

1 CHAIRMAN NOBER: Do you know what the
2 challenged rates are for '04 through '08?

3 MR. LOFTUS: I'd have to look at the
4 appendices to the decisions, but they're in there.
5 And you know, it's under the original DCF analysis.
6 You have the challenged rate and the revenue stream
7 under the challenged rate is run out over the full
8 DCF. So it's in there. And that is what was used
9 this time around. And both the BN and Complainants
10 come back to you and say that the DCF shows that the
11 challenged rates are not unreasonable and therefore
12 you should vacate the prescription. Both come back
13 and say to you you should prescribe this rate level.
14 That's the state of the record before you.

15 CHAIRMAN NOBER: Except one of the parties
16 has asked to prescribe a rate level that's above the
17 challenged rate and that was my premise to them, which
18 is can we do that?

19 MR. LOFTUS: Yes, and that's an intriguing
20 question that I had certainly not thought about either
21 and I'm as much taken aback by it as --

22 CHAIRMAN NOBER: Well again, I don't mean

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1 to surprise people.

2 MR. LOFTUS: No, no.

3 CHAIRMAN NOBER: This is strictly --

4 MR. LOFTUS: No, it's a --

5 CHAIRMAN NOBER: It's a simple premise,
6 but --

7 MR. LOFTUS: It's a perfectly logical
8 question. In a way, it's no longer in effect. The
9 challenged rates were found unlawful, set aside many
10 years ago and a rate prescription was established.
11 So, you know, when you exercise your jurisdiction
12 today to refine that rate prescription, I don't know,
13 I haven't studied it, I haven't carefully analyzed it.
14 It is an intriguing question.

15 CHAIRMAN NOBER: Well, I don't think it's
16 ever come up. I'm pretty sure of that because I don't
17 think these provisions were in place back, you know,
18 before the Staggers Act to begin with.

19 MR. LOFTUS: A couple other quick points.
20 In protesting that what BN is asking you to do here
21 does not violate Arizona Grocery. Mr. Sipe said what
22 you cannot do is go back and set a different rate for

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1 the past. And yet, that is exactly what they're
2 asking you to do. They're asking you to set for the
3 elapsed period a different rate than you set before.
4 That's what their lines show. We want this line,
5 which is a different rate, instead of the line that
6 was originally set. They are asking you to go back
7 and set a different rate. They are asking you for
8 reparations. That is what is going on.

9 As to the modified TDC6, on the slide he
10 went up and added columns as he went across, we do
11 object strenuously to that. In their evidence
12 submitted, on their reply BN said, "Here is our
13 revenue adjustment to deal with this conceptual flaw."
14 And it was a dollar amount. It was not broken down
15 among individual issues. The computer files that were
16 submitted by BN when they asked the Board to accept
17 this new evidence, many of those computer files didn't
18 exist. It was all newly created. Well, they say,
19 "Well, but it's from data that was in the record. Well
20 maybe so. It's new evidence. No one has explained
21 it. No expert witness has come in support of these
22 numbers, justified them, allowed us the opportunity to

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1 challenge how they did it, etcetera. All they said
2 was, "There's a conceptual flaw. The amounts that
3 were collected are this many dollars less than, you
4 know, What this would have been under these new
5 rates." They made no effort to distinguish among
6 those dollars how many might relate to any given issue
7 and we don't believe they've properly done it. So, we
8 do object to that and that whole line of argument.

9 As to the minimum annual volume issue,
10 I'll simply say we think you have sufficient record
11 before you. We raised this point in our opening
12 evidence. We argued that it was improper, but that we
13 hoped to be able to work something out with the BN.
14 We were not able to. We think it's before you
15 properly and should be decided.

16 VICE-CHAIRMAN MULVEY: I'd just like to
17 thank the witnesses for their time and efforts today.
18 If you please, we'll decide about -- on the redacted
19 materials and this contract memorandum of
20 understanding, whether or not that's -- if it's not
21 relevant, I don't need to see it.

22 MR. SIPE: Well, we'll let you know.

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1 VICE-CHAIRMAN MULVEY: All right.

2 MR. SIPE: And we'll confer with Mr.
3 Loftus.

4 CHAIRMAN NOBER: Can I ask a -- well, I
5 don't have to ask myself permission, but I'd like to
6 ask one more question of the carrier, if I could, that
7 just relates to the contract again, because you know,
8 I do pay attention to what our statutory powers are.
9 And we don't have statutory authority to look at
10 contracts. You have asserted that and I agree with
11 that.

12 The question is, is it error for us to
13 take no account of the contract? I mean, if we were
14 to do what you ask, you know, we would be issuing a
15 prescription. Then, you know, is it right for us to
16 say, "Well, we can't take any notice of a contractual
17 provision that calls some of those premises into
18 question?"

19 MR. SIPE: Well, I've got to say, Chairman
20 Nober, that I --

21 CHAIRMAN NOBER: No, I'm kind of -- that
22 part of it.

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1 MR. SIPE: Okay. I'm really puzzled by
2 the underlying premise of the question because the
3 contract speaks about what happened during a defined
4 period of time which has elapsed, and you can take my
5 word for it, Mr. Weicher's word for it and Mr. Loftus
6 is not going to controvert that we adhered to the
7 terms of the contract while it was in effect. And so
8 our position is, it doesn't have anything to do with
9 this case.

10 I will go further and say in response, I
11 hope it's in response to your question, that in a
12 variety of contexts, the Board takes into account the
13 existence of contracts and indeed takes into account
14 their provisions and gives those provisions weight in
15 its decisions. I mean, in projecting stand alone
16 revenues, for example. In SAC cases you often look at
17 the contractual revenue escalation provisions. You
18 look at the volume guarantee provisions. When you do
19 that, I don't think you're deciding something about
20 the contract. I think it would be clearly wrong for
21 you to say, "BNSF has", you know somehow interpreted
22 the contract and construe whether the parties have

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1 performed. That would be beyond what you can do, but
2 can you notice what's in the contract? I think so.

3 CHAIRMAN NOBER: Well, except, if I
4 understand it properly, they're saying that whatever
5 you waive your right to complain about what happened
6 over the four-year period of the contract --

7 MR. WEICHER: And I --

8 CHAIRMAN NOBER: -- because you signed the
9 contract.

10 MR. WEICHER: I think --

11 CHAIRMAN NOBER: If I can paraphrase,
12 that's what I think they're saying.

13 MR. WEICHER: I think it would be
14 erroneous for you to interpret contract language or a
15 settlement agreement language as to what that meant to
16 the Board's prescriptive power. You look at facts
17 just like you look at what tons moved, what contract
18 rates were, what was actually paid. Things like that
19 are certainly, as Mr. Sipe said, you do that all the
20 time in your DCF projections, you make things like
21 that, but to be the tribunal that in turn determines
22 the rights to seek reopening at a date at the

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1 expiration of an agreement and what that means to your
2 power, I think is beyond the scope and would be
3 erroneous.

4 CHAIRMAN NOBER: That's what I think you
5 were asking us to do, right? Say that they don't have
6 the right to ask for anything over this four-year
7 period because they contracted to that? I mean, I
8 don't want to belabor the point, but that's what I
9 think you're asking us to do, right?

10 MR. LOFTUS: We're asking you to recognize
11 that in an environment where the 9th Circuit says the
12 way to avoid problems with this, you can't go back and
13 award reparations. What happens if we get it wrong
14 the first time? They say the answer is you do it on
15 a timely basis. Come back. They waive their right to
16 do that. My contract --

17 CHAIRMAN NOBER: -- back for four years.

18 MR. LOFTUS: Yes. They waived their right
19 to do that.

20 MR. WEICHER: If I could, Chairman Nober,
21 if I could present a brief hypothetical, if you go
22 down that path of what's being settled and waived,

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1 then that forces you to look at the contract, excised
2 or un-excised provisions or whatever, and then you
3 have to look for are there words that address the
4 nature of what the applicant/supplicant railroad can
5 ask for in its reopening? Well, you know, there's
6 nothing in there on that, I would say. Others might
7 disagree. And then you're getting into interpreting
8 the jurisdiction of the Board as though it were
9 governed by a private agreement.

10 CHAIRMAN NOBER: Well, that I think is
11 probably the premise of my question to Mr. Sipe, which
12 is, you know, yes, we can certainly take notice of
13 contracts, we do that all the time, as facts, but that
14 was slightly different than I think the way this one
15 was being presented, if I understood it.

16 MR. WEICHER: That is how we heard it,
17 but --

18 CHAIRMAN NOBER: I just wanted to make
19 sure I did understand it properly.

20 MR. SIPE: I think our bottom line
21 position is, it would be improper for you as a matter
22 of contract interpretation to rule that something in

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1 this contract constitutes a waiver, but I think it's
2 an irrelevant question because we're not asking for
3 something in the past.

4 CHAIRMAN NOBER: Again, Frank, do you have
5 any follow-up?

6 VICE-CHAIRMAN MULVEY: No. Thank you very
7 much for coming today

8 CHAIRMAN NOBER: Okay. Now we'll get into
9 the pleasantries and thank everyone for coming and
10 appreciate all of your time and your questions and
11 bearing with looking at some of our questions as well.

12 So if there's no further questions or
13 comments, the meeting will stand adjourned.

14 (Whereupon, the meeting was concluded at
15 12:35 p.m.)

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