settlement agreement at issue in Docket No. 42081, because that agreement only bars rate increases on DNI's traffic for as long as the pipeline is precluded from imposing increases on its other market dominant traffic by the May 9, 2000 rate prescription in Docket No. 41685. When and if that prescription is lifted and the pipeline is allowed to increase its rates to CFI, the settlement agreement will self-destruct and the rate increases can apply to DNI as well. Thus *the October 25, 2000 settlement agreement cannot, by its terms, affect the rates charged other Kaneb shippers.*

It is of course true that rates fixed by contracts that (unlike the settlement agreement at issue here) do not "self-destruct," can in some circumstances affect the rates charged other shippers. This, however, has not been seen as an impediment to the enforcement of such contracts. In the context of natural gas pipelines, for example, the

Federal Energy Regulatory Commission (“FERC”) simply takes the revenues earned under arms-length contracts as a “given,” and spreads the balance of a pipeline’s revenue requirements over its non-contract traffic by means of a “discount rate adjustment” to contract volumes, *see* RM05-2-000, *Policy for Selective Discounting by Natural Gas Pipelines*, 109 FERC ¶61,202 (Notice of Inquiry issued November 22, 2004); 111 FERC ¶61,309 (order reaffirming discount policy issued May 31, 2005). In the event that the Board is called upon to fix maximum pipeline rates under the “revenue adequacy” prong of Constrained Market Pricing (as it was in Docket No. 41685), and some of the pipeline defendant’s traffic is covered by fixed rate contracts, the Board could presumably adopt and apply FERC’s discount rate adjustment mechanism in setting rates on the pipeline’s tariff traffic.

To summarize, while it is unnecessary in the present case to determine how pipeline contract rates will be factored into subsequent maximum rate determinations for other, non-contract shippers, the Board should be comfortable in endorsing and encouraging pipelines and shippers to enter into contracts, secure in the knowledge that well-tested mechanisms are available for handling the effect of contract rates in subsequent maximum rate cases.

Conclusion

For the reasons set out above and in DNI’s September 12, 2003 “Reply in Opposition to Defendants’ Motion for Dismissal of Count I of the Complaint and

Counter-Motion for Summary Disposition on Count I Directing Compliance With Rate Agreement,” DNI respectfully requests that the Board enter an order directing Defendant Kaneb to reduce its rates on AH shipments to LOMO to the levels prevailing prior to April 1, 2003; to refrain from increasing those rates until such time as the prescription entered against it in Docket No. 41685 is vacated; and to refund to DNI, with interest calculated in accordance with the Board’s regulations, all amounts collected by Kaneb from and after April 1, 2003 that exceeded the amounts that would have been due and owing to Kaneb under the rates previously in effect.

Respectfully Submitted,

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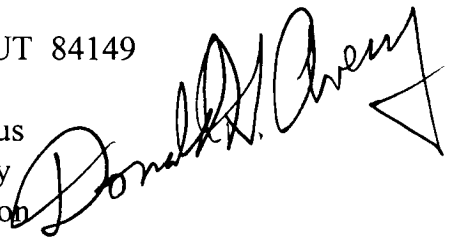
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Dated: June 3, 2005

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A handwritten signature in black ink, appearing to read "Donald G. Avery", is written over the printed name and address of Donald G. Avery.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 40 C.F.R. § 1113.3 and by agreement among the parties, I have this 3rd day of June, 2005, served copies of the foregoing "Post-Argument Brief of Dyno Nobel Inc." by electronic (e-mail) delivery and overnight express delivery upon counsel for Kaneb and CF Industries, as follows:

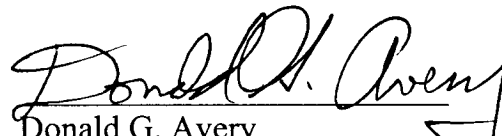
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