

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DYNOL NOBEL, INC., and)	
DYNOL NOBEL LOUISIANA AMMONIA, LLC)	
)	
Complainants,)	
)	
v.)	Docket No. 42147
)	
NUSTAR PIPELINE OPERATING)	
PARTNERSHIP, L.P.)	
)	
Defendant.)	
)	

MOTION FOR LEAVE AND REPLY TO MOTION FOR ORAL ARGUMENT

Complainants Dyno Nobel, Inc., and Dyno Nobel Louisiana Ammonia, LLC (individually and collectively, “Dyno”), submit this Motion for Leave and Reply to the Motion for Oral Argument that Defendant NuStar Pipeline Operating Partnership, L.P. (“NuStar”) filed on August 25, 2016 (“Motion”).

NuStar has said nothing to warrant oral argument, just as NuStar said nothing to warrant dismissal of Dyno’s complaint. Motions to dismiss are disfavored and rarely granted, and the same holds even more for oral argument on such motions. Moreover, the Motion merely regurgitates NuStar’s flawed arguments for dismissal, and as such is a barely-concealed and impermissible reply to Dyno’s Reply to NuStar’s Motion to Dismiss that the Board should not consider.¹

¹ Dyno moves for leave to submit this pleading since replies to requests for oral argument are normally not allowed under 49 C.F.R. § 1116.1(b). Good cause for Dyno’s reply exists since the Motion is so transparently a reply to a reply prohibited by 49 C.F.R.

NuStar asserts that oral argument is necessary because the “core operative facts are not disputed.” Motion at 2. However, besides NuStar’s candid admissions of *some* crucial facts, particularly that it (a) has never abandoned its previously built pipeline that serves Dyno’s Waggaman, Louisiana plant (“Waggaman Plant”) (NuStar Answer at ¶14); (b) continued to maintain the line in accordance with PHMSA safety requirements (*id.* at ¶18); (c) provided Dyno with initial rates and terms for reestablishing transportation from Waggaman (*id.* at ¶13); and (d) represented that the line could be reactivated quickly at relatively minimal cost (*id.* at ¶15), NuStar conveniently ignores that it has disputed virtually every other factual component of Dyno’s complaint. *Id.* at ¶¶1-35 (containing 50 separate NuStar denials). Under governing Board precedent, consideration of such disputed factual allegations should be deferred until the record is developed. *See* Dyno Reply to Motion to Dismiss at 12.

NuStar’s continued fixation on the “idled” (but not abandoned) status of the Fortier branch of its pipeline system is entirely beside the point. The key facts, which NuStar admitted in its Answer and are thus beyond dispute, are that NuStar: (a) held out to provide future service to Dyno’s Waggaman Plant; (b) altered the terms of its original representations to Dyno; and (c) required Dyno to pay for the previously undisclosed costs for restoring the Fortier right-of-way before service could begin.

NuStar originally held out to provide service to Dyno, with estimated upfront costs projected not to exceed \$1 million, and then later forced Dyno to accede to

§ 1104.13(c), and otherwise mischaracterizes Dyno’s Complaint. Dyno’s reply also further highlights the flaws in NuStar’s position.

very different terms and conditions, with an additional \$10 million in upfront costs. NuStar's failure to abide by its original holding out and its exercise of economic duress compel Board review. Moreover, even if NuStar is somehow allowed to recover from Dyno for a reasonable portion (if there is any) of the additional \$10 million for restoring the right-of-way, that recovery can begin only after NuStar is actually providing service, and not before, under *Pejepscot Indus. Park, Inc., d/b/a Grimmel Indus.-Petition for Declaratory Order*, FD 33989 (STB served May 15, 2003).

NuStar's attempt to invoke *Lucking v. Detroit & Cleveland Navigation Co.*, 265 U.S. 346, 350-51 (1924), is a red herring. If NuStar had refused to provide terms for future service at the outset, Dyno could have sought relief at that time from the Board under *Ashley Creek v. Chevron Pipe Line Co.*, 5 I.C.C.2d 303 (1989), or considered developing its plant at some other site. But NuStar held out to provide the requested service. Having done so, and having thus induced Dyno's reasonable reliance in the form of an \$850 million investment, NuStar cannot now defend its actions on the grounds that its prior representations and holding out of service to Dyno are irrelevant because it was supposedly excused from providing service in the first place under *Lucking*. The Board hears oral argument very rarely, and should not squander its resources to consider irrelevant distractions, especially those that NuStar has already forfeited.

In short, nothing even remotely warrants either oral argument or dismissal.

There is, however, more than enough to warrant the Board's careful oversight of this proceeding to ensure that NuStar does not seek to create further opportunities for diversion and delay.²

Respectfully submitted,

DYNO NOBEL, INC. and
DYNO NOBEL LOUISIANA
AMMONIA, LLC

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Dated: September 9, 2016

By: /s/ Peter A. Pfohl
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² The same day it filed its motion for oral argument, NuStar separately filed a status report regarding the procedural schedule. NuStar did not submit any substantive proposal, only a request that the schedule should be deferred to some later time.

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of September, 2016, I caused a copy of the foregoing Complainant's Motion for Leave and Reply to Motion for Oral Argument to be served by U.S. First Class Mail, or by more expeditious means upon all parties of record to this case.

/s/ Robert D. Rosenberg
An Attorney for Complainants