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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>CIVIL ACTION NO.</p> <p style="text-align: center;">PETITION FOR REVIEW OF THE AWARDS OF SPECIAL BOARDS OF ADJUSTMENT PURSUANT TO THE RAILWAY LABOR ACT--COMPLAINT FOR DOUBLE PENALTY FOR WILLFUL WITHHOLDING OF WAGES, AND INTERFERENCE WITH CONTRACTUAL RELATIONSHIP</p>
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PARTIES TO THIS COMPLAINT:

Plaintiffs:

United Transportation Union—
International Headquarters
14600 Detroit Ave.
Cleveland, Ohio 44107-4250
Telephone: (216) 228-9400

Regional Office
General Committee of Adjustment GO-386
Jay L. Schollmeyer, General Chairman
The Academy, Suite 217
400 East Evergreen Boulevard
Vancouver, WA 98660
Telephone: (360) 694-7491

COMPLAINT – 1

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1 Richard D. Kite
2 2260 Larch Street
3 Woodland, WA 98674
4 Telephone: (360) 903-2913

5 Defendants:

6 BNSF Railway Company
7 2650 Lou Menk Drive
8 Fort Worth, TX 76131-2830
9 Telephone: 1-800-795-2673

10 **INTRODUCTION**

11 1. This is an action to review the two sequential Awards of Public Law Board No.
12 7204, (“PLB 7204”) in Case No. 4 and the Award of Public Law Board No. 7254, (“PLB 7254”) in
13 Case No. 28, to recover double penalty wages pursuant to a Washington State statute for
14 defendants’ conduct in willfully withholding wages from an employee, and to recover damages
15 due to defendant’s tortious interference with contractual relationship.

16 **JURISDICTION**

17 Jurisdiction to entertain this petition and to grant the relief sought therein is conferred on
18 this Court by Sections 3, Second and 3, First (q) of the Railway Labor Act, 45 USC § 151, *et seq.*
19 (“RLA”), and by Sections 1331 and 1337 of the Judicial Code, 28 USC § 1331 and § 1337. PLB
20 7204 and PLB 7254 are special boards of adjustment created pursuant to Section 3, Second of
21 the RLA. 45 U.S.C. § 153, Second. True and correct copies of the two awards of PLB 7204, in
22 Case No. 4, and PLB 7254 in Case No. 28 under review are attached to this petition as Exhibits
23 A, B, and C.

24 Supplemental jurisdiction to entertain this complaint and to grant the ancillary relief
25 sought therein is conferred on this Court by 28 USC § 1367.

26 **VENUE**

2. Venue is proper in this Court under Section 3, First (q) of the RLA (45 USC §
153, First (q)), because Plaintiff Kite, the person for whose benefit the Board’s Awards were

1 made, resides in this district, because defendant BNSF operates through this District, because
2 defendant BNSF maintains an office within this District, and because BNSF transacted business
3 and committed a tortious act within this District from which the supplemental causes of action
4 pled in this complaint arise.

5 **PARTIES**

6 4. Plaintiff United Transportation Union, (hereafter, "UTU") is an unincorporated
7 association and a national labor union. UTU is a representative within the meaning of the RLA,
8 45 U.S.C. § 151, Sixth, and is the duly designated and authorized collective bargaining
9 representative for the craft or class of trainman-conductors employed by BNSF. Jay L.
10 Schollmeyer is the General Chairman and head of UTU's subordinate body, the General
11 Committee of Adjustment GO-386, which is located in Vancouver, Washington, and is
12 responsible for handling the grievances of UTU members located within this District, including
13 Richard Kite, which arise under the RLA. In that capacity, Mr. Schollmeyer was appointed to
14 and acted as the labor member of PLB 7204.

15 5. Plaintiff Richard D. Kite is a citizen of the State of Washington. Mr. Kite was
16 employed as a railroad trainman-conductor operating within interstate commerce by Defendant
17 BNSF Railway Company.

18 6. Defendant BNSF Railway Company is a corporation incorporated in a jurisdiction
19 other than the State of Washington, and is a common carrier by railroad operating within
20 interstate commerce and through and within this District.

21 **RLA BACKGROUND**

22 7. Section 3 First (i) of the RLA (45 USC § 153, First(i)) provides that disputes
23 between a railroad carrier and an employee arising out of grievances or out of the interpretation
24 or application of agreements concerning rates of pay, rules or working conditions shall be
25 handled in the usual manner by negotiation up to and including the chief operating officer of the
26 carrier designated to handle such disputes, but failing to reach an adjustment between the parties,

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1 the dispute may be referred to an appropriate division of the National Railroad Adjustment Board
2 (“NRAB”).

3 8. Section 3, Second of the RLA (45 USC §153, Second) provides that a carrier and
4 a representative of its employees may mutually agree to establish a special board of adjustment
5 to resolve disputes otherwise referable to the NRAB. Awards of such boards are subject to
6 enforcement or review in the federal courts in the same manner as awards of the NRAB.

7 9. Section 3, First (q) of the RLA (45 USC § 153 First (q)) provides that an
8 employee or group of employees who is aggrieved by any of the terms of an award of the
9 NRAB, or by the failure of the NRAB to include certain terms in an award, may file a petition
10 for review of the Board’s award in a United States District Court. In such a proceeding, the
11 Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in
12 part, or it may remand the proceeding to the division for such further action as it may direct. On
13 such review, the findings and order of the division shall be conclusive on the parties, except that
14 the order of the division may be set aside, in whole or in part, or remanded to the division, for
15 failure of the division to comply with the requirements of the RLA, for failure of the order to
16 conform or confine itself to matters within the scope of the division’s jurisdiction, or for fraud or
17 corruption by a member of the division making the order.

18 **THE RLA CONTROVERSY**

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

21 11. On January 17, 2005, BNSF performed random breathalyzer testing upon Richard
22 Kite and his train crew for the presence of alcohol as they prepared to board a train at Pasco,
23 Washington and bring it to Vancouver. Kite’s initial test registered a blood alcohol level result
24 of 0.029 percent. A second test performed 20 minutes later registered a blood alcohol level
25 result of 0.027 percent. The alcohol threshold is 0.020 for a positive test on BNSF. Based upon
26 its testing, BNSF scheduled an investigative hearing of its own to develop the facts and

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1 determine responsibility concerning Kite's positive testing. BNSF's hearing was held February
2 25, 2005. Based upon the facts it presented at the hearing, BNSF determined that Kite was in
3 violation of Rule 1.5 of its Consolidated Code of Operating Rules. BNSF also determined that
4 Kite had previously tested positive once before in 1997, and therefore determined that a second
5 positive test within ten years was a violation of its BNSF Policy on the Use of Alcohol and
6 Drugs, which merited a permanent dismissal from service. BNSF therefore permanently
7 dismissed Kite from its employ on March 7, 2005.

8 12. UTU appealed Kite's dismissal in the usual manner through a series of on-
9 property handling conferences with sequentially higher carrier officers which ultimately
10 culminated in a denial by the highest officer of the carrier designated to handle such disputes.
11 Having failed to resolve the claim to the party's mutual satisfaction, they agreed to present it to a
12 special board of adjustment that they had established on or about April 21, 2008 to resolve
13 disputes arising between UTU and BNSF. That board was PLB 7204. Kite's case was assigned
14 as Case No. 4.

15 13. PLB 7204 was composed of Roger Boldra, Director of Labor Relations for
16 defendant BNSF, as the carrier member, Jay Schollmeyer, General Chairman, UTU, as the labor
17 member, and Referee Jacalyn Zimmerman of the National Mediation Board ("NMB") as the
18 neutral and chairperson.

19 14. On July 31, 2008, PLB 7204 held a hearing at Vancouver, WA on Case No. 4
20 involving Kite's claim. Following the hearing, PLB 7204 issued its award on November 7,
21 2008. In the award, the Board found that Kite had violated Rule 1.5 on January 17, 2005, but
22 that the penalty of permanent dismissal was not warranted. Specifically, the board found:

23 "..."the Carrier apparently based its decision to dismiss [Kite] upon
24 an asserted previous drug/alcohol violation and the well-
25 established industry practice to dismiss second-time violators. The
26 on-property handling in this case, however, does not include any
evidence establishing that [Kite] in fact *had* a previous
drug/alcohol violation. Therefore, based upon the record before

1 us, this is [Kite's] first positive result." PLB 7204, Case No. 4,
2 Page 3. (Italics in original).

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

5 15. On January 8, 2009, Boldra requested an executive session in order for the Board
6 to interpret the Award. The executive session was held February 19 or 20, 2009, with the three
7 members of PLB 7204 in attendance. In the course of the meeting, Boldra stated that he opposed
8 the decision, and wanted Neutral Zimmerman to reverse her vote for reinstatement and re-issue
9 the award as sustaining the dismissal. When Zimmerman refused, saying that her notes from the
10 hearing clearly mandated the decision she had authored, Boldra then told her that "If you are
11 going to issue these kinds of opinions, you will never work for a Class One railroad again." In
12 response, Zimmerman responded that all she could do at that point was recuse herself. If BNSF
13 carried out its threat to blacklist Zimmerman with all Class One railroads in the United States,
14 such conduct would likely have had a devastating effect upon Zimmerman's earnings as a
15 referee.

16 16. On April 20, 2009, Zimmerman issued a second "Award," stating that "After due
17 consideration, the Board has determined that this matter should be dismissed without prejudice."
18 The award went on to dismiss Case No. 4.

19 17. Thereafter, on February 7, 2009, Boldra made an attempt to have Kite's case
20 assigned to another existing Public Law Board, (PLB 7254), with a different neutral, (Robert
21 Petersen) as Case No. 24. UTU opposed those efforts by protesting to the National Mediation
22 Board. On April 6, 2009, the National Mediation Board, by order of its Director of Arbitration
23 Services, Roland Watkins, denied Boldra's request to add Case No. 24 to PLB 7254, stating that
24 "...Arbitrator Jacalyn Zimmerman rendered a decision on case number 4 (PLB No. 7204) on
25 November 7, 2008. For this reason, this case cannot be added to PLB No. 7254. The request to
26 add this case is denied."

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1 18. Nevertheless, on April 30, 2009, Boldra listed the same case, (PLB 7204, Case
2 No. 4), with PLB 7254 with a different Carrier and Organization File No. as Case No. 28. UTU
3 objected again, but NMB did not intervene, and Neutral Petersen and Boldra agreed to add Kite's
4 case to PLB 7254 as Case No. 28. Having been added to the Public Law Board, UTU was bound
5 under the RLA to participate in the hearing on the board award.

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

13 20. Kite successfully completed an Outpatient Alcohol Treatment program and was
14 medically fit to return to service on or about May 13, 2008.

15 CLAIMS

16 (RLA REVIEW)

17 21. Boldra's actions in threatening Referee Zimmerman with economic ruin in
18 retribution for her decision in the November 7, 2008 award, and Referee Zimmerman's
19 subsequent April 20, 2009 award dismissing the appeal, constitute fraud and corruption within
20 the ambit of 45 USC First § 153 (p).

21 22. Boldra's further actions in re-listing the same case under a different File Number
22 with PLB 7254, Petersen and Boldra's actions in agreeing to add Kite's case to PLB 7254, then
23 reviewing Zimmerman's November 7, 2008 decision, and then reversing that decision and
24 sustaining Kite's permanent dismissal constitute further fraud and corruption within the ambit of
25 45 USC First § 153 (p).

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1 23. Pursuant to 45 USC § 153(p), the RLA provides for an appeal to federal district
2 court from a Board decision on the ground of fraud or corruption of one or more of the board
3 members. UTU and Kite seek this Court's Order vacating the April 20, 2008 "award," of PLB
4 7204 and the April 10, 2010 Award of PLB 7254 upholding BNSF permanent dismissal of Kite,
5 reinstating and enforcing the November 7, 2008 award of PLB 7204, and awarding to Kite wages
6 from November 8, 2008 until his date of reinstatement, in an amount to be determined, but not
7 less than \$250,000. On appeal, Petitioners Kite and UTU are exempt from court costs and if
8 successful, are entitled to reasonable attorney's fees.

9 (WASHINGTON STATE DOUBLE WAGES PENALTY)

10 24. The actions of Boldra and BNSF in using the executive session of February, 2009,
11 customarily utilized under the RLA for interpretation of the Board's award, for the purposes of
12 attempting to overturn the award, and using threats and intimidation of the neutral in order to
13 effectively do so, was willful and resulted in withholding from Kite the wages he would have
14 earned after reinstatement following the implementation of the first PLB 7204 award of
15 November 7, 2008. Pursuant to RCW 49.52.070, Kite is entitled to recover back pay and penalty
16 wages in an amount equal to twice that which he would have earned from November 8, 2008 to
17 actual reinstatement in a sum that is presently indeterminate, but not less than \$500,000. In
18 addition, pursuant to RCW 49.52.070 and RCW 49.48.020, Kite is entitled to recover reasonable
19 attorney's fees and costs.

20 (TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP)

21 25. Plaintiffs and defendant agreed to bring Plaintiff's grievance before PLB 7204,
22 which was to act a neutral third-party in settling the parties' dispute.

23 26. Defendant interfered with Kite's contractual relationship under the CBA by
24 coercing, corrupting, unduly influencing, intimidating and otherwise by improper means and
25 with improper motive inducing Zimmerman to recuse herself and to negate her prior award
26 reinstating Kite to his employment.

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1 the relief sought in the Prayer at Paragraph 3, upon his claim for defendant's violation of RCW
2 49.52.070.

3 b. Under any award for lost wages, as sought in either Prayer Paragraphs 3
4 and 6a, that Kite be awarded an additional sum, equal to the amount awarded under Paragraph 3
5 or 6a, as exemplary damages under the civil double damages provisions of RCW 49.52.070;

6 7. That Kite be awarded reasonable attorney's fees and costs, pursuant to 49.52.070
7 and 49.48.020 in an amount to be determined, incurred as a result of the prosecution of his action
8 against defendant for civil double damages for willfully withholding wages;

9 8. That Kite be awarded a sum of not less than \$250,000.00 for wages lost from the
10 date of the November 7, 2008 PLB 7204 Award until reinstatement, in the alternative to the
11 relief sought in Prayer paragraphs 3 and 6a, and for the further sum of \$200,000.00 for damages
12 from worry, distress, anxiety, and depression on account of defendant's tortious interference with
13 contract.

14 Dated this 4th day of November, 2010.

15
16 By: /s/ Stephen C. Thompson
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