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**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.)	
)	

REPLY TO MOTION TO DISMISS

Complainants Dyno Nobel, Inc. and Dyno Nobel Louisiana Ammonia, LLC (individually and collectively, “Dyno”), submit this reply in opposition to the Motion to Dismiss (“Motion”) that Defendant NuStar Pipeline Operating Partnership, L.P. (“NuStar”) filed on July 20, 2016. The Surface Transportation Board (“Board” or “STB”) should deny NuStar’s Motion because Dyno’s Complaint clearly sets forth ample grounds for Board investigation and action. NuStar’s assertions reflect disregard and even disdain for its common carrier obligations and the Board’s jurisdiction, and in no way meet the Board’s high threshold for motions to dismiss.

I. SUMMARY

Dyno’s complaint alleges that NuStar engaged in unreasonable practices in violation of 49 U.S.C. § 15501 by failing to preserve or maintain its right-of-way for its pipeline and requiring Dyno to pay NuStar’s costs for restoring the right-of-way before

NuStar would provide pipeline transportation service to Dyno. NuStar's actions contravened both NuStar's obligations as a pipeline common carrier and the rates and the service terms and conditions that NuStar had established and provided to Dyno for transporting output from the anhydrous ammonia plant that Dyno was constructing at Waggaman, Louisiana ("Waggaman Plant"). Dyno Complaint (filed June 30, 2016) ("Complaint") at ¶31.

NuStar candidly admits that it has never abandoned its pipeline that serves the Waggaman Plant that was built long before the Plant was constructed. NuStar Revised Answer (filed June 20, 2016) ("Answer") at ¶14 ("NuStar did not abandon the lateral"). NuStar also admits that it maintained the line in accordance with PHMSA safety requirements in order to "provid[e] for an easier return to service if required." *Id.* at ¶18. However, NuStar still argues that the fact of non-abandonment and continued compliance with pipeline safety requirements are irrelevant because the involved lateral line had been "idled" and that it has no common carrier obligations over idled lines. *Id.*

NuStar asserts that its non-abandonment of the involved pipeline, the rates and terms for Waggaman Plant service that it initially provided to Dyno in 2012, and Dyno's reliance upon those rates and service terms in constructing a new, world-scale \$850 million ammonia facility are all irrelevant, as NuStar actually holds out to provide pipeline service exclusively through its formal, systemwide tariff sheet. NuStar alleges that it had no obligation to provide service from Waggaman until it actually added that location to its tariff sheet, which it finally did so, effective February 1, 2016. NuStar then asserts that any other activities it conducted were merely a standard arrangement for

contribution (or costs) in aid of construction. It also contends that the only claim available to Dyno here is a possible breach of an unspecified agreement that it asserts required Dyno to cover all lateral reactivation costs, which NuStar insists can be heard only in court, and not as an unreasonable practice claim before the Board.

As explained below, NuStar's assertions are all defective. NuStar's contentions that it enjoys exclusive rights to determine when and under what conditions it will provide common carrier rates to the Waggaman Plant, and can defer service under those rates to the Plant and any concomitant common carrier obligations at its discretion until it formally amends its formal tariff sheet offering are clearly contrary to law. NuStar had a duty to provide both service to Waggaman, and rates and terms for such service, upon reasonable request, and it could not avoid those duties until it was convenient.¹ Moreover, the ICC Termination Act of 1995 ("ICCTA") removed any requirement that NuStar hold out as a common carrier only through formal tariffs or that such tariffs even be filed, as rates and other terms and conditions can now be established through other means.² NuStar thus could and did hold out to provide service at Waggaman under terms that did not include reimbursement for the costs of restoring its right-of-way that should not have existed, were the consequence of NuStar's own neglect, and that in no way were responsibility or fault of Dyno.

¹ *E.g., Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, 5 I.C.C.2d 303 (1989) ("*Ashley Creek*").

² 49 U.S.C. § 15701; 49 C.F.R. Part 1305; *Disclosure & Notice of Change of Rates & Other Serv. Terms for Pipeline Common Carriage*, EP 538, 1 S.T.B. 146 (1996) ("*Disclosure of Rates and Terms*"). Dyno does not concede that NuStar's conduct would have been permissible before the ICCTA was enacted.

In addition, NuStar's efforts to coerce Dyno to pay for the right-of-way restoration costs in advance, including costs that were imprudently incurred, violated both Board precedent³ and NuStar's representations to Dyno, thus constituting an unreasonable practice. Further, NuStar could not coerce Dyno into entering into such a contract as a means of evading the Board's jurisdiction, and, in any event, Dyno never contractually waived its rights as a common carrier pipeline shipper, including with respect to NuStar's reactivation cost demands. At a minimum, this is a matter of significant factual dispute that provides no basis for NuStar's Motion.

NuStar's position is audacious and pernicious in multiple respects. First, it would reward a common carrier for engaging in coercion, thereby undermining shipper confidence in pipeline transportation and the associated transportation policies "to promote safe, adequate, economical, and efficient transportation," "to encourage sound economic conditions in transportation," and "to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices." 49 U.S.C. § 15101(a)(2)-(4). It bears noting in this regard that Dyno did what a prudent shipper should do in terms of communicating its needs to the carrier and obtaining reasonable assurances before committing to an enormous investment.

Second, it would discourage prospective shippers from making capital-intensive investments that provide substantial societal benefits. Dyno's investment at the

³ *Pejepscot Indus. Park, Inc., d/b/a Grimmel Indus.—Petition for Declaratory Order*, FD 33989 (STB served May 9, 2003) ("*Pejepscot*").

Waggaman brownfields site has brought needed local employment and economic development.⁴ Anhydrous ammonia is also vital for both the mining and agricultural segments of the economy.

Third, NuStar's assertions about a pipeline restoration cost agreement requiring Dyno to reimburse it for its imprudently incurred costs without resort to agency unreasonable practice relief are incorrect, and at a minimum, are matters in substantial factual dispute that provide no basis for NuStar's Motion. Further, its position would allow a pipeline carrier to contract out of the Board's jurisdiction, when the statute has no such contract exception, and unfairly insist that shippers take service under contracts instead of tariffs or equivalent unilateral offerings, in an unfair effort to evade the Board's jurisdiction and its obligation as a pipeline common carrier.

For all these reasons, NuStar's motion should be denied.

II. THE BOARD'S STANDARDS FOR MOTIONS TO DISMISS ARE VERY DEMANDING, AND SUCH MOTIONS ARE NOT FAVORED

The Board has established very demanding standards for motions to dismiss, under which such motions are disfavored.

To survive a motion to dismiss, a complainant need only plead sufficient facts to establish a *prima facie* case for relief, and the Board may dismiss a complaint

⁴ Complaint at ¶58 (noting 60 new permanent jobs, retention of 440 existing jobs, creation of over 440 indirect jobs, and a peak of up to 800 jobs during construction); *see also, e.g.*, LED News, *Incitec Pivot, Dyno Nobel, Cornerstone Chem. Break Ground on \$1 Billion Indus. Project in Jefferson Parish* (Aug. 5, 2013), [http://www.opportunitylouisiana.com/led-news/news-releases/news/2013/08/05/incitec-pivot-dyno-nobel-cornerstone-chemical-break-ground-on-\\$1-billion-industrial-project-in-jefferson-parish](http://www.opportunitylouisiana.com/led-news/news-releases/news/2013/08/05/incitec-pivot-dyno-nobel-cornerstone-chemical-break-ground-on-$1-billion-industrial-project-in-jefferson-parish) (noting economic benefits of and state and local government support for the project).

only if it “does not state reasonable grounds for investigation and action.”⁵ “In reviewing a motion to dismiss, all alleged facts are viewed in the light most favorable to the complainant.”⁶ The party seeking dismissal bears the burden of proof, and complaints may be dismissed “only when we find that there is no basis on which we could grant the relief sought.”⁷

The Board has “stated frequently that motions to dismiss are disfavored and rarely granted.”⁸ Where a complainant states a reasonable basis for further Board consideration, a motion to dismiss must be denied as the Board has a “duty to investigate the complaint.”⁹ To be sustained at this initial stage, the complaint need not establish a clear violation by the defendant, but only sufficient grounds for further investigation, and the party seeking dismissal must demonstrate that “there is no basis on which [the Board]

⁵ 49 U.S.C. § 11701(b); *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142 (STB served June 15, 2015), at 1 (“*Consumers*”); *Terminal Warehouse, Inc. v. CSX Transp., Inc.*, NOR 42086 (STB served May 12, 2004), at 7.

⁶ *Consumers* at 1 (citing *Montana v. BNSF Ry.*, NOR 42124 (STB served Feb. 16, 2011), at 3; *DHX, Inc. v. Matson Navigation Co. & Sea-Land Service, Inc.*, WCC-105 (STB served May 14, 2003), at 5 (same).

⁷ *Sierra R.R. v. Sacramento Valley R.R.*, NOR 42133 (STB served Apr. 23, 2012), at 3.

⁸ *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104 (STB served Dec. 30, 2009), at 3; *Consumers* at 1 (“[m]otions to dismiss are generally disfavored”); *Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105 (STB served July 29, 2008), at 4 (“*Dairyland*”); *Garden Spot & N. Ltd. P’ship & Ind. Hi-Rail Corp. – Purchase and Operate – Ind. R.R. Line Between Newton & Browns, IL*, FD 31593 (ICC served Jan. 5, 1993), at 2.

⁹ *Brampton Enters., LLC v. Norfolk S. Ry.*, NOR 42118 (STB served Mar. 16, 2011), at 4.

could grant the relief sought.”¹⁰ Unless the Board finds at this stage “that there are no reasonable grounds for further investigation,” the complaint must be sustained.¹¹

III. NUSTAR’S “FACTUAL” CLAIMS ARE UNFOUNDED

NuStar pays token service to the above restrictions on motions to dismiss by purporting to base its motion to dismiss on what it describes as “essentially legal” principles, rather than disputed issues of fact. Motion at 7-8. However, the distinction is illusory as employed by NuStar. Under the heading of “Statement of Pertinent Facts,” NuStar purports to present two factual assertions as the bases its Motion. The first is that NuStar did not hold itself out to provide service at Waggaman until it so amended its tariff in February 2016. *Id.* at 4-6. The second is that whether or not NuStar coerced payments for restoration of its right-of-way from Dyno is irrelevant because the payment was made under an agreement, and claims regarding breach of that contract could only be heard in court, and not in an unreasonable practice claim before the Board. *Id.* at 6-7.

Much of NuStar’s “factual” assertions are legal in substance, and not factual, apart from its generalized assertions as to Dyno’s actual agreement to reimburse NuStar for all pipeline reimbursement costs, which Dyno strongly refutes. *Id.* at 1-2. The assertions are manifestly misplaced and serve only to confirm the validity of Dyno’s Complaint.

¹⁰ *Id.* at 3.

¹¹ *Dairyland* at 5.

A. NuStar’s Holding Out as a Common Carrier is Not Confined to its Formal Tariff

NuStar asserts that its holding out to provide common carrier service is confined to, and defined by, its tariff and only its tariff, such that its other statements and representations are of no effect, at least insofar as the Board may be concerned, until reflected in its formal systemwide tariff containing the rates and terms of all customers.

NuStar summarizes its position as follows:

Simply stated, because Waggaman was not a point named in the tariff at which NuStar would accept tender, Complainant could not become a shipper at Waggaman at its own discretion. Under the tariff, nothing required NuStar to reactivate the Fortier Lateral and amend its tariff to allow Waggaman to exist as an Origin location

Id. at 6.¹²

NuStar is simply incorrect as a matter of law. The ICCTA eliminated any requirement that pipeline common carriers file or even maintain tariffs; instead, they are required to quote or establish rates on request. “A pipeline carrier shall also provide to any person, on request, the carrier’s rates and other service terms.” 49 U.S.C. § 15701(b); *see also Disclosure of Rates and Terms*. While a carrier may establish its rates through formal published tariffs, use of such tariffs is not required.

Furthermore, when a rate is requested and the carrier does not already have one, the pipeline is required to establish such a rate and associated service terms and to

¹² NuStar includes a copy of its tariff S.T.B. No. 22 at Attachment B to its Motion. Curiously, even though NuStar Tariff S.T.B. No. 22 governs common carrier service, the tariff defines “Shipper” as “the party who contracts with Carrier for the transportation of Ammonia under the terms of this tariff.”

do so promptly. “Where a shipper or a prospective shipper . . . requests that the carrier establish a rate in the absence of an existing rate for particular transportation, the carrier must promptly establish and provide to the requester a rate and applicable service terms.” 49 C.F.R. § 1305.3 (adopted in EP 538). A carrier must then honor those commitments. “A pipeline carrier shall provide transportation or service in accordance with the rates and service terms, and any changes thereto, as published *or otherwise made available*....” 49 U.S.C. § 15701(b) (emphasis added). In addition, the ICCTA defines pipeline “transportation” to include not only the transportation services, but also “property, facilities, instrumentalities, or equipment *of any kind* related to the movement of property, *regardless of ownership or an agreement concerning use*.” *Id.*, § 15102(5).

The Board’s predecessor recognized and applied these principles in *Ashley Creek*, at a time when pipelines were still required to file tariffs, where a shipper had requested rates in conjunction with the development of a new plant:

The record in this case, shows a pipeline that is admittedly a common carrier and a potential shipper that has specifically requested tariff publication and whose plans for future development are contingent upon reliable rate information. On this record, we believe that application of the tariff filing principles adopted in the railroad context is appropriate. Therefore, we will require Chevron to file a tariff pursuant to §§10702(a), 10761(a), and 10762(a)(1)(A), and in compliance with 49 C.F.R. Part 1312 within 90 days of the date of service of this decision.

Id. at 311-12. The ICC also specified that “[t]he proper construction of § 10762(a) requires a common carrier subject to the Commission’s jurisdiction to file a tariff when presented with a *potential* shipper with a demonstrable business or business planning

need for the information.” *Id.* at 310 (emphasis added). “The Commission has always recognized the importance of a tariff in enabling a business to make an informed decision on transporting its products.” *Id.* at 311.

In 2012, Dyno asked NuStar what the rates and terms would be for reestablishing transportation from Waggaman, and NuStar responded with a rate and service terms that included an estimate of the costs for reactivating the line, and the expected time frame for restoring service sufficient to meet Dyno’s needs and associated costs. Complaint at ¶13; Answer at ¶13. NuStar did not mention any need to restore the right-of-way or to receive reimbursement to cover the costs of that restoration. Complaint at ¶14.¹³ Moreover, NuStar repeatedly affirmed its earlier representations, even as NuStar was fully aware that Dyno was undertaking a massive investment in reliance on NuStar’s representations. *Id.* at ¶13. Under the circumstances, Dyno was reasonably entitled to rely on NuStar’s representations, regardless of whether NuStar had formally added Waggaman to its formal tariff.

Indeed, the logical implication of NuStar’s position is that it would never be bound, at least not at the Board, by any of the representations and assurances it might make to a shipper regarding future service until it formally amends a formal, systemwide tariff offering to all shippers, which it could and would defer until the moment it is

¹³ NuStar’s claims that service to Waggaman involved an “extension” of its pipeline (Motion at 2, 3, 11, and 12) are contrived. The segment running to Waggaman was in active service through the 1990s. Answer at ¶12. From 2012, NuStar proclaimed its willingness and ability to reactivate the line, and there has never been any dispute as to Dyno’s willingness to cover the costs for the short interconnection at its plant. *Id.* at ¶13.

actually ready, willing, and able to provide service. Motion at 5-6. Additionally, under NuStar's logic, a pipeline carrier can simply disregard the Board's rules that a "carrier must promptly establish and provide to the requester a rate and applicable service terms," and do so "as soon as reasonably possible, but no later than 10 business days from receipt of the request." 49 C.F.R. § 1305.3. Under those circumstances, no shipper would responsibly ever commit to constructing a new facility dependent on Board-jurisdictional pipeline service. Such a result cannot be reconciled with the Board's jurisdiction over interstate pipelines (49 U.S.C. § 15301), the requirements for pipeline practices to be reasonable (§ 15501) and for service and rates to be provided on request (§ 15701(a) and (b)), and the decision in *Ashley Creek*, which NuStar does not attempt to refute and cannot refute.

B. Dyno's Allegations as to NuStar's Failure to Honor its Commitments Presents an Unreasonable Practice Claim

NuStar's second allegation of "pertinent fact" is less straightforward, but is to the effect that even if NuStar did coerce Dyno into agreeing to the reimbursement for the restoration costs, no "unreasonable practice" claim can be heard because such claims would sound, if at all, only in contract, and as such could be heard only in court. Motion at 7.

As an initial matter, Dyno strongly disputes that it ever agreed to be responsible for all pipeline right-of-way restoration and rehabilitation costs. The record will clearly show, and the Board must accept as true at this stage, that Dyno fully and repeatedly resisted NuStar's payment demands which it believed were the product of

NuStar's own neglect and without Dyno responsibility or fault, and that any payments made by Dyno were made only under duress. Complaint at ¶¶ 21-24. Moreover, there is no disagreement that "Dyno specifically reserved its rights under the reimbursement arrangements with NuStar and did not waive its rights as a common carrier pipeline shipper." Complaint at ¶27; Answer at ¶27.

NuStar is simply wrong that Dyno contractually agreed to full reimbursement and without reservation of its rights as a common carrier shipper to bring this unreasonable practice claim. *See, e.g., Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104 (STB served Mar. 27, 2008), at 2 (motions to dismiss including disputed factual allegations "will be deferred until the record is further developed"); *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, NOR 42121 (STB served Apr. 5, 2011), at 6 (factual arguments "will be addressed after the Board has a full record on the issue"). Finding forfeiture under such circumstances would allow and encourage pipelines to coerce shippers with immunity from Board review, so long as some sort of agreement can be extracted. There is thus no basis for finding that Dyno has waived its statutory remedies or eliminated the Board's jurisdiction for NuStar's unreasonable practices.

Moreover, as explained below, as a matter of law, any such attempts at embodying reimbursement terms in contracts simply does not immunize them from Board review.

IV. NUSTAR'S LEGAL ARGUMENTS ARE DEFECTIVE

NuStar presents three legal arguments to support its Motion to Dismiss. The first is that NuStar had no duty to provide service at Waggaman until such time as it

formally amended its tariff to incorporate Waggaman, which it did not do until February 2016, and, absent such an amendment, NuStar was free to require Dyno to cover all of the right-of-way restoration costs. Motion at 8-11. The second is that requiring NuStar to provide a contribution in aid of construction is a common practice and is, therefore, inherently reasonable. *Id.* at 11-13. The third is that any claim that Dyno might have is one under contract and thus falls outside of the Board's jurisdiction under ICCTA. *Id.* at 13-14.

As shown below, NuStar's claims are all defective. First, NuStar had a duty to promptly establish rates for future service to Waggaman upon request. Moreover, NuStar did so, without including any provision for restoration costs, knowingly inducing reliance by Dyno. Second, as explained above, Dyno never agreed to be responsible for all pipeline right-of-way restoration and rehabilitation costs. Under Board precedent, arrangements for contributions in aid of construction may be permissible if agreed to voluntarily, but are not to be used as a means of coercion, and Dyno's claims falls well within the Board's unreasonable practice jurisdiction. Third, NuStar's attempts to include reimbursement terms for pipeline restoration in contracts does not shield them from Board review.

A. NuStar Had a Duty to Serve Dyno and Held Out to Do So

Contrary to its claims, as discussed *supra*, NuStar had a duty to provide service to Dyno and a duty to promptly establish rates upon request. 49 U.S.C. § 15701; 49 C.F.R. Part 1305; *Disclosure of Rates and Terms*. If NuStar had refused to establish rates and terms for service to Waggaman, then Dyno would have been entitled to seek an

order from the Board compelling NuStar to do so, as occurred in *Ashley Creek*, as further explained *supra*.¹⁴

Moreover, even assuming *arguendo* that NuStar had no duty to do so, the fact is that NuStar held out to establish rates and service terms in a series of communications with Dyno. NuStar represented that it could easily restore the pipeline to service, provided Dyno was willing to cover interconnection and reactivation costs (which did not include restoration of the right-of-way), which costs were not expected to exceed roughly \$1 million. Complaint at ¶15; Answer at ¶15. Significantly, Dyno admits that it made these representations: “NuStar also did state to Dyno that it would be able to reactive [sic] the lateral and provide service” Answer at ¶13.¹⁵ Having held out to provide that service and those terms, NuStar was bound by its representations. “A pipeline carrier shall provide transportation or service in accordance with the rates and service terms” it establishes. 49 U.S.C. § 15701(d).

¹⁴ NuStar argues in passing that the statute “does not impose a duty on the part of an existing common carrier pipeline company to extend its facilities in order to provide new service to a customer.” Motion at 8-9. However, that situation is clearly inapposite, as here NuStar has admitted that had a preexisting pipeline in place (the Fortier Lateral) that had been maintained and had not been abandoned that reached Waggaman, and thus, no extension of its pipeline was necessary to serve the Waggaman Plant.

¹⁵ NuStar claims it “maintained that Dyno needed to reimburse for all of the costs associated with reactivation of the Fortier Lateral,” “Dyno at all times agreed that it would reimburse NuStar for those costs,” and “NuStar provided an initial estimate of the costs of reactivating the lateral in 2012, primarily reflecting physical and engineering requirements.” Answer at ¶13. Dyno strongly denies that its reimbursement agreement with NuStar was so open-ended. What Dyno expected were reimbursement costs of \$980,000, plus or minus 15%, and not plus 1,000%. This sort of factual disagreement provides no basis for granting a motion to dismiss.

As explained *supra*, NuStar's claim that it was in no way bound because Waggaman was not added to the tariff is makeweight. The formal, systemwide tariff is not the only mechanism by which Dyno can and does establish rates and service terms. As further explained *supra*, the ICCTA eliminated the requirements to maintain and file tariffs, and replaced it with requirements to disclose and establish rates upon request. NuStar purported to do exactly that. Having held out to provide service and induced Dyno's reliance based on that holding out, NuStar cannot deny that it did so, especially for purposes of a motion to dismiss, where all disputed facts are to be construed in favor of the Complainant.

NuStar's reasoning is to the effect that the Board cannot go beyond the surface of the tariff to consider the reasonableness of the practices embodied therein. The fact that an unreasonable practice may be embodied in its tariff does not immunize that practice from agency review.

Tariffs are but forms of words, and in administering the act we can look beyond the forms to what causes them, and what they are intended to cause and do cause. [*I.C.C. v. Baltimore & O. R. Co.*, 225 U.S. 326, 345 (1912).] It is fundamental that where an unlawful practice is being worked, the mere fact that the machinery for working it is in tariff form cannot afford it sanctity.

N.Y. Warehouse Case, 16 I.C.C. 291, 360 (1936) (other citations omitted). NuStar's reluctance or delay in adding Waggaman to its tariff does not confer any protection or immunity from Dyno's unreasonable practice claim.

B. A Coerced Contribution in Aid of Construction Still Constitutes an Unreasonable Practice

NuStar next contends that its efforts to require Dyno to pay for the cost of restoring the pipeline's right-of-way amount to an agreement for a contribution in aid of construction. NuStar asserts that because such arrangements are common in the pipeline and utility industry, its actions cannot be found to be unreasonable. Motion at 11-13.

The term contribution in aid of construction may be used in other contexts, but it does not appear to have been previously used before the Board or its predecessor, and NuStar has provided no example of such usage. The sole example that NuStar cites in the gas pipeline setting, where NuStar asserts such contributions are "fees a customer pays to a supplier to ensure that a pipeline is built." Motion at 12, n.19. However, here, the Fortier Lateral reaching Waggaman was previously built and placed into service and had not been abandoned, it was capable of service and NuStar so represented, and thus there was no need for duplicative line construction of the existing lateral. In addition, the duty to provide transportation includes the duty to provide "property" and "facilities," 49 U.S.C. §§ 15102(5)(A) and 15701(a), with NuStar's reimbursement demands mainly involving right-of-way property restoration costs.

Regardless, the Board generally regulates pipelines under its jurisdiction according to railroad regulation principles, and has previously rejected reliance on those principles that the Federal Energy Regulatory Commission ("FERC") uses to regulate utilities and pipelines. "This Commission is charged with interpreting and applying the provisions of the Interstate Commerce Act (ICA) in performing its regulatory functions

subject to its exclusive jurisdiction, while FERC is charged with administering its regulatory scheme.”¹⁶ “[W]e believe that application of the tariff filing principles adopted in the railroad context is appropriate.” *Ashley Creek*, 5 I.C.C.2d at 311-12. “In establishing rates, Chevron should look to *Coal Rate Guidelines* . . . for guidance.” *Id.* at 312.

Within the rail context, a shipper might arrange for the railroad to construct some of the shipper’s facilities, such as a private spur, and the carrier would seek reimbursement so that it would not be deemed to have extended its common carrier lines over that private spur.¹⁷ In this instance, Dyno was willing to cover certain costs associated with restoring the Fortier Lateral¹⁸ and making the connection to Dyno’s new facilities at Waggaman, the cost of which was estimated to be approximately \$980,000, plus or minus 15%. Complaint at ¶15; Answer at ¶15. Dyno’s objection is to NuStar’s efforts to coerce the payment of an additional \$10 million to restore the pipeline’s right-of-way, especially as any right-of-way problems were brought about by NuStar’s own neglect and/or fault, and NuStar did not identify any such problem until Dyno had already made a massive commitment to new plant construction at Waggaman, with substantial construction underway.

¹⁶ *Ashley Creek Phosphate Co. v. Chevron Pipeline Co.*, NOR 40131 (Sub-No. 1), 1992 WL 52672, at 5 (ICC decided Mar. 12, 1992).

¹⁷ *E.g.*, *New York Central R.R. v. Southern Ry.*, 226 F. Supp. 463, 473 (N.D. Ill.), *aff’d*, 338 F.2d 667 (7th Cir. 1964), *cert. den.*, 380 U.S. 954 (1965).

¹⁸ NuStar refers to its Fortier Branch (*see* Complaint at ¶10) as the “Fortier Lateral.” Answer at ¶10.

NuStar seeks to fault Dyno for not providing an explanation of the underlying Board policy or case citations in its complaint. Motion at 12. The Board imposes no such pleading requirement, and Dyno's complaint conformed to the Board's pleading standards at 49 C.F.R. § 1111.1. Even if there were no applicable unreasonable practice precedent, the Board would be fully justified in redressing NuStar's coercive behavior. That said, the Board's *Pejepscot* precedent, n.3, *supra*, is directly on point.

Grimmel, the shipper in *Pejepscot*, purchased an abandoned mill served over a line the Maine Central Railroad Company ("MEC") that was out of service, but not embargoed or abandoned. The MEC was willing to restore the line provide the requested service, but only if Grimmel first paid \$250,000 in advance for the restoration or entered into a "take or pay" contract that assured MEC recovery of its costs of restoration and operation. The Board squarely rejected MEC's position:

This is not an acceptable response to a shipper's request for rates or service. A rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper's advance funding of repairs to the rail line over which the service would then be provided. [Footnote omitted.] At the same time, we note that a rail carrier is under no obligation to set the rate at a level under which it would lose money. We do find that, under the circumstances here (i.e., the Line had not been embargoed or abandoned), MEC had an absolute duty to provide rates and service over the Line upon reasonable request, and that its failure to perform that duty was a violation of section 11101 [duty to provide service upon reasonable request].

Id. at 13-14 (footnote omitted). In the footnote omitted from the above quote, the Board added that:

Although respondents [MEC] could, as they did, attempt to persuade Grimmel either to fund the rehabilitation of the [line], or, in the alternative, provide traffic or revenue guarantees, *the railroad could not insist upon such arrangements, nor could it unilaterally withhold supplying rates and providing service until either precondition was met.*

Id. at 13 n.29 (emphasis added).

NuStar did exactly what was prohibited by *Pejepscot* by insisting upon reimbursement in advance under the threat that service would not be provided otherwise. The facts here are even more compelling than in *Pejepscot*. NuStar, unlike MEC, previously quoted rates and service terms, represented that the line could be easily reactivated, and made no mention of the right-of-way issues. Dyno committed to an enormous investment in the Waggaman Plant based on those representations. NuStar then engaged in the equivalent of a “bait and switch” by altering its terms after Dyno was already committed upon discovering potential right-of-way problems brought about by NuStar’s own neglect and/or fault.

NuStar was in a position to have known about its right-of-way problems at the time it made its original representations. NuStar also could have, at a minimum, mitigated its costs if it had reasonably uncovered them early on and sought to fix them in a timely fashion. “[T]he Commission has stated frequently that inefficient costs incurred in the operation of a transportation facility should not be reflected in the tariff.” *Ashley Creek Phosphate Co. v. FS Indus.*, No. 40810, 1992 WL 334176, at *6 (ICC served Nov. 16, 1992). But even assuming *arguendo* that NuStar is entitled to recoup its reasonable

costs of restoring its right-of-way, it was not entitled to insist on receiving payment from Dyno before it would commence service.

NuStar's actions thus constitute an unreasonable practice under applicable agency precedent. NuStar's FERC precedent is not pertinent as noted *supra*, and its one cited Board/ICC precedent is inapplicable.¹⁹ NuStar's claim that it "is entitled to judgment as a matter of law on this issue" is specious.

C. NuStar's Coercion is Not Immunized from Board Review Because it Took the Form of an Agreement, With Dyno Reserving All Rights as a Common Carrier Pipeline Shipper, Including Recoupment of Reactivation Cost Payments

NuStar's final, two-paragraph argument is to the effect that its arrangement for reimbursement for the costs of restoring the right-of-way is immunized from Board review because the arrangement takes the form of a contract, and thus any dispute thereunder can be adjudicated only in court applying Louisiana contract and property law. Motion at 13-14. NuStar's position and its supporting authority are far-fetched.

NuStar's first premise, that it had no duty to provide service at Waggaman (Motion at 13), is incorrect as NuStar had a duty to establish rates upon request. *Ashley Creek, supra*. Moreover, even if NuStar's premise were somehow sound, it would be irrelevant because NuStar did establish rates and service terms that did not include the right-of-way restoration costs. Complaint at ¶13-15. The reasonableness of NuStar's rates

¹⁹ *National R.R. Passenger Corp. and Consol. Rail Corp.*, FD 32467 (ICC served Jan. 19, 1996), Motion at 13 n.21, did not involve a carrier's transportation for a shipper, but the recovery of one carrier's costs for providing access to another carrier. The case did not even involve the ICCTA or its predecessor.

and service terms is subject to the Board's jurisdiction, as is the reasonableness of NuStar's efforts to coerce Dyno into agreeing to the modification of the earlier rates and service terms. Additionally, NuStar's efforts to insist on reimbursement for those costs in advance of providing costs directly violates the Board's policies against unreasonable practices as expressed in *Pejepscot*.

Second, even assuming *arguendo* that Dyno fully and willingly agreed to waive all of its rights under ICCTA with respect its claims, which it did not, NuStar is wrong as a matter of law that Dyno could have waived its common carrier claims. In point of fact, the pipeline provisions of the ICCTA, 49 U.S.C. §§ 15101-16106, do not create the sort of exception for private contracts that appears elsewhere in the ICCTA. *Id.* at § 10709 (addressing private rail transportation contracts), and § 14101(b) (exception for contracts with water and motor carriers for transportation other than household goods). The fact that a "practice related to transportation or service provided by a pipeline carrier" may be embodied in a contract rather than a tariff provides no immunity from the requirement that pipeline rates and practices "must be reasonable." *Id.* at § 15501. The ICCTA's removal of the filing requirement for pipelines did not eliminate the requirement that their rates and practices be reasonable.

Moreover, NuStar has very recently admitted to STB jurisdiction over its lateral lines, and that its status as a common carrier is unaffected by fact that it may have contract service with shippers. Christopher Barr, NuStar's lead counsel in the instant litigation, submitted sworn testimony to the Illinois Commerce Commission as part of a

NuStar application filed June 10, 2016, to extend its pipeline in that state.²⁰ At page 8 of NuStar counsel’s testimony, NuStar confirmed: (a) the service provided under contracts is still common carrier service, (b) NuStar is obligated to establish common carrier rates for prospective shippers upon request, and (c) service provided over isolated segments or laterals is still common carriage:

Q. Does the fact that NuStar may have a contract or contracts with one or a small number of individual shippers change its status from being a common carrier?

A. No. Under both the ICA and the ICCTA carriers have often had contracts with individual shippers as well as common carriage obligations to non-contract shippers, without affecting their status as common carriers. NuStar has more than one shipper for the transportation services provided on its Ammonia Pipeline System including the Illinois Ammonia Pipeline segment. NuStar’s tariff holds it out to provide transportation service to any potential shipper that can meet the tariff requirements, on any portion of the Ammonia Pipeline System.

Q. Does the fact that a particular segment of the pipeline may serve as few as one shipper, make that facility a private pipeline, or otherwise make it not subject to the common carrier obligations of the federal statute?

A. No. As I described earlier, as required by 49 C.F.R. §1305.3, any prospective shipper could require NuStar to provide a new rate for a new service on the Illinois Ammonia Pipeline, if one is not currently available, which NuStar would be obligated to provide promptly.

²⁰ Ill. Commerce Comm’n, Files for 15-0646, <https://www.icc.illinois.gov/downloads/public/edocket/428928.pdf> (testimony available for download, “NuStar Exhibit 5.0 Revised – Christopher J. Barr,” File No. 12) (last visited Aug. 9, 2016).

Q. Is service to single shippers on isolated segments or laterals of other pipeline common carriers typically treated as being private transportation, or as common carrier transportation?

A. It is common for liquids pipelines to own and operate particular segments such as laterals, or other facilities, that in practice serve a single shipper, but that fact does not make the carrier or the particular segment anything other than a common carrier and an asset in common carrier service.²¹

Counsel's sworn testimony for NuStar gives no hint of the position espoused in NuStar's Motion that embodying rates and terms embodied in contracts somehow immunizes them from Board review. The ICCTA does not create a jurisdictional exemption for pipeline rates and service terms that happen to take the form of a contract.²² NuStar certainly identified no such jurisdictional gap in its sworn testimony to the Illinois Commerce Commission.

Third, contrary to NuStar's assertions, the Board is not being asked to interpret a contract here. The Board is instead being asked to determine whether NuStar's coercion of payments constitutes an unreasonable practice relating to the provision of common carrier pipeline transportation service.²³ Unreasonable practices

²¹ In contrast, railroads become "contract carriers when they enter into private contracts authorized by the Act." *State of Texas v. U.S.*, 730 F.2d 409, 417 (5th Cir. 1984), *amended in other respects and rehearing den.*, 749 F.2d 1144, *rehearing den.*, 756 F.2d 882, *cert den.*, 472 U.S. 1032 (1985).

²² Even at FERC, natural gas pipeline, electric transmission, and wholesale power rates may take the form of bilateral contracts, but they must still be filed with and are subject to the agency's review. *E.g.*, *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 531-32 (2008).

²³ *BNSF Ry. Co.—Terminal Trackage Rights—Kans. City So. Ry. Co. & Union Pac. R.R. Co.*, FD 32760 (Sub-No. 46) (STB served July 5, 2016), at 12 & n.8 ("While

reside at the core of the Board’s Congressionally-established jurisdiction over such transportation. A common carrier must engage in reasonable practices, as opposed to merely following unreasonable practices that it has incorporated into its tariffs or other documents.

Again, the ICCTA does not create any jurisdictional exception for contracts, nor does it confer upon the courts any jurisdiction over unreasonable practice claims. Even if a court were somehow deemed to have jurisdiction, its institutional competence would extend only to matters of breach and the like arising under contract law, and not to matters of discretionary judgment and policy delegated to the Board under the ICCTA.²⁴

NuStar’s reliance on *Allied Erecting*²⁵ for its claim that “the Board is not authorized to award damages arising from claims governed by state law, including easements and contract disputes” (Motion at 13) is especially misplaced. NuStar focuses on a single sentence of the decision, but ignores the context of the larger paragraph, which states in full as follows:

informative, arguments concerning whether the parties intended to apply Section 8(n) in such situations are not controlling here because Section 8(n) was imposed by the Board as a merger condition,” and “[t]hus, the Board is not interpreting a private contract....”);

²⁴ Even where claims involving carriers begin in court, unreasonable practice matters can still be referred back to the Board. For example, *R.R. Salvage & Restoration, Inc.—Pet. for Decl. Order—Reasonableness of Demurrage Charges*, NOR 42102 (STB served July 20, 2010), involved unreasonable practice claims that were referred to the Board by a federal district court that was handling a demurrage collection action. The Board then addressed those and additional unreasonable practice issues. Since Dyno has already paid NuStar, Dyno is seeking relief directly from the Board.

²⁵ *Allied Erecting and Dismantling, Inc. & Allied Indus. Develop. Corp – Pet. for a Decl. Order*, FD 35316 (STB served Dec. 20, 2013).

The Board may only award damages where the Interstate Commerce Act establishes its authority to do so. The Act generally does not authorize the Board to award damages in connection with matters that are governed by state law, such as easement or contract disputes. *See* 49 U.S.C. § 11704 (authorizing Board to award damages when a rail carrier has violated the Interstate Commerce Act).

Id. at 17. Dyno is asking the Board to do exactly that: “award damages where the [ICCTA] establishes its authority to do so.” The ICCTA “authoriz[es the] Board to award damages when a [pipeline] carrier has violated the [ICCTA].” 49 U.S.C. § 15904. Engaging in an unreasonable practice constitutes a violation of the ICCTA. *Id.*, § 15501. Dyno is asking the Board to apply the provisions of the ICCTA to determine if NuStar met its duty to engage in reasonable practices and, if not, to award damages.

Moreover, the fact is that the Board does consider matters of property and contracts as needed when exercising its jurisdiction. The Board actually did construe matters of property law in *Allied Erecting* itself:

After reviewing the agreements and the other evidence and arguments submitted, we agree with the reasoning offered by the Ohio state court and find, based on the information before us, that neither easement agreement expressly prohibits Ohio Central from stopping, staging, or storing cars on the lines.

Id. at 16.

The Board similarly interprets and resolves issues relating to contracts and agreements as needed to address disputes that arise under its jurisdiction:

DCED argues that for the Board to rule on contractual disputes is at odds with Board precedent. However, the Board did not issue such a ruling here. While breach of contract allegations, which arise under contract law, should ordinarily be resolved by a court, claims that a carrier has

violated a Board-imposed merger condition clearly belong here. DCED's argument here was that continued Board oversight was necessary because the alleged breach of the letter agreements was a violation of one of the conditions imposed by the Board in its approval of the Conrail Transaction. Thus, it was entirely appropriate for us to consider whether and to what extent the carriers had failed to comply with the letter agreements in connection with our regulatory proceeding.

CSX Corp. and CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail, Inc. and Consol. Rail Corp., FD 33388 (Sub-No. 1), 2005 WL 410421 (STB served Feb. 23, 2005), at *3.²⁶

Furthermore, the ICC in *U.S. Dep't of Energy v. Baltimore and Ohio R.R. Co.*, 364 I.C.C. 951 (1981), rejected carrier arguments that rules mandating special train service for spent nuclear fuel were immunized from unreasonable practice claims because the Section 22 arrangements were contractual in nature. The ICC explained that “this is not a situation where the Government, on hindsight, seeks to renege on a bad bargain. Indeed, the record is clear that the Government has long objected to the mandatory special train service.” *Id.* at 972. Accordingly, “to accept Western railroads’ argument

²⁶ Similarly, the Board frequently reviews track lease provisions to determine if they impinge excessively on a railroad's ability to fulfill its common carrier obligations. *See, e.g., Cayuga Cty. Indus. Develop. Agency, et al.—Acquisition Exemption – Finger Lakes Ry. Co.*, FD 36011 (STB served July 14, 2016), at 6 (reviewing a deed, lease, and sublease for purposes of finding that “the proposed transactions do not give the Agencies control over railroad operations”). The agency also reviews and interprets contracts in complaint cases. *See, e.g., Dayton Power & Light Co. v. Louisville & N. R.R. Co.*, 1 I.C.C.2d 375, 381-82, 384-87 (1985) (construing coal transportation and coal supply contracts for purposes of assessing market dominance, *e.g.*, at 382 (“We disagree with L&N's interpretation of the coal producers' contracts.”), and at 385 (“Thus, L&N has not established that there has been an actual breach such that DP&L could terminate the contracts or reduce its purchase obligations under them.”)).

[that the Government knew that special train service was required and agreed to that service] would, in effect, preclude any award of damages for shipments made. Such a result would be an anomaly and in complete derogation of our responsibility under the Interstate Commerce Act to prohibit unreasonable practices.” *Id.*²⁷ The fact that Dyno was similarly coerced into an agreement, while reserving all rights as a common carrier shipper, including with respect to the reimbursement of costs associated with reactivation, should in no way bar its unreasonable practice claim, particularly as Dyno is not subject to any Section 22 or contract exception in the statute.

NuStar thus seeks to divest the Board of the duties entrusted to it by Congress. The exception sought by NuStar here would create a gaping hole in that jurisdictional pipelines such as NuStar could avoid Board jurisdiction in large part or altogether by the simple expedient of insisting on shippers take service under contracts instead of tariffs or equivalent unilateral offerings.²⁸ Such efforts to evade the Board’s jurisdiction and common carrier obligations should not be entertained.

²⁷ The ICC also “emphasized that the Government had no alternative to rail common carrier tariffs . . . because the Eastern railroads refused to participate in regular tariffs on radioactive materials. Therefore, with respect to the Eastern railroads, suggestions that contract rates were agreed upon and should be enforced must be summarily dismissed.” *Id.* at 973.

²⁸ For example, a tariff-type publication might specify that shipment thereunder creates a unilateral contract, meaning an offer that is accepted by performance, further divesting the Board of jurisdiction.

V. CONCLUSION

For the reasons stated herein, NuStar's Motion to Dismiss should be denied.

Respectfully submitted,

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

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: August 9, 2016

By: /s/ Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Bradford J. Kelley
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of August, 2016, I caused a copy of the foregoing Complainant's Reply to Motion to Dismiss to be served by U.S. First Class Mail or by more expeditious means on the following counsel for Defendant NuStar Pipeline Operating Partnership, L.P.:

Christopher J. Barr
Suzanne McBride
Jessica R. Rogers
Post & Schell, P.C.
607 14th Street, NW, Suite 600
Washington, DC 20005

Karen Thompson, Esq.
Senior Vice President & General Counsel
NuStar Energy L.P.
2330 North Loop 1604 W.
San Antonio, Texas 78248

/s/ Katherine F. Waring
An Attorney for Complainants