CHAIRMAN NOBER: Okay. Well, we'll try to
take turns five minutes at a time and start with the vice-chairman.

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

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

VICE-CHAIRMAN MULVEY: Okay.

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

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

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

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

MR. LOFTUS: Vice-chairman Mulvey, I was representing the Complainants at that time. I am familiar with the record in that case, as well as the
Board's decision. There was uncertainty about the amount of coal that would be available for production at McKinley. The Complainants relied up testimony from the company that owned and operated the McKinley mine and what they had to say about their future plans for augmenting the reserves at that mine and what they believed they would be able to produce from that mine over this time frame. And the Board was also persuaded by that evidence that that was I would say that it would be fair to paraphrase the Board's decision saying that was the best evidence as to the amounts that would be recoverable, and for that reason it was accepted.

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

MR. LOFTUS: That vigorously contested.

VICE-CHAIRMAN MULVEY: They vigorously contested, yes.

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

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

MR. LOFTUS: The redaction was done by us, and it was done in deference to BNSF because there is language in that redacted portion that it was our assumption they would not want. If they wish to submit that, it's fine with us. But, in further
response, I don't remember it word-for-word as I sit here, but I don't believe it has any bearing on the issue here now.

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

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

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

MR. LOFTUS: If what you're asking is could we supplement the record --
VICE-CHAIRMAN MULVEY: Yes.

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

VICE-CHAIRMAN MULVEY: Five years.

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

VICE-CHAIRMAN MULVEY: Yes.

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

VICE-CHAIRMAN MULVEY: Thank you.

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

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

CHAIRMAN NOBER: Okay.

MR. LOFTUS: Was it incorrect? When made, it was reasonable, it was made on evidence that was
the best evidence of record. Did it turn out otherwise? Yes.

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

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

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

MR. LOFTUS: Right.

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

MR. LOFTUS: Well --

CHAIRMAN NOBER: We don't have
jurisdiction over contracts. Let's just say that you said it right and BN is violating it, for sake of argument. I'm not saying that they did, but just hypothetically that you said that they -- well, how do we take that into account?

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

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

MR. LOFTUS: Okay.

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

MR. LOFTUS: All right.

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

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

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

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

MR. LOFTUS: Okay.

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

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

CHAIRMAN NOBER: What can we do?

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

CHAIRMAN NOBER: Evidence that they're not
entitled to --

MR. LOFTUS: That's correct.

CHAIRMAN NOBER: -- retroactive --

MR. LOFTUS: That's correct.

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

MR. LOFTUS: Well --

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

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

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

MR. LOFTUS: I understand.

CHAIRMAN NOBER: -- how would you tell us we should take it into account?
MR. LOFTUS: Well, if I may, in the Arizona Grocery case, what the ICC said in ordering payment of reparations was, "We reserve the right upon a more comprehensive record to modify our previous findings upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer." That was the ICC's rationale for ordering the payment of reparations. And the Supreme Court said, "No, you cannot do that. Substantial justice or no, you have no authority."

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

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

VICE-CHAIRMAN MULVEY: On the contract issue, if I understand this, are you saying that the
Board is not being asked to consider the contract because that's not in our jurisdiction, but simply that there are attestations in the contract which support what you're saying, that is attestations that BNSF has made that they've accepted these rates in good faith?

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

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

MR. LOFTUS: That's correct.

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

MR. LOFTUS: I think so.

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

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

MR. LOFTUS: No.

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

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

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

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

VICE-CHAIRMAN MULVEY: Okay. Thank you.

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

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

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

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

MR. LOFTUS: Yes, it's fair. It is the correct application of the stand alone cost methodology. What you're dealing with is a situation where things change. And the correct application and methodology today results in a different answer than
it did under the facts known when it was done before. But that doesn't make what was done before unreasonable at the time, and the BN has only itself to blame for the fact that there's been this period of time that's elapsed before it's brought back to the agency. This is not a sympathetic plaintiff, if you will, in this regard.

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

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

MR. LOFTUS: Well, we believe that would be in violation of your obligations on the record before you and that would put the Complainants in a
position where the BN could charge whatever rate it
chooses and put us in a position where we would have
to start over again with a brand new case and all that
that entails.

CHAIRMAN NOBER: That would be unfair?

MR. LOFTUS: Yes, it would be unfair.

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

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

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

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

MR. LOFTUS: We would.

CHAIRMAN NOBER: Why is that?

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

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

MR. LOFTUS: Not intermodal, but including other traffic that we logically would have included at that time when we were putting the stand alone cost case together had we known what we all now know about how long the McKinley reserves would last. You know, you could say, "Well, you could have done that then. You could have added in the Springerville plant, you
could have done -- why didn't you?" There were good reasons not to do it. Simplicity is a virtue.

CHAIRMAN NOBER: Okay. Mr. Vice-chairman?

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

You seem to be suggesting that for whatever reasons you would not want to pursue another
stand alone rate case. My question would also be to Burlington Northern, would they oppose that approach as well.

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

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

MR. LOFTUS: Yes.

CHAIRMAN NOBER: -- is to say the fact that the BN waived their rights to challenge it is not equitable and then reopen it because they were
shorted, if you will, over those years.

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

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

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

MR. LOFTUS: Right.

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

MR. LOFTUS: Thank you.