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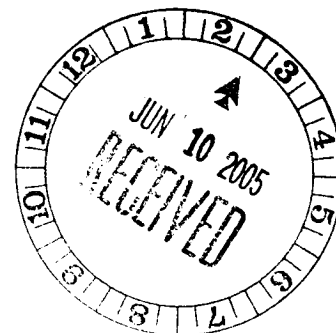
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June 10, 2005

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



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 Reply 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.*

**Part of
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Argument

1. DNI's Claim for Enforcement of the October 25, 2000 Settlement Agreement is Ripe for Decision.

In its brief, Kaneb expands upon the contention its counsel made for the first time at oral argument, *to-wit* that summary disposition on DNI's request for enforcement of the rate parity commitment contained in the October 25, 2000 settlement agreement should be withheld because "issues of material fact remain" in dispute. According to Kaneb, those issues relate to the duration of the pipeline's rate parity commitment – whether it was to expire following the conclusion of the pipeline's appeal from the Docket No. 41685 rate prescription order, as Kaneb has argued, or whether it was to remain in effect until the pipeline succeeded in getting the rate prescription lifted by a court *or by this Board*, as DNI maintains. Because the parties disagree regarding the survival of the settlement agreement, Kaneb suggests, the case is not ripe for disposition.

Kaneb's attempt to postpone enforcement of the settlement agreement against it must fail.¹ To begin with, as both parties have previously argued,² the contract

¹It is worth noting that Kaneb has ample incentive to delay a resolution of DNI's rate parity claim, because DNI has been forced to pay Kaneb's increased rates *pendente lite* and cannot recover those overcharges until the Board rules in its favor.

²See Kaneb's Motion to Dismiss Count I of DNI's Complaint, filed August 1, 2003, at 4 ("there are no material issues of fact to be resolved, and the contract issues involved in Count I are essentially legal"), and DNI's Reply and Countermotion for Summary Disposition, filed September 12, 2003, at 11-12 ("there is no genuine issue as to a material fact regarding Count I that might require ... further evidence, and ... DNI is entitled to summary disposition as a matter of law and sound regulatory policy").

interpretation issues raised by the parties' disparate readings of the October 25, 2000 settlement agreement and associated tariff documents are legal, not factual, issues, and as such are appropriate for summary disposition.³ Stated differently, a careful review of the parties' briefs confirms that the material *facts* relating to the settlement agreement – as distinct from the parties' obvious disagreement regarding how the Board should interpret and apply it – are undisputed. Thus,

- there is no dispute regarding the authenticity of the key documents, *i.e.* the October 25, 2000 letter agreement signed by both parties and the referenced tariff sheets implementing the agreed-upon rate rollbacks;⁴

³See, e.g., *Government Sys. Advisors, Inc. v. United States*, 847 F.2d 811, 812 n.1 (Fed. Cir. 1988) (“Contract interpretation is a matter of law and thus is amenable to decision on summary judgment.”); 5 *Corbin on Contracts* § 24.30 (Rev. Ed. 1998), at 327 (“If ... the words of the agreement, whether oral or written, are definite and undisputed, and if there is no doubt as to the relevant surrounding circumstances, the interpretation of the words is ordinarily held to be a matter for the court.”).

⁴Notably, *both parties'* summary disposition motions filed in August and September of 2003 attached copies of, and relied upon, the same October 1, 2000 tariff, which was the first to implement the promised rate reductions, and which included Note 195 explaining the pipeline's understanding of how long the rate reductions would be maintained. Kaneb's attempt to sow confusion by questioning DNI's earlier submission, with its complaint, of a subsequent edition of the tariff (which had carried the operative provisions forward without change), must be rejected.

Equally off the mark is Kaneb's professed confusion regarding whether either edition of the tariff was “attached” to the October 25, 2000 Settlement Agreement. To set the record straight, DNI never contended that the implementing tariff was physically attached to the Agreement; rather, DNI cited the tariff (and note 195 therein) as contemporaneous, corroborating evidence that Koch understood and intended that the rate

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- Kaneb has not challenged DNI’s evidence regarding the circumstances in which the Settlement Agreement was signed; and finally,
- there is no dispute regarding the parties’ course of performance under the Settlement Agreement and associated tariff documents, prior to Kaneb’s purchase of the pipeline from Koch Pipeline Company LP (“Koch”) in November 2002, including specifically the fact that Koch kept the rate reductions it had agreed to in effect long after it would have been free to restore its rolled-back rate increases if Kaneb’s reading of the agreement were correct.

To this day, Kaneb has not identified a single piece of missing evidence that it believes is necessary before the Board may evaluate and rule upon the parties’ competing claims regarding the meaning of the Settlement Agreement. Kaneb’s efforts to keep the Board from ruling on DNI’s Motion for Summary Disposition, and from enforcing the pipeline’s rate parity commitment, must therefore be overruled.

⁴(...continued)

reduction it was making on DNI’s traffic would remain in effect pending “any subsequent proceedings” needed to get the prescribed rate reduction on CFI’s traffic lifted. Kaneb does not dispute that its predecessor issued the tariff (both editions), and that the tariff says what it says. In other words, none of these facts regarding the language of the parties’ agreement or regarding the circumstances in which it was negotiated are in dispute. The significance of these facts for the interpretation of the contract is a question of law, *see* footnote 3, *supra*.

2. **The Language of the October 25, 2000 Settlement Agreement and Implementing Tariff Confirm that the Duration of DNI's Rate Rollback was Tied to the Duration of the Board-Ordered Rate Rollback in Docket No. 41685, and the Parties' Subsequent Performance Further Corroborates That Conclusion.**

On the merits, Kaneb's brief adds nothing to the arguments that Kaneb had previously advanced, and that DNI had refuted, regarding the duration of the pipeline's rate parity commitment. Thus, Kaneb argues that the implementing tariff's reference (in Note 195) to keeping the rate reduction in effect "[p]ending the outcome of [Koch's] appeal *and any subsequent proceedings*" meant only that the rate reductions would be kept in place if Koch elected to petition for *certiorari* before the United States Supreme Court, and that when Koch elected not to pursue such an appeal it became free to increase DNI's rates – even though it remained bound by the prescription as to the rates charged DNI's competitors. This reading, it asserts, is required by "the plain language of the tariff," although Kaneb does not explain what language it is referring to, or why DNI's contention that the tariff language was also intended to encompass further Board proceedings is incorrect.⁵

⁵In its prior filings in this docket Kaneb asserted that the Settlement Agreement's sixty-day deadline on DNI's filing of a rate reasonableness case after the appeal was over meant that the pipeline's rate parity/rate rollback obligation expired when DNI failed to file such an action. As DNI pointed out in response, however, the sixty-day time limit by its terms applied only to the agreed-upon tolling of the two-year statute of limitations in 49 U.S.C. §15905(c), and that limitation in turn applied only to DNI's reparations claim, and not to an action seeking the prescription of future rates (which may be filed at any time). In other words, the sixty-day time limit related solely to the subsequently-settled
(continued...)

Kaneb's restricted interpretation of the Settlement Agreement and implementing tariff language is untenable. In the first place, as DNI explained in its September 12, 2003 Motion for Summary Disposition and in its oral argument, Kaneb's reading is inconsistent with the explicit purpose of the October 25, 2000 Settlement Agreement, which was to "bring [DNI's] rates into parity with other rates on the pipeline recently reduced" pursuant to the Board's rate prescription in Docket No. 41685. The prescribed rates to which DNI's rates were thus tied could of course not be increased at the conclusion of Koch's unsuccessful appeal, unless and until the pipeline returned to this Board and succeeded in getting the prescription modified or vacated. Because accomplishment of the rate parity objective requires that the duration of DNI's rollback be the same as the duration of the Board-ordered rollbacks,⁶ Koch's commitment to keep the DNI rate reduction in effect pending its completion of the appeal "and any subsequent proceedings" must have been meant to include subsequent proceedings before the Board to get the prescription lifted. Thus, DNI's position regarding the duration of the rate parity commitment is completely consistent with the stated rate parity objective of the

⁵(...continued)
reparations claim and its inclusion in the agreement says nothing about the duration of the rate parity commitment, which – unlike the reparations claim – was already in effect.

⁶Note that under the October 25, 2000 Settlement Agreement the fate of the DNI rate rollback was so closely tied to the fate of the Board-prescribed rollback that DNI would have been obligated to disgorge its reduction retroactively if a court vacated the prescription, but only to the extent that the prescribed-rate shippers were required to do the same.

Settlement Agreement.⁷ Kaneb's narrow reading, by contrast, would emasculate the agreement, destroying the promised rate parity almost before it had taken hold.⁸

DNI's position regarding the duration of the rate parity commitment is further supported by the testimony of DNI's witness Barton regarding the negotiations that led to the Settlement Agreement, and – perhaps most probatively – by the subsequent course of performance of both DNI and Koch under the Settlement Agreement.⁹ In particular, as DNI pointed out during oral argument, Koch made no attempt to restore the rate increase on DNI's traffic following the Court of Appeal's rejection of its appeal, even though it had only reluctantly agreed to roll the increase back in the first place, and

⁷See *M.A. Mortensen Co. v. Brownlee*, 363 F.2d 1203, 1206 (Fed. Cir. 2004) (“We must construe the contract ‘to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract.’”) quoting *Hercules v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002).

⁸Kaneb complains that DNI's reading of the reference to “any subsequent proceedings” as encompassing subsequent Board proceedings would make the rate reduction commitment “essentially last indefinitely.” In fact, however, DNI's reading makes the reduction of its rates last as long as, but no longer than, the Board-prescribed reductions of CFI's rates. That was of course the whole point of the rate parity commitment.

⁹See *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263, 1269 (D.C. Cir. 1992) (“...the parties course of performance may be the best evidence of their intent in using a particular term.”); *City of Campbell v. FERC*, 770 F.2d 1180, 1191 (D.C. Cir. 1985) (stating that course of dealing is “probative of the parties intent”) citing *City of Bethany v. FERC*, 727 F.2d 1131, 1144 (D.C. Cir. 1984); U.C.C. § 2-208(2) (stating that course of performance and the express terms of a contract should be construed as consistent whenever possible).

even though, under Kaneb's interpretation of the Settlement Agreement, Koch would have been free to restore the increase immediately.

Still further corroboration may be found in the parties' February 2002 settlement agreement resolving DNI's tolled claim for reparations for the period prior to October 25, 2000. Specifically, that agreement (Exhibit 4 to the September 12, 2003 Verified Statement of DNI witness Curtis Barton) dealt in great detail with the disposition of DNI's reparations claim, obviating the need for DNI to file a rate case seeking such reparations, but it *made no mention whatsoever of what future rates would apply to DNI's traffic*. Had either DNI or Koch believed that prospective rates on DNI's traffic were no longer governed by the October 25, 2000 Settlement Agreement, it strains credulity to think that they would have settled out the reparations claim as they did without any mention whatsoever of the unresolved "elephant in the room" of future rate levels. (Contrast the October 25, 2000 Settlement Agreement, which as previously noted addressed both past and future rates, holding resolution of reparations in abeyance but specifying an immediate rollback of future rates.)¹⁰

¹⁰More specifically, if DNI had thought that Koch would be free to increase its rates at any time, and that its only remedy would be to file a maximum rate case, it would have had no reason to settle for the half-loaf of lump sum reparations while leaving its future rates up for grabs; rather, it would have wanted to pin down its entitlement to continued rate parity as part of a negotiated resolution, or failing that, to strike while the iron was hot by filing its rate case and seeking to lock in both reparations and prospective relief at the same time. And from Koch's standpoint, if its prospective rates on DNI's traffic remained under a cloud of possible litigation, it would have had little reason to

(continued...)

In sum, the language of the October 25, 2000 Settlement Agreement, with its explicit statement that the purpose of the agreement was to restore rate parity between DNI and the pipeline's customers who had received Board-ordered rate rollbacks, strongly supports DNI's position that the agreement ties the duration of the DNI rate rollback to the duration of the Board-ordered rate rollbacks received by the pipeline's other customers. The contemporaneous implementing tariff language issued by the pipeline is fully consistent with this construction; and it is further corroborated by the parties' subsequent course of performance under the agreement. Kaneb has to this date neither offered a credible alternative interpretation of the agreement that would be compatible with its express purpose, nor offered any evidence to support such an alternative interpretation. Kaneb's attempts to create uncertainty where there is none, and to push off a ruling on DNI's claim, must be denied. Kaneb has had ample opportunity to submit evidence in support of its position,¹¹ if such evidence existed; it has submitted nothing, and even now it has not identified a single piece of evidence that it would like to add to the record in support of its position. The time has come to rule on the parties'

¹⁰(...continued)
settle out DNI's reparations claim, which absent settlement could only be recovered by DNI upon the conclusion of a successful rate case. Simply stated, if the parties thought they were going to have to litigate a maximum rate case anyway, neither would have had an incentive to settle out the reparations part of the case.

¹¹It is axiomatic that in responding to a motion for summary disposition a party cannot simply rely on denials in its pleadings but rather "must set forth specific facts ... showing that there is a genuine issue for trial." *Ghane v. West*, 148 F.3d 979, 981 (8th Cir. 1998).

cross-motions for summary disposition on Count I of DNI's complaint, and to enforce the pipeline's rate parity commitment to DNI by ordering Kaneb to reduce its rates to the pre-April 1, 2003 level as required by that agreement.

Conclusion

For the reasons set out 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," in DNI's June 3 Post-Argument Brief, and in this Reply Brief, 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.¹²

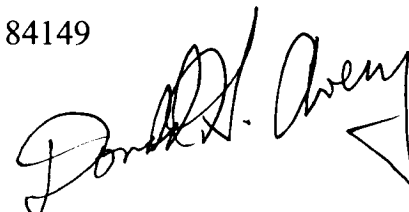
¹²For all the reasons articulated by CF Industries (and by DNI as intervenor) in Docket No. 42084, DNI believes that the Board should *deny* Kaneb's request to lift the prescription that it entered against Kaneb's predecessor, Koch, in Docket No. 41685. If the Board agrees, then the proper remedy for DNI in this proceeding should encompass both reparations on past shipments since April 1, 2003 and a prescribed rate on future shipments at the rolled back level. If, however, the Board were to decide to vacate the Docket No. 41685 prescription, then the appropriate relief for DNI in Docket No. 42081 would be an award of reparations on past shipments to and including the date the prescription is lifted, but without a requirement for future adherence to the rollback. In other words, the prescribed and settlement rollbacks should be kept in sync, under either
(continued...)

Respectfully Submitted,

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A handwritten signature in black ink, appearing to read "Donald G. Avery", with a stylized, angular flourish at the end.

Of Counsel:

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Dated: June 10, 2005

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¹²(...continued)
scenario.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 40 C.F.R. § 1113.3 and by agreement among the parties, I have this 10th day of June, 2005, served copies of the foregoing “Reply Brief of Dyno Nobel Inc.” by electronic (e-mail) delivery and overnight express delivery upon counsel for Kaneb and CF Industries, as follows:

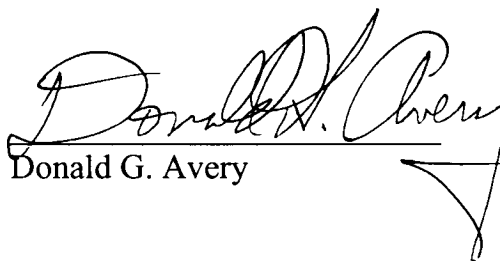
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