

16 CHAIRMAN NOBER: I have a question just to
17 start with a premise here and I think we're spending
18 a lot of time in the trees, but let's step back to the
19 forest and even the county if we have to, which is
20 your premise in this is that the Board made a mistake
21 and set the rate too low back in 1997. And whatever
22 else we want to say, whether it's reparations or

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1 taking it and kind of readjusting the DCF, you now
2 what to raise the rate above the challenged rate. And
3 my question is a simple one. Where in the Interstate
4 Commerce Act, forget the Coal Rate Guidelines, forget
5 prior Board precedent, where in the Interstate
6 Commerce Act do we have the statutory power to set,
7 prescribe a rate above the challenged rate? I mean,
8 as I read the statute, it says, the Complainant -- you
9 set a rate. You have a common carrier rate which you
10 set. The Complainants challenge it and say it is
11 unreasonable. We then reevaluate it based on a whole
12 SAC methodology. If it's determined to be
13 unreasonable, we then prescribe the maximum, the
14 highest reasonable rate you can charge. On the other
15 hand, if we find that the rate is reasonable, that's
16 the end of the inquiry. Where do we have the
17 statutory power to then say we can prescribe a rate
18 higher than the challenged rate, which is what you're
19 asking us to do for the next five years?

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

22 CHAIRMAN NOBER: The challenged rate that

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1 the Complainants challenged in the first place.
2 You're asking us to prescribe a rate above that.
3 Where do we have the power under the Interstate
4 Commerce Act?

5 MR. SIPE: If I could --

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

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

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

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

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

18 A couple of things. the challenged rate,
19 when this started out in 1994 at \$6.91, but Mr. Loftus
20 I'm sure can correct me, would be an entirely
21 different thing today. The Board did this reopening
22 in 1998, took away the prescriptive effect, declined

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1 to grant BNSF's petition to vacate and give us full
2 rate making authority. But clearly then, you would
3 have a differed prescribed rate today under doing the
4 DCF correctly, and what you're really restoring, you
5 don't go back to 1994 and say that the challenged rate
6 would be \$6.91 in the year 2005. If it had been done
7 correctly in 1994, either the rate would have been
8 found reasonable and you'd be out of it or the
9 prescription would have been significantly higher
10 throughout its life.

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

22 MR. SIPE: Right. Let me --

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1 CHAIRMAN NOBER: So how do we do that,
2 which is what you're asking to do.

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

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

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

11 CHAIRMAN NOBER: Let me --

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

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

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1 UNIDENTIFIED SPEAKER: \$6.21?

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

3 UNIDENTIFIED SPEAKER: (Off microphone.)

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

9 If you're saying that the challenged rate
10 today is the rate calculated by application of the
11 RCAF adjusted. Then there is a big discrepancy
12 between what we're asking for in our current evidence
13 and the challenged rate. And I don't know a specific
14 provision of the statute that says that you can do
15 that. I will tell you, however, when we came into
16 this reopening proceeding we were not seeking a new
17 rate prescription. We were seeking to vacate the
18 existing rate to restore our rate making initiative.
19 We had informed APS of the rate that we would charge
20 because we didn't want the Board or APS to be thinking
21 that we would obtain vacation and then skyrocket the
22 rate up to, you know, \$12 or \$15 a ton. We published

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1 a new common carrier rate at that time of \$6.91. The
2 Board said, "You've satisfied us that you're entitled
3 to reopening and you've satisfied us that we can
4 vacate the prescriptive effect of the rate
5 prescription." But the Board told us that it was
6 going to establish a new prescribed rate on reopening
7 or perhaps vacate and there was never any suggestion
8 that it wouldn't be able to do that because we were
9 asking for a new rate higher than the rate that
10 originally had been challenged. That's not where we
11 were when we came into this case.

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

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

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1 like you probably prefer the latter.

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

4 CHAIRMAN NOBER: Well, please do.

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

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

14 MR. WEICHER: It would be \$6.31 --

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

17 MR. WEICHER: It would --

18 CHAIRMAN NOBER: -- through 2009?

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

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1 or ARCAF'd up or something.

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

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

15 CHAIRMAN NOBER: Okay. But that --

16 MR. SIPE: One could argue that this
17 statutory provision right here simply is not
18 applicable to what you're doing on reopening. You're
19 not finding a challenged rate to be unreasonable.
20 You're answering a different question what is the
21 maximum reasonable rate under these set of
22 circumstances?

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1 VICE-CHAIRMAN MULVEY: But is it possible
2 that the maximum reasonable rate that we can set will
3 be limited by what the challenged rate is? And then
4 the question is whether or not the challenged rate is
5 the \$6.21 in 1994 or whether it's \$6.21 and somehow
6 adjusted for inflation, Although given all the
7 adjustment factors that are out there, I'm not sure
8 how we would do that.

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

14 CHAIRMAN NOBER: Go ahead.

15 VICE-CHAIRMAN MULVEY: Back to this
16 redacted contract. The Complainants suggest that there
17 was material redacted that they thought that you would
18 like to see redacted or in any event, the redacted
19 material did not relate to the issues that are
20 highlighted in Section B of that. And my question is,
21 "Would you object to the redacted material being
22 included, or would you accept that the redacted

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1 material was not relevant and therefore we don't need
2 to see that to the extent we take into account what is
3 in this contract?

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

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

19 MR. SIPE: It's different in the sense
20 that we don't know how much would be received going
21 forward if the rates we request are going to be
22 adopted and prescribed. We don't know whether APS is

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1 going to continue to ship the volumes that are
2 projected here until McKinley supposedly shuts down in
3 2009. We might under-recover if they shut down in
4 2006 and there were no further tonnage. We would
5 substantially under-recover. We might over-recover.
6 What this is is the Board's best shot going forward at
7 what a reasonable rate would be given the constraint
8 that you need to bring revenues and costs into balance
9 over the full 20-year DCF period.

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

19 MR. WEICHER: If I may, from the company's
20 standpoint, from Burlington Northern Santa Fe's
21 standpoint, we hit this pretty hard. Over and over
22 again we were unable to persuade the Board of our

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1 cause, of the reality of what we foresaw in the
2 McKinley mine and were pretty resoundingly turned down
3 in the 1998 decision. There's a cute little paragraph
4 where a fine writer on the Board, or someone on the
5 Board, referred to us as, "We don't want to be like
6 Penelope," and I wanted to go back and look up who
7 Penelope was because I can't remember the legend, but
8 coming back every year playing the same thing, because
9 we were saying, "Look, it's already clearer, the
10 tonnage has changed." We then were facing, and if I'm
11 going into something confidential here, Mr. Loftus,
12 you can kick me or you can clear the room. I don't
13 know why -- I mean, we made our peace for a period of
14 time in terms of letting it go forward with the
15 prescribed rates and dealing with the huge reparation
16 liability and put it back into the -- I mean, you told
17 us, not you personally, I mean the agency had told us,
18 "We don't want to hear this now. Go away. Come back
19 when you really know."

20 Well, we're back and at the end of the,
21 I'll call it the stand-still period or whatever that
22 was provided for in the settlement in the contract

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1 that said very clearly 2003, we came back. That
2 doesn't mean we were happy with the situation, but it
3 did mean that we didn't see any recourse. This was a
4 matter of factual determination by the Board that
5 wasn't the kind of thing anybody else is going to
6 overrule the Board on. And then it became abundantly
7 clear as we came to the end of that period that the
8 premise of the original projection was wrong. It had
9 been faulty. So we came back.

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

18 MR. WEICHER: No, I would not suggest
19 that. The Board didn't say we can't come back until
20 2003. The Board, I think, we felt somewhat chastised
21 in the '98 decision, or at least -- not chastised,
22 warned told that there was a pretty high standard here

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1 to be dealt with.

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

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

11 Let me ask another question about this
12 question of non-McKinley coal. You interpret that we
13 can't begin to include non-McKinley coal or shouldn't
14 include non-McKinley coal in the SAC analysis until
15 after 2007 because we use the term "when McKinley
16 shuts down" But isn't it true, as Mr. Loftus points
17 out, that that's only part of that sentence and that
18 you really shouldn't be interpreting the Board as
19 that we couldn't include any of the coal until 2007,
20 but rather there was a process of shutting down and as
21 that process was ongoing when you could be including
22 non-McKinley coal?

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1 MR. WEICHER: Well, I have two responses
2 to that, Vice-chairman Mulvey. The first is, I think
3 the fairer reading of the language "when McKinley
4 shuts down" is when McKinley shuts down, not when
5 somebody thinks the process has begun. But it's the
6 Board's language and if they read it otherwise, so be
7 it.

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

19 VICE-CHAIRMAN MULVEY: I was going to ask
20 you a question on the interest rate period, the
21 inflation rate period as well, but I think you've
22 covered that pretty well. Your objection to the 13-

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1 year period really centers around the spike in the
2 13th year that's included in this. Would you accept
3 that in general that the longer time period for
4 forecasting future inflation is better than the
5 shorter time period, if you take out the spike, or do
6 you think the more proximate time period to the period
7 to be forecast is the better period?

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

17 VICE-CHAIRMAN MULVEY: In general, the
18 longer period you're forecasting, the longer the
19 period you would want to go back to in developing your
20 projections. So if you were forecasting for 100
21 years, you might want 50 years of data. If you're
22 forecasting for 10 years, then that longer term period

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1 might be actually less accurate than a shorter time
2 period.

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

5 VICE-CHAIRMAN MULVEY: Thank you.

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

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

14 CHAIRMAN NOBER: And would that still be
15 your preference?

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

21 CHAIRMAN NOBER: I asked Mr. Loftus. You
22 know, I don't want to put words in your mouth, but the

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1 Complainants in this case would object to vacating the
2 rate and would think it okay if the Complainant wants
3 to vacate a rate prescription, but not okay if the
4 Defendant asked to vacate it based on changed
5 circumstance. You agree with that or disagree with
6 that? I mean, what's your view on the subject?

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

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

15 CHAIRMAN NOBER: I mean, I think, you
16 know, and again I don't like to, you know -- I don't
17 mean to do that to you, but you know, do we really
18 have the legal authority to redress the situation
19 here, either prospectively or retrospectively? I
20 mean, I think everyone concedes retrospectively there
21 are -- you know, we're just prohibited by the Supreme
22 Court from ordering, you know, remediation in the

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1 past. And again, I have raised the question as to
2 whether or not to put aside any calculation whether or
3 not we really can do it in the future or whether or
4 not all we can do is look at it to challenge whether
5 the rate is reasonable or not. And, you know, I can't
6 say finally how we'd come out on that, but I do raise
7 that question because I'm not sure that we can. And
8 then if those two are unavailable, what are we left
9 with?

10 MR. SIPE: Well, I don't think they are
11 unavailable. I think you clearly have authority to
12 vacate the rate prescription. You already found based
13 on the initial round of evidence submitted back in
14 2003 that circumstances had changed materially, that
15 it justified at least vacating the prescriptive effect
16 of the rate prescription. If you find, based on this
17 record, that for example you are unwilling to take
18 account of the cost recovery shortfall in the initial
19 portion of the DCF period for the reasons Mr. Loftus
20 has articulated, because that would somehow constitute
21 reparations, let's say you found that, then you'd have
22 a result where you didn't cover the revenues, you

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1 didn't recover the costs of the stand alone railroad
2 on reopening over the 20-year period and the
3 prescription should be vacated. So there are
4 certainly ways of getting there.

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

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1 to do it correctly over the life of the original
2 prescriptive period that you set in motion.

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

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

20 VICE-CHAIRMAN MULVEY: I had one question,
21 sort of a practical question, if you like. Under the
22 current rates, do you know what the revenue variable

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1 cost ratio is right now? I know it factored in and we
2 considered it in our decision here, but the current
3 rates that are prescribed right now --

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

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

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