

22

CHAIRMAN NOBER: Okay. Well, we'll try to

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1 take turns five minutes at a time and start with the  
2 vice-chairman.

3 VICE-CHAIRMAN MULVEY: Do we want to do  
4 that before we hear from --

5 CHAIRMAN NOBER: Yes, why don't we do the  
6 questions one at a time.

7 VICE-CHAIRMAN MULVEY: Okay.

8 CHAIRMAN NOBER: That's typically how we  
9 do them, how I do them anyway.

10 VICE-CHAIRMAN MULVEY: Fine. Well, I'm  
11 the new kid on the block, so I'm still learning how to  
12 do things here.

13 I wasn't here for the '97-'98 cases  
14 obviously when they were decided, but I'm assuming  
15 that you were all involved in that.

16 Do you recall what was the basis or the  
17 evidence that caused the Board at the time to accept  
18 the forecast that the McKinley mines would have  
19 sufficient reserves for the period?

20 MR. LOFTUS: Vice-chairman Mulvey, I was  
21 representing the Complainants at that time. I am  
22 familiar with the record in that case, as well as the

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1 Board's decision. There was uncertainty about the  
2 amount of coal that would be available for production  
3 at McKinley. The Complainants relied up testimony  
4 from the company that owned and operated the McKinley  
5 mine and what they had to say about their future plans  
6 for augmenting the reserves at that mine and what they  
7 believed they would be able to produce from that mine  
8 over this time frame. And the Board was also  
9 persuaded by that evidence that that was I would say  
10 that it would be fair to paraphrase the Board's  
11 decision saying that was the best evidence as to the  
12 amounts that would be recoverable, and for that reason  
13 it was accepted.

14 VICE-CHAIRMAN MULVEY: But at that time  
15 the Burlington Northern cautioned that they did not  
16 believe that the reserves were going to be sufficient.

17 MR. LOFTUS: That vigorously contested.

18 VICE-CHAIRMAN MULVEY: They vigorously  
19 contested, yes.

20 MR. LOFTUS: Yes, they did. And in fact,  
21 after the decision they filed a petition for  
22 reconsideration, and that was one of their principal

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1 arguments.

2 VICE-CHAIRMAN MULVEY: In the materials  
3 you submitted today where you block out, as you say  
4 and have sided with these stickies, relevant  
5 information from these contracts and the MOU, I notice  
6 that the section directly before the critical language  
7 that you've identified has been redacted. Now, I  
8 don't know what that was, but I suppose since it is  
9 confidential information to begin with, redacting the  
10 section before the critical section, sometimes you  
11 wonder if there's something in that section that's  
12 redacted that might somehow compromise or somehow  
13 affect the reading of the next section. So, is it  
14 possible to get a copy that's not redacted or at least  
15 some assurances that what's in the redacted section  
16 does not apply in any manner whatsoever to what's in  
17 the section that's not redacted?

18 MR. LOFTUS: The redaction was done by us,  
19 and it was done in deference to BNSF because there is  
20 language in that redacted portion that it was our  
21 assumption they would not want. If they wish to  
22 submit that, it's fine with us. But, in further

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1 response, I don't remember it word-for-word as I sit  
2 here, but I don't believe it has any bearing on the  
3 issue here now.

4 VICE-CHAIRMAN MULVEY: On the capacity  
5 utilization at Salt River and Cholia, whether or not  
6 85 percent is reasonable, are there any data? I know  
7 that some of it is in the record, but do you have any  
8 historical data, recent historical data which  
9 demonstrates that utilization above 85 percent is not  
10 unusual?

11 MR. LOFTUS: There is evidence to that  
12 effect in the record.

13 VICE-CHAIRMAN MULVEY: Yes, there is some  
14 already in the record? Do you have it? Would it be  
15 possible to get it for the last say several years? I  
16 notice it was 91 percent in the one period and but I  
17 was wondering if that was just an outlier or whether  
18 or not that was fairly common and to be expected, or  
19 whether or not BN's assertion that 85 percent is a  
20 reasonable rate should be used.

21 MR. LOFTUS: If what you're asking is  
22 could we supplement the record --

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1 VICE-CHAIRMAN MULVEY: Yes.

2 MR. LOFTUS: -- we would be pleased to do  
3 that. And just so that I'm clear, are you asking then  
4 for what, how long?

5 VICE-CHAIRMAN MULVEY: Five years.

6 MR. LOFTUS: Five years? The capacity  
7 factors for the Cholia units?

8 VICE-CHAIRMAN MULVEY: Yes.

9 MR. LOFTUS: We'd be happy to do that for  
10 the Board.

11 VICE-CHAIRMAN MULVEY: Thank you.

12 CHAIRMAN NOBER: Well, let me just see if  
13 I understand the situation here. Do you dispute that  
14 the Board's original calculation of what the rate  
15 ought to be was incorrect because the mine ran out of  
16 coal earlier than we had presumed in 1997? Is that in  
17 dispute?

18 MR. LOFTUS: Well, the way you state it I  
19 would dispute it.

20 CHAIRMAN NOBER: Okay.

21 MR. LOFTUS: Was it incorrect? When made,  
22 it was reasonable, it was made on evidence that was

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1 the best evidence of record. Did it turn out  
2 otherwise? Yes.

3 CHAIRMAN NOBER: The Board took into  
4 account the fact that we might be wrong on the  
5 reserves in the McKinley mine, right? I mean, that  
6 was mentioned.

7 MR. LOFTUS: The Board did, both in '97  
8 and in '98 when it denied BN's petition to reopen. In  
9 this regard, it specifically invited the parties to  
10 come back and seek reopening if things worked out  
11 otherwise. And then BN waived its right to do that  
12 for an extended period.

13 CHAIRMAN NOBER: Okay. Well, I mean, I'm  
14 not a contract lawyer, but I think I can read. And  
15 one question that I have is what -- well, let's just  
16 assume for the moment, and BN will have a chance to  
17 respond, that this says what it appears to say.

18 MR. LOFTUS: Right.

19 CHAIRMAN NOBER: How can the Board take  
20 into account a private contract in this circumstance?

21 MR. LOFTUS: Well --

22 CHAIRMAN NOBER: We don't have

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1 jurisdiction over contracts. Let's just say that you  
2 said it right and BN is violating it, for sake of  
3 argument. I'm not saying that they did, but just  
4 hypothetically that you said that they -- well, how do  
5 we take that into account?

6 MR. LOFTUS: Well, you are presented with  
7 a request by BNSF to change a rate prescription for  
8 the future years in order to give them more money for  
9 traffic that moved in the elapsed period. There isn't  
10 any question about that's what's going on here. So --

11 CHAIRMAN NOBER: Let's assume for the sake  
12 of argument that that's true.

13 MR. LOFTUS: Okay.

14 CHAIRMAN NOBER: I'm not saying that it  
15 is.

16 MR. LOFTUS: All right.

17 CHAIRMAN NOBER: But just for the sake of  
18 your point.

19 MR. LOFTUS: You also know that for four  
20 years of that period BN agreed that the only money it  
21 was going to get paid for the services they were  
22 rendering were these numbers.

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1 CHAIRMAN NOBER: Okay.

2 MR. LOFTUS: And now they're trying to get  
3 more. I think it's appropriate --

4 CHAIRMAN NOBER: Now again, let's just,  
5 for this hypothetical question, take that as the  
6 starting point.

7 MR. LOFTUS: Okay.

8 CHAIRMAN NOBER: How does the Board, which  
9 has no jurisdiction over this contract, take that  
10 fact, if it's a fact, into account?

11 MR. LOFTUS: I think you can take it --

12 CHAIRMAN NOBER: What can we do?

13 MR. LOFTUS: I think you can take it into  
14 account as another reason why you are not willing to  
15 accept this adjustment that they've proposed because  
16 although you don't have jurisdiction over, you know,  
17 the contract itself, you don't have jurisdiction over  
18 a lot of other things that you receive in evidence and  
19 consider in your decisions. And we think it entirely  
20 appropriate that you do this and consider that and  
21 rely upon it in part to reject it.

22 CHAIRMAN NOBER: Evidence that they're not

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1 entitled to --

2 MR. LOFTUS: That's correct.

3 CHAIRMAN NOBER: -- retroactive --

4 MR. LOFTUS: That's correct.

5 CHAIRMAN NOBER: Okay. Putting aside the  
6 contract for the moment, let's assume for the moment  
7 that, you know, back in 1997 and 1998 we took into  
8 account the fact that McKinley might run out of coal,  
9 but the evidence wasn't there at the time. And now BN  
10 comes in in 2003 and says it is and you don't dispute  
11 that. How do we take that into account?

12 MR. LOFTUS: Well --

13 CHAIRMAN NOBER: I mean your position is  
14 you can't? They're SOL? Is that -- and that may be,  
15 but --

16 MR. LOFTUS: You know, that sounds an  
17 awful lot like --

18 CHAIRMAN NOBER: I know, I'm just  
19 asking --

20 MR. LOFTUS: I understand.

21 CHAIRMAN NOBER: -- how would you tell us  
22 we should take it into account?

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1 MR. LOFTUS: Well, if I may, in the  
2 Arizona Grocery case, what the ICC said in ordering  
3 payment of reparations was, "We reserve the right upon  
4 a more comprehensive record to modify our previous  
5 findings upon matters directly in issue before us as  
6 to which it clearly appears that our previous findings  
7 would not accord substantial justice under the laws  
8 which we administer." That was the ICC's rationale  
9 for ordering the payment of reparations. And the  
10 Supreme Court said, "No, you cannot do that.  
11 Substantial justice or no, you have no authority."

12 And if you look at the 9th Circuit's  
13 decision in ArizonaGrocery, they said, "Well, what  
14 then is the remedy in this situation?" They said the  
15 remedy would be a seasonable application for a change  
16 of rate before any serious damage has been suffered.  
17 That's at 49.F.2d 568.

18 A seasonable petition, and they waived the  
19 their right to come before the Board and ask for any  
20 reopening until 2003.

21 VICE-CHAIRMAN MULVEY: On the contract  
22 issue, if I understand this, are you saying that the

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1 Board is not being asked to consider the contract  
2 because that's not in our jurisdiction, but simply  
3 that there are attestations in the contract which  
4 support what you're saying, that is attestations that  
5 BNSF has made that they've accepted these rates in  
6 good faith?

7 MR. LOFTUS: I'm not saying you can't  
8 consider the contract. I'm saying exactly the  
9 opposite. I'm saying you must consider the contract,  
10 that it is evidence.

11 VICE-CHAIRMAN MULVEY: I'm talking about  
12 considering the contract and we cannot adjust the  
13 terms of the contract.

14 MR. LOFTUS: That's correct.

15 VICE-CHAIRMAN MULVEY: That's not our  
16 jurisdiction. But look at the contract in terms of  
17 these attestations which are admissible to us as  
18 evidence. Is that what you're saying?

19 MR. LOFTUS: I think so.

20 VICE-CHAIRMAN MULVEY: I'm not a lawyer,  
21 so I --

22 MR. LOFTUS: Right.

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1                   VICE-CHAIRMAN MULVEY:   Isn't what the  
2 Burlington Northern is asking for different from  
3 reparations?  I mean, reparations would be, as you  
4 said, a check for the amounts that were underpaid over  
5 the period.  They're looking for a reconsideration of  
6 the terms of the agreement or the terms of the charges  
7 for the entire period from 1993 forward for a 20-year  
8 period.  And isn't that different from asking for  
9 reparations?

10                   MR. LOFTUS:  No.

11                   VICE-CHAIRMAN MULVEY:  I know that the --  
12 maybe the effect might be the same, but in a sense  
13 it's still a horse of a different color.

14                   MR. LOFTUS:  I respectfully disagree.  I  
15 think it clearly is reparations and I don't think the  
16 nature of the payment changes by virtue of the fact  
17 that you take the rates that are otherwise generated  
18 by the percent reduction methodology, calculate the  
19 amount of the reparations and then add them in to the  
20 future period.  It does not change the nature of what  
21 they are.  They are without doubt and so described by  
22 BN additional monies for the transportation that

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1 occurred during the elapsed period. That is  
2 reparation.

3 VICE-CHAIRMAN MULVEY: One last question.  
4 This was not brought up in your testimony today, but  
5 it is in the filings. And that is, the different  
6 periods of time that are used, 13 years versus six  
7 years, for the calculations for inflation forecasts.  
8 Do you want to say anything about why you chose to use  
9 the longer period?

10 MR. LOFTUS: We followed, we thought, the  
11 approach that the Board had used. For example, in  
12 1998 when it was presented with an additional year's  
13 data, it added it on to the years that it already had  
14 and used the available data. That is what we did. We  
15 thought that was consistent with the Board's  
16 methodology. We thought that using that trend line  
17 was an appropriate thing to do.

18 VICE-CHAIRMAN MULVEY: Okay. Thank you.

19 CHAIRMAN NOBER: What do you think is the  
20 appropriate action for the Board to take here? What  
21 do you recommend that we do?

22 MR LOFTUS: It seems to me that it would

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1 be appropriate for the Board to reinstate its original  
2 prescription on the grounds that there had not been a  
3 persuasive case made for something else. If you don't  
4 buy that, and I can see how you might not, then I  
5 would say that the correct thing to do under the law  
6 is to accept the DCF analyses performed by the  
7 parties, deciding the issues that divide them, but  
8 rejecting this revenue adjustment.

9 And again, I don't see where you get this  
10 idea that it's tied to capital recovery, because we  
11 don't see that at all. It's a pure revenue  
12 adjustment. But, we think you have to reject that and  
13 that that would be the correct thing to do.

14 CHAIRMAN NOBER: Do you think that your  
15 proposed adjustment where I think the bulk of  
16 something like 85 percent of it is adjusted to years  
17 past, if you will, is that fair?

18 MR. LOFTUS: Yes, it's fair. It is the  
19 correct application of the stand alone cost  
20 methodology. What you're dealing with is a situation  
21 where things change. And the correct application and  
22 methodology today results in a different answer than

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1 it did under the facts known when it was done before.  
2 But that doesn't make what was done before  
3 unreasonable at the time, and the BN has only itself  
4 to blame for the fact that there's been this period of  
5 time that's elapsed before it's brought back to the  
6 agency. This is not a sympathetic plaintiff, if you  
7 will, in this regard.

8 CHAIRMAN NOBER: Well, at some point, you  
9 know, sympathies and equity are one side of the ledger  
10 and then what our legal constraints are, as you, you  
11 know, articulated in the Supreme Court precedent, you  
12 know, is another one. And, you know, you've learned  
13 in my two years here that just because something is  
14 equitable doesn't mean the courts are going to agree  
15 with it. And so, you know, we have to live with that.

16 What about the option of just vacating the  
17 rate, saying that it's wrong, we can't figure out a  
18 new one, we're just going to vacate it and let the  
19 parties do what they may?

20 MR. LOFTUS: Well, we believe that would  
21 be in violation of your obligations on the record  
22 before you and that would put the Complainants in a

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1 position where the BN could charge whatever rate it  
2 chooses and put us in a position where we would have  
3 to start over again with a brand new case and all that  
4 that entails.

5 CHAIRMAN NOBER: That would be unfair?

6 MR. LOFTUS: Yes, it would be unfair.

7 CHAIRMAN NOBER: Well, I think, and I  
8 can't remember the exact case number, we've had a  
9 bunch of them, but in a prior case we held a rate  
10 prescription was in essence the Complainant's  
11 prescription. If the Complainant didn't like it  
12 anymore, they could move to vacate it and we agreed  
13 with that. I think that was one of your cases, right?

14 MR. LOFTUS: That is correct. Well, the  
15 issue was raised and in this case I think you may have  
16 said that another case, but --

17 CHAIRMAN NOBER: Yes, we did say it in a  
18 different case. Assuming for the moment that that's,  
19 you know, a principal we all accept, so your view  
20 would be that it's okay if the Complainant doesn't  
21 like, because of changed circumstances, the rate, to  
22 have that lifted, have it vacated, right?

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1 MR. LOFTUS: I would.

2 CHAIRMAN NOBER: But if the Defendant says  
3 that, "Well, there's changed circumstances. The  
4 rate's unfair. You should vacate it," which I know  
5 they haven't, but if they did that, you would object  
6 to that?

7 MR. LOFTUS: We would.

8 CHAIRMAN NOBER: Why is that?

9 MR. LOFTUS: Well, we believe that the  
10 changed circumstances -- if you want to talk about  
11 equity, we think the equitable thing to do would be to  
12 look at all the changed circumstances and if you did,  
13 we think they'd be entitled to a lower rate today --

14 CHAIRMAN NOBER: Meaning including the  
15 intermodal traffic that goes on that line?

16 MR. LOFTUS: Not intermodal, but including  
17 other traffic that we logically would have included at  
18 that time when we were putting the stand alone cost  
19 case together had we known what we all now know about  
20 how long the McKinley reserves would last. You know,  
21 you could say, "Well, you could have done that then.  
22 You could have added in the Springerville plant, you

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1 could have done -- why didn't you?" There were good  
2 reasons not to do it. Simplicity is a virtue.

3 CHAIRMAN NOBER: Okay. Mr. Vice-chairman?

4 VICE-CHAIRMAN MULVEY: Well, I sympathize  
5 with what Roger was saying. I mean, if we vacate the  
6 rate, do we open this thing up again? All parties  
7 could therefore bring forward their information on the  
8 issue I'm not suggesting that we want to have yet  
9 another one of these cases. But on the other hand,  
10 obviously there were mistakes. Obviously, there are  
11 changed circumstances. McKinley did not have the  
12 reserves that were estimated at the time. The stand  
13 alone railroad you created, would not be the optimum  
14 for these new circumstance. The Board would take into  
15 consideration what that new railroad would look like,  
16 what traffic should be considered on it and come up  
17 with a new rate prescription. You might believe that  
18 that will actually result in a lower rate under those  
19 circumstances, but until the analyses are done by both  
20 parties, we won't know that.

21 You seem to be suggesting that for  
22 whatever reasons you would not want to pursue another

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1 stand alone rate case. My question would also be to  
2 Burlington Northern, would they oppose that approach  
3 as well.

4 MR. LOFTUS: Well, I'm confident that my  
5 clients do not want another rate case and all that  
6 that entails. And I think that to take that action as  
7 a back door way to avoid this reparations issue would  
8 not be appropriate. They asked for this reopening.  
9 They asked for these circumstances to be taken into  
10 consideration and this is the result. And the result  
11 indicates this problem with regard to the elapsed  
12 period, but as a matter of law they're precluded from  
13 recovering for that. And so, too bad.

14 CHAIRMAN NOBER: Do you think when we're  
15 looking at the equities as opposed to the sort of  
16 legal standard, we can take into account the contract  
17 in that circumstance? That's what you're urging us to  
18 do --

19 MR. LOFTUS: Yes.

20 CHAIRMAN NOBER: -- is to say the fact  
21 that the BN waived their rights to challenge it is not  
22 equitable and then reopen it because they were

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1 shorted, if you will, over those years.

2 MR. LOFTUS: They didn't only waive their  
3 rights, but they said, "This is it. This is all the  
4 money we'll get for the transportation services we  
5 render during this period of time." That's in a  
6 nutshell what that contract says. And now, they have  
7 calculated an amount of money in addition that they  
8 want for that service rendered during that period.

9 Now to be fair, the contract is 11-99 to  
10 12-31-02 and there's a little more time in there under  
11 their adjustment that's not covered by the contract.

12 CHAIRMAN NOBER: Yes, there's some before  
13 and a little after.

14 MR. LOFTUS: Right.

15 CHAIRMAN NOBER: Yes. I have no further  
16 questions. Thank you and thanks for being patient  
17 with our questions.

18 MR. LOFTUS: Thank you.

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