

To: MSPB Washington Regional Office
Fr: David W. Noble, Jr.
Re: Dkt. No. DC-0752-11-0880-I-1
Dt: October 21, 2011
By fax: 703-756-7112

Attached for filing are *Appellant's Motion to Certify the Issue of Disqualification of Judge Turbitt to the Board as an Interlocutory Appeal under 5 C.F.R. § 1201.91, and October 21, 2011 Declaration of David W. Noble, Jr., and Exhibit U, Transcript of September 26, 2011 Prehearing Conference*, and a certificate of service.

cc: Stephen W. Furgeson

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MERIT SYSTEMS PROTECTION BOARD
Washington D.C. Field Office

David W. Noble Jr.,
Appellant

v.

United States Postal Service,
Agency.

Docket No. DC-0752-11-0880-I-1

AJ: Turbitt

Date: October 21, 2011

**Appellant's Motion to Certify the Issue of Disqualification of Judge Turbitt to the Board as
an Interlocutory Appeal under 5 C.F.R. § 1201.91.**

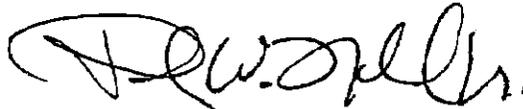
On October 6, 2011 appellant moved that Judge Turbitt be disqualified because in his September 27, 2011 *Order and Summary of Prehearing Conference* he made "false statements about appellant's conduct during the September 26th [prehearing] conference." On October 20, 2011 the judge denied the disqualification motion. Appellant now moves to certify the issue of disqualification of Judge Turbitt to the Board as an interlocutory appeal under 5 C.F.R. § 1201.91.

The attached declaration and transcript of the September 26, 2011 conference prove that Judge Turbitt made false statements about appellant's conduct. Making false statements about a party is evidence of a deep-seated antagonism that would make fair judgment impossible.

Certification as an interlocutory appeal is warranted because the denial of an immediate ruling will cause undue harm to appellant and to the nearly 300,000 members of the National Association of Letter Carriers, AFL-CIO ("NALC"). As he has explained to Judge Turbitt, appellant is the lone plaintiff in a suit brought for the common benefit of the NALC membership

in 1994 against NALC and its highest-ranking officers for, *inter alia*, engaging in a phony "in-town expenses" scheme. The case is still pending. Appellant's standing to continue to pursue the suit may depend on his membership status, which, in turn, depends on his employment by the agency. The judge, therefore, has the power not only to permit the agency to terminate appellant's 36 years of employment, but may also have the power to terminate a federal lawsuit appellant has pursued on behalf of the NALC membership for almost eighteen years. Under these circumstances, both appellant and NALC's membership have an interest in a honest decision by an unbiased judge. Therefore the Board should immediately disqualify Judge Turbitt and replace him with a different judge.

Respectfully submitted,



David W. Noble, Jr.

October 21, 2011 Declaration of David W. Noble, Jr.

I, David W. Noble, Jr., make this declaration based on personal knowledge:

1. I am the plaintiff in Civil Action No. 94-302, *Noble v. Sombrotto, et al.* I filed the suit in 1994. It is presently pending in the United States District Court for the District of Columbia, having been remanded in 2008 by the circuit court. The most recent decision in the case was reported as *Noble v. Sombrotto*, 525 F.3d 1230, (D.C. Cir. 2008).

2. I maintain the *NALC Truth Page* on Facebook. NALC sends out bulletins to about 40,000 stations every 15-20 days. Both the *NALC Truth Page* and the *NALC Bulletin* report decisions in *Noble v. Sombrotto* to the NALC membership.

3. Attached as Exh. U is a true and accurate copy of the transcript of the September 26, 2011 prehearing conference participated in by Judge Turbitt, agency representative Stephen W. Furgeson, and me.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 21, 2011.



David W. Noble, Jr.

Certificate of Service

I certify that I sent on October 21, 2011 I sent *Appellant's Motion to Certify the Issue of Disqualification of Judge Turbitt to the Board as an Interlocutory Appeal under 5 C.F.R. § 1201.91*, and *October 21, 2011 Declaration of David W. Noble, Jr.*, and *Exh. U, Transcript of September 26, 2011 Prehearing Conference* by facsimile transmission to Stephen W. Furgeson at 301.955-0701 and to the Honorable Daniel Madden Turbitt at the MSPB Washington Regional Office at 703.756-7112.



David W. Noble, Jr.

1 September 26, 2011 Prehearing Conference: Administrative Judge Turbitt, Stephen W. Furgeson,
2 agency representative, David W. Noble, Jr., appellant.

3
4 Judge Turbitt: Okay, let's go with the issues in the case. I'm assuming we shouldn't even bother
5 to discuss settlement because of what the appellant said in our last discussion. Is that correct?

6
7 Stephen W. Furgeson: Yes.

8
9 Judge Turbitt: Okay. Mr. Noble, you have not changed your position, is that correct?

10
11 David W. Noble: I'm not willing to do anything that will jeopardize my lawsuit by way of
12 settling this case.

13
14 Judge Turbitt: Okay. The first issue is whether the agency met its burden of proving its charge of
15 unsatisfactory attendance/absence without official leave/permission (AWOL). The next issue is
16 whether the agency had met its burden of proving that the penalty of removal was reasonable and
17 promoted the efficiency of the service under the circumstances of this case. What are the
18 affirmative defenses you're raising in this case, Mr. Noble?

19
20 David W. Noble: That the removal action taken by the agency violated numerous provisions of
21 the collective bargaining agreement.

22
23 Judge Turbitt: And is that your allegation regarding harmful error?

24
25 David W. Noble: I'm sorry, regarding?

26
27 Judge Turbitt: Harmful error and that it was not in accordance with law.

28
29 David W. Noble: The not in accordance with law was that I was not AWOL as charged, but that I
30 was instead in an approved leave status – leave without pay – and that under MSPB case law
31 agencies may not take disciplinary action for approved leave.

32
33 Judge Turbitt: Okay. Is that it?

34
35 David W. Noble: No – (Judge Turbitt interrupts.)

36
37 Judge Turbitt: Are you saying that you were in leave without pay status – approved – all of that is
38 for leave without pay?

39
40 David W. Noble: Is it all about – (Judge Turbitt interrupts) – no it's leave without pay.

41
42 Judge Turbitt: Okay.
43

Exh. U

1 David W. Noble: Another affirmative defense is that my absence from work should be
2 considered a constructive suspension rather than an unauthorized absence because the agency has
3 made my working conditions intolerable.
4

5 Judge Turbitt: What would be a constructive suspension – at the time you say you were on leave
6 without pay? Mr. Noble I'm sorry, I didn't understand what you were saying. Would you repeat
7 that?
8

9 David W. Noble: Yes, I said that my absence from work should be considered a constructive
10 suspension rather than an unauthorized absence because the agency had made my working
11 conditions intolerable.
12

13 Judge Turbitt: Hello? Is somebody else on the call?
14

15 Stephen W. Furgeson: I don't think so. I've got a radio on. Let me turn it off. That's maybe –
16 okay. I just hear a beeping.
17

18 Judge Turbitt: Mr. Noble, I'm not going to have you have to prove that you were subjected to
19 enforced leave. The agency has charged you with an absence without leave. I'm going to leave
20 the burden of proof on them. So they have to prove that that period of time was unsatisfactory
21 attendance or that you were on AWOL. I'm not going to shift the burden of proof to you so let's
22 leave it as is. That doesn't help you.
23

24 David W. Noble: Well, am I going to be permitted to present evidence of intolerable working
25 conditions?
26

27 Judge Turbitt: On what basis?
28

29 David W. Noble: That it caused me to be absent from work.
30

31 Judge Turbitt: I know, but, did they discriminate against you, did they retaliate against you, how
32 did they make you, you know, just intolerable working conditions in and of itself is not a claim
33 under MSPB law. It has to be tied to some law, rule, or regulation that protects an employee.
34 Looking at your petition for appeal I didn't see anything – I did see you said you were subjected
35 to harassment but I don't really understand the basis for intolerable working conditions. What
36 law, rule, or regulation did the agency commit – what violation did they commit by subjecting
37 you to intolerable working conditions? Mr. Noble?
38

39 David W. Noble: Yeah, I'm trying to – I'm trying – I'm trying to understand your question.
40

41 Judge Turbitt: Okay, the Board has jurisdiction over discrimination under the 1964 Act, under
42 disability discrimination, under age discrimination, you know, any of the, you know, race, creed,
43 or color, sex, there are, did the agency retaliate against you for your whistle-blowing, union

1 activity, EEO activity? I mean just subjecting you to intolerable working conditions is not
2 enough. It has to be tied to a law that the Board has jurisdiction over.

3
4 David W. Noble: That's, that's not the way I read the case law, judge. I read the Board's case
5 law to recognize the concept of a constructive suspension by having created (Judge Turbitt
6 interrupts).

7
8 Judge Turbitt: You were not subjected to a constructive suspension. You were removed, sir.
9

10 David W. Noble: I was subjected to a constructive suspension for the (Judge Turbitt interrupts).
11

12 Judge Turbitt: If you were subjected to a constructive suspension, okay, perhaps then intolerable
13 working conditions would be something that I would look at. But that's not what I have, sir.
14 The reason this case is before me under Chapter 75 is because the agency removed you. You
15 have a removal action.

16
17 David W. Noble: But the reason the agency removed me was for a period of absences and I'm
18 contending that as an alternative to my claim that I was in a leave without pay status for that
19 period (Judge Turbitt interrupts).
20

21 Judge Turbitt: That's fine, Mr. Noble. Okay, that's fine, if you prove you were in a LWOP status
22 the agency loses its case and you get returned back to work, all of that leave it is considered
23 appropriate leave. The removal action is rescinded, the agency has to take you back to work. I
24 don't reach a constructive suspension claim. I don't have to reach that.

25
26 David W. Noble: Yeah, but judge, I'm offering this as an alternative defense: Even assuming that
27 I was not in a leave without pay status for the period for which the agency suspended me, er,
28 removed me that the time I was absent from work should be considered a constructive suspension
29 caused by the employer rather than an unauthorized absence.
30

31 Judge Turbitt: Okay. I will accept your claim of whether you can prove that the agency subjected
32 you to intolerable working conditions. I reject your claim that you were subjected to a
33 constructive suspension. That's not what I have, sir. I have a removal action. Okay, any other
34 issues?
35

36 David W. Noble: I listed as a defense that the agency failed to give proper consideration to the
37 *Douglas* factors.
38

39 Judge Turbitt: Okay, the agency has to prove as I stated earlier that the penalty of removal is
40 reasonable and promoted the efficiency of the service under the circumstances of this case. If
41 you believe the penalty was too harsh – if that is how you're going to attack the agency's burden
42 on that. I'm not going to, again, it is the agency's burden of proof. I'm not going to shift the
43 burden to you. That would actually harm you. So I'm leaving it to the agency. The agency has

1 to prove it – you may attack the penalty because you think it's too harsh or unwarranted totally.
2 That's up to you. That's not an issue either. If I did it otherwise I would give you an added thing
3 that you have to prove. I'm not doing that. The agency has to prove that. Okay?
4

5 David W. Noble: Okay.

6
7 Judge Turbitt: Are you clear on that, Mr. Noble?
8

9 David W. Noble: Hello?

10
11 Judge Turbitt: Do you understand what I just said?
12

13 David W. Noble: I believe so your honor.
14

15 Judge Turbitt: Okay. You can attack the agency's penalty. But they still have to prove it. Okay.
16 Looking at the agency's prehearing submission – I'm looking at the – there are no agreed upon
17 material facts. However, the agency, in its response file on September 7, 2011 submitted a list of
18 facts in its response to the acknowledgment order on pages one – this is a pretty short statement
19 of facts, Mr. Furgeson. All right, I instructed the parties to file proposed stipulations. Mr. Noble,
20 where are your proposed stipulations?
21

22 David W. Noble: I'm sorry, your honor, I haven't had an opportunity to put together proposed
23 stipulations yet.
24

25 Judge Turbitt: Okay (David W. Noble interrupts).
26

27 David W. Noble: As I indicated in my prehearing submission (Judge Turbitt interrupts).
28

29 Judge Turbitt: Where is your prehearing submission? I didn't get one.
30

31 David W. Noble: I submitted it on September 23rd. By fax.
32

33 Judge Turbitt: I received from you a copy of something titled on the 19th – a motion to postpone
34 hearing. You also submitted a prehearing submission?
35

36 David W. Noble: Yes.
37

38 Judge Turbitt: Okay, on the 23rd? All right.
39

40 David W. Noble: I stated in my prehearing submission that while there were no agreed upon
41 material facts that I expected discovery to disclose the extent to which there are contested
42 material facts.
43

1 Judge Turbitt: How did you submit your prehearing submission, sir? Did you e-file it?
2

3 David W. Noble: No. I submitted it by fax.
4

5 Judge Turbitt: I checked the fax machine this morning. I checked my in box this morning. Hold
6 on, let me check this now. Do you have a copy that it reached here? I actually came in this
7 weekend. I checked the fax. I checked my in box. I did it again this morning. I never received
8 that, sir. I will check with my staff, just to triple check, but I'm pretty sure it's not here based on
9 the fact that I looked everywhere for it.
10

11 David W. Noble: Steve, did you get a copy of it?
12

13 Judge Turbitt: I beg your pardon?
14

15 David W. Noble: I was asking Mr. Furgeson if he got a copy of it.
16

17 Stephen W. Furgeson: I received a copy of some of it but all of it didn't come through.
18

19 David W. Noble: No, I'm not talking about the list of exhibits that I faxed you this weekend, I
20 talking about the (Stephen W. Furgeson interrupts).
21

22 Stephen W. Furgeson: I got the – it must have come in after hours – I got it this morning, a
23 prehearing submission from you that was faxed.
24

25 David W. Noble: I faxed it in about 3:30 Friday afternoon.
26

27 Stephen W. Furgeson: Okay, I didn't get it until today.
28

29 David W. Noble: Do I understand, judge, that you're going to deny my motion to postpone the
30 hearing?
31

32 Judge Turbitt: I haven't gotten to motions yet. I'm going through the prehearing conference.
33 We'll get to any pending motions after I go through that. (Unintelligible) one second while I look
34 for the – how many pages was your prehearing submission, Mr. Noble?
35

36 David W. Noble: Four.
37

38 Judge Turbitt: Can you fax it again, or can you efile it?
39

40 David W. Noble: I can fax it again. I'll need to get off this phone call to do that.
41

42 Judge Turbitt: All right, give me one second, I'll check with my staff. Okay gentlemen, I do have
43 it. One of my paralegals, one of the paralegals was scanning it in. She does it with all the

1 records. Oh my goodness. You have how many witnesses? One, two, three, four, five, six,
2 seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen,
3 nineteen witnesses. And you say you may need more than that. Holy mackerel. Okay let's turn
4 to the agency's list of witnesses. Mr. Noble be prepared, I'm just giving you a heads up, be
5 prepared to answer questions about your nineteen witnesses. Your proffer of the things they're
6 going to talk about is very short and it doesn't really help me in terms of letting me know
7 whether they will be relevant, material and/or duplicative. I hope you're ready. I'm going to
8 start asking questions to find out if they meet that criteria. Okay? And if they don't, if they do
9 they'll be approved and if they don't they'll be denied. Okay, Mr. Noble do you object to any of
10 the five witnesses, I'm sorry, four witnesses that the agency is requesting?
11

12 David W. Noble: Those being Bill French, Sterling Colter, Paris Washington and, who's the
13 fourth?
14

15 Stephen W. Furgeson: Antonio Jones.
16

17 David W. Noble: I don't object to any of those. They're all on my witness list.
18

19 Judge Turbitt: Okay. All of them are approved for both parties. All right, turning to the
20 appellant list – now when you're talking about whether witnesses are relevant and material I want
21 you to keep in mind the issues I approved. You are approved as a witness Mr. Noble. Okay,
22 Alton Branson. First off, we'll do it this way – Mr. Furgeson, do you object?
23

24 Stephen W. Furgeson: Yes, I do.
25

26 Judge Turbitt: On what basis?
27

28 Stephen W. Furgeson: First of all it's not clear what he's talking about and it doesn't appear to
29 me that it has anything to do with the AWOL charge that has been brought – it has to do with
30 grievances, no time frame, route adjustments, there's no issue of route adjustments in here,
31 discipline in the D.C. post office is pretty far-ranging, uh, I'm not sure why that's in here, I'm not
32 sure there's any theory or defense that's been raised that calls for that. The union's handling of
33 appellant's grievances it seems to be something, I don't know what that means for sure, it seems
34 to be something that Mr. Noble has some problems with the union, the way they've handled his
35 grievances. Again, I don't see any relevance to the particular charge for removal for AWOL.
36

37 Judge Turbitt: Okay. Why, Mr. Noble, why is he relevant?
38

39 David W. Noble: Well, first (Judge Turbitt interrupts).
40

41 Judge Turbitt: Why is this witness relevant (unintelligible)?
42

43 David W. Noble: I'm sorry. First, Alton Branson is the president of the union local in

1 Washington, D.C. Turn first to "discipline in the D.C. post office." One of my affirmative
2 defenses is that the Postal Service was required by the collective bargaining agreement to employ
3 progressive discipline to the offense with which I am charged. And I have submitted some
4 exhibit evidence over the weekend that, indeed, the practice in the Washington, DC post office is
5 to use progressive discipline for charges of AWOL and irregular attendance. Branson will be
6 able to testify as president of the local that it has been his experience that charges of AWOL and
7 irregular attendance have been addressed through application of progressive discipline, which
8 means starting with a letter of warning, and progressing through at least two suspensions before
9 proceeding to removal.

10
11 Judge Turbitt: Yeah, that is recommended. They don't have to.

12
13 David W. Noble: Oh, your honor, you're wrong. On what basis do you make that contention?
14

15 Judge Turbitt: There are certain offenses, I'm not saying this is one of them, there are certain
16 offenses that by their very nature the agency can remove an employee.
17

18 David W. Noble: That's of course true. Striking a supervisor is removable on the first offense.
19

20 Judge Turbitt: That's all I'm saying.
21

22 David W. Noble: Okay. All I'm saying is that in Washington DC for the past thirty years they've
23 been using progressive discipline to address the charge lodged against me in this proceeding.
24 And it upsets me that it sounds as though you're prejudging that issue.
25

26 Judge Turbitt: I haven't prejudged any issue, sir. I'm just letting you know that it's not always
27 the case. There are exceptions to that rule. I didn't say that applied here. It's not always the
28 case. The agency, any agency, is supposed to exercise progressive discipline.
29

30 David W. Noble: It's actually one of the Merit Principles.
31

32 Judge Turbitt: Right. But there are exceptions to that.
33

34 David W. Noble: There are. But I'm going to show that in this Post Office there hasn't been an
35 exception.
36

37 Judge Turbitt: Okay. That's fine. That's your attack on the penalty. That's fine.
38

39 David W. Noble: Now, do you want me to go on and talk about the other things Alton Branson
40 will talk about? Or will you approve him on that basis?
41

42 Judge Turbitt: Well in turning to the adjustments of routes, I notice that you have Alton Branson,
43 Singh Sidhu, Justin Batista, Brandon Toatley, Randy Williams, Leon Tucker, I'm approving

1 Antonio Jones, Terence Seawright, Bright Ofuso. So you have one, I know they're talking about
2 other things, too, some of them, so you have one, two, three, four, five, six, seven witnesses
3 talking about, eight witnesses talking about the same thing. Well, nine, I'm assuming you're
4 going to talk about that too.

5
6 David W. Noble: Yes.

7
8 Judge Turbitt: Okay so (David W. Noble interrupts).

9
10 David W. Noble: I expect the adjustment of routes to be a hotly contested issue. It's at the top of
11 the list of the things the Postal Service has done to make my working conditions intolerable. My
12 route is presently adjusted so that it would take me about sixteen hours to deliver, if I were
13 capable at age sixty-five, with heart and lung problems, of delivering the entire route, which I'm
14 not. My route has been grossly out of adjustment for more than six years. As I will show, the
15 Postal Service has been aware. I expect the Postal Service to hotly deny that my route has been
16 out of adjustment, or is presently out of adjustment.

17
18 Judge Turbitt: Okay, I have two witnesses so far who are going to talk about that, you and Mr.
19 Jones.

20
21 Stephen W. Furgeson: Mr. who?

22
23 Judge Turbitt: Antonio Jones.

24
25 Stephen W. Furgeson: Oh yeah.

26
27 Judge Turbitt: I will give you three more witnesses. You tell me which witnesses
28 (unintelligible). You have Ofuso, Tucker, Williams, Toatley, Batista, Sidhu, Clark, and Branson.
29 You choose three. The others will be denied.

30
31 David W. Noble: This puts me in a very difficult position, your honor, because the MSPB
32 requires, for a showing of practice, an adequate sampling (Judge Turbitt interrupts).

33
34 Judge Turbitt: Five witnesses is an adequate sampling Mr. Noble.

35
36 David W. Noble: Are you telling me that if all of those witnesses testify the same that I will have
37 carried my burden of proof? On this issue?

38
39 Judge Turbitt: Mr. Noble, what I'm doing right now is looking at your prehearing submission.
40 You've given me very little to work with, sir. I'm trying the best I can to get information that's
41 going to help me, the trier of fact, give you and the agency an opportunity to present your
42 respective cases (David W. Noble interrupts).

1 David W. Noble: Let me comment on that, your honor, by saying (Judge Turbitt interrupts).
2

3 Judge Turbitt: Mr. Noble, you don't need to.
4

5 David W. Noble: But I would like to.
6

7 Judge Turbitt: But I'm giving -- here Mr. Noble is what's happening. I -- we're going in circles
8 and I'm going to stop the circle right now. I just told you to come up with three witnesses out of
9 -- there are nine witnesses who are going to be testifying about it. Two I've already approved so
10 I'm giving you three more. I'm instructing you now to tell me who those three witnesses are.
11

12 David W. Noble: Are you going to reduce that order to writing?
13

14 Judge Turbitt: No. You know what I'm going to do? I'm going to choose the three for you. If
15 you don't want to do it, I'll do it for you.
16

17 David W. Noble: Are you going to put that in writing?
18

19 Judge Turbitt: Yes. I'm putting all of this in writing, sir. You have a choice. I'll give you one
20 last opportunity. You have an opportunity to choose three more witnesses on this issue. I will
21 deny the others. Or I will do it. It's your choice. Which do you want to do?
22

23 David W. Noble: Each of these...
24

25 Judge Turbitt: I know they're talking about other things and that's going to factor into your
26 decision.
27

28 David W. Noble: I'm sorry. I didn't understand what you just said.
29

30 Judge Turbitt: I know that some of these witnesses are going to be talking about other things and
31 that will go into your decision making process.
32

33 David W. Noble: Because you won't let them testify about other things if I don't choose them for
34 adjustment of routes?
35

36 Judge Turbitt: I didn't say that. You're putting words in my mouth, sir. I don't appreciate that.
37

38 David W. Noble: I'm sorry. I'm trying to understand what you're saying.
39

40 Judge Turbitt: I said that there are some of these witnesses are also going to be testifying as to
41 other issues. I realize that. So if you're going to -- that is going to be one of the calculations
42 you're going to be factoring in when you choose your three. If you want to. Otherwise I'll
43 choose for you. I will also do one last thing. I've asked you five times now, but I will let you do

1 it by close-of-business today, if you want to do that. Send me a list of the three witnesses. Or I'll
2 do it. Which do you prefer? It doesn't matter to me. You let me know which you prefer.

3
4 David W. Noble: I'll send you a list by close-of-business today.

5
6 Stephen W. Furgeson: Your honor, I'm a little confused. They're being offered -- I mean
7 adjustment of routes is a big issue, as Mr. Noble said. It covers many months. Prior to this it's
8 been on-going in the grievance process for Mr. Noble. I'm not sure how this factors in to the fact
9 that he was removed for not showing up for work. Intolerable working conditions is as you said
10 not a basis for an appeal. I don't know how that factors in to this particular issue of his removal.
11 I'm not questioning it your honor, I'm just trying to understand how I'm going to defend what
12 has just been brought up on me and we're two days away from hearing.

13
14 Judge Turbitt: I don't really understand it yet, either. I will make a determination as I hear
15 testimony. As I said I don't have very much to go on.

16
17 Stephen W. Furgeson: Okay.

18
19 Judge Turbitt: I'm doing the best I can. I will make a decision when I hear a little bit more about
20 how or how it does not tie into the issues I've delineated. I don't know yet, so . . .

21
22 Stephen W. Furgeson: All right. I understood.

23
24 Judge Turbitt: So just that you understand, Mr. Noble, okay? You are to choose (unintelligible)
25 you've already been approved and Mr. Jones has been approved don't put them in the two please.
26 Between the following individuals, Branson, Clark, Sidhu, Batista, Toatley, Williams, and
27 Seawright. That is one, two, three, four, five, six, seven witnesses, okay? Of those seven
28 witnesses, you're to choose three by close-of-business -- by five p.m. eastern time.

29
30 David W. Noble: Three in addition to myself?

31
32 Judge Turbitt: Okay we are not including you and Jones in this equation. They're already
33 approved.

34
35 David W. Noble: Three more.

36
37 Judge Turbitt: Take them out. You have seven witnesses left: Branson, Clark, Sidhu, Batista,
38 Toatley, Williams, and Seawright. Of those seven, you're choosing three. By five p.m. eastern
39 tonight I have to receive it as does Mr. Furgeson. We have to receive it by 5 p.m. tonight.

40
41 David W. Noble: Okay.

42
43 Judge Turbitt: If I do not receive it by five p.m. tonight, no extensions will be granted, if I do not

1 receive it by five p.m. tonight I will make the decision for you.
2

3 David W. Noble: I understand.
4

5 Judge Turbitt: Okay. Mr. French and Mr. Colter are going to be (unintelligible). They are – is
6 part of the harassment Colter's treatment of you?
7

8 David W. Noble: Yes.
9

10 Judge Turbitt: So it seems to me that we have French, Colter, and Maddox who are going to be
11 talking about the same thing. Okay, I've already approved French and Colter, so I don't need
12 Maddox. Is that correct?
13

14 David W. Noble: No. You do need Maddox. I believe Maddox will testify truthfully. I'm not
15 certain Colter will testify truthfully.
16

17 Judge Turbitt: Okay, but you get a chance to cross-examine him and Mr. French will be testifying
18 to that as well.
19

20 David W. Noble: There's one particular incident that Maddox witnessed that French did not.
21

22 Judge Turbitt: Okay, and you can testify as to that. Correct?
23

24 David W. Noble: Are you telling me that I will meet my burden if my testimony – or through my
25 testimony alone?
26

27 Judge Turbitt: Let me answer this question. I'm not in a prehearing conference telling anybody
28 whether they're going to meet their burden. I don't know yet. I don't have all the evidence. I
29 have certainly not heard any testimony. I can't make that kind of decision. I'm waiting until I
30 get all of the evidence before I can make my decision. I'm not telling the agency it's going to
31 meet its burden. I'm not telling the agency it's not going to meet its burden. I can't tell you, sir,
32 whether you are going to meet your burden or whether you're not going to meet your burden. It's
33 premature. I don't know yet. I'm waiting for this evidence. I'm trying to cull through the
34 evidence that's going to be relevant and material and then that will assist me during the hearing
35 for me to make a decision. After that I'm hoping I will have all the evidence and then at that
36 point I can make a decision. I can't do it before then.
37

38 David W. Noble: Not even when I was in the United States District Court, your honor, did the
39 judge assume that the witnesses I would call would give irrelevant or immaterial testimony.
40

41 Judge Turbitt: Well, that's my job. My job is to decide during the prehearing conference what
42 evidence there's documentary evidence as well what is going to be admitted and what is not
43 going to be admitted. As gatekeeper that's one of my roles. I also have to do that with respect to

1 testimony, I have to find out – that's the burden I have to make sure the testimony I'm going to
2 get is relevant, material, and not duplicative. Those are the standards that I use to make sure the
3 evidence I'm going to receive is acceptable in this appeal. Let me short-circuit this. Well, Mr.
4 Furgeson, very quickly, do you object to Mr. Maddox?

5
6 Stephen W. Furgeson: Yes, I do.

7
8 Judge Turbitt: Mr. Maddox is denied. French and Colter, as I stated before, are approved.

9
10 David W. Noble: And you will reduce that to writing?

11
12 Judge Turbitt: All of this is going to be reduced to writing.

13
14 David W. Noble: Okay, I will file a written offer of proof.

15
16 Judge Turbitt: Okay. That's fine. Okay, the handling of your grievances and the blocking of
17 your grievances, is that all part of the harassment as well and the intolerable working conditions?

18
19 David W. Noble: Yes.

20
21 Judge Turbitt: Okay, so we have Dowdy, Tucker, and Minor. Now I realize – I note that some of
22 the witnesses on your adjustments of routes will also be talking about the agency's alleged
23 improper actions regarding your grievances, so I don't know which of those you're going to pick
24 yet because I still don't know. But – and how, in terms of the agency's handling of your
25 grievance procedures, how did that impact on the agency's decision to remove you?

26
27 David W. Noble: It's one of the ways in which the Postal Service has made it – has made my
28 working conditions impossible, or intolerable, by blocking my access to the grievance procedure
29 over the last four years, which behavior has twice caused the National Labor Relations Board to
30 issue complaint against the Postal Service.

31
32 Judge Turbitt: Okay. Choose two out of the three. Dowdy, Tucker, or Minor. That you have to
33 choose now.

34
35 David W. Noble: Well, Williams is also in there. I chose Tucker and Williams.

36
37 Judge Turbitt: Yeah, but Williams is part of the three out of seven that you're going to request as
38 far as if you note that Mr. Williams is adjustment of routes.

39
40 David W. Noble: Yeah, well, if I don't choose him for adjustment of routes I will nevertheless
41 want him for his testimony about blocking access to the grievance procedure.

42
43 Judge Turbitt: I understand, but I've put him in a different group. So you have three witnesses.

1 You may want to call Williams for that because then he'll be talking about two different things.
2 That's fine, but now he's not in the equation. You have Dowdy, Tucker, and Minor. That's why
3 I was hoping in our first batching that you'd let us know first so we'd have an idea going forward
4 but that's why I'm giving you extra time until close of business tonight. Of the three witnesses
5 Dowdy, Tucker, or Minor, chose two. One will be denied. Go ahead.

6
7 David W. Noble: I'm sorry, Dowdy, Tucker, and who's the third?

8
9 Judge Turbitt: Louis Minor. Your last witness.

10
11 David W. Noble: Minor and Tucker.

12
13 Judge Turbitt: Okay. Dowdy is denied. Tucker and Minor are approved. Again, I am assuming
14 these issues are relevant and material. I don't know yet if they are. When they begin to testify I
15 will get a clearer idea from you whether they are relevant and material. Okay. We have Fletcher.
16 I've already approved Antonio Jones talking about annual and sick leave and holidays. Why is
17 annual and sick leave and holidays relevant?

18
19 David W. Noble: They're part of the mosaic relating to intolerable working conditions.

20
21 Judge Turbitt: Mr. Furgeson, are you willing to stipulate that the agency is not allowed to charge
22 individuals with AWOL if they've been approved for annual or sick leave or holiday?

23
24 David W. Noble: That's - that's not the issue your honor.

25
26 Judge Turbitt: First off let me - Mr. Furgeson, are you willing to stipulate to that?

27
28 Stephen W. Furgeson: Well, I'm not sure. He's not been charged with that. He's been charged
29 with AWOL. He's not been charged with approved annual leave (unintelligible). We've not
30 charged him with that.

31
32 Judge Turbitt: How is it relevant, Mr. Noble?

33
34 David W. Noble: When the proposing supervisor, Bill French, became my supervisor in mid-
35 September of last year he began systematically cheating me out of holiday pay for the next five
36 holidays. He delayed for over two months a request I made in January 2011 for annual leave.

37
38 Stephen W. Furgeson: Some of these issues, your honor, have come up before, Mr. Noble has
39 filed a case about his holidays with the MSPB and that's been found to be without jurisdiction.
40 That was dismissed. On some of his holidays. Brian Fletcher. We had a restoration, Mr. Noble
41 was improperly removed on an emergency suspension, not given his due process rights and we
42 restored him status quo ante however he had other issues about the health benefits and Mr. Brian
43 Fletcher, who's now retired, by the way restored his health benefits in accordance with, I mean,

1 we restored him status quo ante, notwithstanding that there were some health benefits issues that
2 were out there. Mr. Noble filed an appeal with MSPB and they found that we had properly
3 restored him. His other health benefit issues were not part of that status quo ante restoration and
4 that's why Mr. Brian Fletcher was involved who is now as I said before retired. I don't see at all,
5 any relevance at all to this particular charge of AWOL. And particularly with Mr. Brian Fletcher.

6
7 Judge Turbitt: Are these issues you've litigated previously, Mr. Noble?

8
9 David W. Noble: Not the merits of them, your honor.

10
11 Stephen W. Furgeson: They were found to be without jurisdiction.

12
13 Judge Turbitt: The Board found they were without jurisdiction?

14
15 Stephen W. Furgeson: Yes. Some of them. One of them is still pending. I can't remember
16 which one. Mr. Noble's appealed one of them to the full board and I think there's still a pending
17 decision. Is that right, Mr. Noble.

18
19 David W. Noble: Yes.

20
21 Stephen W. Furgeson: Which one was that?

22
23 David W. Noble: The - whether I was restored to the status quo ante with respect to my health
24 benefits. That's not, however, what I want Fletcher to address.

25
26 Judge Turbitt: Okay. Choose one, Fletcher, Ofuso, Myers. I don't think it's relevant. But
27 choose one of those three. And then I'll take a look at whether you're precluded by collateral
28 estoppel or res judicata from bringing this up again. But you choose one of the three: Fletcher,
29 Ofuso, or Myers.

30
31 David W. Noble: Myers. She works for OPM.

32
33 Judge Turbitt: And why is your health benefits relevant to this case?

34
35 David W. Noble: It's part of the intolerable working conditions mosaic.

36
37 Judge Turbitt: And she personally did your - what did she do with your health benefits?

38
39 David W. Noble: She advised me that Mr. Furgeson was taking an incorrect position on my
40 ability to reenroll in health benefits.

41
42 Stephen W. Furgeson: Again, that's the issue that's been appealed (David W. Noble interrupts).
43

1 David W. Noble: No, it's not.
2
3 Stephen W. Furgeson: That's the one I was aware of. Fletcher was involved with that. And
4 that's been taken care of status quo ante. And again, it's so far removed from the current issue of
5 AWOL that I'm just confused at best as to where we're going to.
6
7 Judge Turbitt: I am denying Fletcher, Ofuso, and Myers. If you want to have me revisit that. I'm
8 going to take a look at especially it sounds as though you are precluded from relitigating issues
9 that have been previously litigated with the Board.
10
11 David W. Noble: Okay. Will you put that in writing?
12
13 Judge Turbitt: Yes. Okay. The appellant requested that we reschedule the hearing. Mr.
14 Furgeson?
15
16 Stephen W. Furgeson: Yes?
17
18 Judge Turbitt: Do you have an objection?
19
20 Stephen W. Furgeson: No. Not really. Because all this – I can't get all these witnesses here in
21 two days I don't think anyway. I think my own sanity would be hard to hear them all or even
22 schedule them all in one day. (Unintelligible) reschedule.
23
24 Judge Turbitt: Okay. Mr. Noble predicts that he's going to need two more months before the
25 case can go to hearing. I don't know if that's true, but he's (unintelligible) all sorts of discovery
26 battles. I don't know if that's true or not.
27
28 Stephen W. Furgeson: I think our discovery is due Monday. A week from today.
29 (Unintelligible). Hello?
30
31 Judge Turbitt: Okay. Do you have your calendars?
32
33 Stephen W. Furgeson: Yes I do.
34
35 Judge Turbitt: Mr. Noble?
36
37 David W. Noble: Yes.
38
39 Judge Turbitt: Okay. Week of October 17th.
40
41 Stephen W. Furgeson: (Unintelligible).
42
43 Judge Turbitt: Tell me the days you're available.

1 Stephen W. Furgeson: The days I'm available are the 17th, 18th, everything except the 18th.

2
3 David W. Noble: I object to that week.

4
5 Judge Turbitt: Okay. Why?

6
7 David W. Noble: Because I won't be permitted to take follow-up discovery. (Judge Turbitt
8 interrupts).

9
10 Judge Turbitt: Let's see if you need it first. You may need that, you may not. I don't know if
11 that's true. So, (unintelligible) give me the dates you're available Mr. Furgeson, again.

12
13 Stephen W. Furgeson: Every day that week except the 18th of October.

14
15 Judge Turbitt: Okay. Mr. Noble?

16
17 David W. Noble: Will you note my objection, your honor?

18
19 Judge Turbitt: No, you note it. You want to set the hearing date – I'm granting your request, but
20 if you want to make a, I'm granting your request to reschedule the hearing, but if you want to
21 note an objection to me granting your request (unintelligible).

22
23 David W. Noble: Your honor, I was prepared upon hanging up here to go immediately to federal
24 court to get this proceeding blocked, because I have a right, under MSPB regulations, to take
25 discovery.

26
27 Judge Turbitt: Mr. Noble, you know, you made several threats, or whatever, during this the
28 phone call (David W. Noble interrupts).

29
30 David W. Noble: I don't regard that as a threat, your honor.

31
32 Judge Turbitt: Here's what I have to say to you. Do whatever you need to do, sir. Follow
33 whatever rights you have. That's okay by me. I want you to exercise whatever rights you think
34 you have. Now please answer my question. The week of October 17th – I am granting your
35 request to reschedule the hearing – tell me a date during the week of the 17th (David W. Noble
36 interrupts).

37
38 David W. Noble: I don't agree to any of those dates. None of those dates are agreeable to me.

39
40 Judge Turbitt: Okay, I'm scheduling it for Wednesday, October 19th starting at 9:30 a.m. We will
41 have a status conference on Monday, October the 17th at 11:00 a.m. So the hearing scheduled for
42 the 28th is cancelled and the hearing on the 19th will be here at the Washington Regional Office at
43 the same address I put in the hearing order before. Gentlemen, that's all that I have. Do you

1 have anything else?
2

3 Stephen W. Furgeson: Well we can go through the evidence on the 11th or on the 17th?
4

5 Judge Turbitt: You're talking about the exhibits? Well, I just literally got the appellants.
6

7 Stephen W. Furgeson: Yeah, I did too. Uh, this morning.
8

9 Judge Turbitt: Why don't you do this – if you object to any of the appellant's exhibits, put it in
10 writing, state which exhibit it is, and why you object to it being admitted.
11

12 Stephen W. Furgeson: And what time is that due? When is that due?
13

14 Judge Turbitt: Do that by October 11th. And Mr. Noble, if you object to any of the agency's
15 exhibits, do the same thing.
16

17 Stephen W. Furgeson: Your honor, I don't know how you want me to handle this. I going to
18 withdraw one exhibit. I found out it's not a proper exhibit. Which is Exhibit 3, the March 3rd
19 return to duty letter.
20

21 Judge Turbitt: This is yours? Or the appellant's?
22

23 Stephen W. Furgeson: My exhibit, my exhibit.
24

25 Judge Turbitt: Okay.
26

27 Stephen W. Furgeson: It was in the file, but it was never issued, it was just an erroneous letter
28 that was not issued to Mr. Noble.
29

30 Judge Turbitt: Okay. You can put that in your objections.
31

32 Stephen W. Furgeson: Okay.
33

34 Judge Turbitt: And request to withdraw the exhibit.
35

36 Stephen W. Furgeson: Okay. Thanks.
37

38 Judge Turbitt: Okay. Is there anything else?
39

40 Stephen W. Furgeson: Not at this time for me.
41

42 Judge Turbitt: Okay. Mr. Noble.
43

1 David W. Noble: No.

2
3 Judge Turbitt: Okay. Mr. Furgeson, would you set up a conference call like you did for this one
4 for October the 17th at 11 a.m. again? And let us know what number it's at?

5
6 Stephen W. Furgeson: Okay. I will.

7
8 Judge Turbitt: Okay. I think I did this during our last phone call, but I just want to make sure.
9 Have the parties waived the prohibition against ex parte communications concerning settlement
10 matters? And I'll be happy to explain what that means. First off, Mr. Furgeson?

11
12 Stephen W. Furgeson: Yes. I would waive any (Judge Turbitt interrupts).

13
14 Judge Turbitt: Okay, Mr. Noble? I'll be happy to explain what that means.

15
16 David W. Noble: Yeah. I understand what it means, your honor. I'm not a newbie.

17
18 Judge Turbitt: Okay, is that – honestly, Mr. Noble I have to ask that. That was not meant – I
19 asked both sides to explain. I do it as a matter of course. That was not intended – honestly – that
20 was not intended as an insult, that was not – I do it in every prehearing conference. I want to
21 make sure that people understand. Okay? So honestly, that was not – there was no hidden
22 agenda, that was an honest request.

23
24 David W. Noble: I didn't think there was a hidden agenda. I thought it was patronizing.

25
26 Judge Turbitt: I asked both sides. (Unintelligible) it doesn't matter to me. Do you wish or not
27 wish to waive the prohibition against ex parte communications concerning settlement matters,
28 sir?

29
30 David W. Noble: Yeah. I don't waive the prohibition.

31
32 Judge Turbitt: Okay. Gentlemen, thank you very much for your time and have a good day.
33
34