

EXHIBIT 1

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 1-4

Page 1

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE WESTERN DISTRICT OF WASHINGTON
 3 AT TACOMA
 4
 5 UNITED TRANSPORTATION UNION)
 6 and RICHARD D. KITE,)
 7 Plaintiffs,) Case No.:
 8 -vs-) 3:10-CV-05808-RBL
 9 BNSF RAILWAY COMPANY,)
 10 Defendant.)
 11
 12
 13 The videotaped deposition of
 14 JACALYN JOY ZIMMERMAN, called as a witness herein
 15 for examination, taken pursuant to the Federal
 16 Rules of Civil Procedure of the United States
 17 District Courts pertaining to the taking of
 18 depositions, taken before ROSANNE M. NUZZO, a
 19 Notary Public within and for the County of Will,
 20 State of Illinois, and a Certified Shorthand
 21 Reporter of said state, at the law offices of
 22 Jones Day, 77 West Wacker Drive, Suite 3500,
 23 Chicago, Illinois on Wednesday, April 1, 2015,
 24 at approximately 9:30 a.m.

Page 2

1 APPEARANCES:
 2 KIRKLIN THOMPSON & POPE LLP
 3 BY: STEPHEN C. THOMPSON, ESQ.
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 5 1000 SW Broadway, Suite 1616
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 8 appeared on behalf of the Plaintiffs;
 9
 10 JONES DAY
 11 BY: DONALD J. MUNRO, ESQ.
 12 dmunro@jonesday.com
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 15 202-879-3939
 16 - and -
 17 BNSF RAILWAY COMPANY
 18 BY: DAVID M. PRYOR, ESQ.
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 22 817-352-2286
 23 appeared on behalf of the Defendant;
 24

Page 3

1 APPEARANCES (Continued):
 2 U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
 3 BY: TAMRA T. MOORE, ESQ.
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 5 20 Massachusetts Avenue, NW
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 8 - and -
 9 NATIONAL MEDIATION BOARD
 10 BY: EILEEN HENNESSEY, ESQ.
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 13 BY: MARY L. JOHNSON, ESQ.
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 16 1301 K Street NW, Suite 250E
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 18 appeared on behalf of the National
 19 Mediation Board and the Deponent.
 20
 21
 22 VIDEOTAPED BY: JAMIE SCHILLER.
 23 REPORTED BY: ROSANNE M. NUZZO, RMR, CRR,
 24 CSR License No. 84-1388.

Page 4

1 THE VIDEOGRAPHER: This is Tape No. 1 to the
 2 videotaped deposition of Jacalyn Zimmerman in the
 3 matter of United Transportation Union and
 4 Richard D. Kite vs. BNSF Railway Company, being
 5 heard before the United States District Court for
 6 the Western District of Washington at Tacoma,
 7 Case No. 3:10-CV-05808-RBL.
 8 This deposition is being held at
 9 77 West Wacker Street, Chicago, Illinois on
 10 April 1st, 2015 at 9:30 a.m.
 11 My name is Jamie Schiller, and I'm
 12 the videographer. The court reporter is
 13 Rosanne M. Nuzzo.
 14 Counsel, will you please introduce
 15 yourselves and affiliations, and the witness will
 16 be sworn in.
 17 THE WITNESS: You look familiar to me.
 18 MR. THOMPSON: Good morning. I'm Steve
 19 Thompson with Kirklin Thompson Pope in Portland,
 20 Oregon, and I represent Mr. Kite and United
 21 Transportation Union.
 22 MR. MUNRO: I'm Donald J. Munro with
 23 Jones Day, Washington, D.C. I represent the
 24 Defendant, BNSF Railway Company.

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 5-8

Page 5

1 MR. PRYOR: David Pryor, and I'm in-house with
 2 BNSF Railway Company.
 3 MS. MOORE: Tamra Moore with the United States
 4 Department of Justice. I'm representing the
 5 National Mediation Board and Jacalyn Zimmerman.
 6 MS. HENNESSEY: Eileen Hennessey with the
 7 National Mediation Board.
 8 MS. JOHNSON: Mary Johnson, National Mediation
 9 Board.
 10 THE COURT REPORTER: Could you please raise
 11 your right hand to be sworn.
 12 THE WITNESS: Sure.
 13 (WHEREUPON, the witness was duly
 14 sworn.)
 15 THE COURT REPORTER: Thank you.
 16
 17 JACALYN JOY ZIMMERMAN,
 18 called as a witness herein, having been first duly
 19 sworn, was examined and testified as follows:
 20
 21 EXAMINATION
 22 BY MR. THOMPSON:
 23 Q. Good morning, ma'am.
 24 A. Good morning.

Page 7

1 the handling of the decision you made with respect
 2 to Public Law Board 7204 back in 2008?
 3 A. I actually never did make a decision in
 4 that case, but I understand that it involves those
 5 proceedings.
 6 Q. All right. What have you done in terms
 7 of preparing for this deposition?
 8 A. Well, I've spoken to counsel. I looked
 9 for the documents that were responsive to the
 10 subpoena. Obviously, I took a general look at my
 11 overall docket to get an estimate of how many
 12 cases I had actually handled for the railroads at
 13 the time in question.
 14 And my search for the subpoena,
 15 I searched e-mail, I searched paper records,
 16 I searched computer.
 17 Q. When you say you spoke to counsel, can
 18 you tell me specifically who.
 19 A. I spoke to Ms. Hall and to
 20 Ms. Hennessey.
 21 MS. MOORE: You mean Ms. Moore?
 22 THE WITNESS: Did I say "Ms. Hall"?
 23 MS. MOORE: Yes. That's okay.
 24 THE WITNESS: I'm so sorry. Okay. Who is

Page 6

1 Q. Would you state your full name for the
 2 record --
 3 A. Yes.
 4 Q. -- please.
 5 A. It's Jacalyn J. Zimmerman.
 6 Q. And the middle initial -- the middle
 7 initial is for "Joy"?
 8 A. Yes.
 9 Q. Okay. And can you tell us the city and
 10 state in which you reside.
 11 A. I reside in Libertyville, Illinois.
 12 Q. Are you currently a resident and
 13 domiciled in the state of Illinois?
 14 A. I am.
 15 Q. And for the foreseeable future, and at
 16 least through September of 2015, do you intend to
 17 remain domiciled in, and a resident of, the state
 18 of Illinois?
 19 A. Yes. I have lived in Illinois my
 20 entire life, actually.
 21 Q. Okay. You understand that this
 22 deposition is being taken in connection with a
 23 claim made by the United Transportation Union
 24 and Mr. Kite that there was corruption in terms of

Page 8

1 Tamra Hall? Okay. There must be another one.
 2 I am so sorry.
 3 MS. MOORE: That's okay.
 4 THE WITNESS: Okay. All right. Well, we know
 5 who you are.
 6 MS. HENNESSEY: She recognizes the face.
 7 THE WITNESS: I recognize the face, yes.
 8 BY MR. THOMPSON:
 9 Q. Have you spoken to anyone who has -- is
 10 a representative or counsel for the BNSF Railway
 11 at --
 12 A. I --
 13 Q. -- any time concerning this case?
 14 A. I received, I believe after the Ninth
 15 Circuit opinion issued, I received an e-mail from
 16 Mr. Pryor, asking if I would discuss the events of
 17 this case, and I responded that I wouldn't.
 18 And that was the only communication we
 19 had.
 20 Q. Okay. How long did you spend in
 21 preparation in the last week with counsel
 22 preparing for this deposition?
 23 A. In the last week? We spent most of
 24 yesterday.

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 9-12

<p style="text-align: right;">Page 9</p> <p>1 Q. "Most of yesterday" means six hours, 2 seven hours, eight hours? 3 A. Closer to six, probably; maybe not even 4 quite that long. 5 Q. All right. You're a lawyer? 6 A. I am a lawyer. 7 Q. Tell me the jurisdictions that you're 8 presently licensed in. 9 A. I'm licensed in Illinois, and I have an 10 inactive license in California. 11 Q. Okay. When did your license in 12 California go inactive? 13 A. Almost as soon as I got it. I never 14 lived in California, so 1978. I think I have been 15 act-- inactive the entire time I have possessed 16 that license. 17 Q. All right. Are those the only two 18 jurisdictions you've ever been licensed in? 19 A. Yes. 20 Q. Okay. Is it fair to say that I 21 attempted to talk with you several years ago about 22 this case by telephone? 23 A. I don't recall if it was you, but it 24 was someone -- an attorney on behalf of you, yes.</p>	<p style="text-align: right;">Page 11</p> <p>1 act as the neutral arbiter for the Public Law 2 Board 7204 in 2008, correct? 3 A. That's correct. 4 Q. All right. And do you recall how many 5 cases were actually assigned to that Law Board? 6 A. It was, I -- I believe, twelve; or at 7 least twelve initially. 8 Q. Okay. 9 A. Sorry. Allergies. 10 Q. I sympathize. 11 A. Yeah. Well, hopefully, I won't have to 12 go take a Zyrtec in the middle of this, but... 13 MR. THOMPSON: Could you mark those as 1 and 14 2, please. Ladies, that's going to be 2. Don, 15 that's going to be. That will be 1. 16 (WHEREUPON, said documents were 17 marked Plaintiffs'-Zimmerman 18 Deposition Exhibits No. 1 and 19 No. 2, for identification, as of 20 04-01-2015.) 21 BY MR. THOMPSON: 22 Q. Handing you Exhibits 1 and 2 to your 23 deposition, would you take a moment just to 24 acquaint yourself with those, please.</p>
<p style="text-align: right;">Page 10</p> <p>1 Q. Okay. And -- and, effectively, is it 2 fair to say that you told me that you didn't know 3 if you wanted to talk with me and you wanted to 4 think about it and then returned my call to say 5 that you did not want to discuss the case with me? 6 A. I recall that I actually picked up the 7 phone and, apparently, you were on the other end 8 of it. And so I was taken pretty off guard by 9 that call. I had no idea any of this was going 10 on. So I don't remember the exact sequence, but 11 I may well have said, "Let me think about it" and 12 then thought I can't do this, I won't do it, and 13 called back and told you that. 14 Q. Okay. So is it fair to say, at least 15 in your mind, you've treated both the BNSF and -- 16 and Mr. Kite equally in terms of denying access? 17 A. Yes. 18 Q. What are the reasons, if any, that you 19 can articulate that you don't want to speak to 20 either party? 21 A. Because the deliberations of a 22 tripartite panel or, really, any arbitrable 23 deliberations, I view as completely confidential. 24 Q. You were chosen by the parties to</p>	<p style="text-align: right;">Page 12</p> <p>1 A. Okay. 2 Q. Exhibit 1 is a letter from Mr. Boldra 3 with a carbon copy to you and Mr. Schollmeyer of 4 April 21st, 2008. 5 A. Right. 6 Q. Enclosing an executed Public Law Board 7 Agreement requiring -- or requesting the 8 establishment of a new Public Law Board with you 9 as -- 10 A. Yes. 11 Q. -- the arbiter, correct? 12 A. Yes. 13 Q. And Exhibit 2 is the actual Agreement 14 between the UTU and the BNSF Railway with respect 15 to the rules and agreements concerning that 16 Public Law Board? 17 A. Yes. 18 Q. On page 2 of Exhibit 2, would you agree 19 that that's marked Bates stamp NMB 000003? 20 A. I see that. 21 Q. You see that? 22 A. Yes, I do. 23 Q. Okay. Subparagraph (F) -- (F) -- 24 A. "F," okay.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 13-16

Page 13

1 Q. -- reads as follows.
 2 "The Board shall hold hearings on
 3 each claim or grievance submitted to it."
 4 Correct?
 5 A. Yes.
 6 Q. Subparagraph (H), does it say:
 7 "The Board shall make findings of
 8 fact and render an award on each case
 9 submitted to it, within ninety days
 10 after the close of the hearings of
 11 each claim?"
 12 A. Yes.
 13 Q. Does it say further down at the last
 14 sentence of that paragraph:
 15 "Each member of the Board shall
 16 have one vote and any two members of
 17 the Board shall be competent to
 18 render an award and to make any
 19 decision which the Board is empowered
 20 to make by statute or agreement."
 21 A. That is what it says.
 22 Q. Subparagraph (I), does it say:
 23 "Awards of the Board shall be
 24 final and binding on the parties

Page 14

1 subject to the provisions of the
 2 Railway Labor Act"?
 3 A. Obviously, it does.
 4 Q. Okay. Subparagraph (K), does it say,
 5 quote:
 6 "The Board hereby established
 7 shall continue in existence until
 8 it has disposed of all claims and
 9 grievances submitted to it under
 10 this agreement."
 11 Is that right?
 12 A. Yes.
 13 Q. Okay. And if you will go to the last
 14 page of Exhibit 2, which is Bates stamped NMB 5 --
 15 A. Right.
 16 Q. -- do you see that the fourth case
 17 under this particular Board, not yet numbered, is
 18 R.D. Kite?
 19 A. Yes.
 20 Q. With an Organization File Number of
 21 Kite 1/17/2005?
 22 A. Yes.
 23 Q. Okay. And you know that to be my
 24 client, Richard Kite?

Page 15

1 A. Yes.
 2 Q. Now, what usually happens in these
 3 cases is, the parties pick a neutral, they execute
 4 an agreement, the agreement goes for approval to
 5 both the United Transportation Union International
 6 and to headquarters at BNSF.
 7 The agreements are approved, then that
 8 material is sent to the National Mediation Board,
 9 and the National Mediation Board issues a
 10 certificate and numbers the Board sequentially,
 11 isn't that fair?
 12 A. I'm not familiar with the internal
 13 workings of the organization and the carrier, but
 14 I do know that once it's been finalized, it does
 15 go to the NMB.
 16 Q. Okay. What I'm trying to do is just
 17 avoid time-wasting and a lot of paper, if we
 18 can --
 19 A. I understand.
 20 Q. -- get to the bottom line, okay?
 21 A. It goes to the NMB, and they ultimately
 22 put a Board number on it and approve it.
 23 Q. Okay.
 24 A. There is a somewhat different system in

Page 16

1 place now, as you may well be aware of, but we're
 2 talking about the system then.
 3 MR. THOMPSON: Okay. Would you mark this as
 4 3 and 4 sequentially, please.
 5 (WHEREUPON, said documents were
 6 marked Plaintiffs'-Zimmerman
 7 Deposition Exhibits No. 3 and
 8 No. 4, for identification, as of
 9 04-01-2015.)
 10 (WHEREUPON, discussion was had off
 11 the record.)
 12 BY MR. THOMPSON:
 13 Q. Have you had an opportunity to look
 14 at --
 15 A. Yes.
 16 Q. -- Exhibits 3 and 4?
 17 Would you agree with me that,
 18 essentially, 3 is a transmittal letter from
 19 Mr. Roland Watkins, Director of Arbitration
 20 Services for the National Mediation Board, to
 21 Mr. Boldra, essentially approving or certifying
 22 the Board headed by you as the neutral?
 23 A. Yes.
 24 Q. Naming that Board as Public Law

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 17-20

<p style="text-align: right;">Page 17</p> <p>1 Board 7204?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And indicating that the parties</p> <p>4 have chosen you to be the neutral arbitrator?</p> <p>5 A. Yes.</p> <p>6 Q. And would you agree with me that 4 is</p> <p>7 your agreement with the National Mediation Board</p> <p>8 to act as the arbiter under the Railway Labor Act?</p> <p>9 A. Yes.</p> <p>10 Q. And does it -- does it define your</p> <p>11 duties and responsibilities in connection with</p> <p>12 that appointment?</p> <p>13 A. Well, I'll tell you, this is pretty</p> <p>14 hard to read, but --</p> <p>15 Q. You know, it really is.</p> <p>16 A. -- I -- it really is.</p> <p>17 Q. But this is the best that --</p> <p>18 A. I understand.</p> <p>19 It defines the limited areas that the</p> <p>20 NL -- NMB regulates, I would say, with respect to</p> <p>21 our handling of cases; you know, how much you're</p> <p>22 paid, what you have to do about travel. It's</p> <p>23 really about case management and expenses --</p> <p>24 Q. Okay.</p>	<p style="text-align: right;">Page 19</p> <p>1 additional cases," period, close quote.</p> <p>2 A. That is what it says.</p> <p>3 Q. All right. The third paragraph down</p> <p>4 says that you're being:</p> <p>5 "...compensated at the rate</p> <p>6 of \$300.00 per day for each day</p> <p>7 actually engaged in the performance</p> <p>8 of... duties or... travel."</p> <p>9 A. Um-hum. Yes.</p> <p>10 Q. Is that your current rate for work on</p> <p>11 behalf of the NMB as an arbiter in Railway Labor</p> <p>12 Act matters where you are either in hearing,</p> <p>13 writing decisions or case study?</p> <p>14 A. The NMB has recently increased the rate</p> <p>15 to -- I believe it's 330.</p> <p>16 Q. And --</p> <p>17 A. Well, the NMB -- I should back up. The</p> <p>18 NMB has gone to a new system of paying people per</p> <p>19 case. So this doesn't apply anymore --</p> <p>20 Q. Um-hum.</p> <p>21 A. -- the language you're reading me.</p> <p>22 They have gone to a new system of compensating</p> <p>23 arbitrators.</p> <p>24 Q. And how does that system break down</p>
<p style="text-align: right;">Page 18</p> <p>1 A. -- as far as I can read this.</p> <p>2 Q. Take a look at paragraph two, please.</p> <p>3 It's the second paragraph. I beg your pardon.</p> <p>4 A. "This certificate is issued"?</p> <p>5 That one?</p> <p>6 Q. Right.</p> <p>7 A. Okay.</p> <p>8 Q. (Continuing) -- "on the basis of</p> <p>9 selection by partisan members."</p> <p>10 A. Right.</p> <p>11 Q. Then it goes on to say, quote:</p> <p>12 "You are authorized to sit with</p> <p>13 the Board and make awards in accordance</p> <p>14 with Section 3, Second of the Railway</p> <p>15 Labor Act, 45 United States Code</p> <p>16 Section 153, Second," unquote.</p> <p>17 A. Yes.</p> <p>18 Q. At the bottom, the very last paragraph,</p> <p>19 does it say, quote:</p> <p>20 "All awards must be rendered</p> <p>21 within six months of the date of</p> <p>22 hearing. If you have cases heard</p> <p>23 and not decided within six months,</p> <p>24 you will not be able to hear</p>	<p style="text-align: right;">Page 20</p> <p>1 in terms of a per diem rate?</p> <p>2 A. It's not a per diem rate. They pay you</p> <p>3 by case.</p> <p>4 Q. And how much?</p> <p>5 A. It's \$630 by case, and they no longer</p> <p>6 pay the arbitrators for the hearing.</p> <p>7 However you do the hearings, you work</p> <p>8 out with the parties and you do on your own, and</p> <p>9 then you're compensated per case. So this is not</p> <p>10 in effect anymore.</p> <p>11 Q. Okay.</p> <p>12 A. This is very recent, though, within the</p> <p>13 last few months, so it's still a work-in-progress,</p> <p>14 I would say.</p> <p>15 Q. When did the \$330 per day rate go into</p> <p>16 effect?</p> <p>17 A. I misspoke. It's not 330 per day.</p> <p>18 It's -- it's 630 per case. They no longer pay for</p> <p>19 days. It's just cases. And this is -- and I</p> <p>20 think this is the second month that that system is</p> <p>21 in effect.</p> <p>22 Q. So regardless of how many days or how</p> <p>23 much time you actually spend on a case, you</p> <p>24 receive from the NMB \$630?</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 21-24

<p style="text-align: right;">Page 21</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. Thank you.</p> <p>3 A. If this is the right number. As I</p> <p>4 said, this is the second month of this, so it's --</p> <p>5 it's a work-in-progress.</p> <p>6 Q. Okay. Explain to me, if you would,</p> <p>7 please, when you're the neutral arbiter and you</p> <p>8 have been appointed, what do you do from the time</p> <p>9 of your appointment up to the time you actually</p> <p>10 hold the hearing in normal circumstances where</p> <p>11 it's a case like this involving discipline?</p> <p>12 A. Well, you make the preliminary</p> <p>13 arrangements with the parties as to what sort of</p> <p>14 hearing they want; where it will be held; you</p> <p>15 know, when, that kind of, you know, the scheduling</p> <p>16 things. You know, this one was out of town, so</p> <p>17 there was -- there was travel involved. So you</p> <p>18 make the hearing arrangements.</p> <p>19 Most of the time, the parties will send</p> <p>20 you the -- their -- their briefs, basically, but</p> <p>21 they're called Submissions. Generally, but not</p> <p>22 always, you will get those ahead of time.</p> <p>23 Sometimes they bring them to the hearing, and you</p> <p>24 get them then.</p>	<p style="text-align: right;">Page 23</p> <p>1 Q. Okay. What do you recall about whether</p> <p>2 or not you had the submissions of the UTU and the</p> <p>3 BNSF in Mr. Kite's case --</p> <p>4 A. I --</p> <p>5 Q. -- beforehand?</p> <p>6 A. -- believe I had them ahead of time.</p> <p>7 I'm not sure how long ahead of time I would have</p> <p>8 had them, but I believe I did.</p> <p>9 Q. Did you read them before the hearing?</p> <p>10 A. As I said, I believe that I read them</p> <p>11 to a limited extent to familiarize myself with --</p> <p>12 Q. Right.</p> <p>13 A. -- the general outlines of the cases,</p> <p>14 what the issues were, et cetera.</p> <p>15 Q. Okay. Now, you had --</p> <p>16 A. Typically, I would read the arguments,</p> <p>17 at least.</p> <p>18 Q. All right. And you had twelve cases on</p> <p>19 this particular Board?</p> <p>20 A. Right.</p> <p>21 Q. And you'd have twelve submissions from</p> <p>22 each side?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And you'd bring those</p>
<p style="text-align: right;">Page 22</p> <p>1 If you have them ahead of time, in my</p> <p>2 practice, at least -- the NMB back then did not,</p> <p>3 when -- when they were paying for days, did not</p> <p>4 pay for time prepping for the hearing. So if</p> <p>5 I had the submissions ahead of time, I would do a</p> <p>6 preliminary review of them, read the arguments,</p> <p>7 take a few notes. Typically, we would not go</p> <p>8 through the entire transcript and record at that</p> <p>9 time but, you know, enough to have a sense of what</p> <p>10 the case was about.</p> <p>11 And then, you know, arrive at the</p> <p>12 designated time and place for the hearing if the</p> <p>13 NMB had authorized funds to have the hearing.</p> <p>14 Q. Okay. At that time, the traveling from</p> <p>15 Chicago to Vancouver, Washington --</p> <p>16 A. Right.</p> <p>17 Q. -- would the NMB pay for your travel</p> <p>18 day?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Was it your practice to</p> <p>21 typically read the submissions of the parties</p> <p>22 while you were traveling onboard an airplane if</p> <p>23 you had them?</p> <p>24 A. I might have.</p>	<p style="text-align: right;">Page 24</p> <p>1 submissions with you to the actual hearing?</p> <p>2 A. Or -- you know, it may well be that</p> <p>3 I pulled the arguments off and -- you know,</p> <p>4 they're -- they're big. I don't know that I</p> <p>5 traveled to Portland with three suitcases worth of</p> <p>6 Submissions, but I'm sure I brought something with</p> <p>7 me.</p> <p>8 Q. And you don't recall what?</p> <p>9 A. No.</p> <p>10 Q. Okay. Other than the Submissions and</p> <p>11 their possible review before the hearing, anything</p> <p>12 else that you do up to the day of the hearing</p> <p>13 except travel there, typically?</p> <p>14 A. Typically, no.</p> <p>15 Q. Okay. This particular hearing for</p> <p>16 Public Law Board 7204 was held in late July of</p> <p>17 2008; I believe the 31st of July.</p> <p>18 A. You know, I actually have no</p> <p>19 recollection of when that hearing was held, except</p> <p>20 that the weather was good. But I know the</p> <p>21 subpoena said July, and there are various other</p> <p>22 references to it. I have no reason to dispute it.</p> <p>23 But I remember that the weather was</p> <p>24 better than it was in Chicago, which could be</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 25-28

<p style="text-align: right;">Page 25</p> <p>1 almost any time. So I really don't remember when 2 it was. 3 Q. That's Portland in July. 4 A. Yeah. 5 Q. Okay. But you -- do you have any 6 memory of the hearing itself? 7 A. Yes. I remember I flew into Portland, 8 took a short taxi ride across into Washington 9 State, stayed at a hotel. It was not the Red Roof 10 Inn, but it was the Red something that the parties 11 had suggested. It was near or on a river walk. 12 I remember going out and having dinner. 13 And then, the hearing itself, I'm going 14 to refer to it, for ease of reference today, as 15 "on the property" but it was -- they're often on 16 railroad property. This particular one was not. 17 It was in an old house, I believe, that had been 18 renovated into office space. 19 Q. A place called The Academy that was 20 once a military base in -- 21 A. That -- 22 Q. -- Vancouver? 23 A. That -- that may well be -- 24 Q. All right.</p>	<p style="text-align: right;">Page 27</p> <p>1 Q. Yes. 2 A. Yes. 3 Q. Involving the Kite case? 4 A. Yes, I did. 5 Q. Okay. Where are those notes now? 6 A. Those notes would have been disposed of 7 after I completed my handling of this case. 8 Q. By you? 9 A. Yes. 10 Q. Is that your common practice? 11 A. That is the standard practice for every 12 one of my arbitrations, and it's standard practice 13 in the arbitration industry. 14 Q. And how do you know that? 15 A. Well, I've been labor relations neutral 16 for 30 years; I've been an arbitrator for -- going 17 on 20; I've attended numerous -- very numerous 18 professional conferences. We have a very close 19 arbitration group in Chicago. We all talk to each 20 other. I mean, this is -- this is the industry 21 standard. It's discussed at meetings. It's 22 discussed among ourselves. I mean, you could ask 23 almost anyone, and they say, "You always get rid 24 of the notes." I mean, everybody always gets rid</p>
<p style="text-align: right;">Page 26</p> <p>1 A. -- correct. And I don't actually 2 remember if the organization had offices there or 3 had just secured a conference room there. But, 4 anyway, that -- that's where it was. It was not 5 on the railroad property. 6 Q. All right. What do you recall about 7 the actual hearing involving Mr. Kite's case? 8 A. I believe that the parties -- we 9 started with an open session, okay? And where it 10 would be the three -- the Board members: 11 Mr. Schollmeyer in this case and Mr. Boldra and 12 myself. And at the open session, sometimes 13 claimants are present; sometimes an additional 14 organization or carrier representative may be 15 present. And the parties present arguments 16 generally on each case, especially if there are 17 other persons there. 18 Q. Um-hum. Do you recall Mr. Kite being 19 physically present? 20 A. It seems to me that he might have been, 21 but I cannot -- I am not sure. 22 Q. Okay. Did you take notes during the 23 presentations of the arguments? 24 A. These arguments?</p>	<p style="text-align: right;">Page 28</p> <p>1 of the notes. 2 And I did that in every case, both 3 railroad arbitration as well as what I'm going to 4 call traditional rail arbitration, which is -- 5 you know, the process is different in industries 6 outside the railroad. 7 Q. Okay. So you would have destroyed your 8 notes when? 9 A. At sometime after I issued the 10 dismissal order in this case. I would have kept 11 them until then -- 12 Q. So -- 13 A. -- as long as the case was active on my 14 docket. 15 Q. So they were in your possession and 16 control until at least April 20th of 2009? 17 A. When I -- that's the date of the 18 dismissal order, yes. 19 Q. And what would you do, throw them away 20 or shred them or what? 21 A. Usually, I -- I shred them. I usually, 22 by the way, get rid of the records as well 23 because, otherwise, I would have rooms upon rooms 24 upon rooms of paper.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 29-32

<p style="text-align: right;">Page 29</p> <p>1 Q. What do you understand the Rules of 2 Professional Responsibility of the Illinois 3 State Bar say about retaining your records? 4 A. You know, I'm not actually familiar 5 with the State Bar Rules. I -- I focus on the 6 arbitration rules. 7 Q. Okay. 8 A. Okay? And... 9 Q. Do you believe that the Rules of 10 Professional Responsibility apply to you, as a 11 lawyer licensed to practice law in the state of 12 Illinois, even when you're acting as an arbiter? 13 A. Actually, arbitrators are not required 14 to be lawyers. 15 Q. I understand that, but my -- 16 A. Yes. 17 Q. My question is: Do you believe that 18 because you are a lawyer, you must comply with the 19 Rules of Professional Responsibility while you act 20 as an arbiter nevertheless? 21 A. Actually, you know, that is something 22 I have to tell you, I have not pondered to any 23 extent. I mean, there's plenty of discussion 24 about the rules governing arbitration, and that's</p>	<p style="text-align: right;">Page 31</p> <p>1 A. I have never heard of judicial review 2 of any case other than this one. That doesn't 3 mean, obviously, that it couldn't happen, but I've 4 never heard anyone talk about that. So it's -- 5 it's certainly not at the forefront of any of our 6 minds. We believe it's final and binding and, you 7 know, that's usually the end of it. I have never 8 heard of another case going to judicial review. 9 Q. Let me ask you this specific question. 10 A. Okay. 11 Q. Were you unaware at the time that the 12 Kite hearing was held -- 13 A. Um-hum. 14 Q. -- that the Railway Labor Act provided 15 for a narrow and limited judicial review of any 16 Railway Labor Act case? 17 A. I'm sure at some point when I learned 18 this process, that was probably communicated; but 19 it was certainly at no point during my handling 20 of this case until I got, you know, the call, 21 apparently from you, that that was anywhere on the 22 horizon. 23 Q. Okay. 24 A. And I never got -- gave that one</p>
<p style="text-align: right;">Page 30</p> <p>1 what I focused on. 2 Q. Is it fair to say that you view your 3 client, in cases where you are the arbiter, as the 4 NMB? 5 A. I would say I view the clients as the 6 parties. 7 Q. Okay. You're aware, aren't you, from 8 your extensive experience in the arbitration field 9 that some cases end up, even after a decision by a 10 neutral has been issued and endorsed by one of the 11 other participants, the partisans, end up going to 12 judicial review? 13 A. I believe that this is the only case 14 I've ever had go to judicial review. It is -- 15 it's not completely uncommon in the public sector 16 in particular for there to be some sort of public 17 policy challenge to an arbitrator's decision. 18 Q. Okay. 19 A. I haven't had that happen to any of 20 mine, but it has happened to colleagues. 21 Q. But as an arbiter experienced in 22 handling Railway Labor Act matters, you were 23 certainly aware that judicial review is always a 24 possibility?</p>	<p style="text-align: right;">Page 32</p> <p>1 second's thought. 2 Q. Do you believe that the content of the 3 notes that you made in the hearing, if preserved, 4 might help BNSF, Mr. Kite and Mr. Schollmeyer, 5 representing the UTU, to gain a further 6 understanding of what your thought processes were 7 in terms of the decision that you rendered in this 8 case? 9 A. I'm laughing because when I look at my 10 notes six months later, I can barely make out what 11 they say, so I'm not sure they would have been 12 very helpful to anybody else. 13 Q. Okay. 14 A. Okay? 15 Q. Isn't it true that during the executive 16 session in this case, you had your notes with you 17 and made reference to using them when Mr. Boldra 18 exhorted you to change your opinion? 19 A. Okay. There were two different 20 executive sessions in this case. 21 After we had the open arguments on the 22 property that I've discussed, we had an executive 23 session where everyone, I believe, left; whoever 24 was there, everyone left except the three</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 33-36

Page 33

1 adjudicators: Mr. Boldra, Mr. Schollmeyer and
 2 myself. I took additional notes at that executive
 3 session that, typically, the practice would be,
 4 I'd have, you know, this is PLB 7204, today's
 5 date, case this, this -- these are the arguments;
 6 case that. And then, if we had executive session,
 7 you know, I would write "Executive Session" at the
 8 top of the page and then go forward with whatever
 9 was said at the executive session.
 10 So I did have notes at the ex- -- I'm
 11 going to call it "on the property" just for ease
 12 of reference, but I took -- but I did take notes
 13 of the executive session on the property.
 14 Q. Okay.
 15 A. Okay.
 16 Q. Now, my question is really this:
 17 You -- Mr. Boldra requested an executive session
 18 after you issued your decision that was actually
 19 held by telephone conference in February of 2009.
 20 A. I never issued a decision in this case
 21 except for the dismissal order on April 20.
 22 Q. Well, you issued a decision, termed
 23 it an "Award," and sent it to the parties in
 24 December of 2008 after you had completed it on

Page 34

1 November the 7th of 2008, correct?
 2 A. Okay. Again, I have no recollection of
 3 the dates. I have no reason to dispute your
 4 case -- your dates.
 5 But in the executive session on the
 6 property, the parties, I believe, reached a
 7 resolution of Mr. Kite's case. They asked me to
 8 draft/write up that resolution. I -- you know,
 9 it's in the form you've got. That represented
 10 their agreed order. They asked me to send it to
 11 them to review.
 12 That decision in no way represented my
 13 judgment of the case. I wrote up an agreed order
 14 for the parties. And that's what I sent to them
 15 in -- at -- on whatever dates you're referencing.
 16 Q. In effect, you've just told me that
 17 Mr. Boldra agreed to a reinstatement of Mr. Kite
 18 on terms.
 19 A. I believed he had.
 20 Q. Okay.
 21 A. I did believe he had. That was a
 22 preliminary verbal agreement subject to, you know,
 23 my memorializing it, their reviewing it, and
 24 finalizing it.

Page 35

1 Q. Did your handwritten notes reflect
 2 that?
 3 A. I believe they did.
 4 Q. Can you paraphrase for me as accurately
 5 as you can what you recall Mr. Boldra saying about
 6 his amenability to Mr. Kite's reinstatement under
 7 terms.
 8 A. Okay. At -- what I recall of the
 9 executive session was -- the focus was on -- for
 10 most of the executive session, the focus was on
 11 the second violation, the fact that -- as
 12 I recall, it was a fairly low-level blood alcohol,
 13 .02, .04, something significantly under the legal
 14 limit.
 15 Q. You're close. It was a .29.
 16 A. Okay.
 17 Q. Fifteen minutes later, because there's
 18 a required second, it was a .27.
 19 A. Okay.
 20 Q. Just for -- for accuracy.
 21 A. Okay. But I knew it was -- the legal
 22 limit in Illinois is .08. I knew it was
 23 substantial -- I mean, this wasn't Illinois.
 24 Q. Right.

Page 36

1 A. But that's my view of the legal limit.
 2 So I knew it was substantially under the legal
 3 limit; that he was a long-term employee. It may
 4 have been that there was quite a bit of time
 5 between the first and second offense. I'm not
 6 quite sure about that.
 7 Q. Yes.
 8 A. And he claimed that he had not been
 9 using alcohol on duty but had, rather, been
 10 drinking the day before, the evening before,
 11 something like that. So, initially, the focus was
 12 on that.
 13 I don't recall that anyone disputed
 14 that, in fact, he had been guilty of the first
 15 offense. You know, the focus was, can we do
 16 something on Mr. Schollmeyer's part with the
 17 second offense because there were these
 18 sympathetic factors.
 19 And ultimately, I believe the parties
 20 concluded that because this is a zero tolerance
 21 policy, that there was -- and I don't think there
 22 was any dispute about the lab results, either, as
 23 I recall; that because this was a zero tolerance
 24 policy, there was no way to do anything about the

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 37-40

<p style="text-align: right;">Page 37</p> <p>1 second offense without doing damage to the policy 2 but that the record did not have all of the 3 paperwork about the first offense that's usually 4 in a record and that they could agree to settle it 5 on that basis; to say that, you know, the record 6 didn't have whatever it needed to support the 7 first offense and so, therefore, the second 8 offense would be treated as a first offense, and 9 he'd be reinstated as a first-time offender. 10 Q. If I tell you that Mr. Boldra has 11 said -- 12 A. Um-hum. 13 Q. -- and the record reflects, in terms of 14 his submission -- 15 A. Um-hum. 16 Q. -- that he attached what is sometimes 17 called in the industry the employee's hard card 18 employment record -- 19 A. Um-hum. 20 Q. -- to demonstrate to you that Mr. Kite 21 had had a prior drug and alcohol policy 22 violation -- 23 A. Um-hum. 24 Q. -- and that the hard card displays that</p>	<p style="text-align: right;">Page 39</p> <p>1 Q. Do you have any memory of Mr. Boldra 2 either conceding or perhaps at least acknowledging 3 that there might be an evidentiary problem with 4 proof of the first drug and alcohol violation 5 during the executive session? 6 A. I don't. What I recall is that this 7 was more in the nature of the carrier granting 8 leniency. I mean, the -- the impression I had 9 was that he perhaps knew Mr. Kite, felt that for 10 whatever reason he was deserving of a third 11 chance. And this was how they thought they could 12 get to it without doing, you know, damage to the 13 policy which is, obviously, a very strong policy. 14 I -- I don't recall that. 15 Q. Okay. Did you get any sense or learn 16 any information that local management on scene at 17 the Vancouver terminal -- 18 A. Um-hum. 19 Q. -- strongly wanted Mr. Kite reinstated? 20 A. I don't. I don't recall that, but 21 I don't have any reason to doubt that. That may 22 well have been the case. I don't know that. That 23 might have been a conversation I wasn't even privy 24 to. I don't recall.</p>
<p style="text-align: right;">Page 38</p> <p>1 he was medically disqualified for a period of 2 time, but does not specify the reason for that 3 medical disqualification. 4 Assuming all that to be true, does that 5 help refresh your memory at all -- 6 A. No. 7 Q. -- about the problems with the 8 paperwork -- 9 A. No. 10 Q. -- for the first -- 11 A. I don't remember seeing that hard card. 12 Q. Okay. 13 A. I mean, it may well have been there. 14 This was more than six years ago -- 15 Q. Sure. 16 A. -- but I don't recall seeing it. 17 Q. I'm just trying to find out if you have 18 any memory specifically about what the problems 19 with the underlying paperwork for the first 20 violation were. 21 A. I understand. And I -- I cannot tell 22 you, sitting here today, whether I had read the 23 record enough that I knew that at the time or not. 24 I might have, and I might not have.</p>	<p style="text-align: right;">Page 40</p> <p>1 You know, again, this -- we're talking 2 about a conversation on the property that's six 3 and-a-half years ago, I mean, and so -- okay. 4 Q. I know. I totally understand. 5 A. I under- -- yeah. 6 Q. I'm sympathetic to that. 7 A. I understand. I'm trying to -- yeah. 8 Q. This case has been wound up in the 9 Ninth Circuit for a long time -- 10 A. Right. 11 Q. So... 12 A. Right. I don't remember that. 13 But -- but, obviously, if, you know, 14 he had been willing to take him back, there had to 15 be, you know, some reason, so... 16 Q. And you felt he was willing to take him 17 back? 18 A. I did. 19 Q. "He" being Mr. Boldra? 20 A. I -- I felt that Mr. Boldra had agreed 21 to take him back. I did. 22 Q. Okay. We got off on this subject 23 because I had asked you about using your notes 24 during executive session.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 41-44

Page 41

1 A. Um-hum.
 2 Q. I want to go back to --
 3 A. That's fine.
 4 Q. -- before I move on.
 5 A. Sure.
 6 Q. Okay? Just I'm not picking at you.
 7 I just want to close that --
 8 A. I understand.
 9 Q. -- that story.
 10 When I say "the executive session," I'm
 11 speaking about the session in February of --
 12 A. Phone call?
 13 Q. -- 2009 phone call conference requested
 14 by Mr. Boldra.
 15 A. Okay.
 16 Q. Did you have your notes in front of you
 17 when that phone conference with Mr. Boldra and
 18 Mr. Schollmeyer --
 19 A. You're talking about the notes from the
 20 property?
 21 Q. Yes.
 22 A. Whether I had them in front of me at
 23 the beginning of that conference, I am -- I can't
 24 tell you. But I know that I pulled them out as

Page 42

1 we were talking -- as it became clear what we were
 2 talking about, yes, I pulled them out.
 3 Q. Okay. And so you accessed them and
 4 reviewed them as part of your support for whatever
 5 you said to Mr. Boldra and Mr. Schollmeyer in that
 6 phone conference?
 7 A. Yes.
 8 Q. Okay. Thank you.
 9 MR. THOMPSON: Would you mark these -- c'mon,
 10 Steve -- in order as 5 and 6.
 11 (WHEREUPON, said documents were
 12 marked Plaintiffs'-Zimmerman
 13 Deposition Exhibits No. 5 and
 14 No. 6, for identification, as of
 15 04-01-2015.)
 16 BY THE WITNESS:
 17 A. Okay.
 18 BY MR. THOMPSON:
 19 Q. Okay?
 20 A. Okay.
 21 Q. You have had a chance to take a look at
 22 5 and 6?
 23 A. Yes.
 24 Q. Would you agree with me that 5 is your

Page 43

1 e-mail of December 22nd, 2008 to both Mr. Boldra
 2 and Mr. Schollmeyer with respect to your decisions
 3 on cases 1 through 5 on Public Law Board 7204,
 4 which are enclosed?
 5 A. Okay. Again, you know, I'm -- I'm
 6 going to have to quibble with the word "decision"
 7 because at least -- I don't recall sending this
 8 e-mail but, obviously, I did.
 9 But if I had said, "I've attached the
 10 first set of draft awards," that meant they were
 11 unsigned, so none of them were decisions at that
 12 point.
 13 Q. What are they?
 14 A. They're drafts. They're -- you know,
 15 they're drafts for the parties to review.
 16 Q. Drafts? Drafts of what?
 17 A. They could be drafts of settlements, as
 18 was the case in -- in Kite. I don't recall at
 19 this time if there were any other settlement
 20 results on any of the other cases.
 21 Or they could have been just drafts of
 22 my own result on some Boards, and this must have
 23 been what the parties told me on this one, on most
 24 of my Boards. But the parties, even on the cases

Page 44

1 that I absolutely decide myself, where there are
 2 no settlement discussions at all, they prefer to
 3 see them in draft form because sometimes,
 4 especially coming from outside the industry, there
 5 may be some language in there that causes people a
 6 problem that I don't know is going to cause them a
 7 problem. And so, often, the parties agree to
 8 reword something or something like that. So
 9 generally on my Boards, people prefer to get all
 10 the awards in a draft form.
 11 But -- so I don't know if any of the
 12 rest of these were settlements or not. But if I'm
 13 saying "draft," none of them were signed, so none
 14 of them were actually issued or awards at that
 15 time because if I had signed it, I wouldn't refer
 16 to it as a draft.
 17 Q. The way this works in practice --
 18 A. Um-hum.
 19 Q. -- is that Mr. Schollmeyer and
 20 Mr. Boldra probably have infinitely more hands-on
 21 knowledge about the way the railroad world works
 22 than you, fair?
 23 A. I don't know how long Mr. Schollmeyer
 24 had been in the industry, but I -- he was -- had

JACALYN JOY ZIMMERMAN
UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
45-48

Page 45

1 recently been appointed to his position. And
 2 I believe that our hearing on the property back in
 3 July was his very first docket of arbitration
 4 cases and his first arbitration. So I don't know
 5 his experience in the industry, but as I recall,
 6 he had no experience in -- in the arbitration
 7 field.
 8 Mr. Boldra, I believe, had been doing
 9 this kind of work for quite a while.
 10 Q. Well, my question was more about not
 11 the arbitration process so much --
 12 A. Um-hum.
 13 Q. -- but, actually, how the railroad
 14 works.
 15 A. I had done a substantial number of
 16 cases by this time. I had participated in a
 17 couple of training things. I had been going to
 18 meetings of the National Association of Railroad
 19 Referees for several years. So I -- I did not
 20 work in the industry but, you know, I -- I tried
 21 hard to learn as much as I could about the
 22 industry, and I believed that I knew it pretty
 23 well by then.
 24 Q. Yeah. I'm not pitching rocks at you.

Page 46

1 A. No, I understand.
 2 Q. What I'm saying is this: My -- my
 3 understanding --
 4 A. Um-hum.
 5 Q. -- is that oftentimes, a neutral who
 6 has not actually worked in the railroad
 7 industry --
 8 A. Um-hum.
 9 Q. -- often relies upon the participants,
 10 the partisans who have experience in both
 11 management and labor, in terms of the railroad
 12 industry, for the specific language that
 13 sometimes, as you've told us, will or won't upset
 14 one or both, and --
 15 A. I think that's a little --
 16 Q. -- I may be tweaking --
 17 A. -- broader than I would have -- than
 18 I would see this. I mean, there might be a
 19 little bit in there. Sometimes, there's some
 20 very technical things in a case where I may not
 21 understand --
 22 Q. Um-hum.
 23 A. -- the exact -- I mean, what's a
 24 gravity drop move? I remember a case like that

Page 47

1 where, you know, they had to help me out with
 2 how to write about a gravity drop move which is,
 3 apparently, an unusual thing.
 4 Q. Okay. That's a perfect example of what
 5 I'm trying --
 6 A. Okay.
 7 Q. -- to illustrate --
 8 A. Okay.
 9 Q. -- the expertise that these folks --
 10 these two individuals bring to the table in
 11 terms --
 12 A. But it wouldn't be on the result.
 13 I have never -- I have never changed a result on
 14 a case I sent out, to the best of my recollection.
 15 Where I -- I was charged with deciding
 16 the case, the parties had not settled it, the
 17 language might get tweaked a little, but I don't
 18 believe I ever changed a result on a case that was
 19 my own decision.
 20 Q. Okay. So when you tweak the language
 21 because there's some particular technical issue --
 22 A. Um-hum.
 23 Q. -- that the parties might take a
 24 prob- -- might have a problem with, that's, in

Page 48

1 essence, the purpose of an executive session,
 2 isn't it?
 3 A. No. I mean, an executive session, if
 4 I have a question -- you know, because there are
 5 some transcripts, for example, where everybody
 6 talks in -- completely in railroad terminology,
 7 and you need a little translation. That would be
 8 something I would do in executive session.
 9 But in my experience, the main purpose
 10 of executive session is for parties to settle
 11 cases.
 12 Q. Oh?
 13 A. And that happens a lot.
 14 Q. Well --
 15 A. I mean, I have had Boards where that
 16 has happened on every single -- every single case
 17 got resolved in executive session. That's the
 18 primary purpose for people --
 19 I'm sorry. No question. Go ahead.
 20 Q. If we look back at Exhibit 2 in this
 21 case --
 22 A. Which one was Exhibit 2?
 23 Q. It's the agreement --
 24 A. Um-hum.

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 49-52

Page 49

1 Q. -- between the UTU and the Railroad --
 2 A. Okay.
 3 Q. -- on this specific board.
 4 A. Okay.
 5 Q. And if we look at page 2 --
 6 A. Um-hum.
 7 Q. -- subparagraph (J) on that page --
 8 A. Um-hum.
 9 Q. -- doesn't it say, quote:
 10 "In case a dispute arises involving
 11 an interpretation or application of an
 12 award, the Board, upon request of either
 13 party, shall interpret the award in
 14 light of the dispute."
 15 A. "Interpretation or application" is
 16 general -- that refers to something that might
 17 come up with a remedy.
 18 Q. How it's going to be implemented?
 19 A. How it's going to be implemented.
 20 The only cases I recall that I've ever
 21 had having that had the issue of outside earnings,
 22 whether outside earnings will be deducted from a
 23 back pay award, which is a hugely controversial
 24 issue in the industry.

Page 50

1 Q. Okay.
 2 A. Those are the only cases I remember
 3 where I ever had to get involved in an inter- --
 4 interpretation award, and I think that was --
 5 that was two cases.
 6 Q. How about an interpretation where
 7 you're reinstating someone with respect to a drug
 8 or alcohol policy violation, whether real or
 9 alleged --
 10 A. I have never reinstated an employee
 11 pursuant to -- who had two drug or alcohol
 12 violations.
 13 Q. Let me finish.
 14 A. I'm sorry. I should let you. I
 15 apologize.
 16 Q. (Continuing) -- where that individual
 17 is reinstated and there are issues about whether
 18 that person goes through a medically developed
 19 dry-out policy or has some sort of EAP program.
 20 Aren't all those the kinds of issues
 21 that are classic for an executive session after an
 22 award is drafted and issued?
 23 A. No, because you wouldn't reinstate a
 24 two-time drug or alcohol user.

Page 51

1 Q. Well, how about a first time?
 2 A. The first-time ones, I cannot recall
 3 that I've ever had a case with a first-time
 4 offender because those almost all get resolved
 5 between the parties. The individual goes into the
 6 Employee Assistance Program, fulfills whatever the
 7 particular carrier's requirements are for, you
 8 know, returning to work; has to be medically
 9 cleared.
 10 I've -- I've had a lot of cases, so
 11 I -- as best as I can recall, I have never seen a
 12 case involving a first-time Rule G offender.
 13 Q. So you've never had an opportunity to
 14 hold an executive session where the parties needed
 15 to work out just exactly what those arrangements
 16 were for a first-time offender in terms of
 17 satisfying the railroad's requirements to go back
 18 to work?
 19 A. As I said, I -- I haven't; and from
 20 what, you know, I understand from, again,
 21 colleagues, that type -- typically doesn't come
 22 before an arbitrator. Usually, you know, the
 23 employee is caught pretty much dead to rights and
 24 understands that they have to fulfill these

Page 52

1 conditions if they want to return -- let me back
 2 up for a minute.
 3 The giving someone a second chance is
 4 not required. A first-time offender can be fired.
 5 So if the employee does not agree to jump through
 6 the hoops, that employee is not going to have a
 7 job. So those -- there's no entitlement, as far
 8 as I understand railroad policy, to -- you know,
 9 that kind of second chance.
 10 So that's pretty much the option
 11 presented to the employee. You're going to do
 12 this, or you're going to lose your job. So
 13 they -- they don't typically come to arbitration.
 14 I've never seen one.
 15 Q. Hmm.
 16 A. So, I guess, to answer your question,
 17 I would have to speculate about that because I've
 18 never -- I've never seen it, and I don't believe
 19 most arbitrators see that.
 20 Q. Well, what do you understand or what is
 21 your understanding of what paragraph (J) in the
 22 award -- or, I'm sorry -- in the Agreement
 23 paragraph --
 24 A. Paragraph --

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 53-56

Page 53

1 Q. -- Exhibit 2 actually means?
 2 A. Is that where we were, again?
 3 Q. Yes.
 4 A. That would be -- you know, arbitrators
 5 typically, in regular arbitration as well, if you
 6 have any sort of positive result for a grievant --
 7 you know, as opposed to the whole grievance is
 8 denied -- any sort of positive result, we retain
 9 jurisdiction for, typically, 60 days to resolve
 10 any issues concerning interpretation or
 11 application of the agreement.
 12 So it could be an agreement about how
 13 much back pay is owed. It could be a disa- --
 14 disagreement, I'm sorry. Was somebody entitled
 15 for vacation time during the time they had been
 16 suspended? You know, that is my understanding of
 17 the kinds of issues that would be covered by that.
 18 But as I said, I only had two of them,
 19 and they both concerned the deduction -- whether
 20 employees who had other employment during a period
 21 of suspension, whether the railroad was entitled
 22 to deduct those outside earnings from their back
 23 pay award.
 24 Q. The award that you call a draft that

Page 54

1 you wrote in terms of Mr. --
 2 A. Settlement order, yes.
 3 Q. -- Mr. Kite's case --
 4 A. Um-hum.
 5 Q. -- let's call it the settlement order
 6 so we can stop --
 7 A. Okay, that's fine, fooling around.
 8 Q. -- dicing about that.
 9 A. Okay.
 10 Q. Yeah?
 11 A. That's fine.
 12 Q. (Continuing) -- was a positive award
 13 for the Claimant, wasn't it?
 14 A. Yes, it was.
 15 Q. In Exhibit 6, the settlement
 16 agreement --
 17 A. Okay.
 18 Q. -- you set out basic facts on page 1.
 19 A. Um-hum. Yes.
 20 Q. And you say on page 2, quote:
 21 "The underlying facts of this case
 22 are not in dispute," end quote.
 23 Correct?
 24 A. Right.

Page 55

1 Q. Okay. And you outline what those facts
 2 are, which is --
 3 A. Right.
 4 Q. -- basically a pos- -- a very low-level
 5 positive --
 6 A. Okay.
 7 Q. -- on that date.
 8 A. I see now that that's the case, yes.
 9 Q. Okay? Then you outline, basically, the
 10 contentions of the parties.
 11 A. Um-hum.
 12 Q. That the organization contended that
 13 there was no proof that the breathalyzer was
 14 accurate, and there was no proof that there had
 15 actually been a first violation --
 16 A. Right.
 17 Q. -- for Mr. Kite.
 18 A. Um-hum.
 19 Q. You rejected the first of those two
 20 contentions but accepted the second of those
 21 contentions, saying, quote, at page 3:
 22 "With respect to the penalty
 23 assessed, the Carrier apparently based
 24 its decision to dismiss Claimant upon

Page 56

1 an asserted previous drug/alcohol
 2 violation and the well-established
 3 industry practice to dismiss second-
 4 time violators. The on-property
 5 handling in this case, however, does
 6 not include any evidence establishing
 7 that Claimant in fact had" --
 8 emphasis in original --
 9 A. I see that.
 10 Q. -- "a previous drug/alcohol
 11 violation. Therefore, based upon the
 12 record before us, this is Claimant's
 13 first positive result."
 14 A. Right.
 15 Q. Those are facts that you were entitled
 16 to find, and you so found?
 17 A. I did not find those facts. Those were
 18 the facts the parties agreed to put in this order
 19 as part of their settlement.
 20 Q. And you --
 21 A. That was the basis upon which they
 22 agreed to settle it --
 23 Q. All right.
 24 A. -- to agree that these were the facts.

JACALYN JOY ZIMMERMAN
UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
57-60

Page 57

1 I didn't find any facts.

2 Q. So Mr. Boldra and Mr. Schollmeyer

3 stipulated to what I just read as the facts?

4 A. "Stipulated" is probably too strong

5 a word, but that was what I came away from the

6 executive session on-the-property believing was --

7 Q. Believing to be the case?

8 A. -- was their understanding, yes.

9 Nobody signed off on anything. Nobody -- yes.

10 But that -- that -- that was not --

11 that was not my finding based on that record.

12 Q. You didn't make any findings?

13 A. I didn't make any findings based on the

14 record. I wrote up what they -- I wrote it up the

15 way they instructed me to write it --

16 Q. Fine.

17 A. -- to reflect their settlement.

18 Q. Good. Okay.

19 Does the next paragraph, which I'm now

20 going to read, summarize the totality, together

21 with the paragraph above we just talked about, the

22 agreement that Mr. Schollmeyer and Mr. Boldra made

23 before you?

24 The last paragraph reads, quote:

Page 58

1 "The record further indicates that

2 it is the Carrier's standard practice

3 to offer first-time drug/alcohol

4 offenders a bypass, an opportunity for

5 rehabilitation and the chance to retain

6 their railroad careers."

7 A. Right.

8 Q. "Without minimizing in any way the

9 serious nature of this violation, we

10 find that the Carrier's decision to

11 dismiss Claimant, when the record

12 indicates only one drug/alcohol

13 violation, is an arbitrary, capricious

14 and unjust exercise of Carrier's

15 discretion in the particular

16 circumstances presented herein."

17 A. Yes.

18 Q. "We therefore find, in especially

19 in light of Claimant's almost 30 years

20 of service, that he should be offered

21 a bypass agreement, and, if he accepts,

22 granted the opportunity to return to

23 service, without backpay, when it has

24 been determined, in accordance with the

Page 59

1 Carrier's standard Employee Assistance

2 Practices, that he is medically able to

3 do so," period, close quote.

4 A. Right. Okay.

5 Q. That's it? That's the agreement they

6 made?

7 A. This is all the agreement they made,

8 and I will tell you that -- I'm looking here.

9 "In the particular circumstances

10 presented herein," among -- among the arbitrators,

11 that is generally code for this is an agreed

12 award. That is language we put in awards where

13 it's a decision of the parties rather than the

14 decision of us.

15 Q. I see.

16 A. So that -- that --

17 Q. So you're reading between the lines

18 because you have the experience to know that's

19 what that means?

20 A. If I picked up somebody else's award

21 and saw that language, "in the particular

22 circumstances presented herein," I would believe

23 that there was a very strong likelihood that that

24 had been an agreed order by the parties.

Page 60

1 Q. Thank you.

2 MR. THOMPSON: 7.

3 (WHEREUPON, said document was

4 marked Plaintiffs'-Zimmerman

5 Deposition Exhibit No. 7, for

6 identification, as of 04-01-2015.)

7 THE WITNESS: Sorry. Okay.

8 BY MR. THOMPSON:

9 Q. Again, I apologize for the --

10 A. It's okay. It's okay.

11 Q. -- quality of the copy.

12 A. Okay.

13 Q. It's what I got.

14 A. Okay.

15 See, I -- I have no recollection of the

16 results on this Board. So I see that overall,

17 they were all -- okay. Go ahead.

18 Q. Okay?

19 A. Yeah.

20 Q. Exhibit 7 is an NMB form entitled

21 "Neutral's Report of Activity." Is that fair?

22 A. Yes.

23 Q. This is a form that, essentially,

24 you're required to fill out from time to time with

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 61-64

<p style="text-align: right;">Page 61</p> <p>1 respect to your work in order to tell the NMB and 2 justify your request for payment in terms of what 3 you've been doing on cases? 4 A. Under the old system. 5 Q. Right. 6 A. Yes. 7 Q. Yes. Thank you. 8 And this is particular to your work on 9 two Boards, one of which was our Board 7204? 10 A. Yes. 11 Q. All right. And, in fact, what it shows 12 is the dates and the number of days and the 13 decision code that you actually made on each of 14 the cases on Public Law Board 7204, correct? 15 A. That's what it shows, yes. 16 Q. All right. So if we look down the 17 columns here -- there under "Month," we see 18 various -- "Month," "Day" and "Year," we see 19 various dates that indicate you worked on those 20 particular cases under the NMB case number on 21 those particular days. Fair? 22 A. That's what it says, right. 23 Q. All right. So, for instance, in 24 Mr. Kite's case, which is No. 4, which is the</p>	<p style="text-align: right;">Page 63</p> <p>1 result for the Claimant. 2 Q. Right. 3 A. I mean, if you could have somebody who 4 was dismissed and it's reduced to a 30-day 5 suspension, for example, that would be a 6 "Partially Sustained." 7 Q. Or if someone is making a claim to come 8 back to work and wants backpay but is reinstated 9 without backpay, that's a "Partial Sustained" 10 also? 11 A. Exactly. 12 Q. Okay. And that was the case here with 13 Mr. Kite, wasn't it? 14 A. The way the settlement was put 15 together, it would have been on the M -- NMB 16 system a "Partially Sustained" result. 17 Q. Okay. You need to fill this out in 18 order to actually get paid, don't you? 19 A. Right. This is a monthly -- 20 Q. Under the -- under the old system? 21 A. Under the old system, exactly. 22 Q. Okay. You did get paid for the 23 two days of writing that you did in this case on 24 Mr. Kite as a result of submitting this document,</p>
<p style="text-align: right;">Page 62</p> <p>1 fourth column down, across -- reading it indicates 2 that on November 6th and 7th, you apparently 3 worked on that, drafting the settlement agreement 4 that we've just talked about on those two days. 5 Fair? 6 A. That's what it says so -- 7 Q. Okay. 8 A. -- again, this was -- yeah. 9 Q. Okay. Under "Decision Code" in what is 10 the -- 11 A. Um-hum. 12 Q. I'm counting -- 13 A. Yes. 14 Q. -- the sixth column over? 15 A. Yeah, I understand. It's "PS." 16 Q. It's "PS," and that means "Partially 17 Sustained"? 18 A. It does. 19 Q. All right. And "Decision Code" means 20 what? 21 A. "Decision Code" means whether you 22 denied the claim, you sustained the claim; or 23 in this part- -- in this particular case, it was 24 partially sustained because it wasn't a full</p>	<p style="text-align: right;">Page 64</p> <p>1 correct? 2 A. The NMB system was that you submit 3 this. You were required to attach draft 4 decisions, and that's when you were paid. Often, 5 those deci- -- decisions would be changed before 6 they were final. 7 Q. Okay. My question was: You did get 8 paid on this case? 9 A. I believe I did, yes. 10 Q. Okay. Do you see down below the chart, 11 and above the box where your name appears, a 12 footnote that reads, quote: 13 "I certify that copies of the 14 awards in the cases listed above 15 have been forwarded to the parties," 16 colon, and then your name -- 17 A. I do see that. 18 Q. -- "Jacalyn J. Zimmerman." 19 A. Sure. 20 Q. And then there's a box that says 21 "Signature," and I'm seeing "Or3p." 22 A. The NMB gives each of us an electronic 23 signature code that we use on their documents. 24 Q. Is that --</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 65-68

Page 65

1 A. That's what that is, yeah.
 2 Q. But that's your electronic signature
 3 code?
 4 A. Yes.
 5 Q. And there's a date of 12/10/2008?
 6 A. And we have until the -- well, we still
 7 have, actually, until the 10th of the next month
 8 to submit the billing for the previous month.
 9 Q. Okay.
 10 A. So --
 11 Q. So you --
 12 A. -- they get a lot of billings. They
 13 get a lot of these on the 10th of the month.
 14 Q. Okay. So your sig- -- your electronic
 15 signature on this document on December the 10th,
 16 2008 --
 17 A. Um-hum.
 18 Q. -- certifies that copies of the awards
 19 stated above were served on the parties. Fair?
 20 A. It says what it says.
 21 Q. Okay. One more thing.
 22 A. Um-hum.
 23 Q. The other 11 cases on this Board were
 24 all denied, in total, by you?

Page 66

1 A. That's what this says. I have no
 2 recollection of anything about the other ones --
 3 cases.
 4 Q. You don't know whether they were
 5 settled or you actually decided them?
 6 A. I don't. I don't recall that, no.
 7 Q. If Mr. Boldra and Mr. Schollmeyer have
 8 memory about that particular subject, would you
 9 defer to them?
 10 A. If they agreed. I mean, if they didn't
 11 agree, you know, at this point, I'd have no way of
 12 challenging it because I don't have anything
 13 except the awards themselves. I -- it may well be
 14 that some of them were settled. I -- I just don't
 15 know.
 16 Q. And is it fair for -- well, I --
 17 I shouldn't assume.
 18 Is it fair to say that following your
 19 standard practice, once these decisions or these
 20 awards were sent to the parties and the time for
 21 asking -- the 90 days under the agreement for
 22 asking for executive session had expired, you
 23 destroyed your notes in the other 11 cases?
 24 A. Yes.

Page 67

1 Q. So --
 2 A. Once I sign the awards, I would have,
 3 yes.
 4 Q. So unless you could go back and read
 5 awards 1 through 3 and 5 through 12 and, with your
 6 expertise, find some code in the language that
 7 would suggest there was a settlement, unless that
 8 were possible, you have no idea --
 9 A. I don't.
 10 Q. -- whether they settled or you made the
 11 decision?
 12 A. I don't.
 13 Q. Okay.
 14 A. But I have no recollection of what any
 15 of those cases are even about.
 16 Q. Okay.
 17 A. So...
 18 I was doing a lot of cases at that
 19 time, so...
 20 Q. Okay.
 21 A. I don't mean just these, I mean many
 22 generally, so...
 23 Q. Well, that reduces what was about
 24 twenty exhibits down to seven, so --

Page 68

1 A. Okay.
 2 Q. -- how is that?
 3 A. Fine.
 4 MR. THOMPSON: That should be 8.
 5 (WHEREUPON, said document was
 6 marked Plaintiffs'-Zimmerman
 7 Deposition Exhibit No. 8, for
 8 identification, as of 04-01-2015.)
 9 MS. HENNESSEY: 7?
 10 MR. THOMPSON: That's 8.
 11 BY MR. THOMPSON:
 12 Q. Do you recall receiving Exhibit 8?
 13 A. I don't recall this particular e-mail,
 14 but I do recall that Mr. Boldra requested an
 15 executive session, and it was, I thought, by
 16 e-mail so...
 17 Q. Okay.
 18 A. Okay. Yes.
 19 Q. And that's -- that appears to be
 20 what --
 21 A. That's appears --
 22 Q. -- this is?
 23 A. That appears to be what this is.
 24 Q. Okay. Fine.

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 69-72

Page 69

1 A. Okay.

2 Q. Before we move on, I forgot to ask you

3 one thing.

4 A. Um-hum.

5 Q. Why did you wait after what appears to

6 be the writing of -- of the awards 1 through --

7 on cases 1 through 5 on this Board until

8 December 22nd to send them out, when it appears

9 from Exhibit 7 that they were ready to go or

10 finished in early November? There was, like, a

11 six-week hiatus before they got sent to the

12 parties. Do you know?

13 A. Probably because I sent them together.

14 I mean, maybe I would have waited until I was

15 completely done to send them.

16 Q. Okay. Let me ask you to go back and

17 look at 7 for a moment because --

18 A. Okay.

19 Q. -- that's why I'm confused.

20 A. Uh-huh. So the last one would have

21 been November -- November -- you work on them on

22 these days.

23 Q. Oh, I see. Well --

24 A. I don't recall when I sent them. Let's

Page 70

1 see. Do we have this? Let's -- you gave me it.

2 Q. Yeah. It's -- it's --

3 A. What number is this that you're looking

4 at here? Oh. December 22nd.

5 Q. Yeah. We're looking at Exhibit 5,

6 which is dated December 22nd, and it only attaches

7 1 through 5 which, according to Exhibit 7, were

8 completed by the 10th of November.

9 And I'm curious why there's -- if

10 you're only sending out those first five, why

11 there's that -- what looks like to me -- almost

12 six-week hiatus.

13 A. You know, honestly, I don't know.

14 Q. All right.

15 A. I have -- I have -- I don't know.

16 Q. I just needed to ask the question.

17 A. Yeah. No, I don't know.

18 Q. All right. Thank you.

19 Between the time that you received

20 Mr. Boldra's request for an executive session on

21 the Kite case on Board 7204, which is Exhibit 8 --

22 A. Um-hum.

23 Q. -- and the actual telephone conference

24 in -- in mid to late February, did you have any

Page 71

1 contact with the parties or with the National

2 Mediation Board about the Kite case?

3 A. You know, not that I recall; but,

4 again, I don't know why there would have been this

5 delay, either. I don't know. You're saying we

6 went from January 8th to sometime in February.

7 I don't recall the dates. I don't have any reason

8 to dispute your date, but --

9 Q. I can tell you in a brief, to save

10 time -- and I think counsel would probably

11 agree -- all of you were busy, and you had a hard

12 time trying to find a date and time --

13 A. That may well be.

14 Q. -- you all had time.

15 A. I mean, typically, this would happen

16 relatively quickly --

17 Q. Yeah.

18 A. -- but I don't remember why it didn't

19 here.

20 Q. There's a long e-mail thread where

21 you're going back and forth --

22 A. Okay.

23 Q. -- and nobody's calendar fits, and

24 that's just a waste of time.

Page 72

1 A. Okay. I don't have those e-mails, but

2 you, obviously, do, so --

3 Q. So --

4 A. -- that's fine.

5 Q. What I want to know is --

6 MR. THOMPSON: Let's -- let's go to this. It

7 would be 9.

8 (WHEREUPON, said document was

9 marked Plaintiffs'-Zimmerman

10 Deposition Exhibit No. 9, for

11 identification, as of 04-01-2015.)

12 BY MR. THOMPSON:

13 Q. What I want to know is whether you had

14 any inkling about this.

15 A. You're talking about the case going on

16 the other Board?

17 Q. Right.

18 A. At some point in all of the discussion

19 of this, and I -- and I don't remember the

20 particular discussions, you know, certainly one by

21 one.

22 But I do know there was some discussion

23 that Mr. Boldra and Mr. Schollmeyer had another

24 Board. I knew it was with Mr. Peterson, who

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 73-76

Page 73

1 I don't know; but they mentioned his name and that
 2 they could put this case on the other Board they
 3 had together.
 4 Q. When they -- when you say "they"
 5 mentioned his name, do you mean that in the sense
 6 that Mr. Schollmeyer discussed that with you, or
 7 are you saying that Mr. Boldra discussed it --
 8 A. I think --
 9 Q. -- with you?
 10 A. I believe that Mr. Boldra said to
 11 Mr. Schollmeyer, "We could -- we could put this on
 12 Bob Peterson's Board."
 13 Q. Okay.
 14 A. You know, they weren't saying it to me.
 15 I mean, that wasn't mine to do.
 16 Q. All right. So let's go back to my
 17 original question.
 18 A. Okay.
 19 Q. This is, obviously, after -- this --
 20 this e-mail is after the executive session, the
 21 second executive session --
 22 A. The phone executive session, right.
 23 Q. We -- let's call that the "second
 24 executive session."

Page 74

1 A. "Phone" is better for me.
 2 Q. "Phone" is -- "phone" is better for
 3 you?
 4 A. "Phone" is better for me. Okay.
 5 Q. I'll do that.
 6 A. Thank you.
 7 Q. All right. So after -- between the
 8 time of Mr. Boldra's request for the phone
 9 executive --
 10 A. Um-hum.
 11 Q. -- session and the phone executive
 12 session --
 13 A. Yes.
 14 Q. -- any contact with them?
 15 A. Not on this. I mean, there was
 16 another -- there was an expedited Board with these
 17 same parties. An expedited Board was a paper case
 18 even then, and it was just a result, no -- no
 19 decision. It was just an up or down thing.
 20 Q. Are you speaking about Mr. Knutson's
 21 Board?
 22 A. I believe that Mr. Schollmeyer was on
 23 one of these Boards. I did have a Board with
 24 Mr. Knutson like that, but I -- I believe there

Page 75

1 was another one that was Mr. Boldra and
 2 Mr. Sean -- I believe that's the case.
 3 Q. Okay.
 4 A. But, in any event, there may have been
 5 some discussion about getting cases out on that
 6 Board.
 7 Q. I see. All right.
 8 A. But I -- we did not have any other
 9 discussion --
 10 Q. Not about that?
 11 A. -- discussion about if it -- if it,
 12 in fact, was Mr. Schollmeyer on that Board, there
 13 could have been something like that, but not about
 14 this.
 15 Q. Okay.
 16 A. Okay. Not about this case.
 17 Q. Did you ever see any letters from
 18 Mr. Schollmeyer to Mr. Watkins and Mr. Boldra
 19 protesting the movement of Mr. Kite's case to
 20 Mr. Peterson's Board?
 21 A. I don't remember that, seeing that, no.
 22 Q. Okay. Well, you're not carbon-copied
 23 on those, so...
 24 So what happened at the second --

Page 76

1 A. The phone executive session?
 2 Q. The phone -- yes, I'm sorry.
 3 I violated --
 4 A. That's okay.
 5 Q. -- my own rule. The phone --
 6 A. I understand what you mean.
 7 Q. The phone executive session.
 8 A. Mr. Boldra stated that he had a problem
 9 with that draft --
 10 Q. Were you surprised --
 11 A. -- in the Kite case.
 12 Q. Were you surprised by that?
 13 A. You know, I really -- I must have been,
 14 but I don't really recall.
 15 Q. Okay.
 16 A. Okay?
 17 Q. Okay. And did he tell you what his
 18 problem with the draft was?
 19 A. Yeah. He said he had not agreed to put
 20 Mr. Kite back to work.
 21 Q. Did that surprise you?
 22 A. Yes.
 23 Q. And did -- what -- what did you tell
 24 him in response to that?

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 77-80

Page 77

1 A. My best recollection of this
 2 conversation -- which, again, was a very long time
 3 ago -- is that Mr. Schollmeyer responded first
 4 and, you know, said that, you know, they had
 5 absolutely agreed that -- and they may have gone
 6 back and forth a few times with Mr. Boldra saying
 7 he hadn't agreed and Mr. Schollmeyer, you know,
 8 kept insisting that they had agreed.
 9 And it got, I would say, a little
 10 heated where, you know, he said he had understood
 11 Mr. Boldra to be an honorable person and, you
 12 know, this was not honorable; he would, you know,
 13 never trust him again, things along that line.
 14 And, you know, he was upset. And I felt, frankly,
 15 bad for him because this was, as far as I recall,
 16 his first Board, and he was obviously blowing up
 17 here.
 18 And I told -- I told him that I also
 19 believed that they had agreed to this result.
 20 Q. You told Mr. Boldra that?
 21 A. I told -- well, they were both on the
 22 phone so --
 23 Q. Sure. Okay.
 24 A. -- I told them -- told them both that

Page 78

1 I agreed with Mr. Schollmeyer that the two of them
 2 had agreed to this result.
 3 Q. And what did Mr. Boldra say in response
 4 to that?
 5 A. Mr. Boldra said that I was wrong, I had
 6 misunderstood, you know, something like that.
 7 Q. Okay. Did Mr. Boldra say anything to
 8 you about his desire that you change the decision?
 9 A. I don't recall him saying something
 10 with those words, no.
 11 Q. Okay. How did this conversation end?
 12 A. Well, there was, you know, back-and-
 13 forth between them on, you know, "I believe you
 14 agreed," "I didn't agree."
 15 And at some point, I said it was -- it
 16 was -- you know, that although I believed they had
 17 a preliminary agreement on the property,
 18 obviously, they were not following through on that
 19 and that I had not written the case giving it my
 20 legal judgment, analysis, whatever, and that if
 21 there was no settlement, then we were going to
 22 have to rewind, unscramble it, whatever term you
 23 want to use, and I would have to go back and
 24 analyze the record, you know, myself and write

Page 79

1 whatever award I came to.
 2 Q. All right. What was the response to
 3 that?
 4 A. Mr. Schollmeyer was very insistent that
 5 I had to issue that document.
 6 Q. Okay. What did he say?
 7 A. You know, I'm not going to remember his
 8 exact words. He just -- he was -- his ire, if I
 9 can use that word at the time, I recall directed
 10 mostly at Mr. Boldra, actually.
 11 But he did insist when I -- when I said
 12 I'm going to have to go back and consider the case
 13 from scratch because I didn't write this as my
 14 judgment, I wrote, you know, what the two of you,
 15 I thought, agreed because if the two of them
 16 agreed and signed it, that was -- that was an
 17 award. And he just continued to insist that
 18 I had to.
 19 And I realized, you know, at some point
 20 that he was not going to likely accept this fair
 21 and impartial, an -- you know, a different award,
 22 an award that I would write myself that was not
 23 the document I had given them.
 24 Q. What about Mr. Boldra, was he equally

Page 80

1 insistent that you reverse or --
 2 A. You know, I don't remember him using
 3 those words, "reverse." I mean, the -- the
 4 comment that, you know, was -- is sort of the
 5 heart of this, that we have all seen, that my
 6 understanding is he has acknowledged he made,
 7 I mean, I remember that being made, you know, in
 8 some words, some words to that effect.
 9 But, you know, I believe it was --
 10 it was following Mr. Schollmeyer's continued
 11 insistence that this award had -- this draft had
 12 to be issued.
 13 Q. All right.
 14 A. All right.
 15 Q. So I -- I think what you just told
 16 us -- and I want to be sure I understand --
 17 A. Um-hum.
 18 Q. -- is that you don't remember the
 19 exact words. But in sum and substance, Mr. Boldra
 20 was arguing for a reversal of the draft to hold --
 21 to uphold the discipline and permanently dismiss
 22 Mr. Kite?
 23 A. What he said was that he had not agreed
 24 to this and that in the absence of agreement, it's

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 81-84

<p style="text-align: right;">Page 81</p> <p>1 very-well-established industry policy that an 2 arbitrator does not reinstate a second time -- I'm 3 going to call it Rule -- Rule G offender. 4 Q. Um-hum. 5 A. If the record establishes somebody is a 6 second Rule G offender, that that's -- that's the 7 industrial death penalty in this industry. 8 Q. All right. And what did you say in 9 response to that position? 10 A. Once, you know, the two of them, you 11 know, had their positions pretty clearly out 12 there, I said that, you know, I was going to have 13 to think about what I was going to do. This was a 14 problem. And I don't believe I gave them any 15 final -- I said I'd have to think about it, and 16 I would get back to them. 17 Q. Okay. Do you recall Mr. Boldra -- 18 Mr. Boldra stating to you in substance, if not 19 exactly these words -- 20 A. Um-hum. 21 Q. -- this statement, quote, "If you are 22 going to issue these kinds of opinions, you'll 23 never work for a Class I railroad again," unquote? 24 A. As I just stated, I remember some words</p>	<p style="text-align: right;">Page 83</p> <p>1 draft awards. During the executive 2 session, Referee Zimmerman stated 3 that her notes from the in-person 4 oral argument indicated that I agreed 5 that reinstatement would be an 6 appropriate remedy." 7 Do you agree with that? 8 A. Yes. 9 Q. "I had not said that during the 10 oral argument, and I told her so." 11 Do you agree that he also said that? 12 A. My -- I certainly know that he said he 13 hadn't agreed so -- 14 Q. Okay. 15 A. -- those particular words, I don't 16 know, but he certainly -- he did say he had not 17 agreed. 18 Q. "She even indicated that she was 19 still inclined to use her original 20 analysis based on her notes." 21 Do you agree with that? 22 A. No. 23 Q. Why not? 24 A. I wouldn't have said that because it's</p>
<p style="text-align: right;">Page 82</p> <p>1 to that effect. 2 Q. Okay. Mr. -- I will tell you that 3 Mr. Boldra says the following in an -- 4 A. Okay. 5 Q. -- affidavit -- I'm sorry -- a 6 declaration that he signed in this matter on 7 the 13th of December 2010 -- 8 A. Okay. 9 Q. -- entitled "Declaration of Roger 10 Boldra in Support of BNSF Railway Company's 11 Motion to Dismiss." 12 A. Okay. 13 MR. THOMPSON: At page 3, counsel, beginning 14 at paragraph 12, line 20. 15 THE WITNESS: Okay. 16 MR. THOMPSON: No. Actually, I'm going to 17 move up to paragraph 11, line 16. 18 BY MR. THOMPSON: 19 Q. Quote: 20 "So I took Referee Zimmerman 21 up on her offer and asked for an 22 executive session. The request was 23 granted, and the Board convened by 24 phone to discuss" -- "discuss the</p>	<p style="text-align: right;">Page 84</p> <p>1 nonsensical. 2 Q. Because? 3 A. Because there are only two ways you can 4 write an award here; either I'm writing it from my 5 judgment, in which case I would be writing it from 6 the record. The arguments that you have on -- on 7 the property are argument. They're not evidence. 8 And, in fact, the railroad rules are 9 very clear that you cannot consider any arguments 10 made for the first time at the arbitration level. 11 Q. Um-hum. 12 A. So one of the reasons, in fact, that 13 we take such good notes is because you then have 14 to go back and check what you've been told at the 15 arbitration hearing against the arguments made in 16 the initial processing. So -- so if I'm making 17 the decision myself, I'm writing it from the 18 record because that's the evidence. 19 Q. So you would have had to go back and 20 review the investigation transcript that was held 21 on the property, the arguments that were made 22 there, and the arguments that were made between 23 Mr. Fitzgerald, who was General Chairman, and then 24 Mr. Schollmeyer together with the BNSF labor</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 85-88

<p style="text-align: right;">Page 85</p> <p>1 relations executives --</p> <p>2 A. Who -- who did the on-property.</p> <p>3 Q. -- all the way at the on- -- the</p> <p>4 on-property handling --</p> <p>5 A. Right.</p> <p>6 Q. -- to the point where it was handed</p> <p>7 over to you?</p> <p>8 A. Yes.</p> <p>9 Q. And then base your decision --</p> <p>10 A. On that.</p> <p>11 Q. -- on that?</p> <p>12 A. The only way one would be relying on</p> <p>13 notes of the hearing is if you were writing an</p> <p>14 agreed award based on how the parties told you to</p> <p>15 write it.</p> <p>16 Q. Okay.</p> <p>17 A. And if there was no settlement, I would</p> <p>18 not be inclined to write that. So that's why that</p> <p>19 statement makes no sense to me.</p> <p>20 Q. I understand. He then continues,</p> <p>21 quote:</p> <p>22 "I then reminded her of what I</p> <p>23 said at the oral argument: Allowing</p> <p>24 a second violation employee back to</p>	<p style="text-align: right;">Page 87</p> <p>1 that in the open session.</p> <p>2 Q. I don't, either. Okay.</p> <p>3 A. Okay. I mean, the open session, you're</p> <p>4 taking sort of your -- your public positions on a</p> <p>5 case --</p> <p>6 Q. Sure.</p> <p>7 A. -- as it were, so --</p> <p>8 Q. Yeah.</p> <p>9 A. -- I have no doubt that he probably</p> <p>10 said that at that point in the hearing.</p> <p>11 Q. Do you agree that he said to you, in</p> <p>12 substance, quote:</p> <p>13 "You won't be able to work in</p> <p>14 the industry if you make decisions</p> <p>15 like that," unquote?</p> <p>16 A. He -- as I have said now, he -- there</p> <p>17 were some words to that effect while we were on</p> <p>18 that phone call.</p> <p>19 Q. Is it fair to say that in response to</p> <p>20 that directly, you said to him -- to both of these</p> <p>21 gentlemen, "In that case, all I can do is recuse</p> <p>22 myself"?</p> <p>23 A. I don't remember saying that at that</p> <p>24 time because I hadn't made a final decision about</p>
<p style="text-align: right;">Page 86</p> <p>1 work would create an emotional response</p> <p>2 from the carrier and that I didn't know</p> <p>3 how I could have made that point any</p> <p>4 clearer unless I had said, quote, "You</p> <p>5 won't be able to work in the industry</p> <p>6 if you make decisions like that,"</p> <p>7 period, unquote.</p> <p>8 Do you agree with that?</p> <p>9 A. Which part of it? There were several</p> <p>10 things in there.</p> <p>11 Q. Okay. You know, you're right, and</p> <p>12 I apologize. It's sort of a compound question.</p> <p>13 A. It is.</p> <p>14 Q. Let's start and break this down.</p> <p>15 A. Okay.</p> <p>16 Q. "I then reminded her of what I</p> <p>17 said at the oral argument, quote:</p> <p>18 'Allowing a second violation employee</p> <p>19 back to work would create an emotional</p> <p>20 response from the carrier.'"</p> <p>21 A. The "oral argument" is the open</p> <p>22 session.</p> <p>23 Q. Right.</p> <p>24 A. I have no doubt that he said exactly</p>	<p style="text-align: right;">Page 88</p> <p>1 what I was going to do.</p> <p>2 Q. When do you think you made the final</p> <p>3 decision to recuse yourself?</p> <p>4 A. Well, I told them that I want to think</p> <p>5 about it.</p> <p>6 I thought about it, you know, for a</p> <p>7 day or two; did decide that the appearance of</p> <p>8 impartiality had been compromised, that the two</p> <p>9 parties were so entrenched in their positions that</p> <p>10 they were not going to accept any award I wrote on</p> <p>11 my own as fair and impartial.</p> <p>12 Before I could have said firmly,</p> <p>13 "I'm going to recuse myself," I would have had to</p> <p>14 have talked to the NMB to figure out procedurally</p> <p>15 how we were going to do that, which I did pretty</p> <p>16 soon, I don't know, a couple days. I mean,</p> <p>17 I would have done all of this pretty quickly.</p> <p>18 But I would have had -- I wouldn't</p> <p>19 really have been able to say to them on that</p> <p>20 phone call, "I'm going to recuse myself" because</p> <p>21 the NMB regu- -- at a minimum, the NMB regulates</p> <p>22 the process, and I wouldn't be able to say that</p> <p>23 until I knew how -- how they would let me deal</p> <p>24 with it. Or, I shouldn't say, "let me deal with</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 89-92

<p style="text-align: right;">Page 89</p> <p>1 it," but how they were going to manage that 2 decision, let's say. 3 Q. Okay. Would you agree with me that 4 a statement that says, "All I can do is recuse 5 myself" is different from "I'm going to recuse 6 myself" or different from "I am recusing myself"? 7 A. I don't believe I told them I was going 8 to recuse myself at that time. I said, "I'm 9 going" -- "I'm going to have to think about what 10 I'm going to do." 11 Q. But you would agree with me, those are 12 sentences with different meanings? 13 A. I don't know. None of them are 14 sentences I recall saying, so I can't really -- 15 I can't really tell you that. They wouldn't have 16 been my sentences, so... 17 Q. Who did you talk to in NMB about re- -- 18 recusal? 19 A. I first contacted Carol Conrad. 20 I think her title is supervisory programs 21 director. 22 Q. She's an assistant administrator to 23 Mr. Watkins, isn't she? 24 A. That's right.</p>	<p style="text-align: right;">Page 91</p> <p>1 sure. I know I talked to him on the phone. 2 Q. When was the first time that you 3 believe you actually told the parties that you 4 were going to recuse yourself? 5 A. You know, I don't -- I don't recall 6 that, actually. 7 Q. Do you have any recollection of how 8 you did it, either by e-mail or by doing it via 9 phone conference or just simply issuing the 10 dismissal without prejudice award on April 20th of 11 2009? 12 A. It was before the dismissal without 13 prejudice because whether I used that word or not, 14 I'm -- I'm not positive. But I know there was 15 correspondence with the parties about getting the 16 case on this other Board, so it was pretty clear 17 that I was recusing myself. I wasn't going to go 18 forward and issue an award in that case. 19 But I do not remember -- I -- if I sent 20 them e-mail, if I called, if the NMB got in touch 21 with them. I don't know. I mean, I do know it 22 took the NMB a while to come around to, you know, 23 putting it on another Board. So I was working 24 with them, and I believe that there were -- either</p>
<p style="text-align: right;">Page 90</p> <p>1 Q. And what did you say to Ms. Conrad? 2 A. I told her that I had a problem in 3 this case, that I believed not necessarily -- 4 not my impartiality but that the appearance of 5 impartiality had been compromised and that I 6 couldn't continue to issue an award in the case, 7 and they were going to have to give it to someone 8 else, another arbitrator. 9 Q. What did she say? 10 A. She said I would have to talk to 11 Mr. Watkins, that that was not something she -- 12 she could handle. 13 Q. When did you talk to Mr. Watkins? 14 A. You know, I -- my recollection, but -- 15 is that this all happened within a reasonably 16 short period of time. So I had -- I'm pretty sure 17 I spoke to Mr. Watkins on the phone at least once. 18 There may have been -- it could have been more 19 than once. It was at least once, and then there 20 was some e-mail correspondence. But I -- 21 I believe I initiated the process pretty quickly. 22 Q. Some e-mail correspondence between you 23 and Mr. Watkins? 24 A. Me, Mr. Watkins, the parties, I'm not</p>	<p style="text-align: right;">Page 92</p> <p>1 I copied the parties on that correspondence or 2 I sent them notes updating them on the progress of 3 getting the case moved or something like that. 4 But I -- I don't remember the exact 5 answer to your question. 6 (WHEREUPON, a certain document was 7 marked Plaintiffs'-Zimmerman 8 Deposition Exhibit No. 10, for 9 identification, as of 04-01-2015.) 10 THE WITNESS: What number is this? Thank you. 11 Okay. So this was March. 12 MS. HENNESSEY: What number is this? 13 MR. THOMPSON: This is 10. 14 THE WITNESS: Okay. 15 BY MR. THOMPSON: 16 Q. Do you recall receiving Exhibit 10? 17 A. I don't. I mean, it appears that I was 18 copied on it, so I probably did, but I have no 19 recollection of -- at this moment of receiving 20 this. 21 Q. Okay. You -- 22 MR. MUNRO: Can I ask a question? Sorry. 23 This is -- this appears to be two 24 copies with an NMB Bates stamp and then one</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 93-96

Page 93

1 without.

2 MR. THOMPSON: Correct.

3 MR. MUNRO: Is this how this was produced to

4 you by the NMB, or do you know --

5 MR. THOMPSON: I'm sorry. What -- I thought

6 this was such a poor copy -- I'm sorry. I should

7 have explained that. You're -- the NMB copy,

8 Bates stamped 16, was so poor because of the

9 railroad moniker and whatnot that I attached what

10 BNSF produced.

11 MR. MUNRO: Okay.

12 MR. THOMPSON: And I -- I apologize. They're

13 the same document, I believe; and if anyone wants

14 to correct me, I'm happy to listen. But I did

15 that just basically on the spur of the moment just

16 for clarity.

17 MR. MUNRO: That's fine.

18 MR. THOMPSON: All right?

19 BY MR. THOMPSON:

20 Q. There's nothing mentioned here about

21 recusal that you see, is there?

22 A. No.

23 Q. Okay. Do you believe that you had told

24 Mr. Boldra on March 17th that you were going to

Page 94

1 recuse yourself?

2 A. On March 17th, the day he sent this

3 letter?

4 Q. No, I'm sorry, by March 17.

5 A. By March 17th? I mean, whether I used

6 the word "recusal" or "I can't go forward and

7 issue a decision in this case," by the time he was

8 asking them to put it on another Board, he's --

9 I certainly had communicated to him that I --

10 I could not continue and decide this case.

11 Q. And the reasons why you could not

12 continue and decide this case were what?

13 A. Because there had been, I believed,

14 on the property, we will call it, a settlement

15 between the parties. The parties told me how to

16 write the award --

17 Q. Okay.

18 A. -- to write it on the basis that that

19 first offense was not sufficiently documented.

20 I went back and wrote it. In writing it, I did,

21 in fact, review the entire record.

22 And based on my review of the entire

23 record, I knew that, in fact, although the record

24 was not quite as complete on that first offense as

Page 95

1 most of the records I had seen were, that there

2 was definitely enough evidence in that record to

3 conclude that the carrier had met its burden of

4 proving by substantial evidence that he had

5 birth -- both the first and second offense.

6 So by the time we were on the phone,

7 the second -- you know, the phone, I knew that if

8 I were writing this award on my own, that the

9 claim would be dismissed, that I would find for

10 the carrier. And once the settlement fell apart,

11 I knew I couldn't issue that award because it was

12 incorrect. It was not a legally correct award.

13 The only way it could be issued was

14 as a settlement, which I had no problem with.

15 I think settlement is fine. This was the

16 carrier's employee. If they knew something I

17 didn't and wanted to take him back, I have no

18 problem with that, but I could not have put him

19 back.

20 And the tone of the conversation,

21 again, the parties were so entrenched, I knew that

22 that would not be accepted as a fair and impartial

23 award.

24 Q. Okay.

Page 96

1 A. And, therefore, you know, I couldn't --

2 I couldn't continue.

3 Q. Mr. Boldra's refusal to go forward with

4 what you understood was his initial agreement --

5 A. Yes.

6 Q. -- to reinstate Mr. Kite --

7 A. Yes.

8 Q. -- at the original hearing --

9 A. Um-hum.

10 Q. -- compromised your impartiality, in

11 your own eyes?

12 A. No. That did not -- the fact that the

13 agreement fell apart, in and of itself, would not

14 have compromised. I -- first of all, let me back

15 up. I don't believe my impartiality was

16 compromised. I believe that I could have gone and

17 written the fair and impartial decision which

18 would have resulted in Mr. Kite losing.

19 The conduct on that phone call was so

20 entrenched and so antagonistic and so whatever you

21 want to call it that I did not believe the parties

22 would see -- it's the appearance of impartiality

23 that was compromised.

24 Q. I appreciate -- I appreciate that

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 97-100

Page 97

1 correction.
 2 A. Okay.
 3 Q. Mr. Boldra's refusal to follow through
 4 with what you understood to be his initial
 5 agreement created the appear- -- an appearance of
 6 a lack of impartiality that you felt tainted you?
 7 A. I would not say that. I -- if -- had
 8 we been on the phone and, you know, the agreement
 9 just fell apart, you know, Mr. Boldra said, you
 10 know, "You misunderstood what I said,"
 11 Mr. Schollmeyer said, "Well, you know, that's not
 12 great," and I would have said, "Well, you know,
 13 this was a preliminary agreement. It wasn't a
 14 binding agreement. It wasn't signed."
 15 But had the conversation on the phone
 16 not gone the way it was, the fact that the
 17 agreement fell apart would not have been enough to
 18 keep me from just saying, then, "I'm going to go
 19 back and, you know, examine the case ab initio,
 20 whatever you want to call it, and issue my own
 21 award." But by then, I had reviewed the record
 22 well enough that I knew what that award would have
 23 to be.
 24 Q. Did you make any attempt to exhort

Page 99

1 recuse?
 2 A. I don't know, but there was, as I
 3 recall, a few weeks of going around on this with
 4 the -- this was a very unusual thing for the NMB;
 5 and, you know, they had to adjust their
 6 procedures. So I think the point that I was
 7 trying to get the NMB to get this case heard
 8 again, they certainly would have known that, but
 9 I can't remember exactly when I told them. It was
 10 sometime before I issued, you know, the dismissal
 11 because I couldn't issue the dismissal until the
 12 NMB had sorted out its procedure.
 13 (WHEREUPON, a certain document was
 14 marked Plaintiffs'-Zimmerman
 15 Deposition Exhibit No. 11, for
 16 identification, as of 04-01-2015.)
 17 THE WITNESS: Okay. Thank you. What's the
 18 date on here? March 13th? Okay.
 19 (Short pause.)
 20 THE WITNESS: Okay.
 21 MR. THOMPSON: This is Exhibit -- what number?
 22 THE COURT REPORTER: 11.
 23 THE WITNESS: 11.
 24 MR. THOMPSON: 11, thank you.

Page 98

1 Mr. Boldra to resume his initial position?
 2 A. Do you mean the agreement?
 3 Q. Yes?
 4 A. I did. I did.
 5 Q. What was his response to that?
 6 A. He continued to maintain that I had
 7 misunderstood.
 8 Q. And that he had never done that in the
 9 first place?
 10 A. He said he had not agreed and if I
 11 thought he -- he had, you know, I had
 12 misunderstood him. He never wavered from that on
 13 that phone call.
 14 Q. Do you think you misunderstood him?
 15 A. No.
 16 Q. Had you spoken to Mr. Watkins about the
 17 circumstance of your considered recusal by the end
 18 of March?
 19 A. You know, I don't recall the dates on
 20 which I spoke to him.
 21 Q. Okay. Can you give me an idea of how
 22 long before you issued the dismissal without
 23 prejudice order on the 20th of April you actually
 24 informed the parties about your decision to

Page 100

1 BY MR. THOMPSON:
 2 Q. I want to draw your attention to the
 3 e-mail on page Bates stamp 54. It's the first
 4 page of 11.
 5 A. Oh, the first page?
 6 Q. Uh-huh.
 7 A. Okay.
 8 Q. And it's the lower of the two on that
 9 page in the string from Carol Conrad dated --
 10 A. Right.
 11 Q. -- Friday, March 13th, 2009 --
 12 A. Um-hum.
 13 Q. -- at 12:06.
 14 A. Yes.
 15 Q. Do you see where it says -- she's
 16 writing to both Mr. Boldra and Mr. Schollmeyer.
 17 A. Uh-huh.
 18 Q. It says:
 19 "This office is in receipt of
 20 requests to add case 24 to Public
 21 Law Board 7254."
 22 A. Yes.
 23 Q. "Also noted is a letter stating
 24 that Case 24 is a case you intend to

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 101-104

<p style="text-align: right;">Page 101</p> <p>1 remove from Public Law Board 7204 2 because Jackie Zimmerman recused 3 herself on this case." 4 A. Right. 5 Q. Do you have any idea how Carol Conrad 6 knew that by March 13th? 7 A. Knew that I had recused myself? 8 Q. Uh-huh. 9 A. Because she says she has a letter from 10 Mr. Boldra stating that -- I mean, reading this, 11 it appears that Mr. Boldra told her that. 12 Q. That's the conclusion I draw. 13 A. But -- 14 Q. Have you ever seen that letter? 15 A. I'm not copied on it. I don't remember 16 seeing it. 17 You have to remember, after my initial 18 conversation with Carol, my contacts were -- were 19 all with Mr. Watkins. So what the two of them 20 communicated, I don't know. 21 Q. Okay. The reason I'm asking is -- 22 A. Um-hum. 23 Q. -- because this letter that has been 24 referred to by Ms. Conrad --</p>	<p style="text-align: right;">Page 103</p> <p>1 removing myself from this Board would have been 2 with -- with Ms. Conrad and then would have been 3 with Mr. Watkins. 4 Q. Um-hum. 5 A. And then, whether one of the NMB people 6 told the parties initially or whether I told them 7 initially, I can't tell you. Obviously, I mean, 8 you have it. I had some communication with the 9 parties about removing myself from this case 10 during the time we were trying to work it out 11 procedurally with the NMB. But what the exact 12 sequence, and who told who what, you know, I don't 13 know. I mean, may -- I may well have told them. 14 I -- I don't think it was a phone call. I may 15 have told them. The NMB may have told them. You 16 know, I just don't know. I don't know. 17 But I -- I believe that before I said 18 anything, if I said anything to the parties -- 19 well, eventually, I did, obviously. But I would 20 have sorted it out with the NMB. 21 Q. Do you recall whether or not a phone 22 call was actually held on either April the 17th or 23 April the 18th between you and Mr. Schollmeyer and 24 Mr. Boldra?</p>
<p style="text-align: right;">Page 102</p> <p>1 A. Uh-huh. 2 Q. -- to my knowledge, has never been 3 produced in this case by you, by the NMB, or by 4 BNSF, and I'm wondering if you have ever seen it. 5 A. Yeah. It appears to me, wasn't one of 6 these earlier e-mails -- is there a date? Also 7 noted is a letter standing -- it looks to me 8 like -- well, this is a letter to Mr. Watkins. 9 But Exhibit 10 says "Please remove" 10 this case, you know, "from Public Law Board 7204." 11 Q. Yeah, but it's April 21st. 12 A. Is that later? March 17th? 13 Q. That's five weeks later. 14 A. March 17th. March -- oh, okay. This 15 was earlier. 16 I don't know. You know, then, I guess 17 the answer is, I don't know exactly who was 18 talking to who and telling them what. 19 Q. Assuming that your assumption is 20 correct that Mr. Boldra told Ms. Conrad that you 21 were recusing, how did he get that information by 22 the 13th of March? 23 A. You know, I don't know. I believe that 24 the first firm conversation I would have had about</p>	<p style="text-align: right;">Page 104</p> <p>1 A. I don't remember that. 2 Q. That would have been three days before 3 you actually issued -- 4 A. Issued the dismissal letter? 5 Q. Yes. 6 A. I don't remember that. I mean, I don't 7 remember it. 8 Q. Would you have made notes in your file? 9 A. I don't generally take notes. I mean, 10 I take very good notes at hearings all the time. 11 Beyond hearings, you know, it's hit or miss if I 12 feel the need to jot something down. But, again, 13 had I jotted something down, that would have been, 14 you know, long gone when I cleared off my desk. 15 I don't -- I don't remember that phone 16 call. It's possible, but I don't remember it. 17 Q. Okay. All right. Let's hang onto 18 Exhibit 11 for a moment because -- 19 A. Okay. 20 Q. -- we're going to come right back to 21 it. 22 A. Okay. 23 24</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 105-108

<p style="text-align: right;">Page 105</p> <p>1 (WHEREUPON, a certain document was</p> <p>2 marked Plaintiffs'-Zimmerman</p> <p>3 Deposition Exhibit No. 12, for</p> <p>4 identification, as of 04-01-2015.)</p> <p>5 THE COURT REPORTER: No. 12.</p> <p>6 THE WITNESS: Thank you.</p> <p>7 March 17th? Okay.</p> <p>8 BY MR. THOMPSON:</p> <p>9 Q. Do you recall receiving a copy of this</p> <p>10 letter, Exhibit 12?</p> <p>11 A. I don't.</p> <p>12 Q. Okay. This is a letter to Mr. Boldra</p> <p>13 with a carbon copy to you --</p> <p>14 A. Right.</p> <p>15 Q. -- saying that he's looked into the</p> <p>16 matter and, basically, the NMB records show that</p> <p>17 Jacalyn Zimmerman, quote:</p> <p>18 "...rendered a decision on this</p> <p>19 case on November 7, 2008. For this</p> <p>20 reason, the case cannot be removed,"</p> <p>21 period, unquote.</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. Okay. Would that suggest to you</p>	<p style="text-align: right;">Page 107</p> <p>1 authority?</p> <p>2 BY THE WITNESS:</p> <p>3 A. I mean, that's like saying it's on a</p> <p>4 case where I'm the sole arbitrator, if I send out</p> <p>5 an unsigned draft or if I send out something</p> <p>6 without a signature, you know, an award has to be</p> <p>7 signed. This is a tripartite arbitration.</p> <p>8 Until -- until two people sign it, it's a draft.</p> <p>9 BY MR. THOMPSON:</p> <p>10 Q. Okay. All I want to know is --</p> <p>11 A. Um-hum.</p> <p>12 Q. -- what's the source of your authority</p> <p>13 that it has to be signed in order --</p> <p>14 A. That is, again --</p> <p>15 Q. Your experience?</p> <p>16 A. Not just my experience, but I have</p> <p>17 learned a lot about arbitration in the railroad</p> <p>18 industry, and I believe there have been sessions</p> <p>19 at the railroad meetings where things like this</p> <p>20 have been discussed. I mean, this is just -- it's</p> <p>21 sort of beyond talking about it. I can't even --</p> <p>22 that's just standard. You know, it's standard</p> <p>23 practice. I mean, anything that's not signed is a</p> <p>24 preliminary -- it's a preliminary document.</p>
<p style="text-align: right;">Page 106</p> <p>1 that Mr. Watkins considered your -- what you call</p> <p>2 settlement agreement to be an award --</p> <p>3 A. No.</p> <p>4 Q. -- that was binding?</p> <p>5 A. No.</p> <p>6 Q. Why not?</p> <p>7 A. Because it was not signed by two</p> <p>8 people.</p> <p>9 Q. Oh.</p> <p>10 A. A binding award is one that's signed by</p> <p>11 two of the three people.</p> <p>12 Q. Where -- where is the authority for</p> <p>13 that?</p> <p>14 A. This is a tripartite panel. I mean --</p> <p>15 Q. No. Where is the authority that says</p> <p>16 that an agreement has to be signed by two people</p> <p>17 before it's effective?</p> <p>18 MR. MUNRO: Objection, calls for a legal</p> <p>19 conclusion.</p> <p>20 MR. THOMPSON: No. I'm just asking her for</p> <p>21 where that is.</p> <p>22 BY THE WITNESS:</p> <p>23 A. No. That's, again, a well-known --</p> <p>24 MR. THOMPSON: What's the source for the</p>	<p style="text-align: right;">Page 108</p> <p>1 Q. Okay. Well --</p> <p>2 A. Okay.</p> <p>3 Q. What does the agreement between the</p> <p>4 UTU and the BNSF Railway that created Public Law</p> <p>5 Board 7204 say?</p> <p>6 A. I have no idea. I mean, I -- I can</p> <p>7 honestly tell you that from the time I first got</p> <p>8 this Board until now, I probably have not looked</p> <p>9 at this agreement. It's not like we keep</p> <p>10 referring back to them. These are boilerplate</p> <p>11 agreements and --</p> <p>12 Q. Right.</p> <p>13 A. -- you want to point me to something</p> <p>14 you believe supports your --</p> <p>15 Q. Sure.</p> <p>16 A. Okay.</p> <p>17 Q. On the second page --</p> <p>18 A. Um-hum.</p> <p>19 Q. -- in subparagraph (H), does --</p> <p>20 A. Um-hum.</p> <p>21 Q. -- the agreement between the parties</p> <p>22 not say, quote:</p> <p>23 "Each member of the Board shall</p> <p>24 have one vote and any two members</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 109-112

<p style="text-align: right;">Page 109</p> <p>1 of the Board shall be competent to 2 render an award and to make any 3 decision which the Board is empowered 4 to make by" -- 5 A. To -- okay. Well, how else -- 6 Q. -- "statute or agreement." 7 A. Well, how else would those two members 8 signify that they've made an agreement other than 9 signing the order? 10 Q. Just by saying yes. 11 A. Well, that -- that's -- that's a legal 12 issue that I -- you know, you can pursue, but I -- 13 it's not my understanding that this lawsuit is 14 about enforcing the settlement agreement. We had 15 a verbal agreement. That's not my understanding, 16 but -- 17 Q. Have you read the Complaint in this 18 case? 19 A. A long time ago. 20 Q. Okay. 21 A. And also, the parties were very clear 22 at the hearing on the property that they wanted to 23 see a draft document before they entered into a 24 final agreement.</p>	<p style="text-align: right;">Page 111</p> <p>1 Q. Okay. Let's go back to Exhibit 11 and 2 go to the second-to-the-last page. 3 A. Um-hum. 4 Q. The bottom of the page, that's Bates 5 number 56. 6 A. Um-hum. 7 Q. Do you see an e-mail dated Monday, 8 April 6th at 2:35 p.m. from you -- 9 A. Yes, sure. 10 Q. -- to Mr. Boldra? 11 A. And Mr. Schollmeyer, yes. 12 Q. Okay. Would you read what you said 13 there. 14 A. I said: 15 "Do you want me to talk to" 16 Mr. Watkins -- "Roland Watkins? This 17 is apparently not straightened out..." 18 "Sorry," but you know -- "Let me 19 know." Wait a minute. 20 "Let me know. Sorry this is so 21 difficult. 22 "Talk to you soon." 23 Q. What was that in response to? 24 A. Well, I knew -- although I don't</p>
<p style="text-align: right;">Page 110</p> <p>1 (WHEREUPON, a certain document was 2 marked Plaintiffs'-Zimmerman 3 Deposition Exhibit No. 13, for 4 identification, as of 04-01-2015.) 5 THE WITNESS: 13, okay. It's a -- this looks 6 like... okay. 7 BY MR. THOMPSON: 8 Q. Do you recall seeing this letter? 9 A. I don't have any independent 10 recollection of seeing this letter. 11 Q. Okay. 12 A. I mean, I am -- go ahead. I'm sorry. 13 Q. It's addressed to you -- or a carbon 14 copy to you. I beg your pardon. 15 A. No, I have no -- no reason to doubt 16 that I got it, but I have no recollection today of 17 having seen it. 18 MR. THOMPSON: Okay. What was that number 19 again? 20 THE COURT REPORTER: 13. 21 BY MR. THOMPSON: 22 Q. Well, you'll note that the date was 23 the 6th of April? 24 A. Right.</p>	<p style="text-align: right;">Page 112</p> <p>1 recall, you know, these particular letters, but 2 I know that because -- and this was based 3 primarily on the financing -- because the NMB pays 4 for the case at the time the arbitrator sends a 5 draft to the parties, in terms of their financial 6 world, you know, that case has been -- 7 Q. Disposed of? 8 A. -- paid for. You know, they only 9 allocate -- I don't know about "disposed of." 10 I'm not in their heads. But it's -- it's been 11 paid for. And in -- in their universe, once it's 12 been paid for once, that -- that's as much money 13 as is paid for the case. 14 And -- and, in fact, I -- so I know 15 there was some back-and-forth. I don't remember 16 those particular letters, but this was -- this was 17 a diffi- -- difficult situation for the NMB to 18 resolve given its financial structures. And I 19 recall at one point even offering to pay them 20 back, if that helped, which I don't believe 21 happened, but -- but I did. I said I, you know, 22 would return the money. 23 But eventually, Mr. Watkins, who is 24 also a lawyer, came to understand that it would</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 113-116

<p style="text-align: right;">Page 113</p> <p>1 compromise my ethical obligations as an arbitrator 2 to continue in this case which would not mean 3 I would issue that draft but that I would go back 4 and write a different award; that, ethically, I 5 couldn't do it and -- because the appearance of 6 impartiality, I believed, had been compromised. 7 And eventually, he came to understand 8 my position and figured out a way to -- to do this 9 by dismissing this case without prejudice, letting 10 the parties treat it as a new case, and putting it 11 on in another Board. This was, apparently, a 12 very -- I mean, the NMB people can speak to this 13 more than I can, but this isn't something that 14 happens very often, so they had to create a 15 procedure for it. 16 Q. Did all that happen on the phone 17 between you and Mr. Watkins, what you've just 18 described for me? 19 A. As I said, I don't remember. There 20 were conversations -- at least one conversation on 21 the phone with him. Whether I had any -- I don't 22 believe I had further substantive conversations 23 with Ms. Conrad, but I might have. There might 24 have been e-mail. How many times I talked to him</p>	<p style="text-align: right;">Page 115</p> <p>1 questions, too. But I don't know, to the extent 2 I wasn't a party to any conversations between the 3 two of them and Mr. Watkins. 4 But Mr. Watkins was not focused on the 5 substance of what was gone on -- going on. He was 6 focused on, you know, he had so much money, they 7 paid for so many cases. This case got paid for. 8 Because they have this -- this system which is not 9 a perfect system, because it's always drafts, and 10 the final decisions, I mean, the arbitrators are 11 paid when they submit drafts. The final decisions 12 may look quite different. 13 Q. Okay. 14 A. But he was -- he was just focused on -- 15 on the money. I mean, that -- 16 Q. And my question -- 17 A. -- was his focus. 18 Q. The essence of my question is -- 19 A. Um-hum. 20 Q. -- what changed his mind? 21 A. He came to understand, as I said, that 22 I had, you know, an ethical problem and could 23 not -- I couldn't -- I couldn't issue the document 24 they had because that was the result of an</p>
<p style="text-align: right;">Page 114</p> <p>1 on the phone, more than once, I really couldn't 2 tell you. 3 Q. Well, when you say that he came to 4 understand that it would compromise the appearance 5 of your impartiality -- 6 A. Compromise my ethics, right. 7 Q. Right. How did that happen? Because 8 you got on the phone, and you talked him through 9 that, and so -- 10 A. You know, I don't remember. I mean, 11 there, obviously, were communications because we 12 came to this result. But how they were, I -- 13 I really just don't remember. It's been a very 14 long time. 15 Q. Um-hum. Well, do you agree that what 16 happened is, is that Mr. Watkins, learning from 17 Mr. Schollmeyer that this case had been heard by 18 you once, refused to make the transfer that 19 Mr. Boldra had requested, and then you needed to 20 get on the phone with Mr. Watkins and tell him the 21 circumstances; and that as a result of that, 22 Mr. Watkins changed his position and allowed that 23 transfer to the Peterson Board? 24 A. Okay. That's -- that's several</p>	<p style="text-align: right;">Page 116</p> <p>1 agreement, and the agreement had fallen apart, and 2 it did not reflect my judgment of the case. 3 And I could not go back and write and 4 issue the decision that would have reflected my 5 judgment in the case because I felt that the 6 parties, you know, were so entrenched that -- 7 I thought I could do it. I mean, in my own head, 8 I could go back and decide the case impartially. 9 I knew what the result would be. But I did not 10 believe that the parties would accept it as a fair 11 and impartial result. 12 And I felt that the best thing for all 13 concerned was to get this cleanly before another 14 arbitrator and let that individual just issue a -- 15 just issue a decision. 16 Q. Okay. That's -- that's a long answer 17 to what I thought was -- 18 A. Okay. 19 Q. -- should have been a short one. 20 A. Okay. I just -- 21 Q. The essence is -- is that -- 22 A. I thought it was a short -- a long 23 question. Go ahead. 24 Q. The essence is --</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 117-120

<p style="text-align: right;">Page 117</p> <p>1 A. Um-hum.</p> <p>2 Q. -- is that you got him focused on the</p> <p>3 bigger picture in a phone call or a series of</p> <p>4 phone calls, and that's what persuaded him to</p> <p>5 reverse his position. Isn't that fair?</p> <p>6 A. I think that's fair, that he -- he came</p> <p>7 to understand that I had an ethical situation</p> <p>8 which ultimately, you know, trumped the -- not</p> <p>9 "trumped," but caused him to figure out a way to</p> <p>10 make this work within their financial framework.</p> <p>11 Q. Okay.</p> <p>12 THE VIDEOGRAPHER: The last question, and then</p> <p>13 I'm out of tape. I just have to change the tape.</p> <p>14 MR. THOMPSON: Okay. Let's stop because we</p> <p>15 have to have a tape change.</p> <p>16 THE WITNESS: Okay. Can --</p> <p>17 MR. THOMPSON: Does everybody want a 10-minute</p> <p>18 break? We've gone for two hours.</p> <p>19 THE WITNESS: I'm okay either way as long as</p> <p>20 I can have some more water.</p> <p>21 MR. MUNRO: I can use a five-minute break.</p> <p>22 MR. PRYOR: Let's keep it short as we can,</p> <p>23 five minutes or less.</p> <p>24 THE WITNESS: All right.</p>	<p style="text-align: right;">Page 119</p> <p>1 you since the billing has confused them."</p> <p>2 Is that fair?</p> <p>3 A. That's what it says, so...</p> <p>4 Q. Okay. Do you recall that?</p> <p>5 A. I do recall. Whether -- probably not</p> <p>6 this specific e-mail, but as I said, I recall the</p> <p>7 back-and-forth that the NMB is focused on the</p> <p>8 billing.</p> <p>9 I don't believe, based on my knowledge</p> <p>10 of the practices, that they review what you send</p> <p>11 in with the billing at all except to make sure</p> <p>12 that the case numbers on the documents make --</p> <p>13 match the case numbers on the billing.</p> <p>14 Q. I'm just wondering if you recall</p> <p>15 getting this e-mail from Mr. Boldra.</p> <p>16 A. This one? No, I don't. But I know</p> <p>17 that, you know, there was -- there was back-and-</p> <p>18 forth on it and that since I was the one who</p> <p>19 submitted the billing to the NMB, that it was</p> <p>20 probably going to be more productive for me to</p> <p>21 stress to them that this had not been a final</p> <p>22 award, that it had been a draft written to reflect</p> <p>23 a tentative agreement and, you know, things had</p> <p>24 blown up. And I had an ethical problem with</p>
<p style="text-align: right;">Page 118</p> <p>1 MR. THOMPSON: They can't agree.</p> <p>2 THE VIDEOGRAPHER: We're now going --</p> <p>3 MS. MOORE: Can we do five? Can we do five?</p> <p>4 MR. THOMPSON: Sure.</p> <p>5 THE VIDEOGRAPHER: We're now going off the</p> <p>6 record with the end of Tape 1 at 11:31 a.m.</p> <p>7 (WHEREUPON, a recess was had.)</p> <p>8 MR. THOMPSON: All right. We're back on the</p> <p>9 record at what I have as 11:42.</p> <p>10 THE VIDEOGRAPHER: Okay. One moment, please.</p> <p>11 We are now going back on the record</p> <p>12 with the beginning of Tape 2 at 11:41 a.m.</p> <p>13 BY MR. THOMPSON:</p> <p>14 Q. I just want to do some housekeeping for</p> <p>15 a moment. Do you -- if you would look at what's</p> <p>16 Bates number 56 on Exhibit 11.</p> <p>17 A. Okay.</p> <p>18 Q. Essentially, I want to go through the</p> <p>19 e-mails of April the 6th at 2:41 and 2:44 there.</p> <p>20 Is it fair to say that in response to your</p> <p>21 question, "Do you want me to talk to Roland</p> <p>22 Watkins," Mr. Boldra writes back immediately and</p> <p>23 says:</p> <p>24 "I think that this has to come from</p>	<p style="text-align: right;">Page 120</p> <p>1 considering -- you know, it was -- it was my</p> <p>2 ethical problem with considering -- continuing.</p> <p>3 So, I mean, I -- I do remember that I</p> <p>4 thought maybe I would be able to do a better job</p> <p>5 explaining to the NMB.</p> <p>6 Q. Okay. And then, you confirm that</p> <p>7 you're going to give him a call in the next e-mail</p> <p>8 up, which is at 2:44 that day?</p> <p>9 A. That's what it says.</p> <p>10 Q. Okay?</p> <p>11 A. Okay. Giving Mr. Watkins a call does</p> <p>12 not necessarily mean that you speak to him, but</p> <p>13 yes.</p> <p>14 Q. Okay. And even later that day, if you</p> <p>15 go to the next forward page on Bates number 55 --</p> <p>16 A. Um-hum.</p> <p>17 Q. -- do you see an e-mail of 3:02 where</p> <p>18 you basically are writing back to Mr. Boldra,</p> <p>19 saying you just talked to Carol Conrad, "...and</p> <p>20 she said," as you say, "no surprise," I have to</p> <p>21 talk to Mr. Watkins, and "He's not in," but I'll</p> <p>22 do it, right?</p> <p>23 A. Right. Okay.</p> <p>24 Q. All right. Let me ask you to hang on</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 121-124

<p style="text-align: right;">Page 121</p> <p>1 to Exhibit 11. Put it somewhere safe so we can 2 refer to it again. 3 A. Sure. 4 Q. We're going to come back to that. 5 A. Okay. 6 MR. THOMPSON: This will be 14, I believe. 7 THE COURT REPORTER: Correct. 8 MR. THOMPSON: Thank you. 9 (WHEREUPON, said document was 10 marked Plaintiffs'-Zimmerman 11 Deposition Exhibit No. 14, for 12 identification, as of 04-01-2015.) 13 MR. THOMPSON: This will be 15. 14 (WHEREUPON, said document was 15 marked Plaintiffs'-Zimmerman 16 Deposition Exhibit No. 15, for 17 identification, as of 04-01-2015.) 18 BY THE WITNESS: 19 A. Right. Okay. 20 BY MR. THOMPSON: 21 Q. Is Exhibit 14 your e-mail to both 22 Mr. Boldra and to Mr. Schollmeyer on April 20th, 23 enclosing a copy of what you call the dismissal 24 without prejudice?</p>	<p style="text-align: right;">Page 123</p> <p>1 I ever saw in this case. 2 Q. Okay. You've issued three declarations 3 in this litigation in an attempt to stop this 4 deposition, is that fair? 5 A. To quash the subpoena, yes. 6 MR. THOMPSON: All right. 7 (WHEREUPON, said document was 8 marked Plaintiffs'-Zimmerman 9 Deposition Exhibit No. 16, for 10 identification, as of 04-01-2015.) 11 BY THE WITNESS: 12 A. Okay. 13 BY MR. THOMPSON: 14 Q. Is Exhibit 16 the third of those 15 declarations? 16 A. Okay. 17 (Short pause.) 18 BY THE WITNESS: 19 A. Okay. It is. It is. 20 BY MR. THOMPSON: 21 Q. It is? Okay. 22 A. True. 23 Q. And at the second page of that 24 declaration, paragraph 5, do you say the</p>
<p style="text-align: right;">Page 122</p> <p>1 A. Again, I don't remember this e-mail, 2 but it certainly appears that -- 3 Q. That's what it appears to be? 4 A. Yeah. I have no reason to think 5 otherwise, yes. 6 Q. Okay. And Exhibit 15 is actually that 7 dismissal without prejudice? 8 A. Yes. 9 Q. At the top of the page, the caption of 10 your dismissal without prejudice is entitled 11 "Public Law Board No. 7204." 12 A. Um-hum. 13 Q. "United Transportation v. BNSF Railway 14 Company." 15 A. Right. 16 Q. "Case No. 4, Award No. 4." 17 A. Right. 18 Q. Okay. 19 A. Um-hum. 20 Q. It's signed by you? 21 A. Right. 22 Q. Have you ever seen a copy of this 23 document with any signature besides yours? 24 A. I believe this was the last thing</p>	<p style="text-align: right;">Page 124</p> <p>1 following: 2 "On or about February 19, 2009, 3 a telephonic executive session was 4 held among the three members of Public 5 Law Board 7204 -- Boldra, Schollmeyer, 6 and me. I do not recall taking any 7 notes during this executive session. 8 I recall that Boldra made a statement 9 to the effect that an" arbiter "who 10 issued an award reinstating a second 11 time Rule G (drug or alcohol) offender 12 would have trouble being appointed to 13 railroad cases." 14 So far, is that all accurate? 15 A. Yes. 16 Q. Do you agree with all of that -- 17 A. Absolutely, yes. 18 Q. Then you say: 19 "I took this as nothing more 20 than a statement of common knowledge 21 within the industry." 22 Is that fair? 23 A. Yes. 24 Q. What does that mean?</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 125-128

<p style="text-align: right;">Page 125</p> <p>1 A. That means that this is probably about 2 the most rigid, shall I say, rule in the industry. 3 The -- Rule G gives somebody who is found to use 4 drugs or alcohol to -- you know, who is found with 5 drugs or alcohol in their system while on duty 6 gets, you know, one chance to go to Employee 7 Assistance, you know, do whatever and -- you know, 8 and that is it. And it's just an ironclad, no -- 9 you know, zero tolerance, no exceptions policy. 10 So an arbitrator who -- and everyone 11 who works in the industry, you know, knows that. 12 I mean, there are obvious reasons for this. Even, 13 frankly, the Unions don't want their members 14 working alongside people who are impaired. 15 So any decision an arbitrator makes, 16 you know, can cause people to -- you know, cause 17 the parties not to use you again. 18 But in this particular case, this is 19 such an ironclad policy that an arbitrator who 20 chipped away at it, for lack of a better word, 21 would not be used by the parties and, frankly, 22 shouldn't be. So -- 23 Q. And you knew that? 24 A. I had had at this time probably 25</p>	<p style="text-align: right;">Page 127</p> <p>1 as it might have been. I'm sure if he were 2 sitting here today, he would phrase it a little 3 differently. But what he was saying is, 4 arbitrators can't put back second-time Rule G 5 offenders. You just can't do it, and the parties 6 will not use arbitrators who do. 7 Q. And if you do, they won't use 8 arbitrators who do; and that would have a 9 financial impact on an arbitrator who did so? 10 A. Well, you know, frankly, it should. 11 Somebody who isn't going to abide by this rule 12 in any capacity has no business, in my opinion, 13 working in this industry. 14 Q. This incident, if we can call it that, 15 Mr. Boldra, as to use your term, less than 16 politely pointing out what you think you say is 17 the obvious, happened at a particularly precarious 18 time for you financially, didn't it? 19 A. No. No. 20 Q. Your answer is no? 21 A. The answer is no. 22 Q. Okay. Shortly after the dismissal in 23 this case, about six weeks later, you were first 24 contacted by Illinois newly-elected Governor Quinn</p>
<p style="text-align: right;">Page 126</p> <p>1 to 30 Rule G cases. I had had enough that I had 2 drafted and have standard analysis language 3 basically saying an employee who blows his second 4 chance, you know, is going to be subject to 5 dismissal. I mean, I knew that very well. I had 6 had, you know, certainly enough of these cases 7 to -- to know that. 8 Q. Okay. And you well understood that 9 not being accepted in future cases could certainly 10 have an impact on your personal income and 11 finances? I mean, that was obvious? 12 A. That -- as I said, you know, that -- 13 that's one of the risks of this business. 14 Somebody loses every case. Sooner or later, 15 somebody is going to lose a case they really, 16 really had to win; and then, you know, you're 17 going to be on time-out. So that's just -- that's 18 a hazard of this business. 19 If arbitrators, you know, ran scared 20 every time -- you can't run scared. You have to 21 sort of put that to the side to make the fair and 22 impartial decisions that we make. 23 But in this case, obviously, 24 Mr. Boldra's statement was not quite as tactful</p>	<p style="text-align: right;">Page 128</p> <p>1 about the possibility of a job with the Illinois 2 Labor Relations Board, is that fair? 3 A. I believe that I was contacted by the 4 Governor's counsel before I issued that dismissal 5 award, if I've got the timing right. I newly -- 6 you have, in the -- in the things we've turned 7 over, the initial e-mail from -- from Mr. Chung -- 8 Q. Um-hum. 9 A. -- which I think was dated prior to the 10 time I issued that final dismissal. 11 Q. I think you're right. I think it -- 12 his contact was on April 3rd. 13 A. That -- that may well be right, but 14 I think it was early April, and the dismissal was 15 later. 16 Q. Okay. And so the contact was about 17 six weeks after Mr. Boldra's comment to you in 18 executive session, "Arbiters who make these kinds 19 of decisions won't work in the industry" or 20 something to that effect? 21 A. The conversation -- the contact from 22 Mr. Chung, who was at the time the then-governor's 23 then-counsel, it was all very close in time. It 24 was.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 129-132

<p style="text-align: right;">Page 129</p> <p>1 Q. Okay.</p> <p>2 A. Okay.</p> <p>3 Q. But that is the sequence?</p> <p>4 A. It was after -- I believe it was after</p> <p>5 the phone call and before I issued the final</p> <p>6 dismissal.</p> <p>7 Q. Okay. And you followed up with that,</p> <p>8 and eventually, in August of 2009, were asked to</p> <p>9 submit a job application for that position?</p> <p>10 A. I met with Mr. Chung shortly after that</p> <p>11 e-mail. We had a general conv- -- conversation.</p> <p>12 He actually started on a different position that</p> <p>13 I was unwilling to take.</p> <p>14 I did not hear from them for months,</p> <p>15 until August, when I got a call from the</p> <p>16 Governor's Chief of Staff and went in and talked</p> <p>17 to him. And sometime either -- they either sent</p> <p>18 me the application and asked me to bring it with,</p> <p>19 or I -- they gave it to me when I was there and</p> <p>20 I filled it out afterwards. But it was filled out</p> <p>21 in conjunction with my meeting with the Governor's</p> <p>22 Chief of Staff.</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 131</p> <p>1 A. I think this is actually -- or some of</p> <p>2 this was at least that and the State Police</p> <p>3 background check, yes. I mean, I'm sure that's</p> <p>4 what all of this was. Okay?</p> <p>5 Q. Yeah. There's State Police, references,</p> <p>6 your --</p> <p>7 A. Statement of economic interests.</p> <p>8 Q. Right.</p> <p>9 A. All the areas.</p> <p>10 Q. Your resume, statement of your economic</p> <p>11 interests.</p> <p>12 A. Right.</p> <p>13 Q. And if we go through it, release of</p> <p>14 personal information and then an employment</p> <p>15 application beginning at Bates stamp SSA 148 that</p> <p>16 asks a number of questions.</p> <p>17 A. Okay.</p> <p>18 Q. Then I'd like you to turn to pages 153</p> <p>19 and 154 Bates stamps.</p> <p>20 A. Okay.</p> <p>21 Q. Do you see those?</p> <p>22 These are expanded answers to some</p> <p>23 questions about issues that might cause</p> <p>24 embarrassment to the Governor -- Governor?</p>
<p style="text-align: right;">Page 130</p> <p>1 (WHEREUPON, said document was</p> <p>2 marked Plaintiffs'-Zimmerman</p> <p>3 Deposition Exhibit No. 17, for</p> <p>4 identification, as of 04-01-2015.)</p> <p>5 MR. THOMPSON: Okay. And Exhibit -- what have</p> <p>6 we marked it as yet?</p> <p>7 THE COURT REPORTER: It's 17.</p> <p>8 MR. THOMPSON: 17?</p> <p>9 MR. MUNRO: Steve, I -- I haven't received a</p> <p>10 copy of that one.</p> <p>11 MR. THOMPSON: Really?</p> <p>12 THE WITNESS: I think I got two copies.</p> <p>13 MR. MUNRO: I think I -- thank you.</p> <p>14 MR. THOMPSON: I'm sorry. I beg your pardon.</p> <p>15 Ladies, I gave you one, I hope?</p> <p>16 MS. MOORE: Yes.</p> <p>17 MR. THOMPSON: Okay. Thank you.</p> <p>18 Thank you for keeping me straight.</p> <p>19 BY MR. THOMPSON:</p> <p>20 Q. Exhibit 17 is at least a fair portion</p> <p>21 of the materials that you submitted in terms of an</p> <p>22 application for that employment.</p> <p>23 A. Okay.</p> <p>24 Q. Is that fair?</p>	<p style="text-align: right;">Page 132</p> <p>1 A. Oh, yes. They ask you, too, anything</p> <p>2 that -- right.</p> <p>3 Q. Is that correct?</p> <p>4 A. Right.</p> <p>5 Q. All right.</p> <p>6 A. Okay.</p> <p>7 Q. Let me -- essentially, in -- on</p> <p>8 page 153, if we can save some time --</p> <p>9 A. Um-hum.</p> <p>10 Q. -- you relate what you call a</p> <p>11 "back story."</p> <p>12 A. Um-hum.</p> <p>13 Q. You had actually been a longtime</p> <p>14 employee of the Labor Relations Board in Illinois</p> <p>15 for many, many years?</p> <p>16 A. That's true.</p> <p>17 Q. You were instrumental in establishing</p> <p>18 it?</p> <p>19 A. I was the first general counsel and</p> <p>20 helped put the agency together, that's true.</p> <p>21 Q. And, to put it bluntly, you were a</p> <p>22 victim of Governor Blagojevich's machine?</p> <p>23 A. That is how I would put it, yes.</p> <p>24 Q. All right. You were summarily fired?</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 133-136

<p style="text-align: right;">Page 133</p> <p>1 A. I was.</p> <p>2 Q. Okay.</p> <p>3 A. Okay.</p> <p>4 Q. Beginning at page -- at the second</p> <p>5 paragraph from the bottom on page 53, do you say:</p> <p>6 "But after 22 years I got three</p> <p>7 hours notice, no severance, and wasn't</p> <p>8 even paid for my accrued vacation."</p> <p>9 A. That's true.</p> <p>10 Q. "I really believe" the "Board took</p> <p>11 the action because I was trying very</p> <p>12 hard to hold the line on many of the</p> <p>13 bad things that have happened since --</p> <p>14 lack of neutrality, poor quality work,</p> <p>15 questionable ethics by some of the</p> <p>16 Board members."</p> <p>17 Have I read your --</p> <p>18 A. Um-hum.</p> <p>19 Q. -- statement accurately so far?</p> <p>20 A. Okay.</p> <p>21 Q. Okay. The next paragraph:</p> <p>22 "I didn't see it coming; really,</p> <p>23 no one did (I think) --</p> <p>24 There's an expletive --</p>	<p style="text-align: right;">Page 135</p> <p>1 A. Yes.</p> <p>2 Q. Right?</p> <p>3 A. Right.</p> <p>4 Q. So you had taken a substantial hit</p> <p>5 economically in terms of being fired, having to</p> <p>6 go out, spend a year to establish yourself, build</p> <p>7 an arbitration practice --</p> <p>8 A. That's true.</p> <p>9 Q. -- where you're basically not earning</p> <p>10 any money until another year is over?</p> <p>11 A. That's true.</p> <p>12 Q. All right. And you were --</p> <p>13 A. Okay.</p> <p>14 Q. -- concerned about that here?</p> <p>15 A. Well, because this position required me</p> <p>16 to put the whole arbitration practice on pause --</p> <p>17 Q. Um-hum.</p> <p>18 A. -- because state law doesn't allow --</p> <p>19 Q. Right.</p> <p>20 A. -- Board members to have outside</p> <p>21 income, that was part of what I weighed in</p> <p>22 deciding whether to take this case.</p> <p>23 Q. Okay.</p> <p>24 A. I mean this -- this position.</p>
<p style="text-align: right;">Page 134</p> <p>1 A. Something.</p> <p>2 Q. -- has been removed.</p> <p>3 A. I don't remember who that is. Okay.</p> <p>4 Q. (Continuing) -- "was more shocked</p> <p>5 than I was). I was very lucky in</p> <p>6 having an arbitration practice come</p> <p>7 together, but with getting cases,</p> <p>8 scheduling, briefing, writing awards,</p> <p>9 etc. it's a year before there's any</p> <p>10 income, and that was a hit I took."</p> <p>11 Did I read that correctly?</p> <p>12 A. Um-hum.</p> <p>13 Q. "With a Board position requiring</p> <p>14 giving everything up, and possible</p> <p>15 revolving door implications, it could</p> <p>16 well take longer to reestablish if I</p> <p>17 have to, and I simply can't take that</p> <p>18 hit a second time in three years."</p> <p>19 A. Right.</p> <p>20 Q. "That is why the focus on the</p> <p>21 pension; at least it would give me a</p> <p>22 base."</p> <p>23 A. Right.</p> <p>24 Q. Period, unquote.</p>	<p style="text-align: right;">Page 136</p> <p>1 Q. And on page 54, in answer to another</p> <p>2 question --</p> <p>3 A. Um-hum.</p> <p>4 Q. -- the last paragraph down there,</p> <p>5 you essentially make the same statement again.</p> <p>6 In other words --</p> <p>7 A. Yeah.</p> <p>8 Q. -- quote:</p> <p>9 "I just can't take that hit twice</p> <p>10 within three years."</p> <p>11 A. Right.</p> <p>12 Q. If you'd been blackballed by the</p> <p>13 BNSF and every other Class I railroad in the</p> <p>14 United States for returning Mr. Kite to work, that</p> <p>15 wouldn't be a second hit within three years</p> <p>16 financially, wouldn't it?</p> <p>17 A. Well, it -- it would have been a hit.</p> <p>18 But this was already almost three years after</p> <p>19 I left -- I had left the Board.</p> <p>20 The railroads, although I very much</p> <p>21 enjoyed my practice in the railroads, it was not</p> <p>22 my only -- it was only my practice. I mean, my</p> <p>23 background is in the public sector.</p> <p>24 Q. Um-hum.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 137-140

<p style="text-align: right;">Page 137</p> <p>1 A. And my focus was, frankly, more on 2 doing work -- regular arbitration in the public 3 sector. A lot of that was starting to come 4 together. That work is also, frankly, more 5 lucrative than the railroad work. 6 And, you know, I -- I did not believe 7 that Mr. Boldra was going to blackball me in 8 the -- throughout the industry. I continued after 9 that hearing in February to, you know, get work 10 from a lot of parties -- 11 Q. Okay. Well -- 12 A. -- so. I mean a lot of railroad 13 parties as well as work outside the industry. 14 Q. Yeah? 15 A. Yeah. And when I met with the 16 Governor's office, I -- their first offer was to 17 go back to my old position, which it -- I had -- 18 had never been filled, which I turned down. 19 And I had several conditions on 20 accepting the Chair appointment. And, frankly, 21 you know, there were several things they needed to 22 do to make me -- to make me take that job. 23 Q. Would you agree that sitting as the 24 neutral for the National Mediation Board on</p>	<p style="text-align: right;">Page 139</p> <p>1 going to travel through the industry that somebody 2 did that, and the parties aren't going to use you. 3 That's not somebody putting into effect a threat. 4 That is the -- would be a result of the fact that 5 you did something that this industry can't have 6 arbitrators doing. 7 Q. And an arbiter who doesn't put back 8 somebody who has that continues to get work from 9 the railroads? 10 A. Maybe, maybe not. There are a lot 11 of -- I mean, there are a lot of things parties 12 don't like and, you know, there are -- there are 13 many people who have large practices. They do 14 something someone doesn't like, and sometimes you 15 know what it is, sometimes you don't know what it 16 is. The practice is very cyclical. 17 Q. Okay. Well, let's look back at 18 Exhibit 11. Remember, I asked you to keep that 19 handy. 20 A. Yeah. 21 Q. Let's turn back to Exhibit 11, the 22 third page, which is Bates stamped 56. 23 A. Okay. 24 Q. You will recall that this is the</p>
<p style="text-align: right;">Page 138</p> <p>1 railroad cases -- 2 A. Um-hum. 3 Q. -- carries with it a certain status 4 within the arbitration world that carries over 5 to private parties and allows you to obtain those 6 more lucrative private-party arbitrations? 7 A. No. I would not agree with that. 8 Q. Okay. 9 A. They're two totally separate universes. 10 Q. Now, Mr. Boldra's statement, alleged 11 threat -- it's been called a number of things 12 here -- 13 A. Um-hum. 14 Q. -- didn't need to be put into effect in 15 this case, did it? 16 A. I don't even know how to answer that. 17 I mean, I understand you're asking me, did 18 I recuse myself and ultimately not issue that 19 decision. 20 Q. Yes. 21 A. Yes. It wouldn't have been a threat 22 being put into effect. Again, as I said, an 23 arbitrator who puts back a second-time Rule G 24 offender -- this is a small industry -- that's</p>	<p style="text-align: right;">Page 140</p> <p>1 e-mail thread running throughout April 6, the day 2 that Mr. Watkins has sent out his letter saying, 3 "You can't make this transfer." 4 And Mr. Boldra is asking you, "Call 5 him," and you called Mr. Watkins or attempted to 6 do all of that in order -- 7 A. Um-hum. 8 Q. -- to get it, quote, "straightened 9 out" -- 10 A. Um-hum. 11 Q. -- as you said. 12 And then at the top of the page and, 13 actually, over onto the bottom of the page before 14 that, 55, it begins: Mr. Boldra on Monday, 15 April 6 at 2:52 writing on the subject matter of 16 there are two Boards, 7204 and 7254. 17 A. Um-hum. 18 Q. Does he say the following, quote: 19 "Jackie, 20 "Separate issue. I spoke with 21 Randy Knutson this morning and he is 22 going to call you concerning an 23 expedited board. As I understand it, 24 the special money is gone so this</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 141-144

<p style="text-align: right;">Page 141</p> <p>1 would be a regular expedited board if 2 you are interested. I wanted to tip 3 you off that he should be calling. 4 We normally have some opinions on the 5 cases and there will be no dismissals. 6 "Hear from you soon. 7 "Roger Boldra." 8 A. Yes. Okay. 9 Q. Would you agree that you and Mr. Boldra 10 speaking about another employment opportunity for 11 you in an e-mail thread that includes all of this 12 back-and-forth about how to manage this particular 13 problem in Kite is at least the appearance of 14 impropriety? 15 A. Now, that's not for me to judge. 16 I had -- I had another BNSF board going 17 with -- with Mr. Knutson. I had met him several 18 times. I was aware, because he had said so, that 19 he was trying to, you know, get me more work 20 within the industry. 21 If I had to guess, I would suspect that 22 this -- this came from Mr. Knutson rather than 23 Mr. Boldra, even though he was communicating it 24 to me.</p>	<p style="text-align: right;">Page 143</p> <p>1 because the first paragraph is on another subject 2 involving the case -- the Kite case, quote: 3 "Thanks for the notice on the 4 other matter. Actually, I spoke to 5 Roland Watkins a couple weeks ago 6 and my understanding was that there 7 is money for per-case boards and he's 8 encouraging parties to use them. So 9 who knows, but when he calls me back 10 on the Kate case I will ask him. But 11 however you want to do the expedited 12 is fine with me; I appreciate it." 13 A. Okay. 14 Q. Fair? 15 A. Yeah. That's what it says. 16 Q. Okay. Now let's go to the e-mail above 17 that. Again on Bates stamp 55, this is Mr. Boldra 18 writing to you at about 3:12, ten minutes later. 19 And does it say, quote: 20 "Jackie, 21 "We are OK with any expedited 22 arrangement that works best for you. 23 It is usually easier to add cases to 24 a standing board so the old expedited</p>
<p style="text-align: right;">Page 142</p> <p>1 Q. You don't know that for a fact? 2 A. I don't know that. 3 Q. Now, did you say you had had a prior 4 board with Mr. Knutson before April of 2009? 5 A. Yes. I had another BNSF Board with 6 Mr. Knutson as the AG rep that -- before -- before 7 this. And I -- I believe that that Board did some 8 work after this as well. 9 Q. Okay. 10 A. I mean before I -- before I left to 11 take the position. And Mr. Boldra was present at 12 the sessions of that Board but, actually, one of 13 his subordinates was the named Board member. 14 Yeah, this was not going to be the 15 first Board with Mr. Knutson. I already had one, 16 maybe two. 17 Q. All right. Now, let's go to the next 18 e-mail in the string, which would be on page 55. 19 Again, it's from you to Mr. Boldra, April 6th, 20 2009, 3:02 p.m. The middle of the page. 21 A. Oh, page 2, I see it. Okay. 22 Q. Okay? And does that say -- you're 23 writing to him, "Thanks, Roger." 24 And then on the second paragraph --</p>	<p style="text-align: right;">Page 144</p> <p>1 works for me but I am not very 2 knowledgeable on your pay part." 3 What did you understand him to mean by 4 that, "pay part"? 5 A. "Pay part," because some -- the NMB 6 had a special fund for a certain kind of expedited 7 case that was a result only, where they were only 8 paying, I think, 2 -- it was \$200 a case. So 9 there were some Boards that were set up for just 10 that. There were some Boards that were set up not 11 to have hearings. 12 Any expedited -- you know, and there 13 was a certain pool of money for these expedited 14 Boards; and if they exhausted it, then they had to 15 be regular Boards. There were a lot of different 16 things NMB was trying at that time to manage its 17 funds. 18 But I had -- I had, not just with these 19 parties, I had expedited Boards with other parties 20 as well, which I suspect was why, if it said I had 21 talked to Roland a few weeks earlier about this, 22 I suspect it was about one of the other expedited 23 Boards I had with other parties. 24 Q. Okay.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 145-148

<p style="text-align: right;">Page 145</p> <p>1 A. Because I had several. 2 Q. Let me ask you about the third 3 paragraph in that same e-mail. 4 A. Okay. 5 Q. It says, quote: 6 "When I spoke with Carol the other 7 day" -- and I assume that means Carol 8 Conrad, Mr. Watkins' assistant -- "she 9 was confused on our plan but when I 10 explained that you would be issuing a 11 dismissal award so there would be work 12 she seemed OK with it. Evidently, Roland 13 got involved and now things changed. 14 "Good luck," period, unquote. 15 A. Um-hum. 16 Q. What did you understand Mr. Boldra to 17 mean on April the 6th when he said "our plan"? 18 A. The plan to put the case on the other 19 Board. 20 Q. Okay. 21 A. Which I understood to be the plan of 22 both parties. 23 MR. THOMPSON: Give me just a moment to 24 switch gears.</p>	<p style="text-align: right;">Page 147</p> <p>1 NMB's website, only shows cases the arbitrators 2 have been funded to work on. It does not reflect 3 at all what -- what the inventory they may have. 4 This is the new system. 5 Q. I see. So ten have been funded, 6 you've just been notified about another ten, and 7 those have been funded? 8 A. Those have not been funded. 9 Q. Not been funded? 10 A. Right. 11 Q. But if they are funded, then they 12 will -- 13 A. Then they will wind up on that list. 14 Q. All right. 15 A. Eventually. 16 Q. Do you have any idea how many more 17 cases could be added by the parties? 18 A. The parties can add as many cases as 19 they want to a Board. 20 Q. Okay. 21 A. But it's -- it's sometimes a matter of 22 quite a few months until they're funded. 23 But the NMB's current system, whereas 24 that list used to show everything you had in your</p>
<p style="text-align: right;">Page 146</p> <p>1 THE WITNESS: Sure. 2 (Short pause.) 3 BY MR. THOMPSON: 4 Q. Your current caseload as of this past 5 week -- 6 A. Um-hum. 7 Q. -- includes how many Boards involving 8 the UTU and the BNSF Railway? 9 A. One. 10 Q. And how many cases are there on that 11 Board? 12 A. I think we've got ten pending; and, 13 actually, I just received a notice to add ten more 14 to that Board. 15 Q. Who are the partisans to the -- 16 A. To that Board? 17 Q. To that Board. 18 A. The parties are Randy Knutson and 19 a young woman named Andrea Smith -- 20 Q. Okay. 21 A. -- as the carrier representative. 22 Q. And is that Public Law Board 7630? 23 A. Yes. I should point out to you that 24 the list, which I assume you pulled from the</p>	<p style="text-align: right;">Page 148</p> <p>1 inventory, now it only shows the cases that have 2 been funded to work on. 3 Q. Okay. What's your relationship to 4 Mr. Javits? 5 A. He is, I would say a professional 6 colleague. 7 Q. Okay. 8 (WHEREUPON, a certain document was 9 marked Plaintiffs'-Zimmerman 10 Deposition Exhibit No. 18, for 11 identification, as of 04-01-2015.) 12 BY MR. THOMPSON: 13 Q. I'm going to hand you Exhibit 18 -- 14 A. Yes. 15 Q. -- which is an amalgam of a number of 16 letters. There is a letter to Judge Leighton, the 17 Federal -- 18 A. I knew who that is, yes. 19 Q. -- trial judge in this case -- 20 A. Yes. 21 Q. -- signed by Henry Farber, who is a 22 lawyer in Seattle representing the National 23 Association of Railroad Referees. 24 A. Right.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 149-152

<p style="text-align: right;">Page 149</p> <p>1 Q. You're a member of that group?</p> <p>2 A. I am.</p> <p>3 Q. How long have you belonged to that</p> <p>4 group?</p> <p>5 A. You can join the -- the group when</p> <p>6 you have one railroad case. So it would have been</p> <p>7 back at the end of 2006 or so.</p> <p>8 Q. Okay.</p> <p>9 A. And I maintained the member- -- the --</p> <p>10 although I was not doing work during the time</p> <p>11 I was back at the Board, I maintained my</p> <p>12 membership in the organization and went to their</p> <p>13 meetings.</p> <p>14 Q. When you were working for Governor</p> <p>15 Quinn?</p> <p>16 A. Yes.</p> <p>17 Q. That's what I --</p> <p>18 A. Yes.</p> <p>19 Q. That's what I thought you said --</p> <p>20 A. Yes.</p> <p>21 Q. -- but I wanted to be clear.</p> <p>22 A. I thought -- went back to the Board,</p> <p>23 but yes.</p> <p>24 Q. And did you leave Governor Quinn?</p>	<p style="text-align: right;">Page 151</p> <p>1 A. Yeah. It wasn't funding, really;</p> <p>2 it was how long I had to be there.</p> <p>3 Q. What role did you play in writing the</p> <p>4 letter that is the third page of Exhibit 18, if</p> <p>5 any?</p> <p>6 A. I told Mr. Javits and, you know,</p> <p>7 Ms. Wesman that your client was seeking to</p> <p>8 subpoena me, that -- and, you know, I knew that</p> <p>9 this was something the NARR would oppose because</p> <p>10 we view these sessions as very confidential.</p> <p>11 And I did ask them to file something on</p> <p>12 my behalf or on behalf of -- I shouldn't say my</p> <p>13 behalf -- on behalf of our process.</p> <p>14 Q. Okay. Did you have a role in actually</p> <p>15 writing this letter?</p> <p>16 A. No.</p> <p>17 Q. What office, if any, do you currently</p> <p>18 hold within this organization?</p> <p>19 A. I'm one of the vice presidents of the</p> <p>20 organization.</p> <p>21 Q. Why aren't -- why aren't you listed</p> <p>22 as a vice president on the letterhead of this</p> <p>23 particular letter?</p> <p>24 A. Because I was just elected this year,</p>
<p style="text-align: right;">Page 150</p> <p>1 What -- what happened there in terms of leaving</p> <p>2 the Board?</p> <p>3 A. When I left the Board the last time?</p> <p>4 Q. Yeah.</p> <p>5 A. My term was up. I had not -- the</p> <p>6 Senators were sitting on a second term. I had hit</p> <p>7 the point where I could retire from state</p> <p>8 government, and it just -- you know, it just</p> <p>9 seemed like the time to come back. I had always</p> <p>10 intended to come back --</p> <p>11 Q. Okay.</p> <p>12 A. -- to the arbitration practice.</p> <p>13 Q. Did Governor Quinn agree with you in</p> <p>14 terms of helping to fund the necessary credits for</p> <p>15 a state retirement that you had asked for?</p> <p>16 A. I stayed there long enough.</p> <p>17 Q. That you got them?</p> <p>18 A. That was the -- the deal they made at</p> <p>19 the beginning and --</p> <p>20 Q. Fine.</p> <p>21 A. -- you know, yes.</p> <p>22 Q. That's all I need to know.</p> <p>23 A. Yeah.</p> <p>24 Q. I understand.</p>	<p style="text-align: right;">Page 152</p> <p>1 and they're probably behind on updating the</p> <p>2 letterhead.</p> <p>3 Q. Okay. This letter is undated, you'll</p> <p>4 note.</p> <p>5 A. Yeah, I guess it is.</p> <p>6 Q. But bears an electronic court filing</p> <p>7 stamp, which is the blue across the top --</p> <p>8 A. Um-hum.</p> <p>9 Q. -- that it was filed on January 2nd,</p> <p>10 2015 with the electronic court filing system in</p> <p>11 Judge Leighton's case file.</p> <p>12 A. Okay.</p> <p>13 Q. All right?</p> <p>14 A. Um-hum.</p> <p>15 Q. So you had -- were an elected vice</p> <p>16 president at that point?</p> <p>17 A. I was elected at the last meeting,</p> <p>18 which is in the fall, so yes.</p> <p>19 Q. And Mr. Javits was the president at</p> <p>20 the time?</p> <p>21 A. He had just been elected president,</p> <p>22 that's right.</p> <p>23 Q. All right. So Mr. Javits is the</p> <p>24 president, and you and Mr. Radek, Mr. Hampton and</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 153-156

<p style="text-align: right;">Page 153</p> <p>1 Mr. Lamey are vice presidents at the time this 2 letter is actually received by Judge Leighton? 3 A. Yeah, I'm not sure if one of them came 4 off as vice president. You know, I think -- but, 5 in any event, I think Don Hampton is no longer a 6 vice -- I think. 7 Q. Hmm. 8 A. I think somebody's term was up and -- 9 anyway. 10 Q. Well, let me suggest, according to my 11 research into the -- on the website, it looks like 12 Mr. Bierig is no longer a vice president. 13 A. That's -- that's entirely possible. 14 Q. Okay. 15 A. Okay. The website is not always as 16 updated as much as it should be, either. 17 Q. Do you see anywhere where this letter 18 advises Judge Leighton that you are a vice 19 president of this organization? 20 A. You know, I -- I never saw this letter 21 until after it was filed, so if -- I don't know if 22 it's in here, but I had no part in writing it and 23 never saw anything until after it was filed. 24 Q. Well, you did have a part in writing it</p>	<p style="text-align: right;">Page 155</p> <p>1 And, frankly, Mr. Javits, who I believe 2 was elected, although he could not attend the 3 meeting, he -- I'm not even sure he was 4 necessarily aware that I had been elected a vice 5 president yet. I don't know. 6 Q. Really? 7 A. He may not have been. He may not have 8 been. You'd have to ask him, but I -- he may not 9 have been. 10 Q. Mr. Javits is a lawyer in New York, 11 isn't he? 12 A. DC. 13 Q. DC, okay. And you're a lawyer in 14 Illinois? 15 A. Yes. 16 Q. Do you agree that as lawyers, we all 17 have an obligation under the Rules of Professional 18 Responsibility in terms of candid disclosure to a 19 tribunal? 20 A. Mr. Javits wrote this letter, I didn't. 21 So I'm not going to judge his conduct in writing 22 the letter. 23 Q. Do you agree we all have that 24 obligation?</p>
<p style="text-align: right;">Page 154</p> <p>1 in that you asked Mr. Javits to write the letter, 2 didn't you? 3 A. I did, but I had no part -- no part in 4 the context, in the -- into the drafting. 5 I mean, if you are telling me that 6 there was no mention that I was a vice president, 7 that wouldn't have had anything to do with me; 8 and if I had -- had to guess, it's not really 9 relevant whether I'm a vice president or not. 10 They were -- they were discussing the process. 11 Q. Don't you think it's important for 12 Judge Leighton to understand that Mr. Javits is 13 writing this letter, not only on behalf of the 14 NARR -- 15 A. Um-hum. 16 Q. -- but on your behalf as a vice 17 president and his immediate subordinate? 18 A. I don't believe he was writing it 19 because I was a vice president. I believe he 20 wrote it because I am an arbitrator who does 21 railroad work, and they were attempting to protect 22 the confidentiality of these tripartite panels. 23 I don't believe the fact that I was a vice 24 president had anything to do with it.</p>	<p style="text-align: right;">Page 156</p> <p>1 A. Well, I agree with the principle. I -- 2 I think you're placing a lot more weight on the 3 fact that I was an officer of this organization 4 than -- than is relevant. 5 I mean, I believe Mr. Javits and 6 Ms. Wesman -- Ms. Wesman would have written this, 7 this letter for any railroad arbitrator who found 8 his or her -- you know, his or herself in this 9 situation. They probably -- I don't think the 10 fact that I was a vice president had anything to 11 do with it. 12 Q. Don't you think Judge Leighton is the 13 person who ought to be entitled to make that 14 decision? 15 A. Yeah, you would have to ask the 16 drafters of this letter. I -- I'm not qualified 17 to speak to that. 18 Q. Hmm. 19 A. I mean, if I were writing the letter, 20 I would -- I would think that the process is what 21 you're focusing on, not what office somebody might 22 hold in a professional organization that meets 23 once a year. 24 Q. Do you think the process in terms of</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 157-160

<p style="text-align: right;">Page 157</p> <p>1 how railroad discipline cases are adjudicated is 2 important? 3 A. Obviously. 4 Q. Do you think the process is just as 5 important as the outcome? 6 A. You know, I don't really know how to 7 answer. I -- this is our deliberative process. 8 In my view, in the view of the NARR, in 9 view of the arbitration community I would say as a 10 whole, even people who do it, you know, outside 11 the railroad where it's only your own head, it's 12 very important that for the whole system to work, 13 especially in this industry, that process has to 14 be confidential. 15 If people come into an executive 16 session knowing that somebody can find out what 17 happened, it -- it would have a tremendously 18 chilling effect on the ability to settle cases. 19 I mean, I think it would, you know, cause all of 20 that to be severely damaged. And I think that 21 that's a really important goal, that people be 22 able to settle these cases. 23 And a lot of times in -- you know, 24 these are settlement discussions. This is true</p>	<p style="text-align: right;">Page 159</p> <p>1 Q. If the railroad and the union wanted to 2 essentially mediate a case to a settlement -- 3 A. Um-hum. 4 Q. -- they could do so even through you, 5 as a mediator, and invoke the mediation rules of 6 the state in which the mediation was being held, 7 which would provide that secrecy and 8 confidentiality -- 9 A. Well, first of all, this is -- 10 Q. -- that you think -- 11 A. -- this is a federal process. 12 Formal mediation is a whole different 13 thing than a conversation in an executive session, 14 and what you're talking about would put a whole, 15 huge burdensome, you know, layer on the process. 16 And in arbitration generally, parties 17 often discuss settlement before -- you know, in 18 traditional arbitration, they often discuss 19 settlement before they go on the record, like in 20 any other litigation-type proceeding. 21 I'm not exactly sure what you're asking 22 me, actually. 23 Q. And when one party makes that 24 agreement --</p>
<p style="text-align: right;">Page 158</p> <p>1 all over the place. People say things in 2 settlement discussions that are confidential. 3 You know, they are not to be disclosed outside 4 that arena. 5 Q. And you think that's true of even 6 a sitting Federal District Court Judge who is 7 authorized under the laws of the United States to 8 perform a judicial review? 9 A. You know, the -- I was subpoenaed to be 10 here, so I'm here. 11 Q. Okay. 12 A. Beyond that, you know, I'm here. I'm 13 trying to answer my questions -- your questions to 14 the best of my ability. 15 I don't -- you know, I don't believe 16 that it is appropriate to delve into that 17 executive session. On this particular case, the 18 two other Board members have already testified so, 19 you know, the confidential -- confidentiality 20 concerns, you know, it's already been breached 21 way before it was by me, but I don't think it's 22 appropriate. I really don't, but that has -- 23 Q. If the rail- -- 24 A. Go ahead.</p>	<p style="text-align: right;">Page 160</p> <p>1 A. Um-hum. 2 Q. -- and then reneges on that 3 agreement -- 4 A. Um-hum. 5 Q. -- do you think that should be 6 protected and should be secret and shouldn't be 7 subject to judicial review? 8 A. I think you're -- you know, you're 9 asking -- the subject of judicial review is 10 really, you know, a legal question. I'm not 11 qualified to answer it. 12 But, yes, I do believe that the 13 discussions that they have are confidential 14 because, otherwise, there's a chilling effect. 15 And if people make a tentative agreement, you 16 know, a preliminary tentative agreement that they 17 can't, for whatever reason, follow through on, 18 yes, I believe that -- that should be protected. 19 I mean, yes. I mean, that had -- that's not 20 uncommon, for people to think they can get 21 something done, and then they take it upstairs or 22 whatever, and they can't get it. I mean, that -- 23 that happens all the time. 24 Q. Well, what, if anything, was -- did</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 161-164

Page 161

1 Mr. Boldra say at the hearing and in the first
 2 executive session --
 3 A. Um-hum.
 4 Q. -- that entitled you to label it a
 5 tentative agreement?
 6 A. They both said they wanted to see it
 7 written up before it was final. It was -- it was
 8 not signed. It was not -- in collective
 9 bargaining negotiations, people sign off on or
 10 initial various parts of contract language.
 11 Nothing, you know, was drafted, even in very,
 12 you know, basic form for them to initial or sign
 13 or anything. It was a classic tentative
 14 agreement.
 15 Q. Well, if that's true, why is your
 16 dismissal without prejudice effective?
 17 A. Because it was necessary to have it
 18 be that way so that the case could be moved to the
 19 other Board.
 20 Q. But you're the only person who signed
 21 the award, as far as you're --
 22 A. I have no idea who signed it. I mean,
 23 somebody else may well have signed it later.
 24 I don't know.

Page 162

1 Q. You don't know that?
 2 A. I don't know.
 3 Q. You're assuming that?
 4 A. I just said I don't know.
 5 Q. Okay. But you're also assuming that
 6 that award was effective?
 7 A. I'm sorry?
 8 Q. You're also assuming that award was
 9 effective?
 10 A. Which award?
 11 Q. The dismissal without prejudice.
 12 A. All I know is that the case got on the
 13 other Board. So am I assuming it's effective?
 14 I can't really answer that, either. All I know is
 15 that the process went forward. The case was
 16 relisted to another Board. Another arbitrator had
 17 it. I never learned what happened to the case
 18 until much later.
 19 Q. So, essentially --
 20 A. Much later.
 21 Q. -- you issued the dismissal --
 22 A. As I have said --
 23 Q. -- you signed it, you washed your
 24 hands?

Page 163

1 A. As best I -- I recall, that was the
 2 last action I took with respect to this case, yes.
 3 Q. The case couldn't have been relisted
 4 with the second Peterson Board unless everyone
 5 treated the dismissal without prejudice order --
 6 A. I have no idea.
 7 Q. -- as effective?
 8 A. I have no idea. I signed it, and the
 9 case went to the Peterson Board. I don't know the
 10 answers to the rest of your questions. What
 11 happened with everybody in between, I don't know.
 12 Apparently -- well, I don't know. It wound up on
 13 the Peterson Board, so --
 14 Q. Did you ever practice contract law?
 15 A. No. I've been, you know, labor
 16 relations neutral my entire career.
 17 Q. Okay. Have you ever worked as a
 18 mediator under Illinois' mediation law?
 19 A. I have not done formal mediation, no.
 20 I mean, I have sometimes employed my fairly basic,
 21 I would say, mediation skills in trying to settle
 22 some cases more -- almost exclusively in other --
 23 other sectors, not in the railroads.
 24 MR. THOMPSON: Okay. Thank you, ma'am.

Page 164

1 That's all I have.
 2 THE WITNESS: Okay.
 3 MR. THOMPSON: My watch says that I have
 4 consumed --
 5 THE WITNESS: You have used every one of your
 6 minutes.
 7 MR. THOMPSON: No. I have used 2 hours and
 8 47 minutes.
 9 THE WITNESS: Oh, okay.
 10 MS. MOORE: I have 2 hours and 50 minutes.
 11 THE WITNESS: Okay. I'm sorry. I take that
 12 back.
 13 MR. MUNRO: Let's take the record time.
 14 THE VIDEOGRAPHER: I have that -- pardon me --
 15 that we are actually at three hours right now.
 16 THE WITNESS: But we had a break.
 17 MR. THOMPSON: But we had a break.
 18 THE VIDEOGRAPHER: Right. So --
 19 MR. THOMPSON: 9:30 to 12:30 is 3, but we had
 20 a break, which I counted to be 13 minutes.
 21 THE VIDEOGRAPHER: Okay. Sorry.
 22 THE WITNESS: Okay. Do you want to take two
 23 minutes again or --
 24 MS. MOORE: No.

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 165-168

<p style="text-align: right;">Page 165</p> <p>1 THE WITNESS: No?</p> <p>2 MS. MOORE: I mean, do you need a break?</p> <p>3 THE WITNESS: No. I'm okay. I'm okay if</p> <p>4 you're ready to -- do you guys want a couple --</p> <p>5 MR. PRYOR: Yeah. Can we take ten minutes,</p> <p>6 and then we will start. I mean, if you'd rather</p> <p>7 take a lunch, that's great, I mean, but --</p> <p>8 THE WITNESS: Sure.</p> <p>9 MR. THOMPSON: Yeah. That's fine with me.</p> <p>10 THE WITNESS: Do you want a candy bar?</p> <p>11 THE VIDEOGRAPHER: We are now going off the</p> <p>12 record --</p> <p>13 MR. MUNRO: I need to talk to my client for a</p> <p>14 couple of minutes.</p> <p>15 MR. THOMPSON: Sure.</p> <p>16 MR. MUNRO: If you need -- if you need me to</p> <p>17 keep it shorter than ten, I'm happy to do that.</p> <p>18 MS. MOORE: Well, yeah. I mean, if we can try</p> <p>19 to limit it to five.</p> <p>20 MR. PRYOR: Yeah. We'll leave --</p> <p>21 MR. MUNRO: That's fine.</p> <p>22 MR. PRYOR: We'll leave right now and we'll</p> <p>23 get --</p> <p>24 THE WITNESS: Okay.</p>	<p style="text-align: right;">Page 167</p> <p>1 Q. At any point during the proceedings of</p> <p>2 PLB 7204, did Mr. Boldra threaten you with</p> <p>3 economic harm?</p> <p>4 A. No.</p> <p>5 Q. Did Mr. Boldra issue threats of any</p> <p>6 other kind, physical violence, anything of that</p> <p>7 nature?</p> <p>8 A. No.</p> <p>9 Q. Counsel referred you to a statement in</p> <p>10 paragraph 5 of your third declaration, which is</p> <p>11 Exhibit 16.</p> <p>12 A. Okay. Yes.</p> <p>13 Q. And he read to you the entire paragraph</p> <p>14 except for the last sentence --</p> <p>15 A. Right.</p> <p>16 Q. -- where you state:</p> <p>17 "I did not perceive this as a threat."</p> <p>18 A. Right.</p> <p>19 Q. Is that a reference back to your</p> <p>20 recollection of Mr. Boldra's statement about</p> <p>21 arbitrators having trouble being appointed to</p> <p>22 railroad cases?</p> <p>23 A. Right.</p> <p>24 Q. So if I understand your sworn</p>
<p style="text-align: right;">Page 166</p> <p>1 THE VIDEOGRAPHER: We are now going off the</p> <p>2 record --</p> <p>3 (WHEREUPON, discussion was had off</p> <p>4 the record.)</p> <p>5 THE VIDEOGRAPHER: We are now going off the</p> <p>6 record with the end of Tape 2. The time is</p> <p>7 12:32 p.m.</p> <p>8 (WHEREUPON, a recess was had.)</p> <p>9 THE VIDEOGRAPHER: We are now going on the</p> <p>10 record with the beginning of Tape 3 at 12:38 p.m.</p> <p>11</p> <p>12 EXAMINATION</p> <p>13 BY MR. MUNRO:</p> <p>14 Q. Good afternoon, Ms. Zimmerman. My name</p> <p>15 is Don Munro. I'm counsel for BNSF Railway in</p> <p>16 this case, and I'd like to follow up on some of</p> <p>17 the matters that counsel for Plaintiffs was</p> <p>18 discussing --</p> <p>19 A. Sure.</p> <p>20 Q. -- with you this morning.</p> <p>21 Ms. Zimmerman, did you recuse yourself</p> <p>22 in the Kite case because of any threats issued by</p> <p>23 the carrier partisan, Mr. Boldra?</p> <p>24 A. No.</p>	<p style="text-align: right;">Page 168</p> <p>1 testimony, then, you did not perceive Mr. Boldra's</p> <p>2 statement to that effect to be a threat of</p> <p>3 economic harm, is that correct?</p> <p>4 A. I did not.</p> <p>5 Q. Do you believe that any reasonable</p> <p>6 arbitrator in these circumstances would have</p> <p>7 perceived Mr. Boldra's statement as a threat of</p> <p>8 economic harm?</p> <p>9 MR. THOMPSON: Objection to the question.</p> <p>10 There is no foundation, and it asks her to</p> <p>11 speculate.</p> <p>12 MS. MOORE: You can answer.</p> <p>13 THE WITNESS: Okay.</p> <p>14 BY THE WITNESS:</p> <p>15 A. What I will say is that anybody with</p> <p>16 any experience as an arbitrator in this industry</p> <p>17 knows that reinstating a two-time Rule G offender,</p> <p>18 yeah, would demolish your railroad arbitration</p> <p>19 career.</p> <p>20 BY MR. MUNRO:</p> <p>21 Q. Do you recall the exact content of the</p> <p>22 alleged statement?</p> <p>23 A. No.</p> <p>24 Q. Mr. Schollmeyer has testified in his</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 169-172

<p style="text-align: right;">Page 169</p> <p>1 declaration that Mr. Boldra said, quote: "If you 2 are going to issue these kinds of opinions, you 3 will never work for a Class I railroad again." 4 Is that an accurate statement of the exact words 5 that Mr. Boldra used? 6 A. I don't recall the exact words. It was 7 something to that general effect. 8 Q. Mr. Boldra has alternatively 9 characterized it in his declaration as saying, 10 quote: 11 "I didn't know how I could have 12 made the point any clearer" 13 about allowing a second violation employee back -- 14 A. Um-hum. 15 Q. -- "unless I had said, 'You won't 16 be able to work in the industry if 17 you make decisions like that." 18 Is it possible that that is an accurate 19 reflection of what was actually said? 20 A. I don't remember that. 21 Q. You just don't recall one way or the 22 other what the exact terminology was? 23 A. I don't. 24 Q. Was it your understanding that</p>	<p style="text-align: right;">Page 171</p> <p>1 A. It confirmed in my mind, that's a -- 2 that's a good way to put it, yes. 3 Q. In the -- in their Complaint in this 4 case, the Plaintiffs allege that the BNSF 5 partisans made a threat to, quote, "blacklist 6 Zimmerman with all Class I railroads in the United 7 States," close quote. Is that accurate? 8 A. No. He never used the word 9 "blacklist." He certainly didn't use that word. 10 Q. Did he threaten to bar you from getting 11 further work with all Class I railroads? 12 A. I don't recall that he said that he 13 would take any action at all. 14 Q. Did you have the understanding at that 15 time that Mr. Boldra had the authority or the 16 ability to prevent you from getting work with all 17 Class I railroads, not just BNSF? 18 A. Well, I don't know that I would say 19 that any railroad party can prevent you from 20 getting work from anyone, but there's certainly -- 21 you know, there's enough communication within the 22 industry that, were somebody to want to do that, 23 they could probably do it beyond their own 24 organization or carrier.</p>
<p style="text-align: right;">Page 170</p> <p>1 Mr. Boldra, in making whatever statement he made, 2 was suggesting to you that he did not agree to the 3 reinstatement that you and Mr. Schollmeyer thought 4 he had agreed to? 5 A. Clearly. 6 Q. Was it your impression that this was 7 a critical moment or a turning point in the 8 conversation, or was this more in the nature of 9 one of the passing remarks during the argument? 10 A. I wouldn't say it was a passing remark; 11 but by the time that statement was made, I pretty 12 much know -- knew where I was in this whole 13 process. 14 Q. And so was Mr. -- did Mr. Boldra's 15 comment, however phrased, play any role, however 16 slight, in your decision to recuse yourself from 17 the Board? 18 A. I would say that it made it clear or 19 a little bit clearer. Mr. -- Mr. Schollmeyer was 20 very clearly entrenched. Mr. Boldra was very 21 clearly entrenched. I mean, it certainly 22 demonstrated that he was really very clearly 23 entrenched, so... 24 Q. It confirmed in your mind --</p>	<p style="text-align: right;">Page 172</p> <p>1 Q. Are there principles that are as 2 important to the unions as the Rule G principle is 3 to the railroads, would you say? 4 A. You know, I felt in my dealings with 5 Rule G cases that it is as important to the unions 6 because they don't want their members working 7 impaired, and they don't want their other members 8 working with people who are impaired. 9 Q. What about seniority, do you -- do you 10 believe that the unions perceive that as an 11 important principle? 12 A. Well, I believe they do. I can't 13 recall that I've ever had a seniority case on a 14 railroad, so... 15 Q. Suppose you had a case where an 16 arbitrator said, "In issuing my ruling in this 17 case, I've gotta tell you, I'm gonna disregard 18 seniority. I just -- I don't feel it's important, 19 and I don't think it should be taken into 20 account." 21 A. Okay. 22 Q. If the union's reaction on that was 23 to say, "If you issue a decision like that, you're 24 never going to get work from a railroad union</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 173-176

<p style="text-align: right;">Page 173</p> <p>1 again" --</p> <p>2 A. Um-hum.</p> <p>3 Q. -- is that comparable, in your mind,</p> <p>4 to the Rule G principle on the -- on the</p> <p>5 management side?</p> <p>6 A. No.</p> <p>7 MR. THOMPSON: Objection, calls for</p> <p>8 speculation.</p> <p>9 BY MR. MUNRO:</p> <p>10 Q. And -- and why not?</p> <p>11 A. Because the Rule G principle really</p> <p>12 has no -- there's no judgment. There's no wiggle</p> <p>13 room. Unless you get a record that's so</p> <p>14 procedurally defective, which this one was not,</p> <p>15 that, you know, the carrier has not met its</p> <p>16 burden, there's really -- you know, there's very</p> <p>17 little judgment left to the arbitrator on how to</p> <p>18 deal with such a case.</p> <p>19 Q. In that -- if that's the case, then --</p> <p>20 A. Um-hum.</p> <p>21 Q. -- is it fair to say that the only</p> <p>22 reason you issued a draft reinstatement in</p> <p>23 Mr. Kite's case was because you thought the</p> <p>24 parties had agreed to it?</p>	<p style="text-align: right;">Page 175</p> <p>1 more than half.</p> <p>2 Q. I believe you testified that it's your</p> <p>3 perception that the outcome of awards has some</p> <p>4 effect on whether parties are willing to accept an</p> <p>5 arbitrator for future cases. Is that accurate?</p> <p>6 A. Yes.</p> <p>7 Q. And is that true of unions as well as</p> <p>8 carriers?</p> <p>9 A. Yes.</p> <p>10 Q. The -- the Ninth Circuit's decision in</p> <p>11 this case referred to extortion as an act that,</p> <p>12 quote, "impairs the integrity of the arbitral</p> <p>13 process," close quote.</p> <p>14 Using your own understanding of what</p> <p>15 that means, that in your view, did Mr. Boldra's</p> <p>16 comment about "You'll never work again" impair the</p> <p>17 integrity of the arbitral process in this case?</p> <p>18 MR. THOMPSON: Object to the form as calling</p> <p>19 for speculation, a legal conclusion, failure to</p> <p>20 create an adequate foundation for it.</p> <p>21 MS. MOORE: You can answer.</p> <p>22 THE WITNESS: Answer? Okay.</p> <p>23 BY THE WITNESS:</p> <p>24 A. As I said earlier, his statement was</p>
<p style="text-align: right;">Page 174</p> <p>1 A. The parties had agreed, essentially,</p> <p>2 to find the record procedurally defective on the</p> <p>3 first -- on the first violation. That was how</p> <p>4 they were going to write it, as I said, to avoid</p> <p>5 doing damage to the overriding principle.</p> <p>6 Q. The union's Complaint in this case</p> <p>7 also alleges -- and this is in paragraph 15 of</p> <p>8 their petition -- petition that: "If BNSF" --</p> <p>9 quote:</p> <p>10 "If BNSF carried out its threat</p> <p>11 to blacklist Zimmerman with all</p> <p>12 Class I railroads in the United</p> <p>13 States, such conduct would likely</p> <p>14 have had a devastating effect upon</p> <p>15 Zimmerman's earnings as a referee."</p> <p>16 Is that, in your view, an accurate</p> <p>17 statement?</p> <p>18 A. Well, it -- it would have cost me a lot</p> <p>19 of income, that's true, I mean.</p> <p>20 Q. What percentage of your income at this</p> <p>21 time was derived from railroad arbitration?</p> <p>22 A. I was doing a lot of railroad work at</p> <p>23 the time; you know, more than half, probably.</p> <p>24 I was still a new arbitrator; probably, you know,</p>	<p style="text-align: right;">Page 176</p> <p>1 certainly inartfully phrased.</p> <p>2 But what he said was a statement of</p> <p>3 what I already knew well was industry standard and</p> <p>4 the likely outcome on anybody who issued an award</p> <p>5 putting back a two-time Rule G offender.</p> <p>6 BY MR. MUNRO:</p> <p>7 Q. Mr. Schollmeyer, in his declaration,</p> <p>8 states that, quote:</p> <p>9 "Boldra then told her that if</p> <p>10 you were going to issue these kinds</p> <p>11 of opinions, you will never work for</p> <p>12 a Class I railroad again.</p> <p>13 "In response, Zimmerman responded</p> <p>14 that all she could do at that point</p> <p>15 was recuse herself."</p> <p>16 Is that an accurate statement of what</p> <p>17 occurred?</p> <p>18 A. I don't recall that -- I don't recall</p> <p>19 the exact sequence of what was said during the</p> <p>20 conversation. I don't -- I don't believe --</p> <p>21 A, I really don't believe I told them I would</p> <p>22 recuse myself, okay? To my best recollection,</p> <p>23 I didn't say that in that conversation at all.</p> <p>24 I said, you know, "I don't know what I'm going to</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 177-180

<p style="text-align: right;">Page 177</p> <p>1 do now. I'm going to have to go back and think 2 about this." So I don't believe that was said in 3 direct -- directly after his statement, but the 4 sequence of what happened was hard -- is hard to 5 remember. 6 Q. Did anyone ever ask you to recuse 7 yourself in this case? 8 A. No. 9 Q. What did you anticipate would happen 10 once you recused yourself? 11 A. I hoped that the -- well, I knew the 12 case had to be decided somehow. I believe that 13 the NMB would eventually figure out a way to put 14 the case before another arbitrator. 15 Q. And what would have happened had the 16 parties not put the case before a different 17 arbitrator? 18 A. I don't know. 19 Q. I mean, Mr. Kite was dismissed at that 20 point, correct? 21 A. Yes. 22 Q. So his only path to reinstatement was 23 to have the case heard by someone, correct? 24 A. I guess so.</p>	<p style="text-align: right;">Page 179</p> <p>1 concerned about your appearance of impropriety 2 or -- 3 A. I would say as the conver- -- I'm 4 sorry. I cut you off before you were done. 5 I would say as the conversation 6 developed that it was -- it became very clear that 7 they were -- they were both pretty entrenched, 8 and -- but -- but he -- he was first. But I would 9 say it was on both of them that they were so 10 entrenched that there was no way to really, you 11 know, unscramble the egg. 12 Q. The -- the job offer from the 13 Illinois Governor -- 14 A. Um-hum. 15 Q. -- did not play any role in your 16 decision to recuse yourself in Mr. Kite's case, 17 is that correct? 18 A. I didn't have the job offer at the time 19 I recused myself, so no. 20 Q. Did you intend in your declaration -- 21 in any of the three declarations you submitted to 22 suggest that the reason for your recusal from 7204 23 was related to the job offer? 24 A. No. I mean, in -- in analyzing that</p>
<p style="text-align: right;">Page 178</p> <p>1 Q. I believe you testified that the reason 2 you recused yourself was because you felt that 3 your appearance of impropriety -- your appearance 4 of impartiality had been compromised. Is that 5 accurate? 6 A. Yes. 7 Q. Did you feel that it was Mr. Boldra's 8 statement regarding "You'll never work for the 9 railroads again" that compromised your appearance 10 of impartiality? 11 A. I came to that conclusion initially 12 because Mr. Schollmeyer was so adamant that I had 13 to issue this award, and I -- I -- you know, 14 I tried to explain that it had not been my award, 15 and I was going to have to, you know, rewind. 16 And he -- he was -- as I said, it was 17 a very emotional and heated conversation which, 18 you know, I understood and felt bad for him. But 19 he was not -- he was not moving from that position 20 that I had to issue that. And so that was really 21 where the thought that he was not going to accept 22 as impartial any award other than that one. 23 Q. So is it fair to say, then, that it was 24 more Mr. Schollmeyer's position that led you to be</p>	<p style="text-align: right;">Page 180</p> <p>1 job offer, which did not come until October, 2 I mean, when -- between the time I first met with 3 the Governor's office and the second time, I did 4 not hear from them and had no expectation that 5 I was going to get the offer. By the time I was 6 considering that offer in October, I never thought 7 for one second about what had gone on with this 8 case. 9 Q. Is it -- it's true, is it not, that 10 your references to the job offer in your 11 declaration were more directed to explaining why 12 you subsequently recused yourself or removed 13 yourself from other NMB panels, isn't that right? 14 A. Because Illinois law, you know, 15 requires a gubernatorial appointment to this Board 16 to have no outside employment, I had to, you know, 17 give it all up. So I had numerous conversations 18 with the various parties about how I was going to 19 handle the cases that were pending. I had a lot 20 of cases pending. And then ultimately -- that was 21 in December -- the NMB asked me to just do a clean 22 resignation from all the Boards for their records. 23 I don't know if that's an answer to 24 your question, but that's what I did.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 181-184

Page 181

1 Q. Did -- did you have the impression that
 2 the Plaintiffs in this case were suggesting that
 3 your termination of your arbitration practice --
 4 railroad arbitration practice entirely --
 5 A. Um-hum.
 6 Q. -- later in the year --
 7 A. And everything else, too.
 8 Q. -- was somehow related to an alleged
 9 threat of economic harm from --
 10 A. Yes.
 11 Q. -- Mr. Boldra?
 12 And so you were rebutting that notion
 13 that -- that it had some connection back to the
 14 Kite case, is that correct?
 15 A. Yes.
 16 Q. And, in fact, your removal from all of
 17 those panels had nothing to do with the Kite case,
 18 correct?
 19 A. I removed myself as a condition of
 20 accepting that position.
 21 Q. During the telephonic executive
 22 session --
 23 A. Um-hum.
 24 Q. -- when -- when Mr. Boldra made this

Page 182

1 statement about work -- further work for the
 2 Class I railroads --
 3 A. Right.
 4 Q. -- at that moment, do you recall
 5 Mr. Schollmeyer responding directly to that
 6 remark?
 7 A. I don't recall that.
 8 Q. Do you recall him saying something
 9 like, "Whoa, Roger, that's out of line," any words
 10 to that effect?
 11 A. I don't. Again, it's been six years,
 12 but I -- I don't remember that.
 13 Q. Do you remember Mr. Schollmeyer in any
 14 way indicating during that call that he thought
 15 Mr. Boldra's comment was inappropriate?
 16 A. I don't remember. I don't remember.
 17 Q. Do you recall Mr. Schollmeyer objecting
 18 later on when you announced that you were recusing
 19 yourself?
 20 A. I don't, actually.
 21 Q. Do you recall him indicating at that
 22 time that his impression was that you were
 23 recusing yourself because of Mr. Boldra had
 24 threatened you?

Page 183

1 A. You know, it's -- that's been in
 2 so many of the documents I've seen recently,
 3 so I know that's out there, but I -- I don't
 4 remember that independently from then.
 5 Q. Subsequent to your recusal
 6 announcement --
 7 A. Um-hum.
 8 Q. -- do you recall Mr. Schollmeyer
 9 objecting to Mr. Boldra's comment to you directly?
 10 A. I'm sorry? To me?
 11 Q. Yes. After the recusal --
 12 A. Right.
 13 Q. -- did -- did Mr. Schollmeyer ever, at
 14 any point after the recusal, say to you directly,
 15 "That comment from Mr. Boldra was inappropriate"
 16 or a threat of economic harm?
 17 A. No.
 18 Q. Counsel took you through a considerable
 19 amount of back-and-forth between you, the parties
 20 and the National Mediation Board about
 21 transferring the Kite case to a new Board.
 22 A. Right.
 23 Q. Do you remember that?
 24 A. Of course.

Page 184

1 Q. At any point during that process, do
 2 you recall Mr. Schollmeyer objecting or otherwise
 3 indicating that he thought your recusal had been
 4 prompted by an economic threat from Mr. Boldra?
 5 A. No.
 6 Q. I believe you testified that at some
 7 point during that process, you had a call with
 8 Mr. Boldra and Mr. Schollmeyer about relisting the
 9 case, is that correct?
 10 A. You know, I cannot remember if that was
 11 a phone call or if it was all e-mail. I mean,
 12 obviously, you have the e-mail. There were some
 13 conversations. I -- I don't -- I don't recall a
 14 phone call.
 15 Q. Do you recall during this time, when
 16 you were attempting to get the case transferred to
 17 the Peterson Board, that Mr. Schollmeyer did raise
 18 objections to the reassignment relating to the
 19 idea that the National Mediation Board might not
 20 be able to provide funding for the Board?
 21 A. I know, I saw that, I think, in one of
 22 the e-mails today, but I don't -- I don't remember
 23 hearing that at the time.
 24 Q. Do you recall him ever taking the

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 185-188

<p style="text-align: right;">Page 185</p> <p>1 position that it was inappropriate to reassign the 2 case to a new Board? 3 A. No. 4 Q. Was there some secret conspiracy 5 between you and the National Mediation Board to 6 transfer the case to the Peterson Board? 7 A. No. No. I'm laughing because, believe 8 me, the National Mediation Board does not conspire 9 with arbitrators, so no. 10 Q. Were you -- were you trying to sneak 11 this by the union somehow to get it reassigned to 12 the Peterson Board? 13 A. No. 14 Q. And it was to Mr. Kite's benefit that 15 the case be reassigned to a new Board, isn't that 16 true? 17 MR. THOMPSON: Objection, calls for a 18 conclusion, speculation, no foundation. 19 MS. MOORE: You can go ahead and answer. 20 THE WITNESS: Okay. 21 BY THE WITNESS: 22 A. I mean, I felt that the cleanest, 23 best, most ethical thing in this case would be 24 for the case to be heard by somebody with no prior</p>	<p style="text-align: right;">Page 187</p> <p>1 anyone suggested to you that you've been corrupted 2 by threats of economic blackballing or similar -- 3 A. No. 4 Q. -- economic injury? 5 A. No. 6 Q. Has anyone suggested to you -- again, 7 from either side -- that you are not able to 8 fairly resolve cases because you're too concerned 9 about being removed as an arbitrator? 10 A. No. 11 Q. Currently, what -- roughly what 12 percentage of your work is railroad arbitration? 13 A. You know, currently, maybe 15, 14 20 percent. 15 Q. Ms. Zimmerman, do you have any bias 16 against the United Transportation Union as an 17 entity? 18 A. No. 19 Q. Do you have any bias against other 20 railroad unions? 21 A. No. 22 Q. Do you have any bias against BNSF? 23 A. No. 24 Q. Do you have any bias in favor of BNSF?</p>
<p style="text-align: right;">Page 186</p> <p>1 knowledge of any of this, to just get the record 2 and make a decision. 3 BY MR. MUNRO: 4 Q. Because isn't it true that after you 5 had issued your dismissal order, had there not 6 been some subsequent proceeding, Mr. Kite would 7 have remained dismissed? 8 A. I don't know what would have happened, 9 but I was -- you know, I felt he deserved to have 10 his case heard in an NMB arbitration, and so I was 11 motivated to figure out a way to make that happen. 12 Q. And just to be clear, if -- if the case 13 had gone back to you on the merits -- 14 A. Um-hum. 15 Q. -- your testimony is that you would 16 have found against Mr. Kite, is that correct? 17 A. Yes. 18 Q. I believe you testified that since 19 you've come back from your position with the 20 Illinois government, that you have resumed working 21 as an arbitrator for cases involving Burlington 22 Northern Santa Fe and UTU, now SMART? 23 A. I have. 24 Q. During any of those proceedings, has</p>	<p style="text-align: right;">Page 188</p> <p>1 A. No. 2 Q. Is there any reason you haven't 3 disclosed to us today why you cannot function as 4 an impartial neutral in railroad arbitration at 5 this point? 6 A. Do you mean is there any reason? No. 7 I don't believe there's any reason. I didn't 8 think there was any reason then, but... 9 MR. MUNRO: If I could have two minutes? 10 MR. THOMPSON: Sure. 11 MR. MUNRO: Can we go off the record. 12 THE VIDEOGRAPHER: We're now going off the 13 record at 1:04 p.m. 14 (WHEREUPON, a recess was had.) 15 THE VIDEOGRAPHER: We are now back on the 16 record at 1:07 p.m. 17 BY MR. MUNRO: 18 Q. Ms. Zimmerman -- 19 A. Um-hum. 20 Q. -- could I direct your attention to 21 what was previously marked as Exhibit 2. 22 A. Exhibit 2. Here -- here we go. Okay. 23 This is a Board agreement, yes. 24 Q. Correct.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 189-192

<p style="text-align: right;">Page 189</p> <p>1 A. Okay.</p> <p>2 Q. Were you a signatory to -- to this</p> <p>3 agreement?</p> <p>4 A. No.</p> <p>5 Q. And to what extent is it binding on</p> <p>6 you?</p> <p>7 A. Well, it -- I would say that it's --</p> <p>8 it's binding on me. But these are -- these are</p> <p>9 fairly boilerplate agreements, and there are</p> <p>10 things like, for example, the timelines never --</p> <p>11 never get followed because of the NMB findings.</p> <p>12 So these documents, you know, sort of work with</p> <p>13 the process.</p> <p>14 But I can't recall anybody in any</p> <p>15 Board ever referring back to, you know, a Board</p> <p>16 agreement, you know, except to the extent that</p> <p>17 some of them allowed them to rotate arbitrators,</p> <p>18 you know, so...</p> <p>19 Q. I believe counsel pointed you to</p> <p>20 paragraph (K) --</p> <p>21 A. Um-hum.</p> <p>22 Q. -- on the second page.</p> <p>23 A. Okay.</p> <p>24 Q. And in particular, the reference to:</p>	<p style="text-align: right;">Page 191</p> <p>1 Q. Let me also direct your attention to</p> <p>2 the preceding paragraph, paragraph (J).</p> <p>3 A. Okay.</p> <p>4 Q. And counsel asked you some questions</p> <p>5 about that provision, about disputes "involving an</p> <p>6 interpretation or application of an award."</p> <p>7 A. Right.</p> <p>8 Q. Do you recall that?</p> <p>9 A. I do.</p> <p>10 Q. Is it your understanding that this --</p> <p>11 that this provision is something that's talking</p> <p>12 about pre-final award executive sessions or</p> <p>13 something else?</p> <p>14 A. No. My interpretation of this is that</p> <p>15 it goes to disputes about the remedy --</p> <p>16 Q. Is it --</p> <p>17 A. -- about implementation or, you know,</p> <p>18 the remedy.</p> <p>19 Q. So isn't it true, then, that this</p> <p>20 provision applies after an award has been issued</p> <p>21 and there's some dispute about how to implement</p> <p>22 it?</p> <p>23 A. And we never had any discussion about</p> <p>24 this provision, but just reading it cold today,</p>
<p style="text-align: right;">Page 190</p> <p>1 "The Board... shall continue in</p> <p>2 existence until it has disposed of</p> <p>3 all claims and grievances."</p> <p>4 A. Um-hum.</p> <p>5 Q. Do you see that language?</p> <p>6 A. Um-hum.</p> <p>7 Q. In -- in this case, did PLB 7204</p> <p>8 dispose of all claims or grievances submitted</p> <p>9 to it?</p> <p>10 MR. THOMPSON: Objection, calls for a legal</p> <p>11 conclusion.</p> <p>12 THE WITNESS: Well, I can answer that?</p> <p>13 MS. MOORE: Yes, go ahead and answer.</p> <p>14 THE WITNESS: Okay. I can answer.</p> <p>15 BY THE WITNESS:</p> <p>16 A. All of the cases that I had were</p> <p>17 disposed of. Whether this Board continued with</p> <p>18 another neutral, you know, the parties have the</p> <p>19 ability to slide in another neutral, I have no</p> <p>20 idea.</p> <p>21 BY MR. MUNRO:</p> <p>22 Q. Okay.</p> <p>23 A. Whether they closed it or put somebody</p> <p>24 else in there, I don't know.</p>	<p style="text-align: right;">Page 192</p> <p>1 I would read it to involve a remedy, like, in the</p> <p>2 way in traditional arbitration, if we order a</p> <p>3 remedy, there's always a paragraph that says</p> <p>4 "The arbitrator will maintain jurisdiction for</p> <p>5 however many days to resolve any disputes,</p> <p>6 including the interpretation or the application."</p> <p>7 This sounds like remedy language to me.</p> <p>8 Q. Did you --</p> <p>9 A. But I've never had -- I've never had to</p> <p>10 address it.</p> <p>11 Q. The -- the provision on its face</p> <p>12 requires the existence of an award, correct?</p> <p>13 A. It does say that.</p> <p>14 Q. And in -- in Mr. Kite's case, there</p> <p>15 never was an award, correct?</p> <p>16 A. That's correct.</p> <p>17 MR. THOMPSON: Calls for a legal conclusion,</p> <p>18 objection.</p> <p>19 BY THE WITNESS:</p> <p>20 A. No, I don't think so, that I think</p> <p>21 there was not an award.</p> <p>22 I mean, I answered the question, but --</p> <p>23 sorry -- but there was -- there was not an award</p> <p>24 in Mr. Kite's case.</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 193-196

Page 193

1 MR. THOMPSON: Move to strike.
 2 THE WITNESS: Okay.
 3 BY MR. MUNRO:
 4 Q. If you could refer to Exhibit 11.
 5 A. It would have helped if I kept these in
 6 order. Okay. What was 11?
 7 Q. Eleven is a series of e-mails between
 8 you, Mr. Boldra, Mr. Schollmeyer, Carol Conrad.
 9 It looks like this on the first page (indicating).
 10 THE WITNESS: I -- do you have 11?
 11 MS. HENNESSEY: You should have it. Those are
 12 her exhibits, so you want to give --
 13 THE WITNESS: I'm sure I do. I'm just trying
 14 to move this.
 15 MS. MOORE: It's the e-mail?
 16 MR. MUNRO: Correct.
 17 THE WITNESS: I'm just trying to move it
 18 along. I'll get them all together.
 19 MS. MOORE: Here you go.
 20 THE WITNESS: Thanks. Okay.
 21 BY MR. MUNRO:
 22 Q. And if you could turn to the second
 23 page.
 24 A. Yes.

Page 194

1 Q. And counsel asked you some questions
 2 regarding your exchanges with Mr. Boldra regarding
 3 a Board with Mr. Knutson? Is that correct?
 4 A. Yes.
 5 Q. Was there any agreement between you and
 6 Mr. Boldra to dismiss Mr. Kite's case in exchange
 7 for you receiving additional work from the
 8 carrier?
 9 A. No.
 10 Q. Was Mr. Knutson involved in any
 11 decision to refer additional work to you at this
 12 time?
 13 A. I don't know that. But he, you know,
 14 had indicated an interest in -- in working with
 15 me. So I don't -- you know, I don't know exactly
 16 what he did or didn't do.
 17 And I already had one Board with him
 18 at this time. I think I said that before, but...
 19 Q. Outside of the context of the Kite
 20 case, has Mr. Boldra or any other BNSF labor
 21 relations officer attempted to extort you by
 22 threatening to withhold work from you in --
 23 A. No.
 24 Q. -- exchange for --

Page 195

1 A. I'm sorry.
 2 Q. -- your decision in any particular
 3 case?
 4 A. No.
 5 MR. MUNRO: I have nothing further.
 6
 7 FURTHER EXAMINATION
 8 BY MR. THOMPSON:
 9 Q. Would you agree, ma'am, that Mr. Boldra
 10 was as hardened in his position as Mr. Schollmeyer
 11 was at the second executive session?
 12 A. You know, I don't know that I can make
 13 an exact comparison. I'd just say they were --
 14 they were both pretty --
 15 Q. Nobody was moving, were they?
 16 A. Exactly.
 17 Q. All right. And then, when Mr. Boldra
 18 issued his statement, which we have called
 19 throughout this litigation "the alleged threat" --
 20 A. Okay.
 21 Q. -- whether that was, "You'll never work
 22 for a Class I railroad again" or "You can't work
 23 in the industry if you make these decisions" --
 24 A. Um-hum.

Page 196

1 Q. -- that confirmed for you or made it
 2 clear for you that -- what? -- that your
 3 impartiality could be questioned and, therefore,
 4 you may need to recuse yourself?
 5 A. That it certainly -- you know, it --
 6 it confirmed that the appearance of impartiality
 7 had been compromised.
 8 Q. Thank you. Yes?
 9 A. Yes.
 10 Q. Now, do you know whether there was
 11 any -- I'll call it -- "give" by Mr. Schollmeyer
 12 on any other case within the 11 cases outside of
 13 the Kite case on this Board?
 14 A. I don't remember any of the discussions
 15 on the other cases.
 16 Q. So you don't know whether
 17 Mr. Schollmeyer said, "I'll agree with you not to
 18 insist on Rule" -- "on Case No. 5 if you, Boldra,
 19 will agree to reinstate"?
 20 A. I don't --
 21 Q. You don't know if that happened or not?
 22 A. I don't remember.
 23 Q. Okay. Once you had decided to recuse
 24 yourself, is it your testimony that the only path

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 197-200

<p style="text-align: right;">Page 197</p> <p>1 that Mr. Kite would have towards trying to be 2 reinstated or get back to work would then be to 3 go to another arbiter? 4 A. I have no idea what other legal options 5 would have been, you know, available to Mr. Kite. 6 But at least within the NMB arena, he 7 had an arbitration case pending, you know, that 8 needed to be decided. The only way it was going 9 to be decided was by another arbitrator. 10 Q. But you understood that the parties had 11 chosen you as the neutral to decide his case? 12 A. Yes, but I had an ethical problem with 13 considering -- 14 Q. Okay. 15 A. -- with continuing so, it needed to be 16 someone else. 17 Q. And -- 18 A. And they had apparently also chosen 19 Mr. Peterson to resolve disputes since they had 20 a -- an existing Board with him. 21 Q. Do you think, as you sit here today, 22 that you did not say during the second 23 executive -- telephone executive session -- 24 A. Um-hum.</p>	<p style="text-align: right;">Page 199</p> <p>1 do you think they both, as opposite to one another 2 as they are, came to that same point of view? 3 MS. MOORE: Objection, calls for speculation. 4 I mean, you can answer -- 5 THE WITNESS: Okay. 6 MS. MOORE: -- if you can but -- 7 THE WITNESS: Okay. 8 BY THE WITNESS: 9 A. I agree that the phone call probably 10 ended shortly after that last statement. 11 BY MR. THOMPSON: 12 Q. By Mr. Boldra? 13 A. By Mr. Boldra. 14 Q. Okay. 15 A. Whether I ever used the word -- you 16 know, I know I said, "I don't know what I'm going 17 to do. I'm going to have to think about it." 18 I'd be speculating. Is it possible 19 I used the word, "I may have to rec-" -- you know, 20 something like that, that's possible. But I know 21 that I did not make any final decision to recuse 22 myself at that time. 23 Q. Okay. 24 A. Okay? You know.</p>
<p style="text-align: right;">Page 198</p> <p>1 Q. -- "In that case, all I can do is 2 recuse myself"? 3 A. I do not believe I made a final 4 decision at that -- that time. 5 Q. I want you to assume that both 6 Mr. Schollmeyer and Mr. Boldra both say you did. 7 MR. MUNRO: Objection, assumes facts not in 8 evidence. 9 MR. THOMPSON: Well, they are, and they 10 will be. 11 BY MR. THOMPSON: 12 Q. I want you to assume that both of them 13 have testified to that in their depositions and 14 have said so in their declarations in this case. 15 MR. MUNRO: Same objection. 16 BY MR. THOMPSON: 17 Q. And furthermore, ma'am, I want you to 18 assume that both say that was the termination of 19 the phone call. 20 MR. MUNRO: Same objection. 21 BY MR. THOMPSON: 22 Q. Assuming all that to be true -- 23 A. Um-hum. 24 Q. -- for the purposes of my question, how</p>	<p style="text-align: right;">Page 200</p> <p>1 Q. You told us that you knew very well 2 that a referee who put a second-time Rule G 3 offender back to work would essentially demolish 4 their career? 5 A. In the railroad industry, yes. 6 Q. Okay. Isn't that the issue, though, 7 that was at stake in the Kite case, is whether or 8 not he actually was a second offender? 9 A. That was the issue they created to give 10 them a basis for a settlement. That was not an 11 issue in the record. 12 Q. Well, that was an argument that 13 Mr. Schollmeyer made on behalf of Mr. Kite in his 14 position statement to you? 15 A. That may be true. I don't recall that. 16 I don't recall what was in there. 17 Q. And didn't he argue to you that the 18 hard card -- employment hard card submitted by the 19 railroad failed to prove that was the case because 20 all it listed was a medical disqualification but 21 no reason for that disqualification related to 22 alcohol, is that fair? 23 A. As I believe I've stated before, 24 I don't recall at this time any reference to a</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 201-204

Page 201

1 hard card. All of the submissions would have been
 2 discarded a long time ago, so --
 3 Q. So you don't --
 4 A. I -- I don't know if that was in there
 5 or not. I have no recollection. I have no
 6 recollection of hard card. I don't remember that,
 7 but --
 8 Q. Okay.
 9 A. -- I haven't seen that record in six
 10 years, so...
 11 Q. Do you recall that the only evidence,
 12 besides the hard card submitted by the railroad,
 13 was a letter from a Mr. Crispin, who never
 14 testified at the investigation as to the
 15 foundation of that letter?
 16 MR. MUNRO: Objection, assumes facts not in
 17 evidence.
 18 BY MR. THOMPSON:
 19 Q. You can answer.
 20 MS. MOORE: You can answer.
 21 BY THE WITNESS:
 22 A. Yeah, I don't remember. I mean, I --
 23 I didn't -- all I remember about that record now
 24 is that the documentation of the first offense did

Page 202

1 not have the full packet that I had seen in other
 2 cases.
 3 BY MR. THOMPSON:
 4 Q. Um-hum.
 5 A. With other --
 6 Q. Specifically, there was no evidence of
 7 the actual breath or blood or saliva measurement?
 8 A. I don't remember. I mean, I -- I --
 9 I believe that the other cases -- I'm not sure --
 10 no. Anyway, the other cases that I had seen, and
 11 most of them were at CSX, had very extensive
 12 documentation on the first offenses. I knew that
 13 this one -- I recall that this one was not as
 14 complete as what I had seen.
 15 But I do recall that there was other
 16 evidence in the record; maybe there were some
 17 documents, there were statements. You know, I --
 18 I kind of think that Mr. Kite might have admitted
 19 it or, during the hearing, his representative
 20 admitted it.
 21 Beyond that, I -- I just can't tell you
 22 what the specific stuff was. I haven't looked at
 23 this record, as I said, in more than six years.
 24 That's -- that's all I remember of it.

Page 203

1 Q. By very extensive documented evidence
 2 on CSX --
 3 A. Um-hum.
 4 Q. -- which is another rail --
 5 A. Of course.
 6 Q. -- railroad, are you referring to your
 7 experience in terms of seeing the actual bread --
 8 breath, blood or saliva measurements of both the
 9 first and second --
 10 A. Um -- I'm not --
 11 Q. -- Rule G incidents?
 12 A. Yeah, I'm sorry.
 13 I don't recall if I necessarily saw
 14 that. I know that -- I might have seen that.
 15 I remember in -- in particular seeing EAP
 16 agreements where employees, you know, admitted
 17 this was their first offense, they were going into
 18 the EAP, they had agreed that they were never
 19 again going to do this, this or this. You know,
 20 I remember seeing those.
 21 And I don't -- there were -- there was
 22 not as much documentation in this record. But as
 23 I've said before, the -- you know, the standard is
 24 substantial evidence. And whatever was there,

Page 204

1 I knew at the time established by substantial
 2 evidence that he had had that first offense.
 3 Q. In your opinion, you thought that was
 4 substantial evidence?
 5 A. What I saw in that record at the time
 6 when I went through it, as I was writing up their
 7 agreement, I believed was substantial evidence to
 8 support the first offense. What exactly that was
 9 at this time, I -- I can't tell you.
 10 Q. Okay. Counsel asked you about your
 11 declarations and some of the statements you made,
 12 trying to separate a claim about your change in
 13 employment --
 14 A. Um-hum.
 15 Q. -- from your --
 16 A. Yes.
 17 Q. -- arbitration practice to the
 18 government --
 19 A. Yes.
 20 Q. -- to the Illinois Employment Board?
 21 A. Right.
 22 Q. Let me point you to exactly what's said
 23 here, and let's see if we can straighten that out.
 24 A. Are you in Exhibit 17 now, or are

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 205-208

Page 205

1 you --
 2 Q. No. I'm looking at your declaration.
 3 A. 15?
 4 Q. Actually, what I'm going to do, ma'am,
 5 is, I'm going to give you what's now -- what are
 6 we, 19?
 7 THE COURT REPORTER: Yes.
 8 MR. THOMPSON: Okay.
 9 BY MR. THOMPSON:
 10 Q. (Continuing) -- which is your second
 11 declaration, I believe.
 12 MR. MUNRO: It is attached to 16 already,
 13 Steve.
 14 MR. THOMPSON: It could be. But this makes it
 15 easy for the record.
 16 MR. MUNRO: That's fine.
 17 (WHEREUPON, said document was
 18 marked Plaintiffs'-Zimmerman
 19 Deposition Exhibit No. 19, for
 20 identification, as of 04-01-2015.)
 21 BY MR. THOMPSON:
 22 Q. So let's go --
 23 A. Is this 19 we're looking at now?
 24 Q. Yes. So let's go --

Page 206

1 A. Okay.
 2 Q. So let's go to -- you would -- you
 3 would acknowledge that 19 is your declaration?
 4 A. Yes.
 5 Q. And I think it's the second one you
 6 filed in this case because your third one is
 7 actually marked "Third."
 8 A. Okay.
 9 Q. Okay?
 10 A. Sure.
 11 Q. Turn with me, if you would, please, to
 12 the third page, beginning at paragraph 6.
 13 A. "I held the position of"?
 14 Q. No. "I understand that one of the
 15 allegations."
 16 A. Oh. I'm on the wrong page.
 17 "I understand the" -- yes, I see that. You've
 18 highlighted it. Okay.
 19 Q. Do you state at para- -- at page 3,
 20 paragraph 6, lines 2 through 9:
 21 "I understand that one of the
 22 allegations in this case concerns
 23 statements made by BNSF Public Law
 24 Board 7204 Member, Roger Boldra,

Page 207

1 which Plaintiffs allege may have
 2 caused me to, quote, 'withdraw as an'
 3 arbiter "'on behalf of the [NMB],'
 4 unquote, and seek employment other
 5 than as an" arbiter. "I submit this
 6 declaration to make clear... there is
 7 no relationship between my acceptance
 8 of a gubernatorial appointment and
 9 any statements made by parties in
 10 connection with Public Law Board 7204."
 11 A. Okay. Um-hum.
 12 Q. Where did you gain the understanding
 13 that I or my clients were making allegations in
 14 this case concerning statements that would have
 15 caused you to seek employment with Governor Quinn?
 16 A. You know, which paperwork I looked at
 17 to get this from, I -- I don't recall, but --
 18 well, for one thing, the -- the subpoena sought
 19 all my employment records.
 20 Q. Yes.
 21 A. And I saw various -- you know, there
 22 were various filings going back and forth.
 23 What particular thing I saw this in,
 24 I don't know, sitting here today. I mean,

Page 208

1 I don't -- I don't think, from everything I've
 2 heard today, that it's disputed that that was
 3 one of your theories of this case.
 4 Q. It's very much disputed.
 5 What I want to know is where you got
 6 the idea that we thought you went to work for
 7 Governor Quinn because of this case -- because of
 8 what Mr. Boldra said. Is that something you came
 9 to on your own, or did somebody tell you that?
 10 A. You know, I've looked at so much
 11 paperwork in this case that I don't remember where
 12 I saw this statement. As I said, I know it was in
 13 the subpoena for documents. You subpoenaed all of
 14 my search for employment records. I'm not going
 15 to be able to tell you the exact source of this
 16 right now.
 17 Q. Okay. You're not making any claim that
 18 you recused yourself from this case as a result of
 19 the possibility that you might be able to go to
 20 work for Governor Quinn on the Illinois
 21 Relations -- Labor Relations Board?
 22 A. No. I -- in fact, if I can keep the
 23 timing straight, at the time I recused myself,
 24 I hadn't even received the initial --

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 209-212

<p style="text-align: right;">Page 209</p> <p>1 Q. Right.</p> <p>2 A. -- the initial contact from the</p> <p>3 Governor's office.</p> <p>4 Q. The timeline is such that that would</p> <p>5 have been impossible, right?</p> <p>6 A. Right.</p> <p>7 MR. THOMPSON: Thank you, ma'am. I have no</p> <p>8 other questions.</p> <p>9 THE WITNESS: Yeah.</p> <p>10 MS. MOORE: I have a couple of follow-up</p> <p>11 questions --</p> <p>12 THE WITNESS: Okay.</p> <p>13 MS. MOORE: -- for you.</p> <p>14 THE WITNESS: Okay.</p> <p>15</p> <p>16 EXAMINATION</p> <p>17 BY MS. MOORE:</p> <p>18 Q. First, I think it's Exhibit 2, which is</p> <p>19 the -- I think it's Exhibit 2, the agreement --</p> <p>20 A. The Public Law Board agreement?</p> <p>21 Q. Yes.</p> <p>22 A. Right.</p> <p>23 Q. Okay. Are you looking at</p> <p>24 page NMB 00002?</p>	<p style="text-align: right;">Page 211</p> <p>1 question as compound, and you were already -- it's</p> <p>2 already been asked and answered --</p> <p>3 BY MS. MOORE:</p> <p>4 Q. You can answer.</p> <p>5 MR. THOMPSON: -- with respect to number --</p> <p>6 with respect to your first question.</p> <p>7 BY THE WITNESS:</p> <p>8 A. I didn't sign it.</p> <p>9 BY MS. MOORE:</p> <p>10 Q. Okay. So are you -- to be clear,</p> <p>11 are you bound by any of the provisions in this</p> <p>12 contract?</p> <p>13 MR. THOMPSON: Objection --</p> <p>14 BY THE WITNESS:</p> <p>15 A. Well --</p> <p>16 MR. THOMPSON: -- asked and answered.</p> <p>17 THE WITNESS: Okay.</p> <p>18 BY MS. MOORE:</p> <p>19 Q. You can -- you can go ahead and answer.</p> <p>20 A. You know, I would say that I accepted</p> <p>21 this appointment subject to the conditions they</p> <p>22 laid out.</p> <p>23 Q. Okay.</p> <p>24 A. So...</p>
<p style="text-align: right;">Page 210</p> <p>1 A. Yes.</p> <p>2 Q. And what -- can you tell me what's the</p> <p>3 title of this document?</p> <p>4 A. Agreement Between the UTU and BNSF.</p> <p>5 Q. Does -- does it say "and Jacalyn</p> <p>6 Zimmerman"?</p> <p>7 A. No.</p> <p>8 Q. Can you turn to page NMB 00004.</p> <p>9 A. Okay.</p> <p>10 Q. And who -- can you -- well, actually,</p> <p>11 one of these signatures is indecipherable, but --</p> <p>12 A. I believe that's probably Jay</p> <p>13 Schollmeyer's signature.</p> <p>14 Q. Okay. But it is signed by Roger</p> <p>15 Boldra?</p> <p>16 A. Yes.</p> <p>17 Q. And someone whose signature is on</p> <p>18 behalf of the UTU General Chairman, is that</p> <p>19 correct?</p> <p>20 A. Yes.</p> <p>21 Q. Did you -- are you bound by this</p> <p>22 agreement? Did you sign this agreement?</p> <p>23 A. I did not sign --</p> <p>24 MR. THOMPSON: Objection to the form of the</p>	<p style="text-align: right;">Page 212</p> <p>1 Q. As far as you're aware, this is not an</p> <p>2 agreement to which you are bound?</p> <p>3 A. Right.</p> <p>4 MR. THOMPSON: Objection, asked and answered.</p> <p>5 BY MS. MOORE:</p> <p>6 Q. Okay. I just want to also clarify,</p> <p>7 when you are assigned as a neutral arbitrator to a</p> <p>8 Board, are you --</p> <p>9 A. Yes.</p> <p>10 Q. -- functioning as a lawyer or as</p> <p>11 something else?</p> <p>12 A. You're functioning as an arbitrator,</p> <p>13 and there is no requirement anywhere I know of</p> <p>14 that arbitrators be lawyers; and, in fact, in the</p> <p>15 railroad industry, quite a few arbitrators are</p> <p>16 not lawyers.</p> <p>17 Q. Have you represented BNSF or UTU or any</p> <p>18 of the parties in this litigation ever?</p> <p>19 A. No.</p> <p>20 Q. In connection with any litigation?</p> <p>21 A. No.</p> <p>22 Q. Did you -- were you retained by them</p> <p>23 for this specific Board?</p> <p>24 A. For this specific Board and for a</p>

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 213-216

Page 213

1 couple of others.
 2 Q. Well, let me rephrase that question.
 3 Who is paying -- who paid you to work
 4 on this particular Board?
 5 A. The National Media- --
 6 MR. THOMPSON: Objection, asked and answered.
 7 THE WITNESS: No, I don't think that --
 8 I don't think so.
 9 BY THE WITNESS:
 10 A. The National Mediation Board.
 11 BY MS. MOORE:
 12 Q. Okay.
 13 THE WITNESS: I don't think that question
 14 was --
 15 MR. THOMPSON: It was --
 16 MS. MOORE: Just to clarify, he can object all
 17 he wants --
 18 THE WITNESS: Okay.
 19 MS. MOORE: -- and then you can answer --
 20 THE WITNESS: Answer, I'm sorry. I don't
 21 have -- I -- I know. I'm just used to ruling on
 22 the objections. I'm sorry.
 23 BY MS. MOORE:
 24 Q. And so just to be clear --

Page 214

1 THE WITNESS: That's true.
 2 MS. MOORE: Right.
 3 MS. HENNESSEY: And you put her at the head of
 4 the table.
 5 THE WITNESS: Right.
 6 BY MS. MOORE:
 7 Q. And just to be clear, you wouldn't have
 8 received financial documents from either one of
 9 these parties, is that correct?
 10 A. Financial documents?
 11 Q. I mean, just basically, anything --
 12 any invoices --
 13 A. No. The parties do not pay for
 14 arbitration awards.
 15 Q. Would you have established a client
 16 trust account on behalf of either UTU or BNSF?
 17 A. No.
 18 Q. Okay. And so, basically, if you --
 19 the -- the notes that you use or the notes that
 20 you write with respect to the -- you know, as
 21 you're taking during these executive session --
 22 A. During these hearings? Yes.
 23 Q. -- those are your own personal work
 24 product?

Page 215

1 A. Yes.
 2 Q. Is that correct?
 3 A. Yes.
 4 Q. Okay. And then I just have Exhibit 7
 5 is a document --
 6 A. Right.
 7 Q. -- I think titled "Neutral's Report of
 8 Activity."
 9 A. Right.
 10 Q. Is this a document that you created?
 11 A. It's a form the NMB creates that
 12 I would have filled out.
 13 Q. Okay.
 14 A. This was an online form.
 15 Q. Right. And what is -- what is your
 16 understanding of what the purpose of this form is?
 17 A. This is strictly to have the NMB pay
 18 you.
 19 Q. And they -- and my understanding is,
 20 down at the bottom in footnote 1, those decision
 21 codes are -- were created by the NMB? Is that
 22 correct?
 23 A. That's correct.
 24 Q. So those are your -- your only choices

Page 216

1 in order to basically put these -- the disposition
 2 of each of those cases --
 3 A. Right.
 4 Q. -- to report --
 5 A. To report a result, right.
 6 Q. There is no other way to --
 7 A. Exactly.
 8 Q. -- categorize it?
 9 A. Right.
 10 Q. Okay. One last question. Earlier --
 11 well, actually, two last questions.
 12 Earlier you testified that Mr. Boldra's
 13 statement confirmed for you the appearance of
 14 impartiality.
 15 A. That the appearance of impartiality,
 16 you know, had been compromised.
 17 Q. When you say "confirmed," what -- that
 18 suggests that there was some other statement or
 19 other interaction before that that gave you the
 20 initial impression -- impression of
 21 impartiality --
 22 A. Had been compromised?
 23 Q. Yeah.
 24 A. It -- it -- it was -- it was

JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 217-220

Page 217

1 Mr. Schollmeyer's continued in- -- insistent
 2 that -- insistence, excuse me -- that that draft
 3 had to be the result and especially since by that
 4 time, I had reviewed the record enough to know
 5 that were I to go back and issue an impartial
 6 result, it would not be in his favor. It was very
 7 clear to me that he would not accept that result.
 8 But, however, as I said, it was -- it
 9 was a heated conversation. The parties were --
 10 were very entrenched. I didn't think anybody was
 11 really viewing this as a fair process at that
 12 point. So the statement by Mr. Boldra, you know,
 13 was one more thing, but I was already there.
 14 Q. Okay. And just a -- another question.
 15 I think both -- well, actually, you've looked at
 16 the dismissal with prej- -- without prejudice that
 17 you signed?
 18 A. Yes.
 19 Q. Or that has your signature on it?
 20 A. Yes.
 21 Q. It may -- you are not aware -- or you
 22 have no idea whether one of the other Board
 23 members signed --
 24 A. I don't.

Page 218

1 Q. -- the dismissal?
 2 A. I -- I don't believe anyone ever sent
 3 me a signed one. I don't -- I don't. I don't.
 4 Q. But to the best of your -- I mean, you
 5 wouldn't know whether the NMB has a copy of that
 6 document with someone else's signature on it?
 7 A. I wouldn't.
 8 Q. And then, is -- is a dismissal an award
 9 requiring two people's signature?
 10 A. You know, it's not. I mean, there have
 11 been other dismissals in other cases that I have
 12 signed on my own. Why we put everybody's
 13 signature on this one, I can't tell you.
 14 Q. Okay. And then, one last question.
 15 You know, I think there was some discussion or
 16 some testimony about your railroad arbitration
 17 business, and you may have suggested that it has
 18 decreased over time.
 19 Isn't it true that the reason that your
 20 railroad arbitration business may have decreased
 21 is not because of any threat to your economic
 22 viability but, rather, because of funds
 23 appropriated by the NMB to decide these cases?
 24 A. I know that the NMB's funding is down

Page 219

1 substantially, between the first time I did this
 2 and the second, about 40 percent. So as far as
 3 I'm aware, almost everyone has lower caseloads.
 4 You know, beyond that, I'd be
 5 speculating as to, you know, the particular cause.
 6 I mean, it's very cyclical. People get, you know,
 7 very hot, and then they get cold, and then the
 8 parties run through everybody else, so they take
 9 back some of these. Everybody knows some of the
 10 people they didn't use in the past, and that's
 11 just how it goes.
 12 MS. MOORE: All right. I have no further
 13 questions.
 14 THE WITNESS: Okay.
 15
 16 FURTHER EXAMINATION
 17 BY MR. THOMPSON:
 18 Q. One question.
 19 A. Okay.
 20 Q. Well, one set of questions.
 21 A. Okay.
 22 Q. With respect to the dismissal order,
 23 which is Exhibit 15 --
 24 A. Um-hum.

Page 220

1 Q. -- to your deposition --
 2 A. Um-hum.
 3 Q. -- you entitled the document an award,
 4 not once, but twice on that single page, is that
 5 fair?
 6 A. I don't know. I'd have to look.
 7 Q. Upper right-hand corner.
 8 A. Oh, the upper right? Okay. That's the
 9 caption. Okay.
 10 Q. And then down below, above your
 11 signature?
 12 A. Oh, "Award," okay.
 13 Q. Yes?
 14 A. Okay.
 15 MR. THOMPSON: Thank you.
 16 THE WITNESS: I mean, it --
 17 MR. MUNRO: I have -- I have one question as
 18 well.
 19 THE WITNESS: Okay.
 20
 21 FURTHER EXAMINATION
 22 BY MR. MUNRO:
 23 Q. Is it correct that the sole reason
 24 you recused yourself from PLB 7204 was because

JACALYN JOY ZIMMERMAN
UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
221-224

Page 221

1 the settlement between the parties had dissolved,
 2 and you believed you could not review the case on
 3 the merits over the union's objections?
 4 A. I believed that personally I could have
 5 reviewed the case and issued an impartial result,
 6 but I did not believe that the parties would
 7 accept it as such.
 8 Q. And that's the sole reason you recused
 9 yourself?
 10 A. That's the only reason.
 11 MR. MUNRO: Thank you.
 12 THE VIDEOGRAPHER: This marks the end of
 13 DVD No. 3 and the deposition of Jacalyn Zimmerman.
 14 We are going off the record at 1:38 p.m.
 15
 16 FURTHER DEPONENT SAITH NAUGHT.
 17
 18 (Time noted: 1:38 p.m.)
 19
 20
 21
 22
 23
 24

Page 223

1 hand of office at Chicago, Illinois, this 12th day
 2 of April, 2015.
 3
 4
 5
 6 Notary Public, Will County, Illinois.
 7 My commission expires May 16, 2017.
 8
 9
 10
 11 C.S.R. Certificate No. 84-1388.
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 222

1 STATE OF ILLINOIS)
 2) SS:
 3 COUNTY OF W I L L)
 4 I, ROSANNE M. NUZZO, a Notary Public
 5 within and for the County of Will, State of
 6 Illinois, and a Certified Shorthand Reporter,
 7 CSR No. 84-1388, of said state, do hereby certify:
 8 That previous to the commencement of the
 9 examination of the witness, the witness was duly
 10 sworn to testify the whole truth concerning the
 11 matters herein;
 12 That the foregoing deposition
 13 transcript was reported stenographically by me,
 14 was thereafter reduced to typewriting under my
 15 personal direction, and constitutes a true record
 16 of the testimony given and the proceedings had;
 17 That the said deposition was taken
 18 before me at the time and place specified;
 19 That I am not a relative or employee or
 20 attorney or counsel, nor a relative or employee of
 21 such attorney or counsel for any of the parties
 22 hereto, nor interested directly or indirectly in
 23 the outcome of this action.
 24 IN WITNESS WHEREOF, I do hereunto set my

Page 224

1 I N D E X
 2
 3 WITNESS: PAGE:
 4 JACALYN JOY ZIMMERMAN
 5 BY MR. THOMPSON..... 5
 6 BY MR. MUNRO..... 166
 7 BY MR. THOMPSON..... 195
 8 BY MS. MOORE..... 209
 9 BY MR. THOMPSON..... 219
 10 BY MR. MUNRO..... 220
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 12
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 16 *****
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JACALYN JOY ZIMMERMAN
 UNITED TRANSPORTATION -vs- BNSF RAILWAY

April 01, 2015
 225-228

Page 225

1	EXHIBITS	
2	EXHIBIT NUMBER	MARKED FOR ID
3	PLAINTIFFS' DEPOSITION EXHIBITS	
4	Exhibit No. 1.....	11
5	Exhibit No. 2.....	11
6	Exhibit No. 3.....	16
7	Exhibit No. 4.....	16
8	Exhibit No. 5.....	42
9	Exhibit No. 6.....	42
10	Exhibit No. 7.....	60
11	Exhibit No. 8.....	68
12	Exhibit No. 9.....	72
13	Exhibit No. 10.....	92
14	Exhibit No. 11.....	99
15	Exhibit No. 12.....	105
16	Exhibit No. 13.....	110
17	Exhibit No. 14.....	121
18	Exhibit No. 15.....	121
19	Exhibit No. 16.....	123
20	Exhibit No. 17.....	130
21	Exhibit No. 18.....	148
22	Exhibit No. 19.....	205
23		
24		

Page 227

DEPOSITION ERRATA SHEET

2

Page No. _____ Line No. _____ Change to: _____

3 Reason for change: _____

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5

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18 Reason for change: _____

19

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Page No. _____ Line No. _____ Change to: _____

21 Reason for change: _____

22

23

SIGNATURE: _____ DATE: _____

24 JACALYN JOY ZIMMERMAN

Page 226

DEPOSITION ERRATA SHEET

2

3 Assignment No. 300007

4 United Transportation Union v. BNSF Railway Co.

5

6

7 DECLARATION UNDER PENALTY OF PERJURY

8

9 I declare under penalty of perjury that

10 I have read the entire transcript of my

11 deposition taken in the captioned matter, or the

12 same has been read to me, and the same is true

13 and accurate, save and except for changes and/or

14 corrections, if any, as indicated by me on the

15 DEPOSITION ERRATA SHEET hereof, with the

16 understanding that I offer these changes as if

17 still under oath.

18

19

20 Signed on the _____ day of

21 _____, 20____.

22 _____

23 JACALYN JOY ZIMMERMAN

24

Page 228

DEPOSITION ERRATA SHEET

2

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18 Reason for change: _____

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SIGNATURE: _____ DATE: _____

23 JACALYN JOY ZIMMERMAN

24