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

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

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

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

CHAIRMAN NOBER: Well again, I don't mean
to surprise people.

MR. LOFTUS: No, no.

CHAIRMAN NOBER: This is strictly --

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

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

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 In a way, it's no longer in effect.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

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

MR. LOFTUS: A couple other quick points. In protesting that what BN is asking you to do here does not violate Arizona Grocery. Mr. Sipe said what you cannot do is go back and set a different rate for
the past. And yet, that is exactly what they're asking you to do. They're asking you to set for the elapsed period a different rate than you set before. That's what their lines show. We want this line, which is a different rate, instead of the line that was originally set. They are asking you to go back and set a different rate. They are asking you for reparations. That is what is going on.

As to the modified TDC6, on the slide he went up and added columns as he went across, we do object strenuously to that. In their evidence submitted, on their reply BN said, "Here is our revenue adjustment to deal with this conceptual flaw." And it was a dollar amount. It was not broken down among individual issues. The computer files that were submitted by BN when they asked the Board to accept this new evidence, many of those computer files didn't exist. It was all newly created. Well, they say, "Well, but it's from data that was in the record. Well maybe so. It's new evidence. No one has explained it. No expert witness has come in support of these numbers, justified them, allowed us the opportunity to
challenge how they did it, etcetera. All they said was, "There's a conceptual flaw. The amounts that were collected are this many dollars less than, you know, What this would have been under these new rates." They made no effort to distinguish among those dollars how many might relate to any given issue and we don't believe they've properly done it. So, we do object to that and that whole line of argument.

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

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

MR. SIPE: Well, we'll let you know.
VICE-CHAIRMAN MULVEY: All right.

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

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

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

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

CHAIRMAN NOBER: No, I'm kind of -- that part of it.
MR. SIPE: Okay. I'm really puzzled by the underlying premise of the question because the contract speaks about what happened during a defined period of time which has elapsed, and you can take my word for it, Mr. Weicher's word for it and Mr. Loftus is not going to controvert that we adhered to the terms of the contract while it was in effect. And so our position is, it doesn't have anything to do with this case.

I will go further and say in response, I hope it's in response to your question, that in a variety of contexts, the Board takes into account the existence of contracts and indeed takes into account their provisions and gives those provisions weight in its decisions. I mean, in projecting stand alone revenues, for example. In SAC cases you often look at the contractual revenue escalation provisions. You look at the volume guarantee provisions. When you do that, I don't think you're deciding something about the contract. I think it would be clearly wrong for you to say, "BNSF has", you know somehow interpreted the contract and construe whether the parties have
performed. That would be beyond what you can do, but can you notice what's in the contract? I think so.

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

MR. WEICHER: And I --

CHAIRMAN NOBER: -- because you signed the contract.

MR. WEICHER: I think --

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

MR. WEICHER: I think it would be erroneous for you to interpret contract language or a settlement agreement language as to what that meant to the Board's prescriptive power. You look at facts just like you look at what tons moved, what contract rates were, what was actually paid. Things like that are certainly, as Mr. Sipe said, you do that all the time in your DCF projections, you make things like that, but to be the tribunal that in turn determines the rights to seek reopening at a date at the
expiration of an agreement and what that means to your
power, I think is beyond the scope and would be
erroneous.

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

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

CHAIRMAN NOBER: -- back for four years.

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

MR. WEICHER: If I could, Chairman Nober,
if I could present a brief hypothetical, if you go
down that path of what's being settled and waived,
then that forces you to look at the contract, excised or un-excised provisions or whatever, and then you have to look for are there words that address the nature of what the applicant/supplicant railroad can ask for in its reopening? Well, you know, there's nothing in there on that, I would say. Others might disagree. And then you're getting into interpreting the jurisdiction of the Board as though it were governed by a private agreement.

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

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

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

MR. SIPE: I think our bottom line position is, it would be improper for you as a matter of contract interpretation to rule that something in
this contract constitutes a waiver, but I think it's an irrelevant question because we're not asking for something in the past.

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

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

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

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

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