CHAIRMAN NOBER: I have a question just to start with a premise here and I think we're spending a lot of time in the trees, but let's step back to the forest and even the county if we have to, which is your premise in this is that the Board made a mistake and set the rate too low back in 1997. And whatever else we want to say, whether it's reparations or
taking it and kind of readjusting the DCF, you now
what to raise the rate above the challenged rate. And
my question is a simple one. Where in the Interstate
Commerce Act, forget the Coal Rate Guidelines, forget
prior Board precedent, where in the Interstate
Commerce Act do we have the statutory power to set,
prescribe a rate above the challenged rate? I mean,
as I read the statute, it says, the Complainant -- you
set a rate. You have a common carrier rate which you
set. The Complainants challenge it and say it is
unreasonable. We then reevaluate it based on a whole
SAC methodology. If it's determined to be
unreasonable, we then prescribe the maximum, the
highest reasonable rate you can charge. On the other
hand, if we find that the rate is reasonable, that's
the end of the inquiry. Where do we have the
statutory power to then say we can prescribe a rate
higher than the challenged rate, which is what you're
asking us to do for the next five years?

MR. SIPE: By the "challenged rate,"
you're talking --

CHAIRMAN NOBER: The challenged rate that
the Complainants challenged in the first place. You're asking us to prescribe a rate above that. Where do we have the power under the Interstate Commerce Act?

MR. SIPE: If I could --

CHAIRMAN NOBER: Whether or not it's equitable is another question. Where does the statute give us the ability to impose a rate above the challenged rate?

MR. SIPE: He sounds like he knows the answer.

MR. WEICHER: Well, I'm not sure I know the answer, but I'll give Mr. Sipe --

CHAIRMAN NOBER: But that's what you're asking us to do.

MR. WEICHER: I'll give Mr. Sipe more time to think with an observation or two.

A couple of things. the challenged rate, when this started out in 1994 at $6.91, but Mr. Loftus I'm sure can correct me, would be an entirely different thing today. The Board did this reopening in 1998, took away the prescriptive effect, declined
to grant BNSF's petition to vacate and give us full rate making authority. But clearly then, you would have a differed prescribed rate today under doing the DCF correctly, and what you're really restoring, you don't go back to 1994 and say that the challenged rate would be $6.91 in the year 2005. If it had been done correctly in 1994, either the rate would have been found reasonable and you'd be out of it or the prescription would have been significantly higher throughout its life.

CHAIRMAN NOBER: Again, whether or not the prescription would have been higher, there's the rate that you guys challenge, right, your common carrier rate and that's the base line? And in some cases we find that that's a reasonable rate; in some cases we find it's unreasonable. Mr. Moats is in the back. We found in one of his cases recently the rate was reasonable. Now you could have even charged a higher rate than that and it still would have been reasonable. But we didn't prescribe that. We just said the rate's reasonable, end of the discussion.

MR. SIPE: Right. Let me --
CHAIRMAN NOBER: So how do we do that, which is what you're asking to do.

MR. SIPE: Well, I haven't thought about it that way, but it's a really intriguing question. And if I had the killer answer, it would already have been out of my mouth.

CHAIRMAN NOBER: Again, you know, let me --

MR. SIPE: But, you know, as an old Capitol Hill hand --

CHAIRMAN NOBER: Let me --

MR. SIPE: -- the statute's always where I start. It's a good place to start and we're comfortable ending up there as well. Let me first of all make a couple of observations about the challenged rate and also the relief that BNSF sought in this case.

The challenged rate in 1994, and Mr. Loftus may have a more precise recollection than I, because I wasn't counsel in the first go around on this case. I think it was in the low six dollars, like maybe $6.21 or something. Is that --
UNIDENTIFIED SPEAKER: $6.21?

MR. SIPE: Does that ring a bell, Mike?

UNIDENTIFIED SPEAKER: (Off microphone.)

MR. SIPE: Okay. So, at the time it was challenged, 1994, $6.21, in -- in the DCF analysis that was performed in this case, that rate was adjusted going forward by the RCAF SA over the 20-year DCF period. So the $6.21 went down, down, down.

If you're saying that the challenged rate today is the rate calculated by application of the RCAF adjusted. Then there is a big discrepancy between what we're asking for in our current evidence and the challenged rate. And I don't know a specific provision of the statute that says that you can do that. I will tell you, however, when we came into this reopening proceeding we were not seeking a new rate prescription. We were seeking to vacate the existing rate to restore our rate making initiative. We had informed APS of the rate that we would charge because we didn't want the Board or APS to be thinking that we would obtain vacation and then skyrocket the rate up to, you know, $12 or $15 a ton. We published
a new common carrier rate at that time of $6.91. The Board said, "You've satisfied us that you're entitled to reopening and you've satisfied us that we can vacate the prescriptive effect of the rate prescription." But the Board told us that it was going to establish a new prescribed rate on reopening or perhaps vacate and there was never any suggestion that it wouldn't be able to do that because we were asking for a new rate higher than the rate that originally had been challenged. That's not where we were when we came into this case.

That's the best answer I can give. I can't point you to a statutory provision that says, "You can do this."

CHAIRMAN NOBER: I guess I have a question as to whether or not under the Staggers Act and the Interstate Commerce Act we could impose a rate above the challenged rate, as opposed to just say, you know, the challenged rate, we could do one of two things because the challenged rate is now reasonable or we could vacate the rate and just say, you know, go in the rate and set a new rate. Of the two, it sounds
like you probably prefer the latter.

MR. WEICHER: I don't mean to ask you a question, but I will express it as my own confusion.

CHAIRMAN NOBER: Well, please do.

MR. WEICHER: I'm not sure. Part of the answer to this may be what is, in this rather convoluted context, the "challenged rate." And I'm not sure I understand the context you're applying to challenged rate here, because we're not at ground zero, we're not in 1994 with the $6.31 challenged rate and then Complainant challenging it.

CHAIRMAN NOBER: Because your rate would be above -- well, good point.

MR. WEICHER: It would be $6.31 --

CHAIRMAN NOBER: So there isn't a challenged rate you can point to for 2004 --

MR. WEICHER: It would --

CHAIRMAN NOBER: -- through 2009?

MR. WEICHER: Not of the way I first thought of it because there'd be $6.31, that would have been -- if it had been found reasonable, I don't know what it would be. It would have been indexed up
or ARCAF'd up or something.

MR. SIPE: But, Chairman Nober, I mean this is, it's a fascinating question, but let's think about what it is that we're up to here in this reopening proceeding. And again, this emphasizes questions of first impression that arise when you reopen something in medias res, as it were, instead of starting from scratch.

Nobody here in this reopening proceeding has his or her eye on a particular challenged rate. When the Board reopened, it said, "We are going to reopen to determine what a maximum reasonable rate is in light of these changed circumstances we've found."

And one could argue --

CHAIRMAN NOBER: Okay. But that --

MR. SIPE: One could argue that this statutory provision right here simply is not applicable to what you're doing on reopening. You're not finding a challenged rate to be unreasonable. You're answering a different question what is the maximum reasonable rate under these set of circumstances?
VICE-CHAIRMAN MULVEY: But is it possible that the maximum reasonable rate that we can set will be limited by what the challenged rate is? And then the question is whether or not the challenged rate is the $6.21 in 1994 or whether it's $6.21 and somehow adjusted for inflation, Although given all the adjustment factors that are out there, I'm not sure how we would do that.

MR. SIPE: You know, I'm not sure that would be a sensible outcome. I think a better outcome in this case, if that's the dilemma you find yourselves in, a better outcome is to vacate the rate prescription.

CHAIRMAN NOBER: Go ahead.

VICE-CHAIRMAN MULVEY: Back to this redacted contract. The Complainants suggest that there was material redacted that they thought that you would like to see redacted or in any event, the redacted material did not relate to the issues that are highlighted in Section B of that. And my question is, "Would you object to the redacted material being included, or would you accept that the redacted
material was not relevant and therefore we don't need to see that to the extent we take into account what is in this contract?

MR. WEICHER: The answer is I don't know as I sit here because I don't know what that redacted material is. I'll take a look at it and provide a response.

VICE-CHAIRMAN MULVEY: On the question of whether or not this constitutes reparations as defined in Arizona Grocery, isn't the effect the same as reparations? I mean, basically aren't you simply saying that, "Look, we didn't charge enough for these early years. We have a shortfall of all of these millions of dollars. We're not going to ask for a check and interest on that, but instead we're going to load into the future rate to collect reparations?" I mean, in terms of the ultimate effect, how is it different from being paid reparations?

MR. SIPE: It's different in the sense that we don't know how much would be received going forward if the rates we request are going to be adopted and prescribed. We don't know whether APS is
going to continue to ship the volumes that are projected here until McKinley supposedly shuts down in 2009. We might under-recover if they shut down in 2006 and there were no further tonnage. We would substantially under-recover. We might over-recover. What this is is the Board's best shot going forward at what a reasonable rate would be given the constraint that you need to bring revenues and costs into balance over the full 20-year DCF period.

VICE-CHAIRMAN MULVEY: It was clear almost from the outset that the McKinley mine was not going to have sufficient reserves to meet the whole 20-year period and yet you waited until 2003 to finally file for reopening. Why didn't you file for it earlier? I know you called it for '98, but why not come back again in '99? The data were being developed then and to have gotten some sort of relief at that point rather than waiting until now.

MR. WEICHER: If I may, from the company's standpoint, from Burlington Northern Santa Fe's standpoint, we hit this pretty hard. Over and over again we were unable to persuade the Board of our
cause, of the reality of what we foresaw in the McKinley mine and were pretty resoundingly turned down in the 1998 decision. There's a cute little paragraph where a fine writer on the Board, or someone on the Board, referred to us as, "We don't want to be like Penelope," and I wanted to go back and look up who Penelope was because I can't remember the legend, but coming back every year playing the same thing, because we were saying, "Look, it's already clearer, the tonnage has changed." We then were facing, and if I'm going into something confidential here, Mr. Loftus, you can kick me or you can clear the room. I don't know why -- I mean, we made our peace for a period of time in terms of letting it go forward with the prescribed rates and dealing with the huge reparation liability and put it back into the -- I mean, you told us, not you personally, I mean the agency had told us, "We don't want to hear this now. Go away. Come back when you really know."

Well, we're back and at the end of the, I'll call it the stand-still period or whatever that was provided for in the settlement in the contract
that said very clearly 2003, we came back. That
doesn't mean we were happy with the situation, but it
did mean that we didn't see any recourse. This was a
matter of factual determination by the Board that
wasn't the kind of thing anybody else is going to
overrule the Board on. And then it became abundantly
clear as we came to the end of that period that the
premise of the original projection was wrong. It had
been faulty. So we came back.

VICE-CHAIRMAN MULVEY: So you're saying
the Board originally wanted to assume that the
McKinley mines would be sufficient and then the Board
compounded its error by saying that you can't come
back until you have absolute evidence the McKinley
mine is going to close and 2003 would be the earliest
you could come back, and so therefore we foreclosed
your ability to come forward?

MR. WEICHER: No, I would not suggest
that. The Board didn't say we can't come back until
2003. The Board, I think, we felt somewhat chastised
in the '98 decision, or at least -- not chastised,
warned told that there was a pretty high standard here
to be dealt with.

MR. SIPE: It was a judgment call. I think that BNSF made and the judgment was that it was probably not prudent and not likely to be fruitful to come back to the Board until we really could show a lay down hand on this McKinley issue.

VICE-CHAIRMAN MULVEY: But there would have been a record of your coming back over and over and over again on it rather than waiting five years and signing this agreement in the interim.

Let me ask another question about this question of non-McKinley coal. You interpret that we can't begin to include non-McKinley coal or shouldn't include non-McKinley coal in the SAC analysis until after 2007 because we use the term "when McKinley shuts down" But isn't it true, as Mr. Loftus points out, that that's only part of that sentence and that you really shouldn't be interpreting the Board as that we couldn't include any of the coal until 2007, but rather there was a process of shutting down and as that process was ongoing when you could be including non-McKinley coal?
MR. WEICHER: Well, I have two responses to that, Vice-chairman Mulvey. The first is, I think the fairer reading of the language "when McKinley shuts down" is when McKinley shuts down, not when somebody thinks the process has begun. But it's the Board's language and if they read it otherwise, so be it.

The other response is we put in two alternative scenarios on this non-McKinley coal. One was we excluded all McKinley tons prior to 2007. The other was we excluded all McKinley tons prior to 2004 because we thought if somebody were going to take a reading of the Board's language that took into account the parties' understanding of what was likely to take place, a good time to measure that from would have been 2003 when everybody was talking about McKinley shutting down. So we have two alternative versions of evidence on that issue.

VICE-CHAIRMAN MULVEY: I was going to ask you a question on the interest rate period, the inflation rate period as well, but I think you've covered that pretty well. Your objection to the 13-
year period really centers around the spike in the 13th year that's included in this. Would you accept that in general that the longer time period for forecasting future inflation is better than the shorter time period, if you take out the spike, or do you think the more proximate time period to the period to be forecast is the better period?

MR. SIPE: I think the Board has tended to believe the latter, the more proximate period. And if you think back over the last 30 years and think about some of the periods of very high inflation we've gone through and then periods of quite muted inflation, the further you go back it seems to me the more remote you get from where you are. But the reality is these are all projections and none of us knows what inflation is going to be like, you know, four years from now.

VICE-CHAIRMAN MULVEY: In general, the longer period you're forecasting, the longer the period you would want to go back to in developing your projections. So if you were forecasting for 100 years, you might want 50 years of data. If you're forecasting for 10 years, then that longer term period
might be actually less accurate than a shorter time period.

MR. SIPE: I think you're the expert on these subjects and I don't disagree with you.

VICE-CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOBER: Let me ask you the same question I asked Mr. Loftus, which is what ought we to do in this situation? What do you recommend that we do?

MR. SIPE: Well, as I mentioned in response to your question about the statute, when we came in and filed our petition in January 2003, we sought to vacate the rate prescription.

CHAIRMAN NOBER: And would that still be your preference?

MR. SIPE: Well, it would be our preference, but I think more importantly, in light of the various considerations that have come out at this hearing today, I think it would be the more appropriate course for the Board to pursue.

CHAIRMAN NOBER: I asked Mr. Loftus. You know, I don't want to put words in your mouth, but the
Complainants in this case would object to vacating the rate and would think it okay if the Complainant wants to vacate a rate prescription, but not okay if the Defendant asked to vacate it based on changed circumstance. You agree with that or disagree with that? I mean, what's your view on the subject?

MR. SIPE: I strongly disagree that there should be a different standard applied to the carrier and the Complainant. That's an issue that we have actually pending in a case that's currently being briefed at the D.C. Circuit.

MR. WEICHER: We have met the standard for changed circumstances as the Board found in its reopenings.

CHAIRMAN NOBER: I mean, I think, you know, and again I don't like to, you know -- I don't mean to do that to you, but you know, do we really have the legal authority to redress the situation here, either prospectively or retrospectively? I mean, I think everyone concedes retrospectively there are -- you know, we're just prohibited by the Supreme Court from ordering, you know, remediation in the
past. And again, I have raised the question as to whether or not to put aside any calculation whether or not we really can do it in the future or whether or not all we can do is look at it to challenge whether the rate is reasonable or not. And, you know, I can't say finally how we'd come out on that, but I do raise that question because I'm not sure that we can. And then if those two are unavailable, what are we left with?

MR. SIPE: Well, I don't think they are unavailable. I think you clearly have authority to vacate the rate prescription. You already found based on the initial round of evidence submitted back in 2003 that circumstances had changed materially, that it justified at least vacating the prescriptive effect of the rate prescription. If you find, based on this record, that for example you are unwilling to take account of the cost recovery shortfall in the initial portion of the DCF period for the reasons Mr. Loftus has articulated, because that would somehow constitute reparations, let's say you found that, then you'd have a result where you didn't cover the revenues, you
didn't recover the costs of the stand alone railroad on reopening over the 20-year period and the prescription should be vacated. So there are certainly ways of getting there.

MR. WEICHER: And if I may, I think that is a core policy issue here that goes beyond, from your standpoint as a railroad with unfortunately coal litigation, if the Board is going to do these 20-year prescriptions with a 20-year DCF model, then they have to get it right and they have to look at the possibility of changed circumstances and a reopening. If they do a reopening, I think you have the authority to do a reopening and do it right, but right stays within that overall period. Otherwise, this ends up into a "heads-I-win-tails-you-lose" where you get down the road, it was done wrong, you started over again, and you do it on a whole different set of assumptions and that original prescription for its time period is made even worse. You could have vacated it when we asked you originally and started over again. Where we are now, I'm not saying you can't vacate it now, if you stay with this framework, then I do think you need
to do it correctly over the life of the original prescriptive period that you set in motion.

    CHAIRMAN NOBER: I mean, again, there's one question as to their way, an equitable way to deal with it and then, you know, what are our legal constraints under either the Supreme Court precedent or the Interstate Commerce Act and that's I think a point that --

    MR. WEICHER: And if I may, I think there is a deep issue there. If you can't fix I don't mean you personally, if the Board cannot administer its coal rate guidelines in a fashion that preserves the integrity of that period, then I don't think the coal rate guidelines work. I don't think SAC works. I think the structure has got a fundamental corrupt flaw and these cases you've been deciding and setting rates with the prescription and you're doing it on a 20-year basis, what can that mean? It's all an illusion of regulation potentially.

    VICE-CHAIRMAN MULVEY: I had one question, sort of a practical question, if you like. Under the current rates, do you know what the revenue variable
cost ratio is right now? I know it factored in and we considered it in our decision here, but the current rates that are prescribed right now --

MR. SIPE: Well, the current rate is $4.21 a ton, which was the prescribed rate for 2003 and the Board said we had to maintain that rate. I don't know the answer to that question. We can get the answer for you.

MR. WEICHER: You know, but I'd rather not speculate.