

20 Mr. DiMichael, I think you've reserved six
21 minutes.

22 MR. DiMICHAEL: Yes. Thank you, Chairman

1 Nober. Let me just address several things here,
2 perhaps some of them in reverse order that Mr. Sipe
3 talked about them.

4 Concerning productivity. Mr. Sipe said
5 that a reasonable man would ask that there would be a
6 correlation between specific areas of productivity and
7 specific operating costs. And I would submit to you
8 that if that is the test, it will be impossible for
9 anyone to tell whether five, one, two, three, five,
10 ten years from now there is going to be specific areas
11 of productivity that you can link to specific
12 operating costs and then tell how much that is going
13 to be.

14 I would tell you that I don't believe that
15 that is the test. As Commissioner Mulvey said, to
16 some extent the RCAF-A and the RCAF-U have been sort
17 of two extremes and the Board is attempting to find
18 out instead of going to one extreme or the other, just
19 where the balance ought to be.

20 Now, Mr. Weicher said that all we did is
21 give you a list of factors, all conjuncture. I
22 totally disagree with that. Obviously, the list we

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1 have here is simply a list. But that is backed up in
2 the record with literature from the industry
3 indicating that these are likely areas of productivity
4 and indicating likely when they are going to be.

5 Now, I don't think that there is really
6 anything that -- that the Board is going to demand a
7 specific linking in time and place and amount, it is
8 not going to happen. The Board does not and cannot do
9 that in its own productivity adjustment. But it seems
10 to me what we have given the Board here is evidence it
11 has not had in previous cases to make a reasoned
12 judgment, a judgment based on substantial evidence in
13 the record when the Board said there is this one and
14 there is this other, and we don't know where. We have
15 told you at least some factors where you can find
16 where this productivity is going to be and when it's
17 going to be. And we think that you should either now
18 say there is enough in the record to say the RCAF-A is
19 proper or at least to say that the RCAF-U is okay for
20 the first few years, but by that time there is enough
21 time gone past and enough productivity gains that we
22 can assume that it is likely that the arrow will now

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1 point more toward the RCAF-A.

2 Commissioner Mulvey, you mentioned very
3 quickly about Otter Tail's regressions. I will tell
4 you that -- I'll refer to the OTP rebuttal evidence
5 Volume 3A14 for a very detailed discussion of the
6 central limit theorem that will explain how when you
7 apply the statistics over and over again to various
8 movements, the confidence factor for the total becomes
9 actually a very small one. We totally disagree with
10 Mr. Sipe on that question, and we think the central
11 limit theorem will answer all of those questions.

12 COMMISSIONER MULVEY: Was this a mixing of
13 a cross section and time series data? Was it
14 different observations over time?

15 MR. DiMICHAEL: I would not even begin to
16 try to answer that question.

17 COMMISSIONER MULVEY: Because there's a
18 few tests for that as to whether or not it's a valid
19 thing to do, and I was wondering because --

20 MR. DiMICHAEL: I was hoping you would
21 just simply write down the reference and --

22 MR. SIPE: The central limit theorem.

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1 MR. DiMICHAEL: Concerning the modeling,
2 there was a number of questions here asked about the
3 modeling. And, frankly, the matter -- this is a very
4 similar situation to the question that the Board
5 already decided in the PPL case. In that case the
6 shipper the Board said had an incentive, had a very
7 great incentive to put its best case in, and it
8 didn't. And it now can't say well, gee, I thought
9 maybe I didn't have to do it because of some other
10 circumstances.

11 The Board here is faced with the exact
12 same question as far BN was concerned. BN may have
13 had reasons, perhaps, and I don't agree with that for
14 sure, of why they didn't model the whole thing. And,
15 frankly, they had an incentive to do the very best
16 case they can. And the very best case they can should
17 have been the entire model start to finish. So they
18 cannot opine now that there was something that they
19 did that they shouldn't have did. Or something that
20 they didn't do that they should have done.

21 Now concerning the dwell times. BN's
22 evidence on the dwell times is based basically on its

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1 own operations in its own yards, which unlike the
2 Otter Tail railroad yard are located several hundred
3 miles from the Powder River Basin.

4 Otter Tail's evidence on dwell times and
5 yard capacity has been based on a feasible plan which
6 is actually the plan that WRPI used and that now UP
7 uses where the UP has a yard basically in the Powder
8 River Basin. UP operates its yard very differently
9 from the way the BN operates its yard. So what we are
10 telling you is that we think you can certainly credit
11 the Otter Tail times.

12 Just one more quick thing. Mr. Sipe
13 talked about the 25 mile revenue division, and I would
14 refer the Board to our supplemental rebuttal, Exhibit
15 3A13 where we make a very detailed response to that.
16 That was some of the stuff, that was some of the
17 material that I was explaining to you today.

18 And I thank you very much.

19 COMMISSIONER MULVEY: Thank you.

20 CHAIRMAN NOBER: With that, I want to
21 thank the parties on both sides for their excellent
22 preparation and tremendous argument. And I think that

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1 a lot of the real core issues in the case were
2 addressed today. And I'm sorry it was a long
3 discussion, but that meant that we were having a full
4 one.

5 And on behalf of the Board, I want to
6 thank you all for your time and your energy and your
7 attention.

8 And the Board stands adjourned.

9 Thank you very much.

10 (Whereupon, the above-entitled matter was
11 concluded at 3:32 p.m.)

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