

212053

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

ENTERED
Office of Proceedings

SEP 22 2004

Part of
Public Record

ENTERED
Office of Proceedings

SEP 21 2004

Part of
Public Record

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:
cml@sloverandloftus.com

September 21, 2004

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board - Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423



**Re: Docket No. 41185, Arizona Public Service Company & PacifiCorp v.
The Burlington Northern and Santa Fe Railway Company**

Dear Mr. Secretary:

Pursuant to the Board's decision of September 9, 2004, Complainants Arizona Public Service Company and PacifiCorp ("APS/PacifiCorp") hereby advise the Board that C. Michael Loftus of Slover & Loftus will appear on their behalf at the oral argument scheduled in the above-captioned proceeding for September 29, 2004. APS/PacifiCorp also present the following summary of points that they intend to raise at the argument.

APS/PacifiCorp intend to present argument on a number of key issues. The central issue in this reopened proceeding is whether Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") may recover reparations for the difference between the prescribed rates charged on shipments of coal that moved prior to the Board's *May 2003 Decision* reopening of Docket No. 41185 to address changed

Honorable Vernon A. Williams
September 21, 2004
Page 2

circumstances. BNSF is attempting to recoup such retroactive rate relief based on an alleged "conceptual flaw" (as characterized by BNSF) in the Discounted Cash Flow ("DCF") model. APS/PacifiCorp will present argument demonstrating that the purported "correction" is directly and explicitly precluded by the Supreme Court's decision in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932) ("*Arizona Grocery*") and the law of the case in Docket No. 41185.

BNSF's correction is designed to recover the difference between the rates prescribed in the Board's 1997 and 1998 *Decisions* and paid on traffic moving prior to May, 2003 and the higher rates for such traffic calculated in an updated DCF analysis based on the limited factors the Board has allowed the parties to address on reopening. This recovery would be achieved through the imposition of higher rates on post-May 2003 shipments. As APS/PacifiCorp will further explain, not only does this adjustment run counter to the above precedents, it also violates contractual commitments made by BNSF. Accordingly, it should be rejected by the Board.

Second, APS/PacifiCorp will address BNSF's improper attempt to increase the minimum annual volume applicable to the prescribed rates. APS/PacifiCorp will show that this attempt is inconsistent with the Board's 1997 *Decision* in this Docket (which prescribed rates based on the assumption that there was a minimum annual volume of 1.5 million tons) and is otherwise unreasonable. 2 S.T.B. at 370.

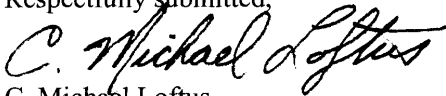
Third, APS/PacifiCorp intend to address the following issues concerning the proper scope of the reopening permitted by the Board:

1. The inclusion of non-McKinley mine traffic in the SARR traffic group for the historic time period;
2. The inclusion of forecast non-McKinley mine traffic in the SARR traffic group for the 2004 through the pre-2007 time period; and
3. BNSF's inappropriate attempt to exclude certain non-McKinley tons for future time periods based on projected burn levels at the Cholla Generating Station, and the inclusion of "supplemental coal" for use at the Coronado Generating Station for the post-2007 time period.

Honorable Vernon A. Williams
September 21, 2004
Page 3

If there is any issue the Board would like to receive argument on that is not covered in this letter, APS/PacifiCorp would welcome any guidance the Board may wish to provide.

Respectfully submitted,


C. Michael Loftus

CML/jwp

cc: Samuel M. Sipe, Jr., Esq. (by hand delivery)