

JUDGE RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

<p>UNITED TRANSPORTATION UNION, and RICHARD D. KITE,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>BNSF RAILWAY COMPANY,</p> <p style="text-align: center;">Defendant.</p>	<p>NO. 3:10-CV-05808-RBL</p> <p>DECLARATION OF JAY SCHOLLMMEYER IN OPPOSITION TO BNSF RAILWAY COMPANY'S MOTION TO DISMISS</p> <p>NOTE ON MOTION CALENDAR: January 7, 2011</p>
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1. My name is Jay Schollmeyer. I am of legal age and otherwise competent to make this declaration. Unless otherwise stated, the information contained herein is based on my personal knowledge.

2. I am the General Chairman for the General Committee of Adjustment GO-386, of the United Transportation Union. United Transportation Union, (hereafter, "UTU") is an unincorporated association and a national labor union. UTU is a representative within the meaning of the RLA, 45 U.S.C. § 151, Sixth, and is the duly designated and authorized collective bargaining representative for the craft or class of trainman-conductors employed by BNSF. As the General Chairman for the General Committee of Adjustment GO-386, which is located in Vancouver, Washington, I am responsible for handling the grievances of UTU members located in the Pacific Northwest working for BNSF Railway.

1           4.       UTU and BNSF are parties to a collective bargaining agreement (“CBA”)  
2 governing the rates of pay, rules, and working conditions of the Carrier’s trainmen-  
3 conductors.

4           5.       Richard D. Kite was, at the time of the discipline issues giving rise to this  
5 lawsuit, a conductor employed by BNSF Railway, and was covered by the UTU CBA that I  
6 and my committee handle.

7           6.       On January 17, 2005, BNSF performed random breathalyzer testing upon  
8 Richard Kite and his train crew for the presence of alcohol as they prepared to board a train  
9 at Pasco, Washington and bring it to Vancouver. Kite’s initial test registered a blood alcohol  
10 level result of 0.029 percent. A second test performed 20 minutes later registered a blood  
11 alcohol level result of 0.027 percent. The alcohol threshold is 0.020 for a positive test on  
12 BNSF. Contrary to the statements of Roger Boldra and his counsel, this does not equate to  
13 “intoxication.” BNSF has an employment policy that sets a blood alcohol level cutoff at  
14 0.020. Kite’s blood alcohol level, based upon BNSF’s testing, was in excess of that cutoff.  
15 On that basis, BNSF brought the discipline charges that led to this litigation. Those charges  
16 were that Kite was in violation of the BNSF policy based cutoff, not that he was  
17 “intoxicated.” To my knowledge, no one has ever claimed Kite was intoxicated until BNSF  
18 filed this Motion to Dismiss.

19           7.       BNSF found Kite guilty of the violation it had charged him with at an intra-  
20 company hearing. UTU, through my office, appealed Kite’s dismissal in the usual manner  
21 through a series of on-property handling conferences with sequentially higher carrier officers  
22 which ultimately culminated in a denial by the highest officer of the carrier designated to  
23 handle such disputes.

24           8.       Because the parties could not resolve the dispute on the property themselves,  
25 UTU and BNSF agreed that the matter be assigned to a special board of adjustment that they  
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1 had established on or about April 21, 2008 to resolve disputes arising between UTU and  
2 BNSF. That board was PLB 7204. Kite's case was assigned as Case No. 4.

3 9. PLB 7204 was composed of Roger Boldra, Director of Labor Relations for  
4 defendant BNSF, as the carrier member, I, as the labor member, and Referee Jacalyn  
5 Zimmerman of the National Mediation Board ("NMB") as the neutral and chairperson.

6 10. On July 31, 2008, PLB 7204 held a hearing at Vancouver, WA on Case No. 4  
7 involving Kite's claim. Following the hearing, PLB 7204 issued its award on November 7,  
8 2008. The award was in writing. I attach as Exhibit 1 to my declaration a true and correct  
9 copy of this award. In the award, the Board found that Kite had violated Rule 1.5 on January  
10 17, 2005, but that the penalty of permanent dismissal was not warranted. Specifically, the  
11 board found:

12 "...the Carrier apparently based its decision to dismiss [Kite]  
13 upon an asserted previous drug/alcohol violation and the well-  
14 established industry practice to dismiss second-time violators.  
15 The on-property handling in this case, however, does not  
16 include any evidence establishing that [Kite] in fact *had* a  
17 previous drug/alcohol violation. Therefore, based upon the  
18 record before us, this is [Kite's] first positive result." PLB  
19 7204, Case No. 4, Page 3. (Italics in original).

20 Accordingly, the Board awarded reinstatement, without back pay, effective once Kite  
21 had completed a brief rehabilitation program and was medically able to return to work.

22 11. During the Board's discussions at the hearing, Mr. Boldra indicated that he  
23 would not oppose a resolution that reinstated Kite, without back pay. I recall him  
24 specifically discussing the need for terms that conditioned his reinstatement on completion of  
25 alcohol rehabilitation.

26 12. I agreed with Neutral Zimmerman that Kite's dismissal was not warranted, and  
that he should be reinstated. At the hearing, I joined Zimmerman in her decision that  
permanent dismissal was not warranted and that Kite would be reinstated.

1           13.     It is common practice on Boards such as PLB 7204 for the neutral to write and  
2 distribute the award without signature and call for any comments or need for interpretation in  
3 executive session. It is typical that none of the Board members would sign the award at this  
4 stage until the time, (90 days), for requesting an interpretation in executive session has  
5 expired.

6           14.     On January 8, 2009, Boldra requested an executive session in order for the  
7 Board to interpret the Award. The executive session was held February 19 or 20, 2009, with  
8 the three members of PLB 7204 in attendance, by telephone. In the course of the meeting,  
9 Boldra stated that he opposed the decision, and wanted Neutral Zimmerman to reverse her  
10 vote for reinstatement and re-issue the award as sustaining the dismissal. Neutral  
11 Zimmerman refused to do that. She said that her notes from the hearing clearly mandated the  
12 decision she had authored, and that based upon the evidence, she could make no other award.  
13 I understood her to mean both that the evidence did not show that Kite had had a prior  
14 violation, and that Mr. Boldra had already indicated at least a grudging acceptance of the  
15 decision Zimmerman and I had reached. Boldra then told her that "If you are going to issue  
16 these kinds of opinions, you will never work for a Class One railroad again." In response,  
17 Zimmerman responded that all she could do at that point was recuse herself.

18           15.     On February 27, 2009, Boldra made an attempt to have Kite's case assigned to  
19 another existing Public Law Board, (PLB 7254), with a different neutral, (Robert Petersen)  
20 as Case No. 24. I attach a true and accurate copy of his correspondence at Exhibit 2. Mr.  
21 Boldra's letter does not cite the prior history of the Kite matter at PLB 7204. I, on behalf of  
22 UTU and Mr. Kite opposed those efforts by protesting to the National Mediation Board. I  
23 attach a true and correct copy of my correspondence of March 3, 2009 as Exhibit 3 to this  
24 declaration.

25           16.     On April 6, 2009, the National Mediation Board, by order of its Director of  
26 Arbitration Services, Roland Watkins, denied Boldra's request to add Case No. 24 to PLB

1 7254, stating that "...Arbitrator Jacalyn Zimmerman rendered a decision on case number 4  
2 (PLB No. 7204) on November 7, 2008. For this reason, this case cannot be added to PLB  
3 No. 7254. The request to add this case is denied." I attach a true and accurate copy of Mr.  
4 Watkins response as Exhibit 4 to this declaration. This exchange of letters and documents,  
5 (Exhibits 2, 3, and 4) is noteworthy for two reasons. First, contrary to the representations of  
6 both Mr. Boldra's declaration and the BNSF law department's memorandum, I, on behalf of  
7 UTU and Kite *did* object to this circumstance and *did* attempt to rectify it to the extent I  
8 could. Secondly, Mr. Watkins, in his role as the Director of Arbitration Services for the  
9 National Mediation Board certainly found Neutral Zimmerman's "draft" award to be a  
10 "decision" that the NMB found binding.

11 17. After her expressed intention to recuse herself from the PLB 7204 decision in  
12 the Kite matter, Neutral Zimmerman apparently made overtures to the NMB on behalf of Mr.  
13 Boldra in order to re-list the Kite case with another PLB. This was apparently done in  
14 response to Mr. Watkins April 6, 2009 refusal to do just that. I attach true and correct copies  
15 of Mr. Boldra's and Ms. Zimmerman's emails of April 6, 2009 as Exhibit 5 to my  
16 declaration.

17 18. Nevertheless, on April 30, 2009, Boldra listed the same case, (PLB 7204, Case  
18 No. 4), with PLB 7254 with a different Carrier and Organization File No. as Case No. 28.  
19 UTU objected again, but NMB did not intervene, and Neutral Petersen and Boldra agreed to  
20 add Kite's case to PLB 7254 as Case No. 28.

21 19. Contrary to the representation by the BNSF law department at Page 3, line 17,  
22 Neutral Zimmerman did not withdraw her award of November 7, 2008. As a result of her  
23 announced intent to recuse herself at the executive session in February, 2009, that decision  
24 was simply never implemented. On April 20, 2009, after she had apparently assisted Mr.  
25 Boldra's attempts with the NMB to re-list Kite's case, she issued an "award" simply stating  
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1 that the Kite case was “. . . dismissed without prejudice.” I attach a true copy of that  
2 “award,” as Exhibit 6 to my declaration.

3 20. Having been added to the Public Law Board, I had no other option but to  
4 participate in the hearing on the board award. I attach a true and correct copy of my  
5 Submission to PLB 7254 as Exhibit 7 to my declaration. The very first page of my  
6 submission makes objection to the assignment to PLB 7254 and seeks that Kite’s case be  
7 dismissed from 7254. I argued for that position, but Boldra and Petersen refused to do this.

8 21. Neutral Petersen and Boldra then proceeded to review the November 7, 2008  
9 award of PLB 7204 in its Case No. 4 by Arbitrator Zimmerman. They found that the findings  
10 of Arbitrator Zimmerman “had not in fact been adopted,” that they were “draft findings”  
11 only, and that they had authority from NMB to render a further decision. Petersen and  
12 Boldra then went on to find that “. . .it [was] difficult to comprehend the basis for the draft  
13 findings as proposed by the neutral member of PLB No. 7204 . . .” and accordingly went on  
14 to reverse Zimmerman’s November 7, 2008 decision and uphold BNSF’s permanent  
15 dismissal of Kite.

16 22. I did sign the award which came out of PLB 7254, but my reasons for doing so  
17 are not accurately portrayed at the brief of the BNSF at Page 11, lines 4-5. My signature  
18 does not equate with a concurrence in the result. It is meant only to signify that I was present  
19 and participated in the hearing and the discussion. I oppose the result. I told Boldra and  
20 Petersen specifically about Mr. Boldra’s threat to Zimmerman in February of 2009, at  
21 executive session, about the recusal and the dismissal, and how I thought it was improper.  
22 Obviously, those arguments weren’t successful with the majority of PLB 7254.

23 23. I am familiar with the means by which the United States Department of  
24 Transportation; Federal Railroad Administration classifies rail carriers in the United States.  
25 Union Pacific Railroad and CSXT are both Class One Rail Carriers under that system.  
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1 I declare under penalty of perjury that the foregoing is true and correct to the best of  
2 my knowledge.

3 Signed the 3rd day of January, 2011, at Vancouver, Washington.

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5 /s/ Jay Schollmeyer  
6 Jay Schollmeyer  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of DECLARATION OF JAY SCHOLLMEYER IN OPPOSITION TO BNSF RAILWAY COMPANY’S MOTION TO DISMISS has been filed with the United States District Court via the ECF system which gives automatic notification to the following interested party:

Bradley Scarp  
Jeremy Rogers  
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1218 Third Avenue, Suite 2700  
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David M. Pryor  
Carolyn Ritchie  
BNSF Railway Co. Law Dept.  
2500 Lou Menk Drive AOB-3  
Fort Worth, TX 76131

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

Dated this 3<sup>rd</sup> day of January, 2011.

/s/ Stephen C. Thompson  
Stephen C. Thompson, WSBA #32625  
Attorneys for Plaintiffs United Transportation  
Union and Richard D. Kite